BL O/0801/25

TRADE MARKS ACT 1994

IN THE MATTER OF CONSOLIDATED CANCELLATION ACTION NUMBERS CA 00506579 AND CAOOO506559 IN THE NAME OF RAZVAN RADU

WITH RESPECT TO TRADE MARK REGISTRATION NUMBERS UK 905341301 AND WO 923726 IN THE NAME OF APPLE, INC

DECISION

Introduction

1. This is an appeal against a provisional decision by Al Skilton, acting on behalf of the Registrar, dated 15 August 2024 (O-0781-24) in which the cancellation actions brought by Razvan Radu ("***Mr Radu***") were struck out ("***the Decision***"); and the subsequent final decision on costs, dated 17 December 2024 (O-1192-24) in which Mr Radu was ordered to pay £19,389 to Apple Inc with respect to the costs of the proceedings ("***the Costs Decision***").

2. On 4 October 2023 Mr Radu made an application to invalidate Trade Mark Registration Number WO 923726 for the mark iPhone in the name of Apple, Inc ("***Apple***"). The application was made on the basis of sections 3(1)(b) and 3(1)(c) of the Trade Marks Act 1994 ("***the 1994 Act***").

3. On 5 October 2023 Mr Radu made an application to invalidate UK Trade Mark Registration Number 905341301 for the mark iPhone in the name of Apple. This cancellation application was put forward under section 3(1)(b) and 3(1)(c) on the same basis as the application made the previous day. Together "***the cancellation applications***". The two trade mark registrations are referred to collectively as "***the contested registrations***".

4. Counterstatements in identical terms were filed in each of the cancellation applications by Apple. Such counterstatements included pleas that (1) the contested marks were inherently distinctive; or (2) had acquired distinctive character as a result of the extensive use made in relation to all of the goods within the specifications.

5. Subsequently, by letter dated 30 January 2024 directions were given for the cancellation applications to be consolidated pursuant to Rule 62(1)(g) of the Trade Marks Rules 2008; and for the filing of evidence by the parties.

6. Pursuant to that direction Mr Radu filed evidence dated 30 March 2024. The witness statement was from Mr Radu and consisted of 4 paragraphs on a single page together with 5 exhibits.

7. On 29 May 2024 Apple made an application to strike out the cancellation applications on the basis that they constituted an abuse of process ("***the strike out application***").

8. The strike out application was supported by evidence in the form of a witness statement from Mr Thomas La Perle dated 23 May 2024; and a witness statement of Mr Ben Hitchens dated 29 May 2024. In the event that the application to strike out was unsuccessful Apple indicated that it would seek certain other consequential directions.

9. By letter dated 6 June 2024 it was indicated on behalf of the Registrar that the preliminary view was that the application to strike out would be refused. Certain other directions were given in the same letter. It was also stated in accordance with the usual practice that (emphasis in the original):

> **Strike out request**
>
> I refer to your email dated 29 May 2024, requesting the cancellation actions are struck out in their entirety. The cancellations have been reviewed and they are considered valid invalidity proceedings and a substantive decision will be determined by a hearing officer.
>
> . . .
>
> If either party disagrees with the above preliminary views they should request a hearing withing 14 days from the date of this letter, that is on or before **20 June 2024**.

10. By letter dated 19 June 2024 Apple wrote to the UKIPO and requested a hearing including *inter alia* with respect to the preliminary decision to refuse the strike out application. By letter dated 11 July sent on behalf of the Registrar the Hearing Officer made a direction pursuit to Rule 62(4) of the Trade Mark Rules 2008 that a Case Management Conference be appointed. The matters to be discussed were identified as the '*Refusal of strike our request*' and '*Any consequential matters*'.

11. At the hearing of the case management conference Apple was represented by Alaina Newnes instructed by CMS Cameron McKenna Nabarro Olswang LLP. Mr Radu filed a skeleton of argument but did not attend the hearing relying on the papers that had previously been filed.

12. On 15 August 2024 the Hearing Officer issued the Decision; and on 17 December the Costs Decision.

The Hearing Officer's Decisions

13. The Decision was concerned with the substantive issues on the application to strike out the cancellation applications. The Hearing Officer first identified the grounds relied upon by Apple in support of its claim that the cancellation applications were *'an abuse of process and should be struck out for collateral an improper purpose or in accordance with the Jameel principle*' (see Decision at paragraph [9]).

