

O/0674/24

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF REGISTRATION NO. 3122374

IN THE NAME OF
FRONTING THE CHALLENGE PROJECTS LIMITED

FOR THE FOLLOWING TRADE MARK:

THRIVE

IN CLASS 41

AND

APPLICATIONS FOR INVALIDATION AND REVOCATION UNDER NOS.

505073, 505076 AND 505079

BY

THRIVE CHILDCARE AND EDUCATION GROUP LIMITED

Background and Pleadings

1. Fronting The Challenge Projects Limited is the Proprietor of the trade mark THRIVE numbered 3122374 (“the contested mark”). The contested mark was filed on 14 August 2015 and registered on 11 March 2016 for the following services:

Class 41: Education services; training services; educational courses; educational services; consultancy and advisory services relating to education; arrangement of conferences for educational purposes; dissemination of educational materials; excluding services used in connection with dental and veterinary sectors.

2. On 1 July 2022, Thrive Childcare and Education Group Limited (“the Applicant”) filed a number of applications to cancel the contested mark under the Trade Marks Act 1994 (“the Act”), on the following grounds:

(i) Under sections 47(1)/3(1)(b) and (c) that the mark is (and was at the date on which it was filed) devoid of any distinctive character and is descriptive of the services for which it is registered. It specifically contends that it is a wholly descriptive term which is a dictionary word meaning to ‘flourish, prosper or develop well’ and as such consumers are unlikely to perceive it as designating trade origin or distinguishing the services of one undertaking from those of another and that it may serve in trade to designate the intended purpose of the services for which it is registered.

(ii) Under sections 46(1)(c) and (d) that through the actions or inaction of the Proprietor, the earlier mark has become commonly used in the trade, and has become misleading. It contends that as a consequence of the inaction of the Proprietor the contested mark has become the common name in the trade because it has “failed to police use of the trade mark and failed to prevent independent third party use of the identical trade mark in the identical industry”. Furthermore use made of the contested mark by the Proprietor and with its consent is liable to mislead the public as to the origin of the registered services. It requests that the contested mark is revoked from at least 19 January 2021.

(iii) Under sections 46(1)(a) and (b) that the mark was not put to genuine use in the five years after registration namely 12 March 2016 to 11 March 2021, or

between 1 July 2017 and 30 June 2022, and consequently the mark should be revoked from either 12 March 2021 or 1 July 2022.

(iv) The Applicant refers to the dictionary meaning of the term 'thrive' and to several third parties in the UK having used and continuing to use it in a generic sense to refer to educational training services. The Applicant claims that the extent of the generic use of the sign is such that that knowledge can reasonably be imputed to the Proprietor and that as such the sign THRIVE has become generic as a result of the inactivity of the Proprietor in not confronting those third party uses.

3. The Proprietor filed a counterstatement in each action denying the claims made, putting the Applicant to strict proof of its claims. Specifically it denies:

- that the mark is non-distinctive or descriptive of the services.
- that the trade mark has become a commonly used name in respect of the services covered by the registration due to its failure to police use of the trade mark.
- that the trade mark is liable to mislead the public as to the origin of the registered services.
- that the Proprietor has not used the mark to a sufficient extent.

4. The proceedings were consolidated on 3 October 2022 which was communicated to the parties shortly thereafter.

Representation

5. The Applicant is represented by Sonder & Clay and the Proprietor is represented by Foot Anstey LLP.

6. Both parties filed evidence in chief during the evidence rounds. Neither party filed evidence in reply nor requested to be heard, but both parties filed submissions. This decision is taken following a careful perusal of the papers.

Evidence and submissions

7. The Proprietor filed submissions dated 5 December 2022 and evidence in the form of a witness statement of Lisa Barber dated 5 December 2022 accompanied by twenty

three exhibits marked LB1-LB23. Ms Barber is the Proprietor's Head of Marketing, a position she has held since March 2022.

8. The main purpose of Ms Barber's statement is to provide evidence to support the Proprietor's use of the contested mark in the UK for all the services of its registration, to include its promotional activity, sales revenue and marketing spend and to demonstrate that the use shown is trade mark use.

9. The Applicant's evidence consists of the witness statement of Rachel Nicholls dated 6 December 2022 accompanied by a number of exhibits marked RN1-13. Ms Nicholls' evidence provides dictionary definitions and third party use of the word THRIVE which it is contended shows it to be descriptive and non-distinctive for education and training services and that it has become the common name of the services, and is misleading.

10. The Applicant also filed submissions in lieu of a hearing dated 28 June 2023.

11. Whilst I have taken all of the evidence and submissions into account, I do not propose to summarise them here. Instead, I will refer to them below where necessary.

Preliminary Issues

Excess evidence

12. A case management conference was held before me on 23 January 2023 regarding an application by the Applicant to file evidence which exceeded the normal 300 page allowance, as set by Tribunal Practice Notice 1/2015 ("TPN"). Following submissions, I took the view that a number of the exhibits filed contained a large volume of screenshots of websites and references to reports and articles which were either undated or dated outside the relevant periods and, therefore, unlikely to be material to the issues in suit. I refused the request and directed that the Applicant refile its evidence to come in line with the TPN. I gave my reasons in my letter to the parties dated 2 February 2023 and I adopt those reasons here.

Previous opposition proceedings

13. I note that the parties (or their predecessors in title) were involved in a previous opposition dispute which has resulted in a provisional decision being issued under number BL O/715/22 and which is currently suspended pending the outcome of these cancellation actions. Whilst certain findings of fact were made in relation to that

decision, particularly in relation to enhanced distinctiveness of the contested mark claimed by the Proprietor, I bear in mind that I am not bound by that decision or its findings, particularly since it relates to an opposition where different considerations and relevant periods/dates are in play. The evidence filed in those proceedings may well differ to the evidence that is before me (albeit I accept that there may be an overlap between them). My decision will therefore consider matters afresh based on the grounds relied upon and the evidence that is before me.

Relevance of EU Law

14. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Decision

Invalidity under sections 3(1)(b) and (c)

15. I consider that it would be appropriate to deal with the invalidation actions brought under section 3 first.

16. Section 3 states as follows:

“3.— Absolute grounds for refusal of registration

(1) The following shall not be registered –

(a) [..]

(b) trade marks which are devoid of any distinctive character.

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods

or of rendering of services, or other characteristics of goods or services,

(d) [...]

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

17. Section 47 gives application to section 3 as follows:

“47. (1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

[...]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

[...]

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made.

Provided that this shall not affect transactions past and closed.”

Average Consumer

18. The above grounds must be assessed from the perspective of the average consumer, who is deemed to be reasonably observant and circumspect: *Matratzen*

Concord AG v Hukla Germany SA, Case C-421/04. Neither party specifically addressed the average consumer of the services but I consider that they consist of those professionals in the education sector who have responsibility for the support and emotional well-being of children, such as teachers, educators, academics, youth and care workers. The specifications are sufficiently broad that they would also include the general public such as parents and carers. Given that any professional or parent would take a reasonable degree of care in the selection of services of these nature I consider that the level of attention undertaken would be above an average degree but not considerably so.

Relevant Date

19. The relevant date under sections 3(1)(b) and (c) is the filing date of the contested mark which in this case is 14 August 2015. However for any acquired distinctive character claim in accordance with section 47(1), the relevant date of the assessment is the date of the application for invalidation, namely 1 July 2022. I shall bear these dates in mind whilst considering the claims.

Section 3(1)(c)

20. Sections 3(1)(b) and (c) are independent and have differing general interests. It is possible, for example, for a mark not to fall foul of section 3(1)(c) but still be objectionable under section 3(1)(b) of the Act.¹ In reality, since the Applicant's case under section 3(1)(b) is that the Proprietor's mark is descriptive, then it follows that if this is found to be the case it will also lack the necessary distinctiveness. Consequently if the section 3(1)(c) claim succeeds or fails, then the same outcome will apply to the Applicant's claim under section 3(1)(b). I shall, therefore, consider the section 3(1)(c) ground first.

21. Section 3(1)(c) prevents the registration of marks which are descriptive of the services or a characteristic of them. I bear in mind when undertaking the assessment that the objective of this section is to ensure signs designating a characteristic of the services, remain free for use by traders.

22. The case law under section 3(1)(c) (corresponding to Article 7(1)(c) of the EUTM Regulation, formerly Article 7(1)(c) of the CTM Regulation) was set out by Arnold J.

¹ *SAT.1 SatellitenFernsehen GmbH v OHIM*, Case C-329/02 P, at paragraph 25.

(as he then was) in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch) as follows:

“91. The principles to be applied under art.7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in *Agencja Wydawnicza Technopol sp. zo.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-51/10 P) [2011] E.T.M.R. 34 as follows:

“33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services (as regards Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40 , p. 1), see, by analogy, [2004] ECR I-1699 , paragraph 19; as regards Article 7 of Regulation No 40/94 , see *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr Co* (C-191/01 P) [2004] 1 W.L.R. 1728 [2003] E.C.R. I-12447; [2004] E.T.M.R. 9; [2004] R.P.C. 18 , paragraph 30, and the order in *Streamserve v OHIM* (C-150/02 P) [2004] E.C.R. I-1461 , paragraph 24).

36. ... due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94 . Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, inter alia , *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-456/01 P) [2004] E.C.R. I-5089; [2005] E.T.M.R. 44 , paragraph 45, and *Lego Juris v OHIM* (C-48/09 P) , paragraph 43).

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley* , paragraph 31 and the case-law cited).

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94 , it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie* , paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM* (C-80/09 P), paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (*Joined Cases C-108/97 and C-109/97 Windsurfing Chiemsee [1999] ECR I-2779*, paragraph 35, and *Case C-363/99 Koninklijke KPN Nederland [2004] ECR I-1619*, paragraph 38). It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).

And

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive (see, with regard to the identical provision laid down in Article 3 of Directive 89/104, *Koninklijke KPN Nederland* , paragraph 86, and *Campina Melkunie*, paragraph 19).

47. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation (see, by analogy, *Koninklijke KPN Nederland*, paragraph 67), Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all

the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No.40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a 'characteristic' of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94 , the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive 89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56)."

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (C-363/99 [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97].”

23. More recently, Zacaroli J summarised the key question in *Puma SE v Nike Innovate C.V.*, [2021] EWHC 1438 (Ch):

“21. Ultimately, as Ms Himsworth Q.C. submitted, the question is whether the mark applied for, when notionally and fairly used, is descriptive of the goods and services in question within the meaning of section 3(1)(c). A sign can be refused registration ‘only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of [the characteristics in section 3(1)(c)]’: *Technopol* (above), at [50]. Moreover, a sign will be descriptive ‘if there is a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of one of the characteristics of the goods and services in question’: Case T-234/06 *Giampetro Torresan* (above) at [25].”

The Applicant’s pleaded case

24. In its submissions in lieu of hearing, the Applicant purported to widen the scope of its pleaded case, submitting that the word THRIVE serves as an indicator in the relevant trade to designate the “quality, intended purpose and value of the services concerned” (my emphasis).² However, its pleaded case in its form TM26I, relied solely on designating the ‘intended purpose’ of the services. Given that the Applicant made no request to amend its pleadings, I am of the view that if it intended to rely on arguments relating to ‘quality’ and ‘value’ they would need to have been argued at the outset. I shall only, therefore, assess its claim as pleaded.

Applicant’s evidence

25. In support of its claim, the Applicant filed evidence from Ms Nicholls, which included both a wide range of print outs of dictionary definitions for the words thrive,

² Paragraph 8(c) and 44 submissions in lieu of hearing 28 June 2023.

education and training, and third party use of the word thrive.³ Even though Ms Nicholls dealt with the invalidity and revocation grounds separately in her witness statement, given the overlap in the issues I shall consider the evidence in its entirety at this stage, returning to consider the specific grounds at the relevant parts of my decision.

26. In so far as the dictionary definitions are concerned, a great number of the sources produced, consist of those attributed to the US or from less common dictionaries which are not reflective of the position in the UK. I shall only, therefore, consider those definitions that are relevant to the average UK consumer and which are commonly known. I also note that the printouts are all dated/shown to be accessed in or about 2022, a considerable period after the relevant date of 14 August 2015 (i.e. the filing date). Ms Nicholls was at great pains to point out that each extract included a “last indexed date” which she said indicated that the particular extract had not been updated, amended or altered since that date, and had been in force up until the time of access.⁴ I take this to signify that their meaning has remained unchanged.

