

O/0574/24

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NO. UK00003644212

BY AMAHORSE TRADING S.R.L.

IN CLASS 18

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 428856 BY

CAVALLO GMBH & CO. KG

AND

IN THE MATTER OF REGISTRATION NO. UK00903406758

IN THE NAME OF CAVALLO GMBH & CO. KG

IN CLASSES 18 AND 25

AND AN APPLICATION FOR REVOCATION THERETO

UNDER NO. 505186

BY AMAHORSE TRADING S.R.L.

AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON

BY CAVALLO GMBH & CO. KG

AGAINST A DECISION OF S WILSON

DATED 13 JULY 2023

DECISION

Introduction

1. This is an appeal from a decision of S Wilson, acting for the Registrar, dated 13 July 2023, in relation to consolidated revocation proceedings filed by Amahorse Trading S.R.L. (“**the Respondent**”) against UK Trade Mark registration no. UK00903406758 owned by Cavallo GmbH & Co KG (“**the Appellant**”) and opposition proceedings filed by the Appellant against the Respondent’s UK Trade Mark application no. UK00003644212.
2. The Respondent’s application (“**the Trade Mark**”) was for the following mark:



Filing date: 19 May 2021

Earlier EU Filing date: 20 February 2020

Class 18: Articles of clothing for horses; Bridoons; Blinkers [harness]; Horse bridles; Covers for horse saddles; Cribbing straps for horses; Fastenings for saddles; Bags (Nose -) [feed bags]; Face masks for equines; Horse fly sheets; Spats and knee bandages for horses; Harness fittings; Harness for horses; Harness straps; Headbands for horses; Hoof guards; Horse blankets; Horse collars; Head-stalls; Equine leg wraps; Riding saddles; Horse tail wraps; Horseshoes; Jockey sticks; Knee-pads for horses; Straps of leather [saddlery]; Pads for horse saddles; Hoof guards; Reins; Saddlecloths for horses; Saddlery; Spur straps; Stirrup leathers; Stirrups; Training leads for horses.

3. The Appellant relied on all the goods for which its earlier trade mark with no. UK0090306758 (“**the Earlier Mark**”) was registered, as follows:



Filing date: 14 October 2003

Registration date: 11 May 2009

Class 18: Whips, harnesses and saddlery; saddle cloths, horse blankets, fastenings for saddles and covers, saddle bags, whips, tendon, nose and neck protectors for horses, bandages, gaiters, hock guards, bridles and reins for horses; saddles, riding accessories.

Class 25: Headgear (for wear); shoes, boots; half-boots; boot uppers; riding shoes; riding boots; riding half-boots; golf shoes; walking shoes; clothing for horseriding; riding jackets; jodhpurs; socks; stockings.

4. The opposition was based on sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("**the Act**").
5. The Respondent filed an application for revocation of the Earlier Mark on the grounds of non-use.
6. Both parties filed evidence in chief, and neither party requested a hearing but filed written submissions in lieu.
7. The Appellant was represented by Murgitroyd & Company and the Respondent was represented by Stobbs.

The Hearing Officer's Decision

Revocation

8. The Hearing Officer found that the Appellant failed to demonstrate use in relation to the class 18 goods. That aspect of the decision was not appealed.
9. The Hearing Officer found that the Appellant had only demonstrated use in relation to some of the class 25 goods, and found a fair specification for the Appellant to retain would be "*Headgear (for wear); riding breeches; socks; stockings*".
10. The Earlier Mark was therefore revoked with effect from 12 May 2014 with respect to the class 18 goods and the rest of the class 25 goods.

Opposition

11. For the same reasons given in the revocation action, the Hearing Officer found that the Appellant could rely on "*Headgear (for wear); riding breeches; socks; stockings*".
12. The best case was in relation to *riding breeches*, but these were dissimilar to the Respondent's class 18 goods.
13. However, if she was wrong on that finding, then:
 - a. there was only a low similarity between the goods;
 - b. the average consumer was a member of the general public with an interest in horse riding or a professional in that field, and would pay a medium degree of attention. Visual considerations were likely to dominate the selection process, but she did not discount aural considerations as advice may be sought from retail assistants;
 - c. the marks were visually similar to a medium degree, aurally similar to between a medium and high degree, and conceptually similar to no more than a medium (or average) degree;
 - d. the Earlier Mark was highly distinctive, but had not been enhanced through use;
 - e. there was no likelihood of direct or indirect confusion.
14. The opposition therefore failed under s.5(2)(b).
15. The opposition failed under s.5(3) due to the lack of the requisite reputation. This aspect of the decision was not appealed.
16. The opposition also failed under s.5(4)(a) due to there being no likelihood of misrepresentation or damage arising in view of the distance between the goods, combined with the differences between the marks. That aspect of the decision was not appealed.

The Appeal

17. The Appellant filed a Notice of Appeal to the Appointed Person under s.76 of the Act. At the hearing before me, which was held remotely, the Appellant was represented by Victoria Jones, instructed by Taylor Wessing LLP, and the Respondent was represented by Julius Stobbs of Stobbs.

Standard of review

18. It is well established that in order to interfere with the decision of the Hearing Officer I must be satisfied that there was a distinct and material error of principle in the decision or that the Hearing Officer was wrong. The relevant principles were set out in *Axogen Corporation v Aviv Scientific Limited* [2022] EWHC 95 (Ch) at [24]. An appeal is by way of review, not a rehearing. Neither surprise at a Hearing Officer's conclusion nor a belief that she or he has reached the wrong decision will justify interference. 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. In the absence of 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* at [80]). 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 v Pie Corbett Consultancy* [2017] RPC 17 at [52(iv)], *REEF Trade Mark* [2003] RPC 5 at [28] and *Fine & Country Ltd v Okotoks Ltd* [2014] FSR 11 at [50]-[51]).
19. In a recent trade mark appeal in *Stitch Editing Limited v. TikTok Information Technologies Ltd* [2023] EWHC 1167 (Ch), Sir Anthony Mann said at paragraphs [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.

"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.

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.

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.

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.

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.”

20. I have borne those principles firmly in mind.

Grounds of Appeal

21. The Appellant relied on two grounds of appeal, which I will deal with in turn.

Ground 1: The Hearing Officer erred in her construction of the fair remaining specification

22. The Appellant submitted that the specification which ought to have been applied in terms of the outcome of the revocation action and in response to being put to proof in the opposition proceedings should have read as follows:

“Headgear (for wear); ~~shoes; boots; half boots; boot uppers;~~ riding shoes; riding boots; riding half-boots; golf shoes; walking shoes; clothing for horseriding; riding jackets; jodhpurs; socks; stockings.

(words shown struck through were not subject to the appeal; words shown underlined were the additional goods which the Appellant argued on appeal should have been allowed to remain).

23. I will deal first with the issue as it related to the revocation action, and return to it under Ground Two in relation to the fair specification for the opposition proceedings.

24. The Appellant did not criticise the Hearing Officer’s summary of the applicable law on genuine use, but did rely on two cases relating to the tribunal’s approach to evidence which the Hearing Officer did not refer to, which I discuss later.

25. The Appellant sought to identify a series of errors made by the Hearing Officer in paragraphs 34 and 37 of her Decision, which I set out below in paragraph 30. The Appellant argued that these paragraphs demonstrated two key errors made by the Hearing Officer. The first was her decision to find that *“riding breeches”* was the only item of clothing shown to have been used which could be *“identified as being for horseriding”*, so that she erroneously replaced *“clothing for horseriding”* and *“jodhpurs”* with *“riding breeches”*. The second was her finding of insufficient evidence of genuine use in relation to *“riding shoes; riding boots; riding half-boots”*. The Appellant submitted that these two key errors had arisen following a series of errors, which I will deal with in turn below.

