IN THE MATTER OF THE TRADE MARKS ACT 1994

AND IN THE MATTER OF UK TRADE MARK REGISTRATIONS NOS.
3776716 VIVO X12
3776718 VIVO X13
3776720 VIVO X14
3776722 VIVO X15
3776723 VIVO X16
IN THE NAME OF VIVO MOBILE COMMUNICATION CO., LTD.

AND IN THE MATTER OF CONSOLIDATED CANCELLATION APPLICATIONS NOS. CA000505590, CA000505591, CA000505592, CA000505593 and CA000505595 BY HONOR DEVICE CO., LTD.

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF MS L. FAYTER DATED 21 DECEMBER 2023

DECISION

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1. This is an appeal from the decision of Ms L. Fayter (the "Hearing Officer"), BL O/1203/23, dated 21 December 2023, in which she rejected an application to invalidate five trade marks, Nos. 3776716, 3776718, 3776720, 3776722 and 3776723 in the name of Vivo Mobile Communication Co., Ltd. ("the Proprietor"). The applicant for the declaration of invalidity was Honor Device Co., Ltd. ("the Applicant") which now appeals.

Background

2. All five contested trade marks ("the Marks") were applied for on 12 April 2022 and registered on 23 September 2023. Each of them covered the same range of goods in Class 9:

> Smartphones; Mobile phones; Earphones for cellular telephones; Protective cases for mobile phones; Stands adapted for mobile phones; Mobile phone display screen protectors in the nature of films; Laptop computers; Displays for mobile phones; Keyboards for mobile phones; Chips [integrated circuits]; Wireless headsets; Wireless headsets for smartphones; Headsets for mobile telephones; USB cables for cellphones; Mobile phone covers; Cases for mobile phones; Mobile phone

straps; Selfie sticks used as smartphone accessories; Smart glasses; Smart speakers; Tablet computers; Headphones; Earphones; Displays for smart phones; Electronic chips; Television apparatus; Liquid crystal displays.

3. In November 2022, the Applicant applied to have the Marks declared invalid under section 47 of the Trade Marks Act 1994. The application was based upon section 5(2)(b) of the Act, and upon the Applicant's 5 earlier registered trade marks:

No. UK00003695416 for **X12**

No. UK00918206324 for **X13**

No. UK00918206326 for **X14**

No. UK00918206328 for **X15** and

No. UK00918206332 for **X16**.

The X12 mark was filed in September 2021 and registered in January 2022, the other earlier (comparable) marks were filed in March 2020 and registered in September 2020. The Applicant relied upon the comprehensive list of Class 9 goods for which its earlier marks were registered. The specifications are set out in the Annex to the decision below and I need not repeat them here.

4. No evidence was filed, and no hearing was requested. The Applicant alone filed written submissions.

5. The appeal turned on the Hearing Officer's assessment of the similarity of the parties' marks and how her findings on that point affected her assessment of the likelihood of confusion. The Grounds of Appeal in essence complained that the Hearing Officer had failed to apply the principles laid down by the CJEU in Case C-120/04 *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* EU:C:2005:594, [2005] E.C.R. I-8551, [2006] E.T.M.R. 13, and that simply appending the Proprietor's company name to the Applicant's marks meant that there was a likelihood of confusion between them.

Standard of appeal

6. This appeal is by way of review, it is not a rehearing. 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 the appellate tribunal 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 [2019] UKSC 15, [2019] RPC 9 at [78] to [81].

7. The principles have been summarised in numerous cases, see *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2]. The principles have also been stated in a number of recent trade mark appeals, such as by Sir Anthony Mann in *Stitch Editing Limited v. TikTok Information Technologies Ltd* [2023] EWHC 1167 (Ch), [2023] ECC 17 at [6] to [8]:

> "6. The correct approach to appeals such as this has recently been confirmed in the decision of Richards J in *Instagram LLC v Meta 404 Ltd* [2023] EWHC 436 (Ch). In that case (which was another trade marks appeal case) the judge followed the guidance to be applied in appeals generally and set out in *Volpi v Volpi* [2022] EWCA Civ 464.
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> > "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
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> > ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
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> > iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
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> > iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
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> > v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

7. So far as the decision below is evaluative, an appellate court should also approach the appeal with caution:

"76. So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion". (*Re Sprintroom Ltd* [2019] EWCA Civ 932)

8. And last, as Richards J observed in *Instagram*, proper respect should be paid to the decision of an expert tribunal in the field in question:

"26. Finally, it is relevant to observe that this is an appeal from a tribunal with particular expertise. As Lady Hale observed in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at paragraph 30, the court should approach the appeal on the basis that it is probable that an expert tribunal, charged with applying the law in their specialist field, has probably got it right.""