27. The dictionary definitions produced support my own understanding of the words, a sample of which are set out below. Despite the volume of evidence in this regard, these definitions do not appear to be disputed by the Proprietor. The accepted meaning of the word THRIVE as advanced by both parties is in summary “to flourish, prosper, develop well, grow and succeed”.

- Collins online dictionary:⁵

“In British English

1. to grow strongly and vigorously
2. to do well; prosper

1. VERB

If someone or something **thrives**, they do well and are successful, healthy, or strong.

Today his company continues to thrive. [VERB]

Lavender thrives in poor soil. [VERB]

³ Taken from www.onelook.com Exhibits RN1 and RN2.

⁴ Paragraph 14 submissions in lieu of hearing.

⁵ www.collinsdictionary.com/dictionary/english/thrive

...the river's thriving population of kingfishers. [VERB-ing]

Synonyms: prosper, do well, flourish, increase More Synonyms of **thrive**

2. VERB

If you say that someone **thrives on** a particular situation, you mean that they enjoy it or that they can deal with it very well, especially when other people find it unpleasant or difficult.

Many people thrive on a stressful lifestyle. [VERB + on]

Creative people are usually very determined and thrive on overcoming obstacles. [V on n/-ing]"

- Cambridge online dictionary:⁶

"To grow develop or be successful.

e.g His business thrived in the years before the war.

*She seems to thrive **on** stress."*

- Merriam Webster dictionary:⁷

1 : to grow vigorously : **FLOURISH**

2 : to gain in wealth or possessions : **PROSPER**

3 : to progress toward or realize a goal despite or because of circumstances
—often used with *on ..thrives on conflict*".

28. In so far as the meaning of the word education and training these are said to include:

"the act or process of teaching or learning, the act or process of imparting knowledge/skills" and "the process of bringing a person to an agreed standard of proficiency by practice and instruction; the education instruction or discipline of a person or thing that is being trained."⁸

29. Ms Nicholls' statement also consists of a large volume of extracts taken from various reports, press releases and articles as well as third party websites where it is

⁶ www.dictionary.cambridge.org/dictionary/english/thrive

⁷ www.merriam-webster.com/dictionary/thrive

⁸ Exhibits RN3 and RN4.

said that the word thrive is in common usage in an educational context in the education sector. Ms Nicholls states that these references show that “educational settings are assessed, inspected, graded and therefore rated in accordance with whether or not pupils thrive within the setting and that this was the case before the filing date of the current registration.”⁹ It is said that the Applicant’s evidence shows that the word “thrive already had a particular meaning and context in respect of educational services” as a “benchmarking tool” and “a measure of success and achievement, and as an aspirational bar...[it is] synonymous with a good education.”¹⁰

30. In support of this contention, extracts are produced from a number of Ofsted Inspection reports dated between 2008 and 2013, Ofsted School Inspection Handbooks, published in September 2012 and January 2015,¹¹ and government reports dated 2003, 2007, 2009, 2010, 2012, 2013 and 2014. Within the Ofsted reports, Ms Nicholls states that the word thrive has been used within two of the four grading boundaries. I note that the word thrive is used throughout the text of these documents and I reproduce below a selection of the typical use of the word within these reports.¹²

Ofsted Inspection Reports (numerous)

- “This is an outstanding school that very successfully achieves its stated aims of welcoming all pupils into a safe and secure Christian environment and providing an excellent education. Pupils **thrive**, gain a love of learning and become mature and responsible members of the community who show high levels of care and concern for others. Parents are very supportive and many commented that their children are very happy at the school. Consequently, the school is a very popular choice.”¹³
- “Pupils behave extremely well and are exceptionally keen and enthusiastic learners, a result of the school’s very strong promotion of pupils’ spiritual, moral, social and cultural development. Consequently, the care and

⁹ Paragraph 22 of witness statement.

¹⁰ Paragraph 27 of witness statement.

¹¹ Exhibit RN6 and RN7.

¹² Exhibit RN9

¹³ Barrowford St Thomas Church of England Primary school Inspection report February 2008.

consideration pupils show for others help to generate a warm, mutually supportive atmosphere in which their learning and development **thrive**.”¹⁴

- “Since the previous inspection pupils’ performance in mathematics has been strengthened and matches that in English. In Year 6, pupils **thrive** on the pace and challenge provided by their teachers.”¹⁵
- “Children **thrive** in the reception class.”¹⁶
- “The school inspires pupils to **thrive** in all aspects of their academic achievement and personal development.”¹⁷

Ofsted Handbook

- Grade descriptor – Outstanding: “The school’s thoughtful and wide-ranging promotion of pupils’ spiritual, moral, social and cultural development and their physical well-being enables them to **thrive** in a supportive, highly cohesive learning community.”¹⁸

Articles, Reports, Press releases etc

Twenty extracts of articles, speeches and press releases are also produced by or on behalf of the Department of Education and other educational bodies which it is said places the emphasis on “for children to thrive”.¹⁹ These extracts are dated 2011, 2012 and 2014 and show use of the word in the text of these journals. An example is reproduced below taken from the article by Sarah Teather, published in ‘Nursery World’ dated 2011, on early education, raising performance and giving opportunities for those from disadvantaged backgrounds, namely:

“Readers will know how committed this Government is to the early years - giving every child, regardless of their family circumstances, the opportunity to **thrive** and flourish.”

31. Further examples are set out as follows:

¹⁴ Bishop Perrin Primary school Ofsted Report 2012.

¹⁵ Bishop Perrin Primary school Ofsted Report 2012 page 6.

¹⁶ Bealings School Ofsted Inspection report 2012.

¹⁷ Barrow primary school Ofsted Inspection report May 2013.

¹⁸ Ofsted handbook January 2015 exhibit RN7.

¹⁹ Exhibit RN10.

“Allow them not simply to cope but **thrive**.”²⁰

“It is vital we continue to raise standards so all children leave primary school with a thorough grounding in reading, writing and maths so they can **thrive** at secondary school.”²¹

“...the government’s school reforms are helping thousands more black pupils, including the poorest, to do well at primary school, **thrive** in their GCSEs, and then succeed in life.”²²

“These reforms represent big challenges for families who only ask for what we all expect for our own children –support to help them develop and **thrive**.”²³

32. Furthermore, in so far as the Applicant’s claims that the word THRIVE has become the common name and is likely to mislead, in support of its claims under section 46(1)(c) and (d) Ms Nicholls provides evidence said to show that there is an abundance of third parties using the mark THRIVE in respect of educational services in the UK. Extracts from websites and documents are produced at RN11 said to support this contention. I note that a large proportion of the screenshots are undated with no indication as to when the websites were accessed. A selection of those that are dated or where a date can be identified from the text, are set out as follows which show how these third parties have used the word THRIVE:

(i) www.thethrivetribe.co.uk refers to THRIVE as a programme designed to create long term habit and behaviour change through lifestyle and wellbeing programmes. The extract is undated although there is a reference within the screenshot to the provider providing stop smoking programmes for over 10 years and in March 2020 it helped 100,000 smokers quit smoking.

(ii) AXA document referring to a THRIVE app provided by www.wearewellbeing.co.uk. (the screenshot for which was undated). There is a reference to the App having been developed in 2012 as the first digital platform to deliver cognitive behavioural therapy. Thrive is described as a social

²⁰ (m) Package of primary school measures will raise ambition and standards - Department of Education March 2013

²¹ (g) Tackling underperformance in weak primary schools – Department of Education January 2014

²² (n) Government reform aid attainment among black pupils Department of Education June 2014

²³ (r) Children’s Minister Edward Timpson speech addressing the Association of Directors of Children’s Services annual conference July 2014

enterprise that provides an evidence based solution for prevention screening and self-management of common mental health issues.

(iii) www.kirros.com is described as a training and development company directed at the business sector. The screenshot is undated but a reference is made to it changing its name from “Thrive training to Kirros Consulting in March 2022 marking a milestone of 10 years in business.

(iv) www.healthylondon.org/our-work/thrive - Refers to an initiative to improve mental health and wellbeing in London. The screenshot is undated save for a reference with the text to March 2021. The document must be dated at least after this date.

(v) Document produced by Birmingham City Council referring to their THRIVE AT WORK framework designed to encourage and reward employers for improving the health and wellbeing of their employees and a desire to explore a similar framework in the education sector under the name THRIVE THROUGH EDUCATION. The extract is undated save for a reference to it being at the conceptual stage with an intention to be available from May 2020. No indication is given as to whether it was used or implemented.

(vi) www.itstime2thrive.co.uk is a company formed in 2019 to deliver mental health and wellbeing training to help [you] develop, flourish and thrive. Its logo is “Its time to thrive not just survive” The extract is undated. Use is shown as follows:



(vii) www.thrive-ots.co.uk an occupational therapy company. The extract is undated save for a reference to training courses scheduled for April 2021 which had to be rescheduled due to the covid pandemic. It makes reference to “our team at Thrive”. It uses the word as follows:



(viii) www.thirvetrust.uk is an educational trust providing educational services under the name THRIVE. The screenshot is undated save for a reference to a copyright date of 2021. Use of the word on its website is as follows:



(iv) www.partnersinsalford.org which refers to a THRIVE In Education programme, developed in response to the Mental Health and Schools green paper. It states that it provides emotional health and wellbeing support in schools and education settings. The screenshot is undated save for a reference to the programme being three years in length and starting in August 2020.

(v) www.thriveeducation.net – a tutoring and education service under the name THRIVE EDUCATION which was founded in 2017. The screenshot is undated other than displaying a copyright date of 2019. Use is shown as follows:



33. Further evidence is produced by way of printouts and screenshots, which are again mostly undated, said to show use of the word THRIVE as an educational framework or model which it is said demonstrates the word has become a common name within the education sector.²⁴ These include:

1. A print out of a CAMHS²⁵ report titled 'Introduction to THRIVE Elaborated' dated November 2015 commissioned by the Anna Freud Centre for use in academic research and mental health practice to support children and young

²⁴ Exhibit RN12.

²⁵ Child and Adolescent Mental Health services.

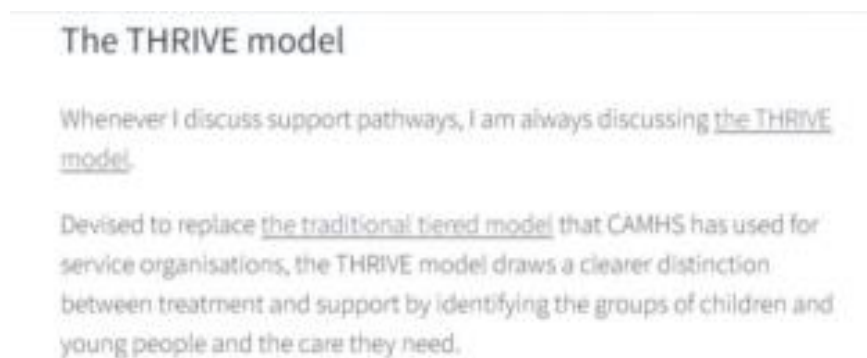
people and mental health practitioners. The report shows that the THRIVE framework was developed by a group of clinical psychiatrists and psychologists in or about November 2014. The report makes the following comment:

“We stressed from the outset that whilst we felt that the THRIVE model offered a radical shift in the way that services are conceptualised and potentially delivered, along with suggestions for how they might be reviewed and improved. We were not presenting THRIVE as a “tried-and-tested one-size-fits-all implementation model”, but rather as a framework to allow for greater clarity of thought, planning and action.”

[...]

“We are aware there are a number of initiatives across the country which use “Thrive” in their title. We use the term to reflect our core commitment to young people “thriving” and to represent our commitment to provision that is Timely, Helpful, Respectful, Innovative, Values-based and Efficient.”²⁶

2. A screenshot taken from www.blog.optimus-education.com - undated.



3. A screenshot taken from www.headstartkernow.org.uk - undated

“A quick introduction to THRIVE

It is worth being aware of THRIVE the context of a Whole School Approach to C&YP’s emotional wellbeing and mental health.”