Errors in the definition of the relevant period / assessment of which evidence fell within the relevant period

26. The Hearing Officer correctly set out the provisions of s.46(1) to 46(6) of the Act in paragraph 25 of her Decision, including in particular the following wording from s.46(3):

“... Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.”

27. She identified the relevant five year period relied on for the revocation action as between 12 May 2009 and 11 May 2014, but then pointed out that the Appellant had relied on evidence which primarily focussed on the time after the relevant period. In addition, the Respondent had misstated the relevant period in its own written submissions as being the five year period between 12 May 2014 and 11 May 2019. She continued in paragraph 31 as follows:

“31. However, I bear in mind that section 46(3) states that where use is commenced or resumed after the expiry of the five-year period and before the application for revocation is made (provided that any use in the three-month period leading up to the application for revocation is disregarded) then a trade mark should not be revoked. I acknowledge that it is not the proprietor’s case that it resumed/commenced trade after the relevant period; Ms Weeke-Therling states that the mark has been used continuously since 1978. However, I have no evidence before me that the mark was being used on the relevant goods during the relevant period. Consequently, if the proprietor is able to show genuine use in the period following the relevant period, then I am satisfied that it can rely upon section 46(3) to protect its registration.”

28. The Appellant submitted that this was an error of law, because in this case it would only have been necessary to disregard use in the three month period prior to the application for revocation where the preparations for commencement or resumption began after the Appellant became aware that the application for revocation had been made. Since the evidence asserted continuous use of the Earlier Mark since 1978, and that this was clearly not a case of commencement or resumption of use purely because of a threatened revocation application, evidence of use during that three month period should not have

been disregarded. Ms Jones said that she would identify evidence which fell within the three month period which the Hearing Officer did not take into account. Furthermore, the Appellant submitted that, despite acknowledging in the final sentence of paragraph 31 of her Decision (set out above) that she could take into account evidence postdating the relevant period, in fact the Hearing Officer did not do so.

29. The Respondent pointed out that the Hearing Officer had set out the wording of s.46(3) correctly in paragraph 25 of her Decision, and argued that she was merely paraphrasing in paragraph 31, such that there was no evidence to suggest that she did not in fact take into account evidence either during the three month period or evidence which postdated the relevant period.
30. It is convenient for me to consider both of these arguments at this stage, even though the Appellant separated them out in its skeleton. I therefore set out the paragraphs from the Decision which dealt with the Hearing Officer's consideration of all of the evidence of use:

"32. With that in mind, I note the following from CG's evidence:

a) Ms Weeke-Therling states that:

"My Company was first established in 1978 in Bad Oeynhausen and produced riding boots. The range of products has since expanded to include casual boots, shoes and chaps as well as related accessories. Since 2000, My Company has also provided sportswear. As of 2019, My Company also provides products designed for horses in combination with the various sportswear ranges."

b) Ms Weeke-Therling states that the 758 Mark and the word CAVALLO have been used continuously in the UK since 1978 and have been used for all of the goods for which the 758 Mark is registered.

c) Approximate turnover figures for the products "and services" provided under the 758 Mark and the word CAVALLO in the UK are as follows:

YEAR	TURNOVER - €	UNITS
2014	451,623.44	14392
2015	688,011.79	15810
2016	536,530.09	13086
2017	412,428.72	13919
2018	476,637.18	14485
2019	364,538.62	10348

I note that Ms Weeke-Therling describes these figures as relating to products and services. There are no services covered by the 758 Mark or relied upon in these proceedings. However, as the turnover figures appear alongside a 'units' column, which would not apply to services, it seems likely to me that this is a typographical error.

I note that only the figures for 2014 would fall (in part) within the relevant period.

Additional figures have been provided for 2020 and 2021 as follows:

2020 £279,244.94 12440 units

2021 £458,009.08 18399 units

d) Examples of print outs from the CG's website have been provided. Ms Weeke-Therling states that these are taken from the Wayback Machine.

However, the dates to which these print outs relate are not clear to me. For example, I note that in the address link to the Wayback Machine archive at the top of the page a string of numbers appears, but it is not clear to me whether this (or part of this) is intended to represent a date (for example, on the first page the number string 201502225171110 appears). However, as the earlier number string begins 2015 (and the relevant period ends in 2014), I note that these documents would also be dated after the relevant period.

e) Invoices have been provided which are dated 6 June 2014, 25 September 2014, 9 October 2014, 11 December 2014, 23 March 2019, 26 April 2019, 20 August 2019 and 17 February 2020. These are all dated after the relevant period and are addressed to a single customer, based in Flintshire. They all display the following mark:



I note the following quantities of goods have been sold:

Riding breeches 906

Riding boots/polo boots 27

Half Chaps 1

Lady's bomber jacket 103

Riding jacket 25

Accessories (button) 4

Mobile phone bag 14

Lady's parka 193

Lady's shirt 1,229

Men's shirt 27

Stockings 1,336

Caps 122

Long socks 744

Lady's vests 292

Lady's blouse 8

Men's bomber jacket 304

Lady's pullover 424

Lady's jacket 386

Headband 171

Scarf 35

Lady's long coat 114

Lady's anorak 28

Lady's coat 8

Men's vest 54

f) I note that various goods appear on CG's Instagram account (such as horse coats and riding boots), but I have no further evidence as to the extent of sales of these

goods. The print outs from CG's Instagram account are dated 2022 and, consequently, are after the relevant period.

33. The mark shown on the invoices is, in my view, acceptable variant use of the 758 Mark. Whilst the stirrup device is different to the device in the 758 Mark, in that it is filled in rather than being an outline, I do not consider that this alters the distinctive character of the mark. Consequently, this is use upon which CG can rely.

34. There are clearly issues with CG's evidence. Overall turnover figures have been provided for the UK, but these are not broken down by product and so it is impossible to assess what proportion of these figures relate to which of the goods in the specification. There is no evidence at all of actual sales in relation to CG's class 18 goods. Whilst I note Ms Weeke-Therling's narrative evidence that these goods have been sold under the 758 Mark, the evidence does not enable me to assess the extent of that use and whether it qualifies as genuine use. Consequently, I am not satisfied that CG has demonstrated genuine use in relation to its class 18 goods. However, in relation to the class 25 goods, I am satisfied that there has been genuine use in relation to riding breeches, lady's coats and jackets, lady's shirts, stockings, long socks, lady's vests, men's jackets, lady's pullovers, headbands and caps. Whilst I note that CG has sold some riding jackets and riding/polo boots, this is a very small amount over a 5 year period. Ms Weeke-Therling does indicate that the invoices are only some of the invoices actually issued. However, I find myself unable to conclude, on the evidence before me, that there has been genuine use in relation to riding jackets or riding/polo boots.

35. I must now consider whether, or the extent to which, the evidence shows use of the 758 Mark in relation to the goods relied upon. In Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being: "In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned."

31. In paragraphs 35 and 36 the Hearing Officer set out the law applicable to the assessment of evidence in revocation proceedings, before continuing in paragraph 37 as follows:

“37. The Collins English Dictionary states that “jodhpurs” are a type of riding breeches. It is not clear to me, from the evidence, whether the riding breeches sold by CG were jodhpurs. However, I consider “riding breeches” to be an appropriate sub-category of “clothing for horseriding”. I am not satisfied that CG should be permitted to retain that broader term given that there has been genuine use in relation to only one type of clothing item (that can be identified as being for horseriding). Clearly, CG will be able to rely upon the terms “socks” and “stockings”. I note that CG has shown genuine use of “headbands” and “caps”. I am satisfied that the use shown is sufficient for CG to retain the broader term “headgear (for wear)”. Consequently, I consider a fair specification to be:

Class 25 Headgear (for wear); riding breeches; socks; stockings.”