14. The Hearing Officer identified the three claims made under the heading collateral and improper purpose in paragraph [10] of the Decision as:

    (1) That Mr Radu was trying to extract revenue from Apple;

    (2) That Mr Radu was seeking to '*vex Apple and put Apple to considerable expense*' and that the cancellation applications are bound to fail;

    (3) That Mr Radu intended to improperly acquire Apple's trade marks for his own use and financial benefit.

15. At paragraphs [13] to [14] of the Decision the Hearing Officer considered the question of whether the Registrar had the power in principle to strike out the cancellation applications and concluded that such a power existed. There does not appear to be any appeal against that determination.

16. The Hearing Officer then went on to consider the propositions put forward by Apple in support of its application.

17. With respect to the claim that Mr Radu was trying to extract revenue from Apple the Hearing Officer found that the evidence was '*far too scant to justify a finding that the cancellation applications were filed in order to extract revenue from Apple*' (paragraph [15] of the Decision). There is no challenge to this finding, and I therefore say no more about it.

18. With regard to the averment that Mr Radu was seeking to '*vex Apple and put Apple to considerable expense*' and that the cancellation applications were bound to fail the Hearing Officer set out the reasoning and conclusions in paragraphs [16] to [27] of the Decision.

19. Of particular relevance for present purposes are the findings set out below (footnotes omitted):

> 19. Several cases before the UK and EU make it clear that the iPhone marks are prima facie descriptive for internet phones. Mr Radu bases his cancellations on this point with no further submissions relating to acquired distinctiveness through the use made of the marks, beyond his reliance on the EUIPO's decision of 08/12/2020 (in respect of IR 923726).

20. That decision of the EUIPO concerned a provisional refusal to the registration by Apple of 'iPhone' in relation to goods in classes 9 and 28 pursuant to Article 7(1)(b) and (c) and 7(2) of the EU Trade Mark Rules. The EUIPO maintained its objection and found that the sign, iPhone, described the kind, quality and intended purpose of the goods and was also devoid of distinctive character.

21. In respect of that case Apple submits:

> "29. This case is of no application to the Cancellation Actions. It concerned a refusal to register an application whereas Apple's registrations in contention in the Cancellation Applications have already been registered for a number of years. Moreover, the primary reason for the Office's decision was because it required particular evidence such as surveys in order to demonstrate acquired distinctiveness. In the decision, the Office made a distinction between 'direct proof' such as surveys and 'secondary evidence' such as sales volumes, advertising material and duration of use; and the Office highlighted the absence of opinion polls or survey evidence in Apple's evidence (see, in particular, page 19). At the time, Apple had made a commercial decision not to incur the significant time and cost of adducing survey evidence for multiple EU member countries, the necessity of which is denied. Had the surveys been conducted, Apple is confident they would have supported Apple's position. Even aside from survey evidence Apple has significant evidence of enhanced distinctiveness that it can file in these proceedings, as mentioned in Mr Le Perle's statement."

22. The EU and UK offices differ in practice concerning the merits of survey evidence and, as Apple rightly submits, the marks for which Mr Radu seeks cancellation are already registered marks in the UK. I agree with the hearing officer in iFoneYou11 that "The fame and recognition attached to Apple's iPhone, as a mobile telephone, is enormous…"

23. Whilst being cautious before pre-judging a core issue between the parties without letting these cases run their course, I find the fact to be so clear and well known that there is no room for argument or requirement for evidence, on this specific point. As Mr Radu brings these cases under sections 3(1)(b) and 3(1)(c) it follows that my conclusion would be that whilst the iPhone marks may be prima facie descriptive/non distinctive for internet phones or smart phones, they easily clear the hurdle of acquired distinctiveness for those goods and other

closely related goods, such as phone chargers. For goods that are clearly further away, such as exercise apparatus and toy musical instruments, in class 28, the iPhone marks are prima facie distinctive.

24. In the absence of any explanation from Mr Radu as to why he does not accept that iPhone is factually distinctive for phones and related goods, it follows that I agree with Apple that Mr Radu's cancellation cases have no prospect of success.