²⁶ A footnote within the report

4. A screenshot taken from www.educationservicesmedway.org.uk – undated save for a reference to “i-Thrive and Mental Health Lead training, Thursday 08/07/2021/ Education Services Medway”

The [THRIVE Framework for system change](#) is an integrated, person centred and needs led approach to delivering mental health services for children, young people and their families. It Identifies groups of children and young people based on the level of need required categorising groupings; Thriving, Getting Advice and Signposting, Getting Help, Getting More Help and Getting Risk Support. Emphasis is placed on prevention and also the promotion of mental health and wellbeing across the whole population. For those who were unable to attend take a look at how New Road have been implementing Thrive; https://www.youtube.com/watch?v=NUSqrz_SxIk

5. A screenshot taken from www.annafreud.org-undated:

The screenshot shows a webpage titled "THRIVE Framework" with a sub-header "What is the THRIVE Framework?". Below the header is a video player with a red play button and a thumbnail showing a group of people. The main text describes the framework as an integrated, person-centred and needs-led approach to delivering mental health services for children, young people and their families. It was developed by a team of authors from the Tavistock and Portman NHS Foundation Trust and the Anna Freud Centre. The text further explains that the framework provides a set of principles for creating coherent and resource-efficient communities of mental health and wellbeing support for children, young people and families. It aims to talk about mental health and wellbeing help and support in a common language that everyone understands. The framework is needs led – this means that mental health needs are defined by children, young people and their families, alongside professionals, through shared decision-making. Needs are not based on severity, diagnosis or care pathways. The THRIVE Framework thinks about the mental health and wellbeing needs of children, young people and families through different needs-based groupings: 'getting advice and signposting', 'getting help', 'getting more help', and 'getting risk support'. Emphasis is placed on prevention and the promotion of mental health and wellbeing across the whole population. Children, young people and their families are empowered through active involvement in decisions about their care, which is fundamental to the approach. At the bottom of the page, there is a navigation menu with four items: "Who is the THRIVE Framework for?", "The National i-THRIVE Programme", "National i-THRIVE Community of Practice", and "Getting in touch", each with a downward arrow icon.

6. Copy of 'Salford Thrive in Education Programme Plan' document for August 2020 to January 2021 - undated:



7. Screenshots taken from www.structural-learning.com - undated:



Enhance your curriculum
 Build deeper knowledge
 Develop learning behaviours
 Membership

Thrive Approach: A Teacher's Guide
 Paul Main
 How can the thrive approach be adopted in your school to meet the diverse needs of all your children?

What is the Thrive Approach?

Thrive approach is a therapeutic technique to help support children with their **social and emotional development**. Thrive approach is a whole school strategy based around, current models of **child development** and current studies of **effective learning** to help schools to understand children's needs as shown by their behaviour. The development of children is dependent upon having certain needs met. This hierarchy of needs has to be addressed in order for healthy **child development**. In this article, we address some questions about thrive and the various thrive **assessments**.

The Thrive approach provides **practical strategies** and methods and is created on basis of online assessments which specify the emotional development of children and action plans to fulfil their individual needs. **Class thrive activities and techniques** can be used by whole classes to address any matters of child development or as a component of **PSHE sessions** in school. Mental health awareness has improved in recent years and these types of **assessment tools** are designed to give Schools a clear a picture of the k...

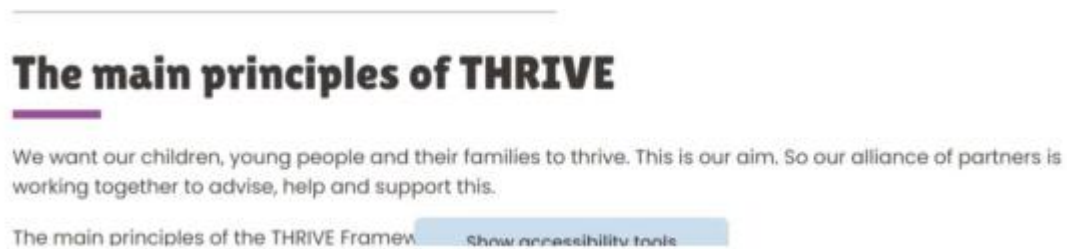
Thrive has 2 main elements:

- The **Thrive**-Online assessment and planning tool, and
- The **Thrive** Training and Mentoring for Teaching Staff.

Thrive-Online is a web-based intervention. Thrive supports the individual assessment of **social skills** : **emotional** wellbeing based on whole-class screening as well as baseline skills and observed behavior. Every child's needs and the ways to address them begin from the targeted, individual action plans, which are applied from weeks to several years on basis of the individual needs of the child. Education professionals can assess groups of young people against **age-related expectations**, and recommendations on curriculum strategies, classroom organisation and environmental changes, will be provided to fulfil the learning needs identified.

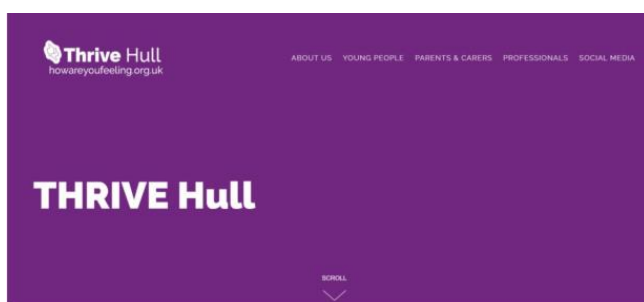
Childcare settings looking to implement Thrive are suggested to train one (or two for larger schools) : member at a minimum by sending the staff on the professional training programme. After attending a training session the staff may use the online tool to guide their work, in class with a small group of children to apply the personally designed action plans into the class.

8. A screenshot taken from www.mindworks-surrey.org introducing THRIVE - undated:



9. Thrive conceptual framework Merton iThrive model. iThrive programme - undated

10. A screenshot taken from www.howareyoufeeling.org.uk - undated:



THRIVE Hull Offer

In Hull the national THRIVE Framework has been adapted to describe the range of emotional and mental health provision available. The successful Head Start Hull bid and subsequent implementation has no doubt helped strategic leaders to recognise fully the importance of good emotional and mental health for our children. This is reflected in the City's Health and Wellbeing Strategy and Hull's Early Help and Prevention Strategy where it is a clear priority over the coming years. In Hull we are continuing to embed the THRIVE Framework to help plan and implement change in Hull. The revised priorities outlined in the CYP Transformation Plan for 2020/21 included further developing an integrated system of support that aligns with the THRIVE quadrants.

The THRIVE Framework provides us with a set of principles for creating a coherent and resource-efficient community of mental health and wellbeing support for children, young people, and families. The Framework is needs-led, and person centred, and our aim is to use the principles of THRIVE to further build and refine our provision.

The THRIVE Framework conceptualises five needs-based groupings for young people with mental health issues and their families. Each of the five groupings is distinct in terms of the Needs and/or choices of the individuals within each group / Skill mix required to meet this need / resources required to meet the needs and/or choices of people in that group (as shown in diagram below):

11. A screenshot taken from www.wileyonlinelibrary.com which consist of a Research Article dated as follows “Received: 23 January 2020, Revised:28 September 2020, Accepted: 3 February 2021 headed “A qualitative investigation of the UK i-THRIVE Programme”.

Abstract

Background: The i-THRIVE Programme is a needs-based model of care, based on the THRIVE Framework, that is being implemented across the United Kingdom with the aim of improving outcomes for children and young people's mental health and wellbeing. This study aimed to investigate the impact that this programme has on accessibility and quality of care, as viewed by key stakeholders.

Methods: Interviews with professionals and service users were conducted during the implementation of the THRIVE Framework in four sites of one mental health and community service provider.

5 | CONCLUSION

As the first study to evaluate the i-THRIVE Programme, the findings provide an early indication of a promising model of care that was perceived by participants to facilitate the accessibility and quality of care. Accessibility was seen to be promoted through integration of a needs-based service model, flexible re-referral, sharing of information, the use of goal-orientated interventions, and a new approach to managing risk and treatment endings.

Shared decision making was seen to improve the involvement and experience of CYP, while multi-agency working was viewed positively. The impact of goal-focused interventions and upfront discussion of treatment endings was less clear-cut: although they were seen to improve the quality of accessibility by helping clinicians manage expectations and discharge, some felt that effectiveness and engagement could be compromised. This tension highlights the importance of outcome and satisfaction monitoring.

Impact was constrained by resistance to multi-agency working along with insufficient resources in CAMHS and the system to support the implementation process, as well as to deliver the service changes required for effective signposting and discharge, or to scale up and sustain. Findings point to the potential benefit of a whole-system approach that implements the full scope of the i-THRIVE Programme across CAMHS, education, health, the voluntary sector and local authority.

12. A screenshot taken from www.evovesi.com dated 19 October 2018 referring to “Project HE:RO AND THE THRIVE FRAMEWORK”.

13. A screenshot taken from www.longtermplan.nhs.uk dated June 2019 headed “A new approach to young adult mental health services...i-THRIVE operating model.”

34. Ms Nicholls also produces at Exhibit RN13 further examples of third party use of the sign THRIVE or where it is used interchangeably with ‘THE THRIVE APPROACH’

and which it is said contain no proprietary information or reference. The evidence includes the following extracts, (again a number are undated):

- Educational Psychology Research and Practice volume 5 Issue 2 dated 2019. Where reference is made to THRIVE as a school based intervention programme developed by an aforementioned psychiatrist. It states that it was previously known as ENABLE (which stood for Emotional Needs Achieving Behaving and Learning in Education).
- Extract taken from Barlyby High School's website referring to the Thrive approach to well-being. The extract is undated but there is a reference in the news section to a post dated November 2022.
- Healthwatch Thrive framework dated February 2022.
- Wigan THRIVE directory and framework – undated.
- Exeter university framework - dated September 2012.
- THRIVE model British Journal of General Practice - dated November 2020.
- MIND - Mental Health - September 2013.
- THRIVE training for peer specialists with the Crazy Diamond training and consultancy provider.
- Education Inclusion strategy covers the plan for 2019-2021 “Mental health support team THRIVE”.
- Salford Education Inclusion Strategy dated 2020 – 2023.
- Walwayne Court - Thrive for the Family - undated.
- ShireHampton Primary school - undated reference is made to the Thrive Approach.
- Healthy Schools THRIVE Hubs programmes - undated save for a copyright date of 2022 and a reference to the school having been 'established in 2016 with further 5 joining in 2017'.
- St Mary's THRIVE Approach - undated.
- Forge Wood Primary school reference to the Thrive Approach to promote emotional Wellbeing - undated.
- Cherry Fields The Thrive Approach – undated.

35. Furthermore, the evidence produced by the Applicant is said to show trade mark use by third parties of the word THRIVE in combination with additional elements. Examples are set out as follows:



Assessment of s3(1)(c) claim

36. The Applicant contends that the word THRIVE will communicate to the consumer that the services provided under the mark are a positive message such that the recipients of the services 'thrive'. It is said that this meaning will be perceived immediately without any further mental effort on their part of the thought process.

37. In contrast, the Proprietor contends that the contested mark is not descriptive of its services and is inherently distinctive. Whilst it accepts that it is a dictionary word meaning to "flourish, prosper and grow, or develop well" it submits that the word is not in and of itself descriptive of any particular category of education and training services offered by the Proprietor. It argues that at its highest the term is descriptive of an aspiration of a desired result but it is not descriptive of the intended purpose of the services. It is said that the services offered do not per se create children that thrive but rather the services teach "the recognition and identification of emotional needs of children; that they thrive is a hopeful outcome of those services but is not descriptive of the services themselves".

38. The evidence of use of the word THRIVE shown by the Applicant within the Ofsted and governmental reports, articles and third party websites includes use in the context of its conventional English dictionary meaning, namely as a verb to describe how children develop, succeed and strive to reach their potential. The evidence however does not show that the word thrive has attained a particular meaning in the educational

sector as at the relevant date, beyond its ordinary dictionary meaning or that it is being used particularly in the education sector over and above any other sector. I note that a good proportion of the Applicant's evidence relates to the provision of services by third parties in the healthcare sector particularly mental health and wellbeing. Given that education services are so broad and wide reaching they would cover education and training services in any field and not those solely restricted to the education sector.