32. In relation to evidence which specifically fell within the three month period, the Hearing Officer did refer to a page from the Appellant’s Instagram account [32(f)]. While the date shown on the page of the Instagram account included a copyright notice dated 2022, it also bore the date 7 June 2022 at the top left of the page. This may have been the date on which the screenshot was obtained, although Ms Jones was unable to confirm this. 7 June 2022 fell within the three month period, namely between 25 April and 25 July 2022.
33. The Appellant relied on the Hearing Officer’s frequent references to certain evidence being outside the relevant period as evidence that she had wrongly excluded that evidence from her consideration because she had correctly found that, although the five year period ended for the revocation proceedings on 11 May 2014, the entire period after that date and up to the application for revocation on 25 July 2022 remained relevant. It is true that the Hearing Officer does make a point of highlighting whether each type of evidence under consideration falls within the relevant five year period or not, without making it clear why she felt it relevant to do so. Perhaps she was indicating that, since she had decided that she could take into account evidence which postdated the relevant period, it was relevant evidence. I have decided that the mere fact that she identifies whether or not particular evidence fell outside the relevant five year period or not did not mean that she failed to take that evidence into account in her assessment, for the following reasons:
- a. She starts her review of the evidence in paragraph 32 of the Decision. The final sentence of the preceding paragraph was her conclusion that she should take into account evidence dated after the relevant five year period, where she said *“Consequently, if the proprietor is able to show genuine use in the period following*

the relevant period, then I am satisfied that it can rely upon section 46(3) to protect its registration.". She then commences paragraph 32 with the words *"With that in mind, I note the following from CG's evidence ..."*. This demonstrates that it was in the forefront of her mind that she should take into account evidence which fell within the period after the five year period, so it would be very surprising if she then proceeded to do the exact opposite. Nor does she exclude the three month period in her conclusion as to what evidence the Appellant can rely on.

- b. In paragraph 32(e), she lists the dates of invoices relied on by the Appellant, which are dated between June 2014 and February 2020. She points out that these are all after the relevant period, but then goes on in paragraph 33 to expressly state that *"this was use which CG can rely on"*. If the Appellant was correct that the Hearing Officer was proceeding on the basis that she should not take into account any evidence which postdated the five year period, then she would not have concluded that the Appellant could rely on any of those invoices.
- c. When she refers to the evidence falling outside of the relevant period, she does not accompany that statement with any conclusion that that meant that she could not take that evidence into account – they were simply statements of fact relating to the date of the evidence in comparison to the relevant five year period. Her reference to the *"relevant period"* was therefore to the relevant five year period rather than to the period of time during which any evidence should be taken into account.
- d. In paragraph 34, where she draws together her conclusions on the evidence, the Hearing Officer refers to turnover figures having been provided. Her criticism of those turnover figures was that, while they had been provided for the UK, they had not been broken down by product. Turnover figures had been provided for the years 2014 to 2021. If she had excluded any consideration of evidence of turnover which postdated 2014, then I would have expected her to have said so in this paragraph.
- e. In paragraph 34, she also refers to the evidence of the Appellant's witness, Ms Weeke-Therling, where she refers to the class 18 goods having been sold under the Earlier Mark. In paragraphs 32(a) and 32(b), the Hearing Officer described that witness' evidence as including that since 2019 the Appellant had provided products designed for horses in combination with various sportswear ranges, and that the Earlier Mark had been used *"continuously since 1978"* for all the goods for which the Earlier Mark was registered. Again, if the Hearing Officer was discounting evidence

after 2014, I would have expected her to have said so in paragraph 34 when summarising her conclusions on Ms Weeke-Therling's evidence.

34. For those reasons, I reject the Appellant's suggestion that the Hearing Officer wrongly failed to take into account evidence which postdated the five year period, including evidence which fell within the three month period prior to the application for revocation.

An incorrect interpretation of the specification, and a failure to take into account certain evidence, or give it sufficient weight

35. The Appellant argued that the Hearing Officer had applied the wrong interpretation to the words "*clothing for horseriding*", which had left the Appellant without any protection for items in relation to which it had proved genuine use. Firstly, the Hearing Officer had taken an unduly narrow approach by assuming that, in order to fall within "*clothing for horseriding*", an item of clothing had to be worn exclusively for/when horse riding, which would not be how the average consumer would perceive "*clothing for horseriding*". Secondly, the Appellant relied on certain items of clothing from the evidence which it said was for horse riding, which the Hearing Officer had failed to consider or give sufficient weight to.

36. The Respondent argued that "*clothing for horseriding*" meant clothing specifically designed or intended for horse riding, and did not cover any item of clothing which could be worn when riding a horse. At the hearing before me, Ms Jones accepted that the clothing had to be sold "*for the purpose of horseriding*". That still led to some disagreement between the parties as to certain items of clothing which appeared in the evidence. For example, Ms Jones argued that a ladies' quilted jacket was clearly marketed by the Appellant to horse riders as a jacket which would be suitable to wear while horse riding, because it was said to "*allow full range of movement whilst in the saddle or mucking out*". Mr Stobbs said that it was not enough to show that advertising targeted a certain section of the public who would be interested to use an item of clothing for a particular purpose, namely horse riding. The correct question was whether the average consumer would see that item of clothing and know that it was specifically designed for horse riding, as opposed to it being an item of clothing which happened to be suitable for horse riding, as well as for other unrelated activities.

37. The Appellant relied on the guidance of Geoffrey Hobbs KC in *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited* BL O/345/10 in order to arrive at the correct way of determining

what items the average consumer would perceive to fall within “*clothing for horseriding*”. In particular, in that Decision Geoffrey Hobbs KC said: “*the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.*”. However, he distinguished that test from the issue of whether goods or services were similar, saying: “*The test for assessing whether there is similarity sufficient to give rise to the existence of a likelihood of confusion does not, in my view, provide the test for determining what the basic specification should itself be.*”. I agree with the Respondent that it is not sufficient to show that particular items of clothing were marketed at consumers interested in horse riding. The average consumer must perceive the particular item of clothing itself as being clothing for horse riding. So, for example, a riding hat is clearly specifically designed for horse riding, whereas a puffer jacket which could be marketed to horse riders to keep them warm but could equally be marketed to any consumer as a warm outdoor jacket would not be perceived by the average consumer as “*clothing for horseriding*”.

38. Ms Jones then took me through the items of evidence which the Appellant considered the Hearing Officer had wrongly failed to take into account or alternatively had failed to give sufficient weight to. I asked both Ms Jones and Mr Stobbs to take me through their submissions on each page of the relevant exhibits at the hearing before me to ensure that they had each addressed me fully on the points on which they intended to rely.

BWT1 (revocation)

39. The first set of evidence was the contents of an exhibit marked BWT1 to the witness statement filed in the revocation proceedings (which I will refer to as “**BWT1 (revocation)**”). The witness gave no explanation in her witness statement of what each page of the exhibit showed and since there was no hearing before the Hearing Officer, she was left to interpret them as best she could.
40. The first items of the exhibit were print outs from the Appellant’s website which had been taken from the Wayback Machine. The Hearing Officer said that the dates of the print outs “*are not clear to me*” as they simply had a number string (e.g.201502225171110) on the top of the page. Ms Jones said that it should have been clear to the Hearing Officer that these number strings related to the year in which they appeared on the Appellant’s website, because they had copyright notices at the bottom of the page e.g. “*copyright 2000 to 2015*”. She also relied on the fact that the Respondent had acknowledged these dates in its written submissions, so the Hearing Officer was wrong to say that she could not date them.