8. I have kept these principles in mind when considering the present appeal.

Merits of the appeal

9. The Hearing Officer noted some concessions that had been made by the Proprietor as to the identicality of some of the goods and found other goods to be either identical or similar to the Applicant's specification. She found that the average consumer might be a member of the general public or a professional user, and that in both cases a medium degree of attention would be paid to the purchase. She also found that visual considerations are likely to dominate but there might also be an aural component to the purchase. None of those findings were appealed.

10. The appeal related to the Hearing Officer's assessment of the similarity of the parties' marks and of the likelihood of confusion. The main parts of the Decision relevant to the appeal are as follows:

> "38. The proprietor's marks consists of the first element "vivo" followed by a second element which consists of the letter X followed by the numbers 12, 13, 14, 15 or 16. The average consumer tends to pay more attention to the beginning of the marks, [*FN El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02] and for reasons I will come to discuss in the conceptual comparison, I consider that the word "vivo" will be recognised as an invented word. I therefore consider that it plays a greater role in the overall impression, with the X12 to X16 elements playing a lesser role in the overall impression of the marks.
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> 39. Visually, the marks overlap in the X element, which is followed by the numbers 12, 13, 14, 15 or 16. This acts as a visual point of similarity. However, the proprietor's marks begin with the word "vivo", and as noted above, the average consumer tends to pay more attention to the beginning of the marks. This acts as a visual point of difference. Therefore, taking all of the above into account, the marks are visually similar to a medium degree.
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> 40. Aurally, the X element of the applicant's and proprietor's marks will be given its ordinary dictionary pronunciation ("EX") followed by the ordinary pronunciation of the numbers 12, 13, 14, 15 or 16. The "vivo" element at the beginning of the proprietor's marks will most likely be pronounced as VEE-VO. Therefore, the beginning of the marks differ aurally. However, as they overlap in the pronunciation of the letter X and the number elements, they are aurally similar to a medium degree.
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> 41. Conceptually, the applicant's marks, X12, X13, X14, X15 and X16, consists of a singular letter X, and the numbers 12, 13, 14, 15 and 16. I note that the letter X could stand for any number of words, and therefore does not convey a particular concept over and above its existence as the letter X from the English alphabet. I also consider that the numbers 12 to 16 do not convey a particular concept over and above their existence as numbers. However, the letter X combined with the number elements do not create a unitary meaning, and therefore the marks as a whole do not convey any particular concept.
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> 42. I now turn to the conceptual meaning of the proprietor's Contested Marks. In its counterstatements, the proprietor submits that the "conceptual content of the

"vivo" element has connotations of life of vivacity" but is also "likely to be interpreted differently by different consumers". Whilst I appreciate that the word "vivo" is a dictionary word which means "with life and vigour", [*FN* https://www.collinsdictionary.com/dictionary/english/vivo] I do not consider that this meaning would be known or understood by a significant proportion of average consumers. I especially consider that this is the case as Collins Dictionary notes that "vivo" originates from Italy and therefore would most likely only be known to UK consumers who can speak Italian (which would not amount to a significant proportion). I therefore consider that the average UK consumer would recognise "vivo" as an invented word with no apparent meaning.

43. The proprietor also claims that there is "no conceptual content" to the X12, X13, X14, X15 and X16 elements. Whilst I consider that this is in the case in the context of the applicant's marks, as highlighted above, the proprietor's Contested Marks begin with the invented word "vivo". I also note that it is common in the technology trade to denote and indicate a product line and number in the series using a combination of a singular letter and numbers. Therefore, in the context of the proprietor's class 9 goods, I consider that the average consumer will see the letter X as denoting the product line/series, and the numbers 12 to 16 as denoting the product number in the "X series".

44. However, I do not consider that a reference to a product line would necessarily be considered as a concept. Therefore, I consider that, as the proprietor's Contested Marks as a whole do not evoke a concept either, I consider that the marks are conceptually neutral. For the sake of completeness, if I am wrong in this finding, and a reference to a product line is considered as evoking a conceptual meaning (the X12 to X16 elements in the proprietor's Contested Marks) then the marks are conceptually dissimilar."

11. At paragraph 48 the Hearing Officer found the earlier marks to be inherently distinctive to no more than a medium degree. At paragraph 50 she summarised the main factors to be borne in mind in her assessment of the likelihood of confusion:

"50. The following factors must be considered to determine if a likelihood of confusion can be established:

• I have found that the overall impression of the applicant's marks lies in the combination of the letter X followed by the numbers 12, 13, 14, 15 or 16 elements.