39. Contrary to Ms Nicholls's contention, I do not find that her evidence shows that the word THRIVE has become an educational standard as alleged; it is not being used as a standard of achievement within Ofsted or any other governmental or educational body. The evidence shows that the Ofsted's grading system is recorded as 'Outstanding, Good, Requires Improvement and Inadequate.' There is no such grade as "THRIVE" or a derivative of that word. Whilst Ms Nicholls submits that the word THRIVE has become synonymous with good education, this is not borne out from the evidence.

40. Despite this, it is also important for me to consider the remaining evidence and particularly the dictionary definitions filed. I must bear in mind the meaning that would be attributed to the word by the average consumer and whether it could be used descriptively of the services or whether it is merely allusive as to their characteristics.²⁷ Given the wording of section 3(1)(c) it is necessary for me to consider the position not only as at the filing date but also whether it 'may serve in trade', which is a forward looking assessment.

41. To the average consumer I consider that the meaning of the word THRIVE will be subjective in so far as it cannot be exactly categorised as to its precise meaning similarly to words such as 'high achiever' for example. Whilst I accept that the meaning of the word thrive is, therefore, not precisely tangible, it will nevertheless be sufficiently clear to indicate to the average consumer the nature of the outcome of the services and their intended purpose, namely, to enable the recipients of the services to flourish and succeed. Therefore, this does not, in my view, prevent it from being perceived as descriptive of, or designating a characteristic of, the services. When coming across the mark THRIVE, the average consumer will believe that there will be a positive

²⁷ Para 38 *Agencia Wydawnicza Technopol sp. z o.o. v OHIM*, as quoted by Arnold J. (as he then was) in *Starbucks*.

outcome as a result of engaging in the Proprietor's services; the same conclusion being reached by both the member of the general public and professionals.

42. It is my view that the average consumer would understand the message being conveyed by the word when regarded in the context of the Proprietor's services. They will consider that the purpose of the services is to create an environment where children and young adolescents can flourish, do well and be supported.

43. I remind myself of the findings of Mummery LJ in the Now TV case, *Starbucks HK Limited v. BSB Group plc* [2013] EWCA Civ 1465 at paragraphs 96 to 99, where the figurative mark "NOW" was invalidated in respect of primarily TV and telecommunication services. In his judgment Mummery LJ drew conclusions including that:

"(i) [...] the claimants chose as their trade mark a commonplace, easily understood, ordinary English word, which was also used by other undertakings in relation to other products or services;

(ii) [...] it must have been obvious to the claimants that, in making that choice, they were running the risk of invalidity on the ground that the message that was conveyed or could be conveyed by the everyday word to the average consumer designated a characteristic of that service.

(iii) [...] The trade mark would attract the custom of all those viewers who "want it now." The attraction is of having immediate and instant access to programmes of choice on demand rather than having to settle for waiting.

(iv) [...] when viewed from the position of the hypothetical average consumer of the claimants' service, the mark NOW would be understood as designating that attractive instant and immediate characteristic of the service for which it was registered. The mark NOW refers to more than just the service itself. It refers to something about the service, an appealing characteristic that will pull in the punters. What is that something if it is not the characteristic of delivering programmes of choice instantly on demand?"

44. As set out in the caselaw the general interest underlying section 3(1)(c) is of ensuring that descriptive signs relating to one or more characteristics of the services in

respect of which registration as a mark is sought may be freely used by all traders offering such services.

45. The word THRIVE is capable of being used descriptively in relation to identical or similar services and it is clear that other traders should be free to use this word in respect of their services. The evidence that has been filed of third parties using the word descriptively, not only in the period leading up to the relevant date but also later, reaffirms my view that the word will be viewed as designating a characteristic of the services, namely their intended purpose.

46. Whilst this finding applies particularly to education/training services I consider that it would equally apply to all of the services in the Proprietor's specification.

47. I find that prima facie the contested mark is objectionable under section 3(1)(c).

Section 3(1)(b)

48. I now turn to the section 3(1)(b) objection. Section 3(1)(b) prevents the registration of a mark which is devoid of distinctive character. The principles to be applied under article 7(1)(b) of the CTM Regulation (which is now Article 7(1)(b) of the EUTM Regulation, and is identical to article 3(1)(b) of the Trade Marks Directive and s.3(1)(b) of the Act) were conveniently summarised by the CJEU in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) as follows:

“29..... the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or service (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

30. Under that provision, marks which are devoid of any distinctive character are not to be registered.

31. According to settled case-law, for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (*Henkel v OHIM*, paragraph 34; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR

I-3297, paragraph 66; and Case C-398/08 P *Audi v OHIM* [2010] ECR I-0000, paragraph 33).

32. It is settled case-law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67). Furthermore, the Court has held, as OHIM points out in its appeal, that that method of assessment is also applicable to an analysis of the distinctive character of signs consisting solely of a colour per se, three-dimensional marks and slogans (see, to that effect, respectively, Case C-447/02 P *KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78; *Storck v OHIM*, paragraph 26; and *Audi v OHIM*, paragraphs 35 and 36).

33. However, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (see Joined Cases C-473/01 P and C-474/01 P *Proctor & Gamble v OHIM* [2004] ECR I-5173, paragraph 36; Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 34; *Henkel v OHIM*, paragraphs 36 and 38; and *Audi v OHIM*, paragraph 37)."

49. I am of the view that I can deal with this ground relatively swiftly. This is because, the Applicant's pleaded case under 3(1)(b) is that the contested mark is devoid of distinctive character on the basis that it is descriptive in accordance with section 3(1)(c). Given my findings above, it follows that as the invalidation reliant upon the 3(1)(c) ground has succeeded, the Applicant's reliance upon the 3(1)(b) ground must also succeed.

50. It is clear from the caselaw that for a mark to possess distinctive character it must serve to identify the services in issue as originating from a particular undertaking. Where a mark is wholly reliant on a descriptive word then it is unable to distinguish

between various entities such that it is incapable of fulfilling its essential function as a trade mark.

51. I am fortified in this view by the Applicant's evidence of third party use of the word as a trade mark (as set out at paragraph 35 above) which includes the word THRIVE with additional matters namely additional words or devices. This suggests to me that the Proprietors of these marks do not see the word THRIVE in isolation as distinctive or sufficient by itself to denote trade origin. This supports my view that the word THRIVE by itself is incapable of fulfilling its essential function as a trade mark to denote trade origin for education and training services and is incapable of identifying those services as originating from a particular undertaking. I find, therefore, that on a prima facie basis the word THRIVE is non distinctive under section 3(1)(b).

52. Subject to the Proprietor's claim for acquired distinctive character, the invalidation actions based upon section 3(1)(b) and (c) succeed.

Acquired distinctiveness

53. The Proprietor bears the burden of proving that its mark has acquired distinctive character through use by the date of the application for invalidation namely 1 July 2022.²⁸

54. The CJEU provided guidance in *Windsurfing Chiemsee*, Joined cases C-108 & C-109/97, about the correct approach with regard to the assessment of the acquisition of distinctive character through use. The guidance is as follows:

"51. In assessing the distinctive character of a mark in respect of which registration has been applied for, the following may also be taken into account: the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations.

²⁸ *Oberbank AG & Banco Santander SA v Deutscher Sparkassen-und Giroverband eV* Joined cases C-108 & C-109/97.

52. If, on the basis of those factors, the competent authority finds that the relevant class of persons, or at least a significant proportion thereof, identify goods as originating from a particular undertaking because of the trade mark, it must hold that the requirement for registering the mark laid down in Article 3(3) of the Directive is satisfied. However, the circumstances in which that requirement may be regarded as satisfied cannot be shown to exist solely by reference to general, abstract data such as predetermined percentages.

53. As regards the method to be used to assess the distinctive character of a mark in respect of which registration is applied for, Community law does not preclude the competent authority, where it has particular difficulty in that connection, from having recourse, under the conditions laid down by its own national law, to an opinion poll as guidance for its judgment (see, to that effect, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 37”).

55. In *Société des Produits Nestlé SA v Cadbury UK Ltd*, Case C-215/14, the CJEU considered a preliminary reference from the High Court of England and Wales which sought guidance about the legal test for showing that a trade mark had acquired a distinctive character. The CJEU understood the question as follows:

“By its first question the referring court asks, in essence, whether an applicant to register a trade mark which has acquired a distinctive character following the use which has been made of it within the meaning of Article 3(3) of Directive 2008/95 must prove that the relevant class of persons perceive the goods or services designated exclusively by that mark, as opposed to any other mark which might also be present, as originating from a particular company, or whether it is sufficient for that applicant to prove that a significant proportion of the relevant class of persons recognise that mark and associate it with the applicant’s goods”.

56. The CJEU answered the question in these terms:

“In order to obtain registration of a trade mark which has acquired a distinctive character following the use which has been made of it within the meaning of Article 3(3) of Directive 2008/95, regardless of whether that use is as part of another registered trade mark or in conjunction with such a mark, the trade

mark applicant must prove that the relevant class of persons perceive the goods or services designated exclusively by the mark applied for, as opposed to any other mark which might also be present, as originating from a particular company.”

57. The Court of Appeal in England and Wales subsequently indicated that it understood the CJEU’s answer to mean:²⁹

i) A non-distinctive mark can only acquire distinctive character if, as a consequence of the way(s) that it has been used, a significant proportion of the relevant public would, at the relevant date, have taken the mark, by itself, to mean that the goods/services sold under it are those of a single undertaking, which is responsible for their quality;

ii) In answering this question it is necessary to distinguish between, on the one hand, mere recognition of the mark in the abstract and, on the other hand, the likely use of that mark during the course of trade, by the relevant public, for the purposes of distinguishing the source of the goods/services;

iii) It is not necessary to show that a significant proportion of the relevant public have in the past placed reliance on the mark for this purpose.

58. The Proprietor’s evidence as to acquired distinctiveness comes from Ms Barber, who gives evidence as to the Proprietor’s business and the services it provides. She states that the Proprietor provides training and tools for both professionals in the education, health and social care sectors and to parents and carers, to support the social and emotional development and wellbeing of children and young people from early years through to adolescence.³⁰ Following a rebrand it is said that the Proprietor has used the contested mark since 2008.

59. A selection of course flyers for 2018/2019 and 2020 are produced setting out the availability of early years training courses to practitioners to help babies and very young children develop.³¹ The mark is shown as follows:

²⁹ [2017] EWCA Civ 358

³⁰ Paragraph 7.

³¹ Exhibit LB1.



Thrive Train-the-Trainer

Are you a committed Thrive Licensed Practitioner who would like to help others achieve this status too?

Our new and improved Thrive Train-the-Trainer course will further extend your knowledge and understanding of Thrive, while developing your skills as a trainer. This new edition of the course will delve deeper into the underpinning theory of Thrive. It will provide you with a more comprehensive and up-to-date base from which you can, in turn, train others to become licensed practitioners as a Licensed Thrive Trainer.

Price: £2,950 (excl VAT)

Format: e-learning modules, face-to-face training, practice sessions and assessment

Duration: 6 months



Website

60. Extracts taken from the Proprietor's website www.thriveapproach.com are produced, dated between 4 July and December 2020 retrieved using the internet archive tool the Wayback Machine.³² As of 2020 the website had over 1.4 million views from over 210,000 users with those figures increasing to 4 million views and 285,269 users in 2021. The use of the contested mark on its website is as follows:



³² Exhibit LB2.



Q LOGIN TO THRIVE

About Thrive Who we work with The Thrive Approach Thrive training News and views Contact us

HOME > ABOUT THRIVE

About Thrive

Developed over the past 25 years, Thrive is a leading provider of tools and training to help adults support the social and emotional development of the children and young people they are working with.



Q LOGIN TO THRIVE

About Thrive Who we work with The Thrive Approach Thrive training News and views Contact us

HOME > THRIVE TRAINING

Thrive training

From an introductory session to evolving and embedding the Approach, embarking on your Thrive training journey will ensure you can support the social and emotional development of all the children and young people you work with. Our training is delivered live by Thrive trainers, providing dynamic, connected learning using online platforms.