41. I do not consider that paragraph 32(d) can be read as evidence that the Hearing Officer took no account of these screenshots. Rather than saying that she could not date them, she in fact said that the dates were not clear to her.
42. The first page of BWT1 (revocation) appeared to be a screenshot of the Appellant's UK website taken from the Wayback Machine dated 2015. The Earlier Mark appeared prominently on the top left of the page, underneath which was a list of products. The first section was headed "*Winter Collection*" and listed a range of different types of clothing such as "*Fleece Jackets*", "*Basic Shirts*", "*Knit Range*", "*Accessories*" and "*Functional Jackets*", none of which had a specific description relating to horse riding. Further down the page were other headings, including "*Breeches*", "*Show Jackets*", "*Boots*" and "*Dressage Hat*". The price of a particular jacket was shown in pounds sterling.
43. The next page appeared to show the webpage which was displayed once the "*Show Jackets*" heading had been selected. Four jackets were shown, which appeared to be show jackets specifically designed for equestrian competitions of some sort, and so would clearly be clothing for horse riding. The Earlier Mark appeared on one of the pocket labels.
44. The next page Ms Jones took me to appeared to be the webpage which appeared when the "*Boots*" category was selected, which listed a range of different types of boots, including "*Dressage Boots*", "*Jumping Boots*" and "*Casual Shoes*", plus "*Chaps*", which Ms Jones described as similar to cowboy leggings made from leather. No image of the chaps or the boots appeared on the page, but the Earlier Mark still appeared prominently in the top left of the page.
45. The next page was a screenshot of a website of an equestrian dealer called Zebra Products, www.zebraproducts.co.uk, taken from the Wayback Machine with a capture date which appeared to be 2016. About one third of the way down the page, the word CAVALLO appeared as a heading, under which the Earlier Mark was shown, with text underneath that which read "*Highlights*" and "*Welcome to Cavallo!*". Beneath that, the following text appeared:

"Cavallo is a brand synonymous with quality and style – whether it's their bridle range, vast collection of riding boots, their mainline competition wear or their seasonal fashion line.

The Cavallo clothing collection brings together the hottest fashions colours and trends and translates them into stylish and functional rider clothing. Whether its

functional fleeces, cute cropped bomber jackets, plaid breeches or hooded quilted waistcoats with multiple pocket designs, Cavallo takes equestrian style from the catwalk to the yard.”

The next paragraph described how the Appellant had joined forces with another company to create a new “spur system” that only fitted onto “Cavallo riding boots”. Ms Jones submitted that this page clearly showed that the Appellant was selling many items of clothing for horse riding.

46. The next page listed the names and photographs of a few “top international riders who choose Cavallo”, and was followed by a news section with links to various different news articles. As the pages to which the links were addressed were not exhibited, it was not possible to see any use of the Earlier Mark in relation to these articles. While some of the links did specifically refer to riding boots and ladies’ riding breeches, for most of the links it was not possible to tell from the description whether the clothing referred to in the few words of text taken from the article as a snippet was clothing for horse riding or a general purpose fashion item (e.g. “quilted biker jacket”, “waterproof jackets”, “men’s soft shell jacket”, “kids hoodie” and “gilet”). There were also references to clothing which would clearly not be seen by the average consumer to be clothing for horse riding, such as snow boots and scarves.

47. Ms Jones referred me in particular to a link which featured the following text:

“Totally technical tops from Cavallo ... winter fashion from Cavallo Making sure riders have the best performance clothing available Cavallo have introduced a range of technical tops for winter 2013. The April is ...”.

Below this text appeared the following link:

“Read More (/web/20160209184328/http://zebraproducts.co.uk/Cavallo/totally-technical-tops-from-cavallo.html)”

I give this link as an example because under Ms Jones’ previous submissions, she criticised the Hearing Officer for not appreciating that the Wayback Machine webpages were dated from a particular year because the first four digits of the webpage link clearly referred to the year. However, in this example the first four digits of the link are 2016, and yet the article clearly dates from 2013. This demonstrates why the Hearing Officer was entitled to state that the dates were unclear. Furthermore, there was no evidence that the Earlier Mark was used in relation to the technical tops referred to, nor is it clear whether the technical tops

were tops designed for horse riding or were technical tops which were targeted at horse riders to wear as fashion items – the reference to “*performance*” suggests the former, but once again it was by no means clear.

48. The next page was a list of key stockists, most of which appeared to be equestrian outlets.

49. One of the adverts on the Zebra Products webpage screenshots was for the Appellant’s “*new boots*” under the Earlier Mark. It featured a photograph of five boots which were described as riding boots.

50. I was then taken to what appeared to be a screenshot of the home page of the Appellant’s UK website taken from the Wayback Machine, also in 2016 based on the first four digits of the web address and the copyright notice “2000-2016” which appeared at the bottom of the page. As before, the Earlier Mark appeared prominently in the top left corner. It featured a photograph of a woman standing in front of a horse wearing a blue jacket with a C device on the sleeve (which I will call “**the C device**”), which appeared to be the same stylised C taken from the Earlier Mark, but which on its own would not be similar enough to the Earlier Mark to amount to an acceptable variant of it. As before, the product category list appeared on the left hand side, listing “*Winter Collection*”, “*Breeches*”, “*Show Jackets*”, “*Boots*” and “*Dressage Hat*”. The following text appeared under the photograph:

“Cavallo – this is the brand for high-quality equipment for riders and their horses, in function and fashion, perfectly complement on another. [sic] In national and international equestrian sports, Cavallos products are widely used and enjoy an extremely high reputation for riders. Cavallo is the outfitter of the “German Olympics Committee for riding” (DOKR) for 30 years and equips the German national teams in this function.”

51. The final page of the exhibit featured a screenshot from the Appellant’s website, which appeared to have been captured by the Wayback Machine in 2017, which showed a photograph of two single boots, one black and one brown, each of which featured the C device, above the caption “*Allround Boots*”. While not described as riding boots, they looked very similar to the riding boots seen in the advert on the Zebra Products website referred to in paragraph 49 above. Further down the page, there was a photograph of a casual shoe which appeared next to the category “*Casual Shoes*”, which did not appear to be a horse riding-related item.

52. Where the products shown on the website did not bear the Earlier Mark itself, Ms Jones relied on the use of the Earlier Mark on the same page of the website, as described above, as genuine use of the Earlier Mark. In support of that argument, she relied on the decision in *VIRGIN O/164/13*. In the *VIRGIN* decision, the Hearing Officer found that use of the *VIRGIN* signature mark on the front cover of a catalogue which did not contain any third party brands would be *“perceived as an overarching badge of origin for everything in the catalogues”*. The Hearing Officer therefore found that that use of the *VIRGIN* signature mark on the front cover was genuine use of the mark in relation to the goods shown in the catalogue.
53. In addition, Ms Jones relied on paragraph 26 of the Court of Justice of the European Union’s decision in *Apple Inc v Deutsches Patent und Markenamt*, Case C-421/13, where it held that *“a sign depicting the layout of the flagship stores of a goods manufacturer may legitimately be registered not only for the goods themselves but also for services falling within one of the classes under the Nice Agreement concerning services, where those services do not form an integral part of the offer for sale of those goods.”* Mr Stobbs did not seek to object in principle to the Appellant’s reliance on use of the Earlier Mark on the website depicting the relevant goods as genuine use at the hearing before me, but was concerned about the nature of the goods relied on. I find that the Appellant was entitled to rely on use of the Earlier Mark on the screenshots of pages from its website where the goods shown would be perceived by the average consumer as *“clothing for horseriding”*.
54. However, I do not consider that those few pages contained within this exhibit which I have indicated above as amounting to potentially relevant evidence of use were enough for me to conclude that the Hearing Officer did not attach sufficient weight to the exhibit, such that she should have found genuine use of clothing for horse riding when considering it with the other evidence in the round.

Exhibit BWT1 (opposition)

55. Ms Jones then took me to one of the exhibits to the witness statement filed in relation to the opposition proceedings which Weeke-Therling said contained evidence of use of the Earlier Mark. Ms Jones explained that the Appellant had filed two witness statements in the proceedings before the Hearing Officer, one in the revocation proceedings and one in the opposition proceedings, but that, unfortunately, each statement had an exhibit called *“BWT1”*, and whose numbering each started from page one rather than having consecutive numbering. Ms Jones said that the Hearing Officer did not refer to exhibit BWT1 of the

opposition statement anywhere in her judgment (which I will refer to as “**BWT1 (opposition)**”), and concluded that that showed that the Hearing Officer wrongly ignored that evidence.