> • The proprietor's Contested Marks consists of the first element "vivo", an invented word, followed by a second element which consists of the letter X followed by the numbers 12, 13, 14, 15 or 16, which will be recognised as indicating a product line and number in the series. Therefore the word "vivo" plays a greater role in the overall impression, with the X12 to X16 elements playing a lesser role in the overall impression of the marks.
> • I have found the marks to be visually and aurally similar to a medium degree.
> • I have found the marks to be conceptually similar neutral, or dissimilar, depending on whether a reference to a product line is considered as a concept.
> • I have found the applicant's marks to be inherently distinctive to no more than a medium degree.
> • I have identified the average consumer for the goods to be the general public and businesses, who will select the goods primarily by visual means, although I do not discount an aural component.
> • I have concluded that a medium degree of attention will be paid during the purchasing process for the goods by the general public.
> • I have found the parties' goods vary from being identical to similar to a medium degree."

12. At paragraph 51, the Hearing Officer dismissed any likelihood of direct confusion:

> "51. Taking all of the above factors listed in paragraph 50 into account, and even bearing in mind the principle of imperfect recollection, I am satisfied that the marks are unlikely to be mistakenly recalled or misremembered as each other. As noted above, the beginning of the marks tend to make more of an impact than the ends, and the average consumer will be paying a medium degree of attention when selecting the goods. Therefore, I do not consider that the average consumer would overlook the invented word "vivo" which appears at the beginning of the Contested Marks, which consequently plays a greater role in the overall impression. Taking all of the above into account, I do not consider there to be a likelihood of direct confusion."

13. At paragraphs 55-56, the Hearing Officer set out her analysis of the likelihood of indirect confusion:

> "55. The shared common use of the X12 to X16 elements could be a factor in favour of finding indirect confusion. However, as noted above, in the Contested Marks, these elements follow the invented word "vivo", and in the context of the parties' class 9 goods, it is common within the technology trade to denote and indicate a product line and number in the series using a combination of a singular letter and numbers. Therefore, when confronted with the Contested Marks, I consider that the average consumer will see the invented word "vivo" as indicating the origin of the goods, with the X12, X13, X14, X15 and X16 elements denoting that these goods fall within vivo's "X series", with the numbers 12 to 16 denoting the product number in that series.
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> 56. Therefore, I consider that when encountering the applicant's earlier marks, the average consumer would not believe that the proprietor had removed the invented "vivo" word element at the beginning of its marks, to use the X12, X13, X14, X15 and X16 elements solus, because the "vivo" element is the part of the Contested Marks that denotes the origin of the proprietor's goods. I therefore do not consider that the average consumer would see the applicant's earlier marks as an updated version/subbrand of the proprietor's Contested Marks, and vice versa, because the change of removing or adding the "vivo" elements to X12, X13, X14, X15 or X16 is not logical or consistent, nor are the marks natural variants or brand extensions of each other. Consequently, I consider there is no likelihood of indirect confusion."

14. The Grounds of Appeal stated that the Hearing Officer had erred in her assessment of the likelihood of direct confusion, suggesting that she had paid too much attention to the guidance of the General Court in Cases T-183 and 184/02, *El Corte Ingles v OHIM* to the effect that consumers pay more attention to the beginning of marks. The Applicant pleaded that the "mere inclusion of the "vivo" company name would not be sufficient to allow the consumer to differentiate between the respective marks." It criticised the Hearing Officer's findings at paragraphs 38-39 and 42-44 which are reflected in the second bullet point in paragraph 50, and complained that she had not given due (or perhaps any) consideration to the principles established in *Medion.*

15. Paragraphs 38-39 related to her assessment of visual similarity whilst paragraphs 42-44 related to conceptual similarity. In paragraph 38, the Hearing Officer first mentioned her view that the word VIVO would be seen by the average consumer as an invented

word. Mr March, who appeared before me on behalf of the Applicant, argued that VIVO was in fact the company name of the Proprietor and would be seen as such by the average consumer, this meant, he said, that it did not add a new and distinctive element to the earlier mark. There was, however, no evidence before the Hearing Officer to support the submission that VIVO would have been recognised as a company name by the average consumer. In my view, it is not self-evidently a company name, and it was, therefore, open to the Hearing Officer to conclude as she did that VIVO would be seen as an invented word. Certainly, that view is not rationally insupportable. That being so, in my judgment it was open to the Hearing Officer to reach the conclusion which she did in the last sentence of paragraph 38, that as an invented word VIVO would play a greater role in the overall impression of the Proprietor's Marks. Indeed, I consider that the latter finding flowed logically from her view of VIVO as an invented word.