Click here to explore all Thrive courses

[VIEW ALL COURSES](#)

61. A selection of further screenshots taken from its earlier websites www.thriveftc.com and www.thethriveapproach.co.uk dated between June 2009 and June 2022 are produced (using the Wayback machine) showing the range of services provided under the contested mark as well as the use of the mark. A sample is reproduced below:

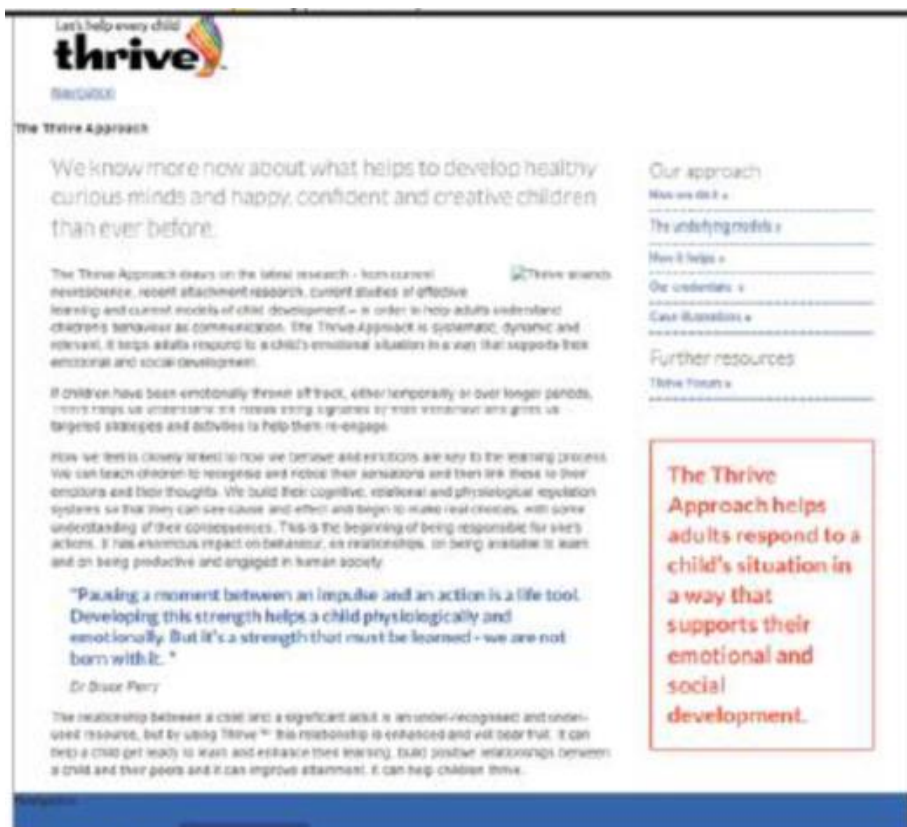
February 2011



January to June 2012



February 2014



December 2014

Let's help every child thrive

Account Login Register

The challenge The Thrive Approach Customised Online tools Courses and events News and views About us

Fronting the challenge for every child

Every child needs to feel valued, involved and appreciated.

However, many children and young people face challenges that can make them feel unsure that is when they exhibit what is often referred to as a 'bad behaviour' or 'behavioural problem' behaviour which is a bit. One way of communicating that something is wrong. They need understanding and help to get their feet on track.

Thrive is a specific way of working with all children that helps to develop their social and emotional well-being, enabling them to engage with life and learning. It supports them in becoming more self-assured, capable and adaptable. It can also address any troubled, or troubling, behaviours providing a firm foundation for academic attainment.

Thrive provides training for professionals who work closely with children and young people from birth to adulthood, and it fully involves parents in the process as well. Thrive is used by:

- Parents and Carers
- Adopters and Foster Carers
- Early Years Settings
- Teachers/Schools
- Health Professionals

"Thrive training has been so enlightening, informative, enriching. I now feel I have the tools to make a difference to the children I work with"

March and September 2016

Let's help every child thrive

Account Login Register

The challenge The Thrive Approach Get involved Online tools Courses and events News and views About us

Developing emotional resilience

Every child needs to feel valued, involved and appreciated.

Thrive helps adults prepare children and young people for life's emotional ups and downs.

The Approach teaches you how to be, and what to do, with children's differing and sometimes challenging behaviour. As a result, children become more self-assured and ready to engage with life and learning.

Based on neuroscience and attachment research, Thrive training provides a targeted intervention. All practice is underpinned by Thrive-Online, an assessment tool and extensive action planning resource that charts progress and measures outcomes.

Thrive provides training for professionals who work closely with children and young people from birth to adulthood, and it fully involves parents in the process as well. Thrive is used by:

- Parents and Carers
- Adopters and Foster Carers
- Early Years Settings
- Teachers/Schools
- Health Professionals

A short film illustrating Thrive online as a whole school approach

"Thrive training has been so enlightening, informative, enriching. I now feel I have the tools to make a difference to the children I work with"



Account Login

Features

Site Search: Search [input] [Go]

Home

- Home
- The challenge
- The Thrive Approach
- Get involved
- Online tools
- Courses and events
- News and views
- About us

The Thrive Approach

We know more now than ever before about what helps to develop healthy curious minds and happy, confident and creative children.

The Thrive Approach

The Thrive Approach draws on the latest research - from current neuroscience, recent attachment research, current studies of effective learning and current models of child development - in order to help adults understand children's behaviour in communication. It is an integrated approach, its strength is that it pulls together work from different disciplines to provide one model that is systematic, dynamic and relevant and helps adults respond to a child's emotional situation in a way that supports their emotional and social development.

If children have been emotionally thrown off track, either temporarily or over longer periods, Thrive helps us understand the needs being signalled by their behaviour and gives us targeted strategies and activities to help them re-engage.

Causes and effects

Feelings are closely linked to behaviour and emotions are key to the learning process. We can teach children to recognise and name their sensations and then link these to their emotions and their thoughts. We build their cognitive, relational and physiological regulation systems so that they can see cause and effect and begin to make real choices, with some understanding of their consequences. This is the beginning of being responsible for one's actions. It has enormous impact on behaviour, on relationships, on being available to learn and on being productive and engaged in learning society.

The relationship between a child and a significant adult is an under-engaged and under-used resource, but by using The Thrive Approach we can enhance this relationship, which will bear fruit. It can

- help a child get ready to learn
- enhance their learning
- build positive relationships between a child and his/her peers
- improve attainment

<https://www.thriveapproach.com/2015/08/04/15-thrive-approach-questions-answers/>

April 2017

October 2017

The Thrive Approach | What's New! | Thrive Centre | Who we work with | News & views | Contact us | [Log in to Thrive Online](#) | [Member area](#)

Every child needs to feel valued, involved and appreciated.

We know how busy you are in your classroom when trying to deliver lessons to all from the needs of your most vulnerable and neurodiverse children.

If children have been successfully supported during a session, temporarily away from lessons periods, Thrive helps us address and the needs being signalled by their behaviour and gives us targeted strategies and activities to help them re-engage.

[Read on the Thrive Approach](#) | [Discover our online courses now](#)

UPCOMING EVENTS

Annual Trainer Seminar

15 Tue 13th Oct 2017
 9:30am - 4:00pm
 1 DAY
 100 PLACES LEFT

[Read more & book](#)

Thrive-Online Refresher

15 Tue 13th Oct 2017
 9:30am - 4:00pm
 1 DAY
 100 PLACES LEFT

[Read more & book](#)

Family Thrive for Practitioners and Trainers - 2 days

15 Tue 13th Oct 2017 - 16th 14th Oct 2017
 9:30am - 4:00pm
 2 DAYS
 100 PLACES LEFT

[Read more & book](#)

Latest news

Playtime for Children with Autism

15th September 2017

[Read more](#)

[Member on Thrive Online](#)

December 2018

Teachers and schools | Parents and Carers | Advertisers and Further Providers | Special Care | Health Care

Teachers and schools

There are many ways in which The Thrive Approach can be helpful to you in your role as an educator. The Thrive Approach, underpinned by the Thrive-Online programme can help you look at the behaviour of the children in your care and get a better understanding of what is helping or hindering it.

Primary

Do you want the children in your classes to thrive?

- Are you keen to find some effective ways to support the learning of some of your less engaged pupils?
- Are you confused or frustrated or concerned about some of your pupils' behaviour?
- Do you want to know how to be with your more vulnerable

Secondary

Do you want to find some tried and tested ways to:

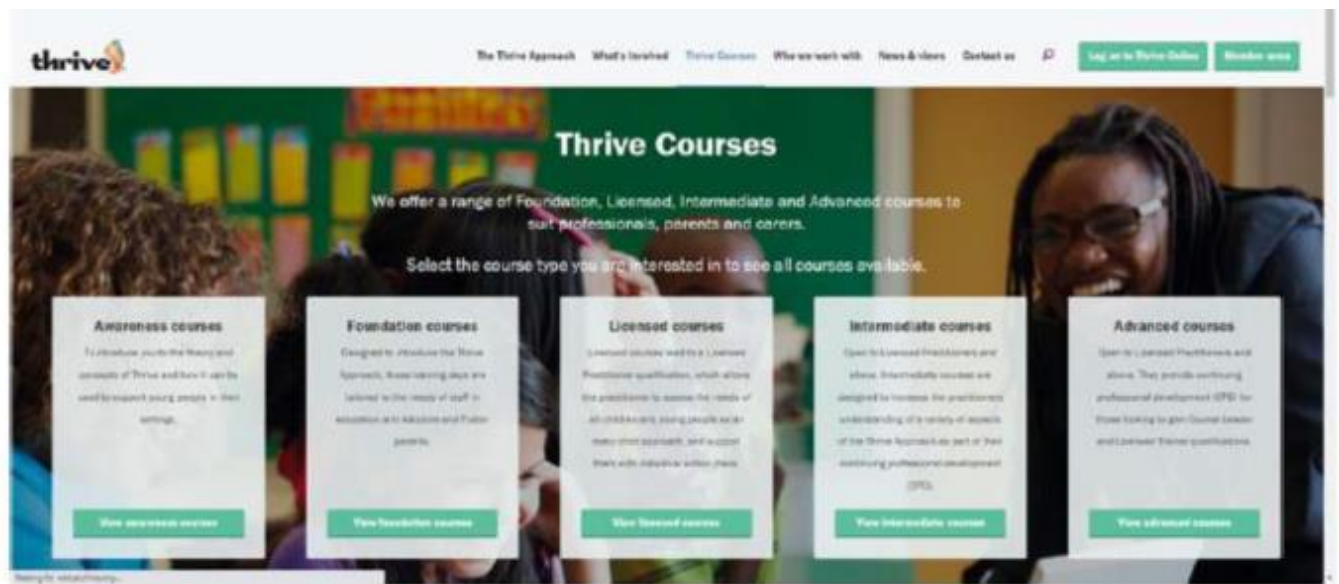
- improve attendance to learning?
- improve attendance?
- produce the evidence of progress in their educational and social skills?