56. It is clearly unfortunately that the exhibits were not correctly numbered, but the mere fact that the Hearing Officer does not specifically mention a particular exhibit in her Decision is not proof that she did not take it into account as part of her overall assessment of the evidence. Ms Jones accepted that, as the extract from *Volpi v Volpi* set out in paragraph 19 above makes clear, absent a compelling reason to the contrary, I can assume that the Hearing Officer has taken the whole of the evidence into her consideration. However, in this case, Ms Jones submitted that the Appellant says that there is good reason to think that the Hearing Officer did not consider BWT1 (opposition) at all.
57. Firstly, Ms Jones said that in paragraph 32 of the Decision, the Hearing Officer set out her summary of all of the evidence filed in both the revocation and opposition proceedings, and did not refer to the evidence contained in BWT1 (opposition). She suggested that the reason may have been because she overlooked the fact that there were two separate exhibits marked BWT1, and so only considered BWT1 (revocation).
58. Alternatively, Ms Jones suggested that the Hearing Officer had discounted BWT1 (opposition) because all the evidence contained in it was dated 2022. While she acknowledged that not all of the evidence fell within the three month period between April and July 2022 discussed above, some of it did. In fact, only four of the 19 press clippings definitely fell within the three month period, with six where it was not possible to tell, and nine which fell outside of it. However, that would not explain why the Hearing Officer would have discounted all of the evidence contained in 2022 rather than just the evidence which fell within the three month period, so I reject that second option as a possible reason.
59. Nor do I consider that there is enough to support Ms Jones’ suggestion that the Hearing Officer overlooked BWT1 (opposition) because there were two exhibits both marked BWT1. There were also two exhibits marked BWT2, each of which contained invoices (but not the same invoices) and it was clear that she referred to the contents of both of those exhibits because the Appellant confirmed that the value of total sales for the individual products which the Hearing Officer had added up had been taken from both exhibits marked BWT2.
60. I therefore reject the suggestion that the Hearing Officer failed to consider the contents of BWT1 (opposition) at all merely because she did not refer to its contents in paragraph 32.

However, it is still necessary for me to consider the contents of BWT1 (opposition) because the Appellant argued in the alternative that the Hearing Officer did not give it sufficient weight.

61. The first page of BWT1 (opposition) appeared to be an extract from the May/June 2022 edition of a magazine called Equestrian Life, which featured a photograph and a short article relating to the Appellant's Baga Quilted Jacket, a ladies' jacket described as "*a modern, sporty padded quilted jacket*". The text included the sentence "*It is lightweight with a heat-insulated filling made of fake down to keep riders warm in winter.*", but also stated that it "*is a must have for any wardrobe*". Above the text was another photograph of a lady wearing what appeared to be the same jacket in a different colour, next to a horse. The jacket had the word CAVALLO on it in various places, although as part of what appeared to be different device marks to that of the Earlier Mark. The same page also featured a separate short article and photograph relating to another jacket, which featured the sentence "*Added active flex movement zones made of soft shell allow full range of movement whilst in the saddle or mucking out.*". This jacket was described as the Cavallo Bouncy Jacket, and may or may not have had the Earlier Mark on the right cuff, as the writing was illegible in the exhibit. Both jackets were said to be offered for sale by a company called Zebra Products.
62. There is no question that the two articles clearly targeted the Appellant's jackets at female horse riders. However, were they "*clothing for horseriding*"? They were jackets suitable for wearing while horse riding, but would the average consumer, on seeing the jackets, have recognised them as clothing designed for horse riding, rather than being a quilted jacket designed for a variety of uses, one of which could have been for use while horse riding? The Hearing Officer had found the average consumer to be a member of the general public with an interest in horse riding, or a professional in that field. There was no evidence before the Hearing Officer to assist her in understanding what made a jacket specific for horse riding, and, in light of the statement in relation to the Baga Quilted Jacket being "*suitable for any wardrobe*", I consider that it was reasonable for the Hearing Officer to have concluded that there was insufficient evidence to persuade her that these were examples of "*clothing for horseriding*".
63. The next page featured what was described as a press clipping taken from Equestrian Living in May 2022, showing a photograph and a short article relating to the Appellant's Bojana Sweat Hoody. Again, the product was being sold by Zebra Products. This was described as being "*perfect for everyday wear at the yard or when out and about. Wear it on its own for a*

casual look or under a jacket as an added layer of warmth on cooler days.”. However, the text also stated *“the cosy hoody has a large hood which is fixable on the back for practicality when riding. With a full range of movement both in and out of the saddle, the Bojana Sweat Hoody had been designed with riders in mind”*. I consider this reference to the features of the top having been specifically designed for horse riding would lead the average consumer to consider this hoody to be an item of *“clothing for horseriding”*.

64. The top had a large representation of the C device on its front, but no use of the Earlier Trade Mark. However, the article described the product as the *“new Bojana Sweat Hoody from Cavallo”* and the Appellant said that this should be considered together with all of the other evidence in the round. The problem with this is that there are examples in the evidence of the Appellant having used a number of different device marks for its CAVALLO brand, so the Hearing Officer could never be certain that this product was sold in connection with the Earlier Mark as opposed to with one of the other device marks used by the Appellant. However, as we will see in paragraph 74 below, there was another page in the same exhibit which showed other images of the same top being sold in conjunction with the Earlier Mark.
65. Several of the pages showed images of breeches, but Ms Jones said that she did not need to take me to those as the Hearing Officer had found genuine use of *“riding breeches”*. I will therefore not comment on those pages other than to point out that, of the 19 press clippings featured in the exhibit, eight of them showed just breeches.
66. The next page I was taken to appeared to be a clipping said to have been taken from the publication *Your Horse* dated Spring 2022, which featured a photograph of the Appellant’s Diane *“sporty hoody jacket”*. There was nothing to indicate that this was *“clothing for horseriding”*, as it appeared to be similar to any ladies’ fashion hoodie.
67. The next page appeared to be another clipping from the same publication, which showed a photograph of the *“Cavallo Destina polo shirt”*. This did not look like a typical fashion polo shirt as it had a stand-up collar, but there was no evidence to assist the Hearing Officer as to whether this was a top specifically designed to wear while playing polo. The top featured the CAVALLO name printed along the bottom in a different font to that used in the Earlier Trade Mark.
68. In order to demonstrate that these two items were specifically designed for horse riding, Ms Jones relied on the following passage from Ms Weeke-Therling’s statement:

“My Company was first established in 1978 in Bad Oeynhausen and produced riding boots. The range of products has since expanded to include casual boots, shoes and chaps as well as related accessories. Since 2000, My Company has also provided sportswear.”

Ms Jones said that her reference to *“sportswear”* could have been to sportswear for horse riding, and should be read in conjunction with the statement referred to in paragraph 45 above where the Appellant’s website referred to their sale of *“stylish and functional rider clothing.”*

69. While it is true that the reference to sportswear in the witness statement could have been to sportswear for horse riding, it could equally have been to sportswear to be worn as casual fashion clothing. While there were references on the Appellant’s website to making clothing specifically for horse riding, there was also evidence that they sold other items which were general fashion items, such as snow boots and scarves. I therefore consider that it was reasonable for the Hearing Officer to have concluded that these two items were not items of *“clothing for horseriding”*.
70. The next page I was taken to was said to be a clipping from the publication Horse and Rider dated April 2022, which showed a normal-looking belt with a pattern on it, as well as what appeared to be a representation of the Earlier Mark when the C device on the belt loop lined up with the rest of the word CAVALLO beneath it. Again, Ms Jones said that it was relevant that all of these clippings were taken from equestrian publications, which was *“quite a strong suggestion that these are clothing for riders”*, and again emphasised the need to consider all of the evidence in the round. Mr Stobbs, on the other hand, argued that just because the item in question was featured in a publication aimed at horse riders did not mean that the product shown was *“clothing for horse riding”*. From the evidence, there was no way for the Hearing Officer to tell whether or not this was a belt specifically designed for horse riding or whether it would be viewed by the average consumer as a normal belt which would be desirable to horse riders because it had the Appellant’s branding on it. There was certainly nothing visible from the photograph in the design of the belt which set it apart from the appearance of a standard belt. Accordingly, I consider that the Hearing Officer was entitled to have concluded that this belt was not *“clothing for horseriding”*.
71. The next page I was taken to showed the Baga Quilted Jacket which was discussed in paragraphs 60 and 61 above, said to be taken from the publication Your Horse in April 2022.