16. The Hearing Officer's assessment of the conceptual meaning of the Marks and of their conceptual similarity to the earlier marks again flows from her conclusion as to how the average consumer would understand VIVO. She set out her reasoning in some detail at paragraph 42. Rather similarly, at paragraph 43, the Hearing Officer dealt with her view of the likely impact upon the average consumer of seeing the X12 (etc) parts of the Marks. She referred to the use of such signs to indicate a product line and number, when used in the context of the Class 9 goods in question. I do not read the Grounds of Appeal as criticising either conclusion, nor do I consider that there are grounds for me to say that the Hearing Officer fell into error in those respects.

17. As I have said, the main thrust of the appeal was that the Applicant considered that the Hearing Officer had put too much weight on the fact that VIVO was the first part of each of the Marks and had failed to take into account the guidance of the CJEU in *Medion,* namely:

> "30. However, beyond the usual case where the average consumer perceives a mark as a whole, and notwithstanding that the overall impression may be dominated by one or more components of a composite mark, it is quite possible that in a particular case an earlier mark used by a third party in a composite sign including the name of the company of the third party still has an independent

distinctive role in the composite sign, without necessarily constituting the dominant element.

31. In such a case the overall impression produced by the composite sign may lead the public to believe that the goods or services at issue derive, at the very least, from companies which are linked economically, in which case the likelihood of confusion must be held to be established.

32. The finding that there is a likelihood of confusion should not be subject to the condition that the overall impression produced by the composite sign be dominated by the part of it which is represented by the earlier mark.

33. If such a condition were imposed, the owner of the earlier mark would be deprived of the exclusive right conferred by Art.5(1) of the Directive even where the mark retained an independent distinctive role in the composite sign but that role was not dominant.

34. This would be the case where, for example, the owner of a widely-known mark makes use of a composite sign juxtaposing this mark and an earlier mark which is not itself widely known. It would also be the case if the composite sign was made up of the earlier mark and a widely-known commercial name. In fact, the overall impression would be, most often, dominated by the widely-known mark or commercial name included in the composite sign."

18. The impact of *Medion* was discussed by Arnold J (as he then was) in in *Whyte & Mackay Ltd v Origin Wine UK Ltd* [2015] EWHC 1271 (Ch); [2016] E.C.C. 2:

"18. The judgment in [*Bimbo SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-591/12 P) EU:C:2014:305; [2014] E.T.M.R. 41] confirms that the principle established in *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH (C-120/04) EU:C:2005:373; EU:C:2005:594* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks - visually, aurally and conceptually - as a whole. In *Medion v Thomson* and subsequent case law, the

Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20. The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21. The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors."

I note that this passage was relied upon by the judge at first instance in *Combe International LLC v Dr August Wolff GmbH & Co KG Arzneimittel* and Arnold LJ did not take the matter further in his judgment in the appeal in that case at [2023] FSR 13.

19. The approach which should be taken to the assessment of the likelihood of confusion was helpfully summarised by Ms Emma Himsworth KC sitting as the Appointed Person in BL O/0368/23 *Peninsula.* Having cited *Whyte & Mackay*, she said:

"44. Taking the guidance from the case law, in circumstances where for present purposes there is no claim to acquired distinctive character and the services are identical or highly similar, the approach can be summarised as follows:

(1) The distinctiveness of the mark as a whole must be assessed, taking into account that a minimum degree of distinctiveness must be acknowledged.

(2) The distinctiveness of each of the components of both marks must be assessed with priority being given to the coinciding elements.

(3) The focus of the assessment of the likelihood of confusion should be on the impact of the non-coinciding components on the overall impression of the mark.

(4) Account must be taken of the similarities/differences in the non-coinciding elements of the marks.

(5) A coincidence of an element with a low level of distinctiveness will not usually lead to a likelihood of confusion.

(6) There may be a finding of a likelihood of confusion if (a) the non-coinciding elements of the mark are of lower (or equally low) degree of distinctiveness or are of insignificant visual impact and the overall impression is similar; or (b) the overall impression of the marks is highly similar or identical."

20. Mr March was right to say that the Hearing Officer did not specifically advert to *Medion* in the course of her reasoning, although it was included in her standard-form recitation of the case law at paragraph 13, and the principles arising from it are summarised in that paragraph. The question for me is not so much whether the Hearing Officer ought to have mentioned *Medion* when she assessed the likelihood of confusion but whether she misapplied the principles arising from the case, as explained in *Whyte & Mackay* and by Ms Himsworth.