Alternative provision

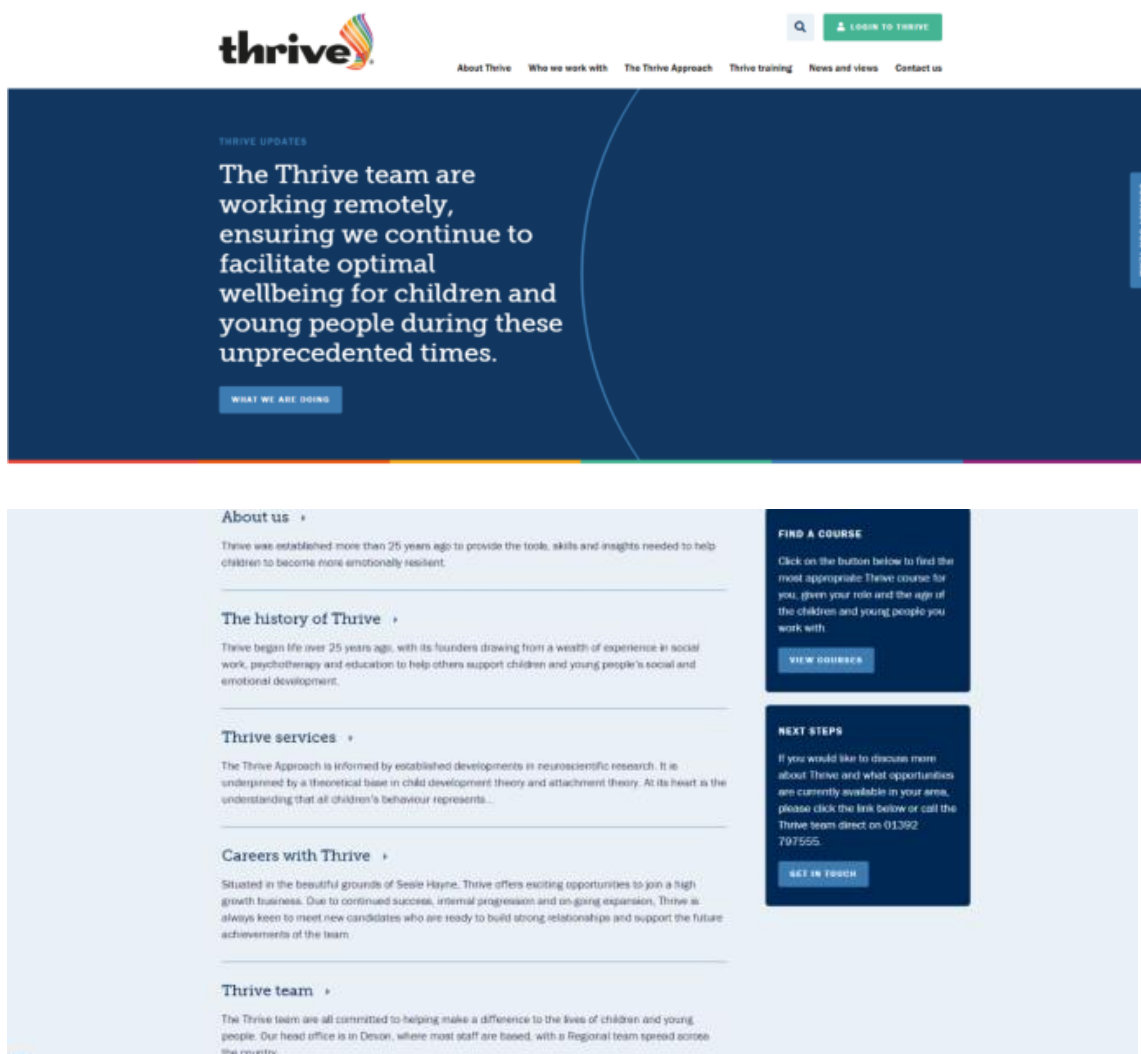
Do you want the children and young people who have been excluded from all other forms of education to have a chance to learn?

- Do the children and young people have serious angry outbursts and use this when coping in ways that have harmed their safety?
- Do you want to know how to support your staff?

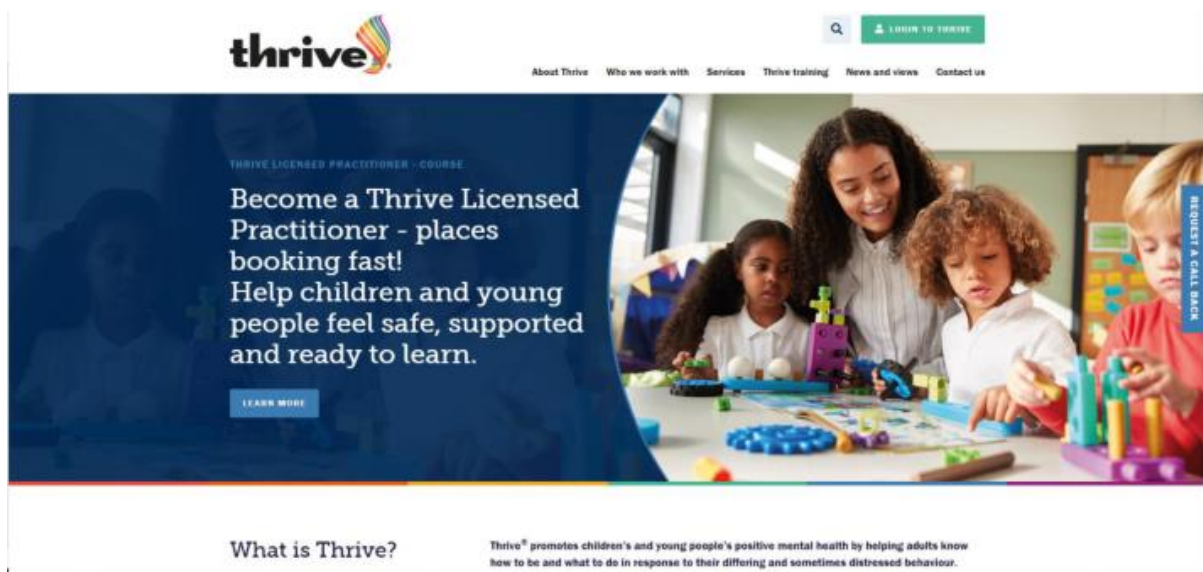
January 2019



January and April 2021



February 2022



June 2022



Social Media

62. The Proprietor has social media accounts with Facebook, Instagram, Twitter (now known as X), LinkedIn and Pinterest. A selection of posts are produced at exhibit LB8. A post on its Facebook page dated November 2021, for example, makes references to the contested mark as 'Thrive Approach', 'Introduction to Thrive', '... see more of Thrive Approach on Facebook', 'The Thrive Approach gives adults the tools, insights, and skills to support the social and emotional wellbeing of children and young people.'

The four originators of The Thrive Approach came together in 1994 concerned about the number of children being excluded from schools and learning....’. The home page shows that as at 24 January 2022, 30,655 people liked the account and that 32,138 people followed the account. Its Twitter account is shown to have made 10,900 tweets, with 11,500 followers as of January 2022. A Tweet dated 10 May 2021 is produced referring to the “Thrive Approach” and the ‘Thrive subscription’ service, with users being able to contact the “Thrive team” for further information.

63. The use of the mark on both these accounts in its figurative form is shown as follows:



64. The Proprietor’s Instagram account shows that it has 4,009 followers as at January 2022 and refers to the word Thrive in a similar manner to its other social media accounts as aforementioned. Two of its ‘radio/option buttons’ refer to ‘Thrive activities’ and ‘Thrive rooms’. Its LinkedIn account shows it has 1,360 followers as at January 2022. The Proprietor is referred to as “Thrive Approach Business Skills Training – A leading provider of tools and training, supporting the social and emotional development of children and young people.” The mark is displayed as follows:



and ‘The Thrive Approach®’

65. Exhibit LB9 includes screenshots of data as to the number of followers these platforms had as at December 2020.

66. In addition to these platforms, Ms Barber states that the Proprietor runs a public Community page with nearly 7,000 followers and a number of closed groups on Facebook which include those called Thrive the Central Region, Thrive Course Leaders, Thrive support network, The Thrive Approach, Thrive Licensed Practitioners and Thrive Trainers, etc..³³ These groups are shown to be located throughout the UK to include London, Dorset, South West, South East, Wales, Scotland and North. Its

³³ Exhibit LB10

membership runs on average to a few hundred members per group. I note that the home pages of these groups were accessed as at January 2022.

67. From 2017 to June 2022 the Proprietor has also published a number of Blogs on its website and social media pages. Reference is made to its 'Family Thrive' and 'Thrive Approach' sessions dated December 2017, November 2018, April 2019, September 2020 and 7 January 2021. The use of the mark is shown in the body of the text as a word only and as follows:



68. The Proprietor is said to have launched its own Podcast service in October 2019 which is available to download from its website. In 2020 the Proprietor also launched the Thrive Ambassador School and Thrive Schools Of Excellence scheme, awarded to establishments for showing their commitment to developing healthy happy pupils in accordance with Thrive principles. As at 31 December 2020 five schools were awarded ambassador status and one as a school of excellence with another pending.³⁴ The certificates awarded are displayed as follows:³⁵

³⁴ Exhibit LB 5.

³⁵ Exhibit LB 6.

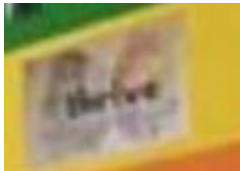


Users, Employees and Licensed Practitioners

69. Ms Barber states that the Proprietor employs over 50 employees across the UK. Since 2008, 10,558 professionals have been trained as 'Thrive Licensed Practitioners' to include teaching staff at every level, community family groups, local authority children's services departments, mental health teams and parents/carers. It is said that 3,976 of these professionals have been trained as course leaders and are therefore able to deliver the Thrive courses to parents. It also has 179 Thrive Licensed Trainers who deliver Licensed Practitioner and continuous development training. At least 55,949 staff across the UK have attended THRIVE induction and/or training sessions since 2012. In 2006 the Proprietor launched a subscription³⁶ service known as Thrive Online which was available from 2008. This platform is said to be a profiling, action planning and progress monitoring tool that underpins all Thrive practices. It is said that 5,088 establishments are subscribed to this platform including nurseries, preschools, primary schools, secondary schools and specialised units. These establishments are said to have used the Thrive logo on their premises and websites, between 2016 and 2020 as follows:³⁷

³⁶ Exhibit LB7

³⁷ Exhibit LB4



70. Ms Barber states that almost 1 million children have registered to 'Thrive', with over 566,000 children and young people registered for the 2021/2022 academic year. However, there is no evidence to explain how the registrations came about; whether this was done by the teachers or their parents or even whether the parents were aware of the registrations.

Turnover and Marketing Figures

71. The Proprietor's Turnover and Marketing spend since 2014 is produced as follows:

Year	Turnover £	Marketing £
2014	1,083,414	89,997
2015	1,680,186	67,569
2016	2,656,750	106,907
2017	3,153,686	115,984
2018	3,612,595	218,520
2019	3,773,025	298,504
2020	3,193,896	253,736
2021 ³⁸	5,121,828	385,393
2022 ³⁹	2,870,000	85,765

³⁸ To 30 November 2021- 15 months.

³⁹ December 2021 to June 2022.

Marketing and promotional activity

72. Examples of its branding being used on marketing materials, business cards, in offices and email footers before January 2021 are produced (dated November 2020, January 2019 and November 2018). These are said to have been routinely used by its employees and handed out to clients/potential clients and visitors.⁴⁰ Within those publications/material the mark is used as follows:



73. Some examples of the marketing and promotional activities it has undertaken are produced at Exhibit LB11 which include its advertising and promotional material published on The Times Educational Supplement's ('Tes') website and in print publications. Tes is said to have an average readership of 70,000 and a circulation of 15,000 plus. A sample email mail shot (reproduced below) is produced said to have been sent on 26 November 2020 to various education establishments throughout the UK. Data is produced showing the number of emails that were opened and the number of clicks achieved.



The Thrive Approach offers a whole-school approach to promoting mental health for all students. With Thrive tools, training and insights, your staff will be better able to support your students in becoming open to learning, despite all that is affecting them today.

- **The tool:** Thrive-Online is a web-based profiling, action-planning and measuring tool enabling you to clearly and systematically identify the social and emotional needs of groups and individuals. Suggested strategies are designed to be easy to incorporate in your everyday curriculum.
- **The training:** engaging and experiential virtual training for senior leaders (providing a strategic overview) and student support staff (for a deeper, practical knowledge to meet reparative needs), plus induction training for all other staff.
- **The insight:** ongoing support from a Relationship Manager and the Member Services team, and a dedicated Member's web portal.

⁴⁰ Exhibit LB3

74. The Proprietor is also said to have sponsored a number of awards with Tes such as the 'Tes Independent Schools' award in February 2020 and 'Tes school awards' 2021.

75. Ms Barber exhibits a number of third party articles which feature the contested mark both in its figurative form and as follows 'Thrive', 'The Thrive Approach®' and 'Invest In Thrive®'.⁴¹ These include:

- The Educator - 28 January 2020

One of the main tools Mr Hickman is using to make these changes is The Thrive Approach, which is based on neuroscience and attachment theory to equip adults with the knowledge, insights and resources needed to develop the relationships that help children to flourish and learn.

- TES – 14 February 2020

"The framework emphasises the option for pupils to have alternative provision for some topic areas where sensitivities may be known. However, there will be many young people who haven't been identified," argues Rose Webb, a former RE and PSHE teacher and social, emotional and mental health specialist at the organisation Thrive. "It sometimes isn't until these things are touched on in curriculum content that things come to light."