72. The following page was a clipping said to have been taken from Horse & Rider dated March 2022, which Mr Stobbs accepted featured an item of clothing for horse riding. This was because it featured a photograph of what appeared to be a riding jacket or show jacket for use in horse riding competitions, because it was accompanied by the following text: *“TOP TIP Be sure to check the rules of your discipline’s governing body before purchasing a jacket. Even local events may have guidelines or rules for riding attire.”*. The jacket was described as the Cavallo Estoril Ma, but the writing on the inside label was not clear enough to be legible so it was not possible to tell whether or not it was the Earlier Mark.
73. The next page was said to be a clipping from the same publication and showed a photograph of what were described as Cavallo Lin Grip Riding Leggings. Ms Jones submitted that these must be different from breeches as they were described as leggings rather than breeches. I note that the next page which showed the *“Camille Grip Performance Stretch Breeches from Cavallo”* were said to *“combine the comfort of riding tights with the trendy look of a classic breech”*, but there was no evidence which explained to the Hearing Officer what the difference might be between breeches, tights, leggings or jodhpurs. The leggings were accompanied by text which read: *“Look smart in the ring with these comfortable competition leggings”*, so they appeared to be leggings designed to be worn for horse riding competitions. However, there was no evidence of use of the Earlier Mark in respect of them.
74. The following page featured the Baga jacket and text referred to in paragraph 60 above, this time as a cutting from Equestrian Index dated 27 January 2022.
75. The next page Ms Jones took me to was said to be a clipping from Equestrian Index dated 21 January 2022, which showed photographs of the Bojana Hoody which I found to be an item of clothing for horseriding in paragraph 63 above. This time, however, the Earlier Mark appeared prominently next to the photographs.
76. The next page was from the same publication and featured the Appellant’s Bouncy Jacket discussed in paragraph 60 above. The article began *“Pairing great style with practical functionality makes the Bouncy Jacket from Cavallo a wardrobe essential this winter”* and featured the same sentence which also appeared in the article discussed in paragraph 60: *“Added active flex movement zones made of soft shell allow full range of movement whilst in the saddle or mucking out.”*. This time, the photographs of the jacket appeared next to use of the Earlier Mark, but, as I found in paragraph 61 above, it was reasonable for the Hearing Officer to have concluded that there was insufficient evidence to persuade her that these were examples of *“clothing for horseriding”*.

77. The final pages were said to be clippings dated 17 January 2022 taken from Equestrian Index, which featured breeches, the Appellant's Bree Faux Fur Jacket, the Baga Quilted Jacket discussed above, and mention (but no images) of the Bibi turtle neck shirt (described as *"the ideal base layer for any outfit"*), the Badara Sporty Blouson (*"a waterproof outer jacket"*) and the Bruna Long Waterproof Rain Coat (*"long waterproof coat"*). The text also featured various phrases which suggested that the Appellant's clothing was not designed specifically as clothing for horse riding, such as *"With a wide range of clothing there is something for everyone whether it's down at the yard, out with friends or walking the dog"* and *"a sporty all-purpose breech which are comfortable and are ideal for every day wear, regardless of the occasion."* Again, I find that it was reasonable for the Hearing Officer to have concluded that there was insufficient evidence to persuade her that (ignoring the breeches) these were examples of *"clothing for horseriding"*.

78. My conclusion in respect of the evidence contained in BWT1 (opposition) is therefore that:

- a. there were only two pages in the exhibit which showed the Bojana Hoody, which I have found to be an item of *"clothing for horseriding"*, one of which showed use of the Earlier Mark; and
- b. there were only two other pages which showed items which I have found to be items of *"clothing for horseriding"* (namely the Cavallo Estoril Ma jacket and the Cavallo Lin Grip Riding Leggings), but without use of the Earlier Mark.

79. I therefore reject the Appellant's submission that the Hearing Officer did not attach sufficient weight to the evidence in BWT1, and find that its contents were not such that she should have found genuine use of clothing for horse riding when considering it with the other evidence in the round.

Exhibit BWT3

80. Ms Jones also took me to exhibit BWT3 in the opposition proceedings, which featured a screenshot from the Appellant's Instagram account bearing the date 22 June 2022, which was within the three month period (as discussed in paragraph 32 above). The page featured a large image of the C device followed by 12 photographs of a woman with a horse, a woman wearing items of the Appellant's clothing and two photographs which showed items which the Appellant said fell within class 18, namely a saddle and what I understand to be a horse bit. The Earlier Mark appeared in one of the central photographs, and could also be

seen on a pair of riding breeches/tights/leggings and on what I understand to be a saddle pad beneath the saddle on the horse.

81. The Hearing Officer dealt with this evidence in paragraph 32(f) of the Decision, stating that she had no further evidence as to the extent of sales of the goods shown in the images. The Appellant argued that the fact that she referred to the printouts being dated from 2022 and “consequently are after the relevant period” demonstrated that she did not take any account of this evidence, but I do not accept this for the same reason given in paragraph 33 above.
82. There was no evidence as to the number of subscribers to the Instagram account, how many of those subscribers were based in the UK, or how many visits each page had attracted, for example.
83. Accordingly, I again reject the Appellant’s submission that the Hearing Officer did not attach sufficient weight to the evidence in BWT3, and find that its contents were not such that she should have found genuine use of clothing for horse riding when considering it with the other evidence in the round.

Failure to take the evidence of Ms Weeke-Therling for what it was and/or a failure to look at the evidential picture as a whole

84. The Appellant referred me to the General Court’s judgment in *New Yorker SHK Jeans GmbH & Co KG v OHIM*, Case T-415/09 [2012] ETMR, where it said at paragraph 53:

“In order to examine whether use of an earlier mark is genuine, an overall assessment must be carried out which takes account of all the relevant factors in the particular case. Genuine use of a trade mark, it is true, cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (COLORIS, paragraph 24). However, it cannot be ruled out that an accumulation of items of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (see, to that effect, judgment of the Court of Justice of 17 April 2008 in Case C-108/07 P Ferrero Deutschland v OHIM, not published in the ECR, paragraph 36)”

85. Ms Jones referred me to paragraph 32(e) of the Decision, where the Hearing Officer had set out the totals for each item of clothing sold by the Appellant, taken from the various invoices forming part of the evidence. The Appellant did not agree with the totals calculated

by the Hearing Officer, giving as an example that the correct total for the number of riding breeches sold should have been 955 rather than the Hearing Officer's total of 906, and 29 rather than 25 riding jackets. While Ms Jones did not suggest that these discrepancies "*changed the case themselves*", she said that it did show that the Hearing Officer had got them wrong, and that it demonstrated a flawed approach of focussing on individual items of evidence rather than looking at the evidence in the round, pointing out that she had taken it upon herself to add up the totals herself when the Appellant had not undertaken that exercise itself or invited the Hearing Officer to do so.