21. The Applicant submitted that the Hearing Officer had wrongly discounted the impact of the X12 (etc) part of the Marks and had effectively ignored that part of the Marks, treating it as of negligible importance. Given her findings that the earlier marks had average inherent distinctiveness, it submitted that would have been an error. However, *Medion* does not call for a mechanistic approach to the assessment of the likelihood of confusion. Despite Mr March's attractive submissions, I do not accept that in every case "merely" adding a company name to an existing mark will lead to a likelihood of confusion. It is not sufficient to say that where the challenged composite mark contains a component which is identical to an earlier mark there will automatically be a likelihood of confusion, as was pointed out by Arnold J in paragraph 21 of *Whyte & Mackay*. Even where the composite mark contains an element which is identical or similar to the earlier trade mark and has an independent distinctive role within the composite mark, it does not automatically follow that there is a likelihood of confusion.

There may or may not be such a likelihood, and the tribunal must carry out a proper assessment of the likelihood of confusion.

22. It does not seem to me, reading paragraphs 52-56 of the Decision, that the Hearing Officer failed to carry out an appropriate assessment. In my view, the Hearing Officer's emphasis on the importance of VIVO as the first part of the Marks arose from her earlier finding that it would be seen by the average consumer as an invented word. In giving it importance she was taking into account Ms Himsworth's third principle and focusing her assessment of the likelihood of confusion on the impact of that non-coinciding component on the overall impression of the mark. She was also giving due weight to her view of the impact of VIVO as the non-coinciding part of the marks. Furthermore, she was taking into account her conclusion at paragraph 43 of the impact upon the average consumer of the earlier marks as part of the Proprietor's composite Marks. Looking at the assessment in light of Ms Himsworth's 6th point, the Hearing Officer clearly thought that the non-coinciding elements of the parties' respective marks were of greater distinctiveness than the coinciding elements, and gave a different overall impression to them. In those circumstances, her conclusions were fully justified.

23. At paragraph 51 the Hearing Officer considered whether there was a likelihood of direct confusion, that is to say whether consumers would be likely to mistake the Proprietor's Marks for the earlier marks. Given the differences the Hearing Officer had identified between them, which are, indeed, self-evident, it seems to me that her conclusion that there was no such likelihood of confusion was inevitable and cannot be criticised.

24. At paragraphs 52-56 the Hearing Officer analysed the likelihood of indirect confusion. Rightly, there was no criticism of her analysis of the law, but the Applicant argued that her application of the law in paragraph 56 of the Decision was wrong. It submitted that someone with knowledge of the earlier mark seeing Class 9 goods bearing the Proprietor's equivalent mark would be confused. Mr March suggested that a consumer familiar with one of the earlier marks, seeing the equivalent challenged Mark, would inevitably consider either that the goods bearing that Mark emanate from the Applicant, or would consider there to be some trade connection to the Applicant.

25. I have considered carefully whether the Hearing Officer erred in paragraph 56 of the Decision. The manner in which she expressed her thought processes, especially in the

first sentence of that paragraph, strikes me as rather curious. She appears to have contemplated the impact of seeing goods bearing the earlier marks on an average consumer who knows of the Proprietor's Marks. The question should have been posed the other way around – what would be the impact on the consumer who is aware of the earlier marks of seeing the Proprietor's Marks? However, in the second part of the paragraph she did consider the question the right way round and concluded that the marks would not be seen as updated versions of the other party's marks, or as sub-brands, and that they are not "natural variants or brand extensions of each other."

26. In the circumstances, and again because the Hearing Officer thought that the non-coinciding elements of the marks were of greater distinctiveness than the coinciding elements and gave a different overall impression to the other marks, it seems to me that there is no appealable error here. The problem with paragraph 56, in my view, is one of a failure of clarity of expression, rather than a failure to apply the law. It was open to the Hearing Officer, in light of her views as to the dominance of the VIVO element of the Proprietor's Marks and the way in which she considered the earlier marks would be seen as part of those composite marks, to reach the conclusion that there was no likelihood of indirect confusion. Whilst I accept that another Hearing Officer might have reached a different conclusion, I do not consider that there is any identifiable flaw in the Decision.

27. For these reasons, I dismiss the appeal.

28. The Proprietor took no part in the appeal process. If it has incurred any costs in relation to the appeal, the Proprietor may apply for an award of costs, setting out the basis of such a claim in writing by 26 June 2024. Otherwise, I will make no order as to the costs of the appeal. The costs award made by the Hearing Officer will stand.

Amanda Michaels
The Appointed Person
12 June 2024

Mr Daniel March of **Forresters IP LLP** appeared for the Appellant/Applicant.

The Respondent did not attend and was not represented.