- Early Years Educator - 11 June 2020

Dr Jack Lewis, Kim S Golding and Dr Suzanne Zeedyk will be giving a series of live webinars in June and July, organised by Thrive, which trains teachers and other educational professionals to support children's mental and emotional well-being.

- International Journal of Environmental Research and Public Health - Exploring Mental Health And Illness in the UK Sports Coaching Workforce – 13 December 2020 - contribution by Jon Jones Thrive Approach.

⁴¹ Exhibit LB22

- SEN Magazine – Importance of music and performing arts – the author is described as a Thrive Relationship Manager London - March 2021.
- Barking and Dagenham Post - 17 October 2020

Highfields Primary School, in Lawford, has been named as an Ambassador School with Excellence in the Environment after going through a rigorous assessment process by Thrive.

Thrive trains teachers and other education professionals to support the emotional and social development of all children.

76. The Proprietor is also said to engage in pay per click advertising to promote ‘Thrive’ on its social media accounts but no further details are provided. It publishes a fortnightly newsletter sent to all its members via email. Samples are produced at LB12 dated between December 2020 and January 2022. The December edition refers to an updated version of its ‘Embraced and Introduced Thrive Logos’ displayed as follows:



Use with educational establishments

77. Ms Barber states that the Proprietor attended a number of events and gave presentations at conferences and exhibitions across the UK, to include key regional education events run by Mondale, local authority events targeting senior leaders in schools and nurseries and practitioner focussed events. A table is produced showing attendance at several events across the UK to include Llanelli, Manchester, Leeds, Birmingham, Kent, Cardiff from 2017 to June 2022.⁴² Photographs taken of its event

⁴² Paragraph 26 Ms Barber’s statement.

stands at these venues are produced at LB14. An illustration of how the contested mark is displayed at these events is shown below:

National Education Show 2019, Cardiff



78. Ms Barber states that its THRIVE services have been included in a number of public sector and University studies. Extracts are provided at exhibits LB16 to LB20 which include studies undertaken by Brighton University (2015), Bath Spa University (2015) Office for Public Management (2013), Department of Education (2018), White Sail Consultancy (2013) and ImpactEd (2019). References are made within these publications to 'Thrive', 'the Thrive initiative', 'Impact of Thrive', 'The Thrive approach', 'Thrive training', 'THRIVE principles', 'continued integration of THRIVE within schools', 'THRIVE-trained staff' and 'THRIVE assessments'.

79. Ms Barber states that the impact of Thrive has been picked up by Ofsted and Estyn during school inspections:

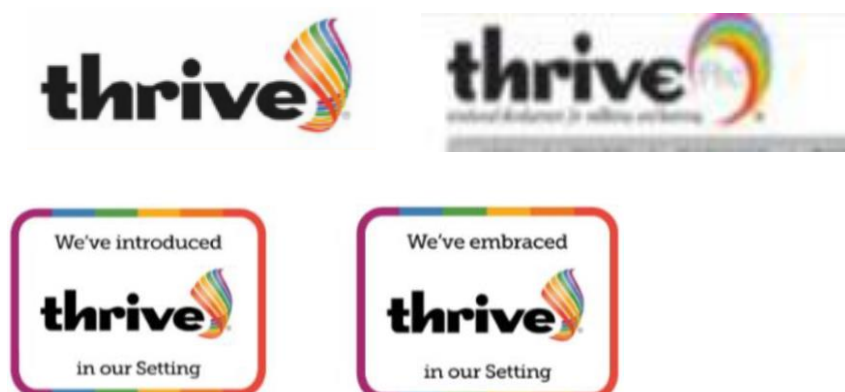
- i. *"School leaders are also supporting pupils' mental well-being through their 'Thrive' approach, and the designated 'Thrive' room provides a quiet and calming reflection space"* Ofsted Report for Martlesham Primary Academy, 14 November 2018;
- ii. *"The 'Thrive' programme has helped to identify some of the root causes of poor attendance. Providing this additional support has helped pupils, especially those with complex needs, to manage their behaviour and attend better. This nurturing and caring environment helps pupils with additional needs settle more quickly, receive more support, and enjoy learning more"* Ofsted Report on Saxmundham Primary School, 14 March 2018; and
- iii. *"Early help, both internally, through the school's 'Thrive' initiative, and from external agencies, is put into place swiftly for those pupils who need it"* Ofsted Report on Thomas Arnold Primary School, 14 November 2018.

Assessment of acquired distinctiveness

80. The Applicant accepts that the Proprietor has made use of signs incorporating the word THRIVE, but disputes that this evidence demonstrates use of the sign as registered namely in the word THRIVE solus, or in a form that does not alter the distinctive character of the sign as registered.⁴³

81. I note from the evidence that the marks have been used in the following formats on the Proprietor's website pages, social media accounts and in the literature accompanying Ms Barber's statement⁴⁴:

- (i) Thrive Insights, The Thrive Approach, Thrive initiative, Thrive training, Thrive team, "Find out about the impact Thrive is having on children...."
- (ii)



⁴³ Submissions para 102 and 103.

⁴⁴ Exhibit LB2 and LB xx



(iii)



82. The evidence overwhelmingly shows the use of the contested mark in its figurative form as per the versions set out at (ii) and (iii) above which have been used on the Proprietor's website since 2011 and April 2017. The evidence shows that by 2020 the Proprietor's website had over 1.4 million views, with over 4 million views in 2021. Since 2008, 10,558 professionals have been trained as Thrive Licensed Practitioners with 3,976 of those further trained as course leaders. The services have been delivered to over 1 million children and used by over 5,088 educational establishments. It has attended at conferences and educational events throughout the UK and participated in studies with universities, academics and public bodies such as the Department of Education, local authorities, schools and care facilities.

83. This evidence clearly shows use of and promotion of the word THRIVE in a variety of forms on its website, promotional material, marketing campaigns, sponsorship of industry awards and by attendance at events and conferences. Its turnover figures are not insignificant and the geographical extent of the use is shown to be throughout the UK, with over 10,000 professionals having attended its courses and become trained licenced practitioners. The use is shown to be longstanding and of significant volume.

84. I now turn to the form of the mark in use. The assessment regarding the claim to acquired distinctive character must take into account the use that is being made of the

mark. If the mark in use is in a form which alters the distinctive character of the mark to the form in which it is registered, it is necessary to determine whether the mark as registered has acquired the capacity to distinguish the Proprietor's services without additional signage. It is necessary, therefore, to consider how the Proprietor has used its mark.

85. The Proprietor's evidence overwhelmingly shows use of the word THRIVE in combination with a rainbow ribbon device as shown above at paragraph 45(ii) and (iii).

86. In so far as the use shown in the version at paragraph 45(iii) above, where the word 'thrive' is used with the words 'let's help every child....' I consider that in this version the word has been incorporated into a phrase such that it conveys a descriptive message rather than one which denotes trade origin. If anything the Proprietor's claim to acquired distinctiveness is weakened by its own use of the word THRIVE descriptively in its own promotional material.

87. In so far as the use shown in the versions at paragraph 45(ii) above, where the word 'thrive' is used with a rainbow ribbon device, I consider the meaning of the word THRIVE is ambiguous. It seems most likely to be understood as a specific approach to education/training intended to help the participants to thrive. However, it is not clear whether without the distinctive rainbow device, average consumers would regard the word THRIVE alone as designating the services of a particular undertaking.

88. Whilst there are some references to the word Thrive without the device shown in evidence, for the most part this is in text on the Proprietor's own website, social media accounts and literature where it has already displayed and referred to the mark in its figurative form. Whilst use for the word Thrive solus shown in this way could be understood as trade mark use, I note that it is difficult to reproduce a device within text and also it would be unnecessary to make reference to the whole mark within text where the Proprietor has already identified itself by reference to the composite word and device mark. I consider that this is the position in the evidence before me. Further, the distinctive/descriptive significance of THRIVE, at least within the terms 'The Thrive Approach' and 'Thrive initiative', is ambiguous.

89. I am not persuaded that the use which has been made of the mark is liable to cause average consumers to rely upon the word THRIVE alone to distinguish the services of the Proprietor. The vast majority of the uses by the Proprietor include the figurative device as aforementioned. The device is sufficiently distinctive that when used with a descriptive/non-distinctive word it makes a contribution which will in my view assist the consumer in identifying the service provider as distinct from the provider of other THRIVE services, as set out in the examples reproduced at paragraph 35 above. I note these other entities use a device and other words alongside the word THRIVE/thrive. Any uses without the device by the Proprietor is scant or has been shown to be a shorthand reference within text to its device mark as aforementioned.

90. Taking all matters into account the ribbon device does more than act as a “figurative figleaf” or is merely token stylisation,⁴⁵ it is not purely a banal device or used merely to reinforce the message of the word. I find that the device gives distinctive character to the mark as a whole such that the word alone is still unable to function as an indicator of origin to a significant proportion of the relevant public.

91. The evidence has not established that, by the relevant date, the word THRIVE solus was factually distinctive of the Proprietor to a significant proportion of the relevant public for education and training services. Any distinctive character that it had acquired is not in the word THRIVE solus but is in the figurative mark or in combination with other words.

92. In light of this finding the Proprietor’s claim to acquired distinctiveness in the word THRIVE solus fails, the consequence of which is that the mark is invalidated and is deemed never to have existed.

93. Having found that the section 3 grounds of invalidity have succeeded in their entirety the revocation actions brought by the Applicant will not improve its position. However, I shall go on to consider the grounds brought under section 46, albeit briefly.

⁴⁵ See *Starbucks* as aforesaid at [117].

Revocation based on sections 46(1)(c) and (d)

94. Section 46 of the Act states as follows:

“46. - (1) The registration of a trade mark may be revoked on any of the following grounds-

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;

(d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purpose of subsection (1) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

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.

(4) [...]

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from-

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existing at an earlier date, that date”.

95. The Applicant’s claims that under section 46(1)(c) the Proprietor has never policed use of the trade mark by either its own consumers or its competitors and that its evidence demonstrates that the word THRIVE has become a commonly used name in the relevant trade for the services listed, as early as 2019, if not before. Further under section 46(1)(d) it claims that the use of the contested mark by the Proprietor and with its consent is liable to mislead the public as to the origin of the registered services.

96. In response to the claim that it has not policed use of the mark the Proprietor states that it has “successfully prevented third parties from using and registering a trade mark consisting or incorporating the term Thrive for education services and training services and other associated services in the UK and will continue to take all appropriate action to do so.”⁴⁶

⁴⁶ Paragraph 41.

Section 46(1)(c)

97. The relevant date for the assessment as to whether the mark is the common name for the services is the period after registration up until the date the revocation action commenced, namely from 11 March 2016 to 1 July 2022.

98. Whether the trade mark has become a common name in the trade for a service is a question of fact assessed through the eyes of the average consumer. The test is a qualitative test rather than a quantitative one, and one which is wholly dependent on the evidence filed.⁴⁷ According to *Kerly's*⁴⁸ in order to satisfy this ground there would be an expectation of substantial independent evidence relating to the relevant product or service market, such as surveys from persons of standing within the trade or from trade organisations and the like, showing the mark in use as the common name in the trade for the relevant product or service.⁴⁹

99. I have already outlined Ms Nichol's evidence earlier when assessing the section 3 ground.

100. Whilst Ms Nicholls' evidence consists of a large volume of screenshots of third party websites, where it is said that the THRIVE/THRIVE APPROACH framework model is referenced, these are mostly undated. Beyond these screenshots no indication is provided as to the scale of use or the extent of engagement either from within the trade or from the average consumer. Certainly some use has been shown of the acronym THRIVE as an educational and mental health support model, but very little has been provided to show that its use is widespread within either the education or healthcare sector such that it has become a common name.

101. To my mind the word THRIVE is being used by these entities mostly as part of signs which denote trade origin and not of a kind that shows that it has become a common name for educational and training services. Whilst there is some evidence of generic use, it is not substantial or of sufficient quality that I can determine that the word THRIVE has become a common name for the services.