86. I reject any criticism of the Hearing Officer's decision to add up the totals, as this was clearly a useful way of assessing the cumulative effect of the individual invoices which the Appellant had put in evidence. As the Hearing Officer pointed out in paragraph 34 of her Decision, the Appellant had not broken down the annual turnover figures by product, so it was impossible for the Hearing Officer to assess what proportion of those figures related to the goods which fell within the specification. Since the invoices showed a mixture of goods which could fall within, but also outside of, the specification (e.g. mobile phone bags), it was a sensible exercise for her to add up the totals for each of the goods listed on those invoices. This enabled her to assess, in particular, the extent to which those invoices demonstrated genuine use of items of clothing which would be perceived by the average consumer as "*clothing for horseriding*".

87. The Appellant argued that, because the Hearing Officer found genuine use in respect of the products with the highest total of sales shown on the invoices, and no genuine use in respect of those goods with lower total sales shown on the invoices, the Hearing Officer had incorrectly reached her conclusions solely on the invoice evidence. I do not agree that it shows that the Hearing Officer reached her findings on the evidence of use based on those figures alone, without also taking into account the other evidence. Indeed, she said as much at the end of paragraph 34, when she stated: "*Ms Weeke-Therling does include that the invoices are only some of the invoices actually issued. However, I find myself unable to conclude, on the evidence before me, that there has been genuine use in relation to riding jackets or riding/polo boots.*".

88. The Appellant also argued that, because Ms Weeke-Therling had not been cross-examined, her evidence should be taken "*for what it is*". The Appellant relied on *Yellow Bulldog Ltd v AP & Co Ltd* [2021] E.C.C. 10 at [40] where Morgan J said:

“In the absence of cross-examination, the witness statement and the exhibits must be taken for what they were and it is not to be presumed that the evidence would have fared better or worse, if there had been cross-examination.”

Accordingly, because Ms Weeke-Therling’s statement contained a sentence stating that the Appellant “uses” the Earlier Mark in respect of the class 18 and class 25 goods listed in the specification, followed by the sentence “Evidence of the mark used in respect of these goods during the relevant period is shown as Exhibit BWT1 through extracts of the Wayback Machine”, that was enough to demonstrate genuine use.

89. The Hearing Officer said in paragraph 34 of her Decision: “Whilst I note Ms Weeke-Therling’s narrative evidence that these goods have been sold under the 758 Mark, the evidence does not enable me to assess the extent of that use and whether it qualifies as genuine use”. This sentence demonstrates that the Hearing Officer did take the evidence for what it was, in accordance with Morgan J’s judgment in *Yellow Bulldog*. The witness confirmed that goods had been sold, but did not indicate the nature and extent of the use for each category of goods set out in the specification for the Earlier Mark, which required the Hearing Officer to consider the other evidence. Morgan J expressly referred to the exhibits as well as the witness statement in the extract from his judgment set out in the previous paragraph. Each case must be decided on the evidence applicable to it, and the Appellant has not identified any error in the approach taken by the Hearing Officer to the assessment of the evidence contained in the witness statements and exhibits in this case.

90. The Appellant also relied on the decision in *RAINBOW RANGERS*, BL O/251/22 at [32]. That case was the other way round from the circumstances on this appeal, in that it was an appeal against a Hearing Officer’s finding that there had been genuine use, so that the burden in that case was on the Appellant to show that no reasonable Hearing Officer could have found genuine use based on the evidence before them. The Appointed Person in that case, Emma Himsworth KC, applied the same principles, namely that the witness evidence should be taken for what it was where there had been no cross-examination, and that the contents of the statement should be considered in the round with the other evidence contained in the exhibits. Accordingly, that case does not alter my findings set out in the previous paragraph.

91. Ms Jones also said that, even where the Earlier Mark was not shown to be used in connection with a particular item of clothing in the evidence, the Hearing Officer should have considered that evidence in the round, together with the statement from Ms Weeke-

Therling that the Earlier Mark had been used in relation to all of the goods within class 25. In particular, the Appellant's skeleton argument gave as an example the Hearing Officer's treatment of the evidence relating to the Appellant's use of riding boots. It was submitted that the Hearing Officer focussed too heavily on the fact that the invoices only showed sales of 27 units, and ignored the evidence of Ms Weeke-Therling that riding boots had been the first product introduced by the Appellant, the evidence of some advertising for riding boots, and the fact that the Appellant's Instagram and TikTok handles were "*Cavallo_boots.fashion*".

92. Having reviewed the evidence relating to riding shoes, riding boots and riding half-boots, the Hearing Officer was entitled to conclude that it suffered from the same defects I have highlighted in relation to the other class 25 goods. The fact that riding boots were the first product sold by the Appellant and that the word "*boots*" featured in its social media handles did not assist the Hearing Officer to overcome those defects.
93. It was incumbent on the Appellant to put its best case forward in terms of evidence to establish genuine use. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Daniel Alexander KC, sitting as the Appointed Person, stated:

"22. The burden lies on the registered proprietor to prove use.... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public."

and further at paragraph 28:

"28. ...The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is

nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted.”

94. Daniel Alexander KC also stated as follows in *Guccio Gucci SpA v Gerry Weber International AG* (O/424/14):

“56. The Registrar says that it is important that a party puts its best case up front – with the emphasis both on “best case” (properly backed up with credible exhibits, invoices, advertisements and so on) and “up front” (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. [...] The rule is not just “use it or lose it” but (the less catchy, if more reliable) “use it – and file the best evidence first time round- or lose it”” [original emphasis].

95. There was no evidence of the scale of the economic sector concerned in order to assist the Hearing Officer in deciding whether the evidence of use was warranted to maintain or create a share in the market for the goods in question, in accordance with one of the requisite criteria from the case law summarised by the Hearing Officer in paragraph 28 of her Decision. The invoices only showed very low sales for certain of the goods relied on. Similarly, the evidence from the webpages was very sparse and often did not show a product which fell within the wording chosen by the Appellant for its specification. Often, the products were not accompanied by the Earlier Mark. The evidence showed that the Appellant had used various different device marks featuring the word CAVALLO, so the Hearing Officer could not assume that the products shown to have been advertised for sale or featured in press clippings, but where the Earlier Mark was not shown, would have been sold under or in connection with the Earlier Mark. The two witness statements were only two pages long, and omitted much of the evidence which would have assisted the Hearing Officer. There was no breakdown of the turnover figures to show the level of sales of the particular products which fell within the specification, whereas the evidence suggested that the Appellant also sold a wide range of clothing which would have fallen outside of the specification. There was no evidence of the number of visitors to the websites referred to, or the number of readers of the publications referred to in the press cuttings. I am therefore satisfied that the Hearing Officer’s conclusion that the evidence did not demonstrate

genuine use was one which a reasonable tribunal could have reached on the evidence before her, and was not one which could be described as rationally insupportable.

96. It is not clear to me why the Hearing Officer repeatedly pointed out that the evidence fell outside the relevant period when she had already said that she would take evidence which postdated the relevant period into account, but I have given a possible explanation for that. She was certainly not helped by the parties getting the relevant period wrong. It is also curious why exhibit BWT1 (opposition) was not referred to at all by the Hearing Officer, when she referred to all of the other exhibits. However, overall I am satisfied that she did take all of the relevant evidence into account in her Decision for the reasons I have given above. Even if the Appellant was correct and the Hearing Officer did overlook the evidence contained in exhibit BWT1 (opposition), it would have had no effect on the overall result as I have found that that evidence was insufficient to demonstrate genuine use beyond the use found by the Hearing Officer, when considered with all of the other evidence and applying the correct test which the Hearing Officer set out in paragraphs 28 and 29 of her Decision.

97. Finally, with respect to the Appellant's appeal against the Hearing Officer's decision to delete "jodhpurs" from the specification, she did so on the basis that there was no evidence which explained to her what jodhpurs were. I agree with the Hearing Officer that it was not clear from the evidence whether the riding breeches sold by the Appellant were jodhpurs. The Hearing Officer said that the Collins English Dictionary stated that jodhpurs were a type of riding breeches, and since she was satisfied that the Appellant had shown evidence of genuine use of riding breeches (noting that the invoices had described sales of riding breeches, but not jodhpurs), she found the fair specification should cover "*riding breeches*", but not specifically "*jodhpurs*". Given that it was not suggested by the Appellant that "*jodhpurs*" would not fall within "*riding breeches*", this is not a conclusion that I am minded to interfere with.

98. As a result, the appeal fails under Ground One.

Ground Two: The Hearing Officer erred in her assessment of whether a likelihood of confusion existed

99. The Appellant broke this ground of appeal down into three sub-grounds, which I will deal with in turn.

The error identified in Ground One resulting in an unduly narrow specification when assessing similarity of goods

100. The Appellant relied on the same arguments in relation to the relevant period as discussed above in relation to the revocation proceedings, save that the relevant period to show use for the purpose of the opposition proceedings was slightly different, namely 21 February 2015 to 20 February 2020 (which therefore excluded about half of the invoices, the press clippings and the Instagram post). However, since I have found that the Hearing Officer did not exclude any relevant evidence from her considerations, as the Appellant had contended in relation to the revocation evidence, I reject those arguments under this ground for the same reasons. The Hearing Officer was therefore not required to consider a wider specification than the fair specification she set out in paragraph 44 of her Decision.

101. In any event, since the Hearing Officer had found use of “*riding breeches*”, I do not consider that the Hearing Officer would have reached a different conclusion on her comparison of the similarity of the class 18 goods with the fair specification if it had included the wider specification of “*clothing for horse riding*”. Ms Jones accepted that, save that she argued that riding boots, which she submitted fell within “*clothing for horseriding*”, would be more similar to the class 18 goods than riding breeches. While the respective products may be made from leather, I do not consider that that fact alone was sufficient for it to have been unreasonable for the Hearing Officer to conclude that there was no more than a low degree of similarity between the respective goods. For example, it was reasonable to conclude that the average consumer would not assume that riding boots and saddles were made by the same manufacturer, just because they were both made of leather. Accordingly, the Hearing Officer was entitled to proceed on the basis of comparing “*riding breeches*” with the class 18 goods.

An error in finding that “*riding breeches*” in Class 25 were dissimilar to the goods in Class 18 or alternatively of only a low degree of similarity

102. The Hearing Officer set out her conclusions in paragraphs 49 and 50 of her Decision as follows:

“49. In my view, CG’s best case is “riding breeches”. I accept that there will, of course, be an overlap in user with AT’s goods, as all will be used by members of the general public with an interest in horse riding or professionals in that field. Clearly, the nature, method of use and purpose of the goods will differ. CG has filed no evidence to suggest that there would be an overlap in trade channels between clothing worn by horse riders and AT’s class 18 goods. The goods are not in competition or complementary. Consequently, I consider the goods to be dissimilar.

As similarity of goods is essential for a likelihood of confusion, my primary finding is that the section 5(2)(b) opposition fails at this point.

50. However, for the sake of completeness, I will continue with the rest of the global assessment, in the event that I am wrong in my finding that the goods are dissimilar. In my view, if there is any overlap in trade channels, it would be at a very general level (being retailers that sell a broad range of goods for use by horse riders/in horse riding) and this, combined with the overlap in users, would result in only a low degree of similarity.”

103. Firstly, Ms Jones submitted that the conclusion that there was no overlap in purpose between the respective goods should be treated with caution, since they all shared the common purpose of horse riding. However, this comparison is at too general a level, since the purpose of a “*training lead for a horse*”, for example, is very different from the purpose of “*riding breeches*”.
104. Secondly, the Appellant criticised the Hearing Officer’s statement that she had not been provided with any evidence to suggest that there would be an overlap in trade channels between clothing worn by horse riders and the class 18 goods. Ms Jones referred to the Respondent’s own witness statement, which referred to the Respondent having sold both rider clothing and accessory horse products. Mr Stobbs submitted that the Respondent’s evidence did not assist the Appellant because the Respondent’s witness statement explained that it had several brands, and that the Trade Mark had only been used to sell class 18 goods, so it did not show that the class 18 goods and the class 25 goods would be sold under the same brand or through the same trade channels. Ms Jones also relied on the Instagram post referred to in paragraph 32 above. She also referred to the press clippings, where a series of adverts appeared further down the pages taken from the website of Zebra Products for items sold by third parties, such as horse bits, reins and stirrups, and for saddle services, as well as the articles on the website which suggested that some third party class 18 products were available to purchase from Zebra Products.
105. As I explained above, both of the Appellant’s witness statements were only two pages long and did not provide any explanation of trade channels to assist the Hearing Officer. I accept that the evidence in the exhibits did show that some of the class 18 goods at least could have been available through the same outlet which also sold riding breeches, such as Zebra Products, so that there would be an overlap in trade channels. Nevertheless, it was certainly clear from the extracts from the Zebra Products website that the pages were dedicated to

different brands, and that Zebra Products sold a wide range of equestrian-related products. Accordingly, I find no error in the Hearing Officer's conclusion on the issue of trade channels when she said that, if she was wrong on her finding of dissimilarity, "*if there is any overlap in trade channels, it would be at a very general level (being retailers that sell a broad range of goods for use by horse riders/in horse riding)*".

106. Thirdly, the Appellant argued that the Hearing Officer was wrong to find that the respective goods were not complementary, and criticised her for not having set out the relevant criteria from *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) OHIM*, Case T-325/06, where the General Court stated that "complementary" means: "[...] *there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking*". In particular, she referred back to the Instagram page described in paragraph 32 above. I do not consider that those photographs would inevitably lead the average consumer to assume that all of the products shown in the photographs were made or sold by the same undertaking, and that a reasonable tribunal could have concluded that the average consumer would consider that the saddle and horse bit shown in some of the photographs on the Instagram page were made by third party manufacturers and used by the Appellant in the photographs in order to market their own class 25 goods.

107. Overall I do not accept that the Hearing Officer erred in finding at best only a low degree of similarity between "*riding breeches*" and the class 18 goods, and reject the Appellant's submission that she should have found a medium to high degree of similarity.

A failure to adequately offset any differences in goods against the level of similarity between the marks and the high degree of inherent distinctiveness of the Earlier Mark.

108. I have not identified any errors made by the Hearing Officer in the rest of her assessment of the likelihood of confusion. The Hearing Officer's conclusion that the average consumer would notice the difference between the respective marks was a reasonable one, when all of the relevant factors identified by the Hearing Officer in paragraph 65 of her Decision were taken into account, together with her finding that visual considerations would dominate the purchasing process, and bearing in mind that these are device marks. Her finding of no direct confusion was reasonable given the difference in the visual appearance of the respective marks, and the fact that the additional letter A appeared at the start of the Respondent's mark (where the average consumer would pay more attention than if there

was only one letter different within the middle of the respective marks), which made the respective marks aurally different.

109. With respect to indirect confusion, I do not agree with the Appellant's suggestion that, even if the average consumer did notice the difference between the respective marks, they would assume that the Trade Mark was a sub-brand or a brand extension of the Earlier Mark. It would not be a natural brand extension or sub-brand to add an A to the front of the word CAVALLO to make a new word.

110. Accordingly, the appeal fails under 5(2)(b).

Conclusion

111. The appeal fails and is dismissed.

Costs

112. Since the appeal has been dismissed, the Respondent is entitled to a contribution towards its costs of the appeal. I therefore make an order that the Appellant pays to the Respondent a contribution of £1,600 towards the costs of the appeal. Since the Hearing Officer did not make an award of costs, I order the sum of £1,600 to be paid within 21 days of the date of this decision.

Simon Clark
The Appointed Person
19 June 2024

Representation:

Appellant: Victoria Jones, instructed by Taylor Wessing LLP

Respondent: Julius Stobbs of Stobbs