⁴⁷ *Hormel Foods Corporation v Antilles Landscape Investments NV* [2005] EWHC 13 (Ch); [2005] E.T.M.R. 54. Richard Arnold QC sitting as a Deputy Judge (*SPAMBUSTER*), at [166].

⁴⁸ *Kerly's Law of Trade Marks and Trade Names* 17th Edition.

⁴⁹ *Kerly's* section 12.139 – 12.140.

102. In *Hormel Foods* as aforesaid the Judge stated:

“... the purpose of these provisions ... is to enable marks to be removed from the register if they cease to fulfil their essential function ... If a trade mark has become a common name for goods or services for which it is registered, then it can no longer perform this essential function even if there are also other common names for those goods or services.”

103. The fact that the THRIVE methodology has been adopted from some academic research and shows some descriptive use, does not make it the, or a, common name in the trade. Even if I am wrong and it can be found to have been used by third parties as a common name to describe an educational framework, there is no evidence before me to suggest that it has become so, as a result of the acts or inactivity of the Proprietor. Whilst it is the Proprietor’s responsibility for ensuring that their mark continues to fulfil its essential function, the focus is on the acts or inactivity of the Proprietor and not merely on the meaning conveyed by the mark. It is not necessary for the Proprietor’s actions or inactivity to be the sole cause of the word becoming the or a common name, but it must nevertheless be the main or major cause of the end result. From the evidence before me I simply do not find this to be the case.

104. The revocation action under section 46(1)(c) fails.

Section 46(1)(d)

105. I note that the Applicant’s submissions in relation to this ground are very short and which I have set out in full as follows:⁵⁰

“88. The Applicant submits that the manner in which the Proprietor has used the Registration in relation to the services covered, namely only in a logo format and not in its registered format, and for the most part, not marked as a proprietary sign, has rendered the sign liable to mislead consumers as the trade origin of the services provided. It is abundantly clear from the evidence filed by the Applicant at Exhibits RN11-RN13 that consumers now have no way of knowing whether the sign THRIVE is a registered trade mark, and whether use of the sign THRIVE infringes any registered rights. The trade origin of the uses

⁵⁰ Applicant’s submissions in lieu of hearing.

demonstrated by the Applicant are unclear at best, and at worst, completely impossible to identify.

89. As such, the use made by the Proprietor of the Registration, or indeed the lack thereof, has rendered the Registration misleading as to trade origin. It is no longer possible to identify the trade origin of services offered under the sign, and it is impossible for the sign to fulfil its essential function. The Applicant submits that the registration should be invalidated under Section 46(1)(d).”

106. Ms Nicholls stated:

“43. ...the Proprietor is misleading consumers in only ever identifying its services in conjunction with a prominent device element, and not in the word only manner. Any instances of the word only manner are unrecognisable as belonging to the Proprietor, and it is only the use of the device element, which does not form part of the registered mark, that identifies any use as belonging to the Proprietor or attributable to the Proprietor. The very fact that the Proprietor has allowed such common usage of the sign THRIVE in respect of educational and training services means that the Proprietor is forced to identify any proprietary use with a logo which does not comprise part of the registered sign.

44. As such, it is not only the inactivity of the Proprietor but the actions of the Proprietor that are rendering the registered sign as misleading to the consumer. The actions of the Proprietor have resulted in the registered sign becoming misleading to members of the relevant public, in particular insofar as it is no longer able to identify the services of the Proprietor from those of other traders in its registered form.

45. Further, the subject registration is registered in respect of, broadly, education and training services. However, any proprietary use of the sign in conjunction with a distinctive and prominent logo appears to be in respect of a mental health service, and not in respect of educational services. The very fact that those mental health services may be offered in an educational setting does not make those services educational services. As such, the actions of the Proprietor are again rendering the registered sign as misleading to the

consumer insofar as any use made does not identify the services covered by the registration.

46. It is clear from the evidence filed herein that at the time of filing the application, the word “thrive” was non-distinctive and descriptive in respect of the services covered.

47. Furthermore, it is clear from the evidence filed herein that following registration, the inaction of the Proprietor has resulted in the sign THRIVE becoming the common manner in which to refer to the services covered, has misled the public as no longer being able to identify the services of the Proprietor from those other traders.”

107. In *Cormeton Fire Protection Ltd v Cormeton Electronics Ltd & Anor* [2021] EWHC 11 (IPEC), it was alleged that the use of the mark was deceptive because there had been at least a partial separation of the goodwill, meaning that the mark was no longer distinctive of a single undertaking and had therefore become misleading. Dismissing the argument, David Stone, sitting as a Deputy High Court Judge, said:

“85. First, in relation to the law, as I have already noted, section 3(3)(b) is in the part of the TMA which deals with absolute grounds of refusal. Absolute grounds are those that pertain to the mark itself – for example, marks devoid of distinctive character, marks which denote kind or quality, certain types of shape marks, and marks contrary to public policy. That is already a clear guide to the interpretation of section 3(3)(b) – it is clearly not aimed at preventing registration of marks in which a third party may own rights.

86. Next, the section itself lists, albeit non-exclusively, examples of types of mark which may deceive the public – “for instance as to the nature, quality or geographical origin of the goods or services”. Counsel for the Defendants submitted that this list is not closed, and I accept that submission. But the examples given are all absolute grounds examples, concerned with deception about the nature of the goods or services on offer. None of the examples given relates to the message that may be conveyed about the business origins of the goods or services provided under the mark.

87. Third, this position is entirely consistent with the limited case law on section 3(3)(b) and its equivalents in the EU instruments I have referred to above [...]"

108. He summarised the findings in Case C-259/04 *Elizabeth Florence Emanuel v Continental Shelf 128 Ltd* [2006] ETMR 56, *Melly's Trade Mark Application* [2008] ETMR 41, *Sworders Trade Mark* (BL O/212/06 and Case C-689/15 *WF Gözze Frottierweberei v Verein Bremer Baumwollbörse* [2017] Bus LR 1795 and said:

"87. [...] These four decisions speak with one voice – section 3(3)(b) of the TMA refers to per se or absolute grounds.

88. Fourth, if the Defendants are right, their interpretation would drive a coach and horses through the relative grounds provisions in section 5 of the TMA. All an earlier right owner would need to do would be to allege public deception, without first having to comply with the requirements for identical or similar marks, identical or similar goods/services, or ownership of a mark with reputation. This cannot be what the legislature intended.

89. Therefore, in my judgment, section 3(3)(b) of the TMA is not engaged where the only "deception" is as to who is using the mark to provide goods or services. That sort of deception is remediable under the relative grounds for refusal of registration to be found in section 5 of the TMA. The Defendants' application for invalidity under section 3(3)(b) fails."

109. The case of *Elizabeth Florence Emanuel v Continental Shelf 128 Ltd* (C-259/04) *EU:C:2006:215*; [2006] *E.T.M.R.* 56 at [47], confirm or reflect the three applicable principles deduced from earlier case law:

(1) For a mark to be liable to mislead, it must be established, having regard to the opinions or habits of the consumers in question, that there is a real risk of their economic behaviour being affected.⁵¹

(2) The existence of actual deceit or a sufficiently serious risk that the consumer will be misled must be shown.

⁵¹ *Verbraucherschutzverein eV v Sektkellerei GC Kessler GmbH und Co* (C-303/97) [1999] *E.C.R.* 1-513; cf. [48] in *Elizabeth Emanuel*: "...even if the average consumer might be influenced in his act of purchasing a garment ...".

(3) It is for the national court to assess the issue and in doing so it must take into account the presumed expectations of the average consumer who is deemed to be reasonably well-informed and reasonably observant and circumspect.

110. Noting the CJEU's finding at paragraph 53 of *Elizabeth Emanuel* that the conditions for revocation under s. 46(1)(d) are the same as those for refusal of registration under s. 3(3)(b), the Deputy Judge also dismissed the allegation of deceptiveness based upon s. 46(1)(d) stating:

“98. In my judgment, for the same reasons as I have set out above in relation to section 3(3)(b) of the TMA, section 46(1)(d) of the TMA is not engaged where the only "deception" is as to who is using the mark to provide goods or services. That sort of deception is remediable under the relative grounds for revocation of a registration. The Defendants' application for revocation under section 46(1)(d) also fails”.

111. I note that there is no assertion regarding the quality of the services at issue or their actual characteristics, merely that by use of the word THRIVE it is incapable of denoting trade origin and is unable to act as distinctive of a single undertaking or fulfil its essential function as a trade mark.

112. I do not consider that the way in which the contested mark is used can be said to mislead the public. In coming to this conclusion I bear in mind that I must have due regard to the message to which a trade mark conveys.⁵² The mere fact that a mark is descriptive or that it is incapable of functioning as a trade mark is not sufficient to engage section 46(1)(d). The cause to wonder test was rejected in *Smirnov*.⁵³ I see no merit in the Applicant's argument and as such this ground is dismissed.

Section 46(1)(a) and (b)

113. The relevant sections of the Act are set out earlier in my decision.

114. Section 100 is also relevant, which reads:

⁵² *Scandecor Development AB v Scandecor Marketing AB* [2002] FSR 7

⁵³ *Smirnov v Russia* (71362/01)2010 51 EHRR 19

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

115. Having regard to section 46(3) of the Act I shall start by considering whether the contested mark was put to genuine use in the last of the five year periods specified, namely 1 July 2017 to 30 June 2022.

Genuine use of the contested mark

116. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundesvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the

characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

117. In light of my earlier assessment regarding the evidence for the purposes of acquired distinctive character I have no hesitation in finding that the Proprietor has made genuine use of the mark, but that it has not done so in an acceptable form. I consider that overwhelmingly the use shown is of the mark in combination with other matters which alters the distinctive character of the mark as registered.⁵⁴ The distinctiveness of the mark in use as designating trade origin is in the overall get-up of the mark rather than in the word THRIVE alone. The occasional use of the word THRIVE solus or in combination with other words, as shown in the evidence and at paragraph 45 (i) above, is in my view insufficient to enable the Proprietor to rely upon it to acquire a distinctive meaning to a significant proportion of the relevant public.

118. In light of my findings in relation to section 3 and the Proprietor’s claim to acquired distinctive character, the same conclusions would apply equally to the grounds of

⁵⁴ *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22

revocation brought under section 46(1)(a) and (b). I consider that when seeing the mark in use as opposed to the mark as registered, the addition of words or a device to the word THRIVE counteracts the descriptive nature of the word such that they are not acceptable variations. The distinctiveness of the mark does not lie in the word THRIVE solus but rather in its combination with other matters. The Proprietor cannot therefore rely on the use it has made of the device marks or with additional words to show use of the word only THRIVE.

119. On this basis the Applicant's claim under section 46(1)(a) and (b) succeeds.

Overall conclusion

120. The invalidation action succeeds in full, the consequence of which is that the trade mark registration shall be invalidated such that it is deemed under section 47(6) never to have existed. Subject to appeal, the contested mark shall be removed from the register.

121. Even though the revocation action has succeeded in part, I need not consider the date upon which the revocation action shall take effect, given my findings in relation to the invalidation action.

Closing remarks

122. In so far as my refusal to allow the Applicant to file evidence beyond the 300 page allowance even if I had allowed the evidence to be admitted to its full extent this would not have assisted the Applicant. The evidence as originally filed, for the most part was ill focussed, with a great deal of it being undated and repetitive. The additional material was of little probative value and, therefore, would not have placed the Applicant in any stronger position.

Costs

123. The Applicant has been successful and it is therefore entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. I note that three sets of proceedings were pursued by the Applicant, each under different grounds but only some were successful. I also note that initially the Applicant filed an excessive volume of evidence beyond the normal page allowance allowed, requiring a CMC. Following consolidation only one set of evidence and submissions

was filed by both parties to cover all grounds relied upon. I take these matters into account and award costs accordingly as follows:

Preparing the statements of ground and considering the counterstatements and TM8s (x3):	£500
Filing evidence/submissions and considering the Proprietor's evidence/submissions:	£1,500
Official fee	£200
Total	£2,200

124. I order Fronting The Challenge Projects Limited to pay Thrive Childcare and Education Group Limited the sum of £2,200 as a contribution towards its costs. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case, if any appeal against this decision is unsuccessful.

Dated this 16th day of July 2024

Leisa Davies

For the Registrar