25. I bear in mind that there is a public interest in not allowing invalid marks to sit on the register, but as Mr Mitcheson held in *SOCIAL WORK NEWS*, the case being brought must be at least arguable and in this case it is not.

26. The tribunal has an inherent duty to manage its procedures efficiently and in accordance with the overriding objective to deal with cases justly and at proportionate cost. In that context, the cancellation actions filed by Mr Radu against the iPhone trade marks have no prospect of success and to allow them to continue would be a considerable waste of time and resources.

27. For the reasons provided above and relying on the powers of the Registrar to manage proceedings before him, the cancellation applications will be struck out.

20. The Hearing Officer then considered the issue of whether Mr Radu intended to improperly acquire Apple's trade marks for his own use and financial benefit. The Hearing Officer dealt with the issue at paragraphs [29] to [37] of the Decision as follows.

29. Mr Radu's sent the following email to Apple's representatives on 13 September 2023:

> "*It's to inform you of my intention to seek invalidation of the registration of the following trade marks in UK based on EUIPO's decision of 08/12/2020: UK00002460723 UK00810975076 UK00905341301 UK00906530406 WO0000000923726 Your client has the possibility to surrender these trade marks which is a more discreet solution for him. I sent the same message last week to eutrademark@lockelord.com but I saw that your client has changed his representative meanwhile. Hoping you're the last one because I don't plan on sending it again.*"

30. Having received no reply to his email, Mr Radu filed the cancellations subject to this strike out request and filed his own three applications which include 'iPhone', 'iPad' and 'iWatch', in addition to 'orange WAVE'. Mr Radu's applications were

opposed by Apple, following which Mr Radu wrote to Apple in the following terms (redacted to remove a reference to a third party):

> "*I contact you about your Notice of threatened opposition against my UK trademarks 'orange WAVE iPhone', 'orange WAVE iPad', 'orange WAVE iWatch' and I assume also against my EU trademarks. It's for asking what's the point of an opposition. We both know that your client will never be able to stop me using this generic terms because they are descriptive for my goods, which means that they are weak or equal to zero when determining the dominant element of my trademarks. Therefore, your client must accept the fact that these generic terms are no more his property. By the way, iWatch never was his property, see EUIPO's decision of 31/05/2018.* [redacted]
>
> *How more your client attacks my trademarks, how faster his current competitors will hear about it and how faster they will copy me and register these generic terms too. If for example Samsung registers the trademark 'Samsung iPhone' for goods in class 9 like smartphones, what can your client do to stop it? He will say that 'iPhone' is the dominant element of Samsung's trademark? Let's be serious.*"

31. In his skeleton argument filed in advance of this CMC, Mr Radu submitted:

> "*13…Once my trade marks are successfully registered in the UK and EU, I will contact Mr Jeff Bezos to propose him a partnership. Since the failure of the Fire Phone in 2014, Mr Bezos is still looking for an innovative idea for trying to enter again on the smartphone market. I will not only offer him innovative ideas to enter on even more markets but I will also offer him one of the most beautiful and eye-catching logo ever made in the consumer electronics industry: Orange WAVE. And if for any reason Mr Bezos is not interested, the lists of billionaires and business investors that could be interested in Orange WAVE are very long. Therefore, Apple should stop with its negativisms about the future of Orange WAVE.*"

32. Whilst Mr Radu refers to his three applications as 'Orange WAVE', it should be noted that each of the marks also includes iPhone, iPad or iWatch in addition to the words Orange and WAVE. Mr Radu says:

> *2. The dominant element of my trade mark applications is the word WAVE. The little descriptive elements like "iPhone" or "iWatch" don't change anything about the dominant element…*
>
> *3…And because the generic term "iPhone" is descriptive for my goods, it doesn't change anything for me if Apple's "iPhone" marks are cancelled or not.*

33. Mr Radu has sought to force Apple to surrender its trade marks in what he calls, 'a discreet solution' in order to avoid his cancellation applications. Having received no response, he then filed the cancellation cases against the iPhone trade marks and applications for his own marks incorporating iPhone, iPad and iWatch. In his skeleton argument, Mr Radu has submitted that he intends to go into partnership with a billionaire to use his marks, which incorporate the Apple trade marks, 'on the smartphone market'.

34. Overall, the nature of Mr Radu's pattern of filings, correspondence with Apple and submissions before this tribunal points to an attempt to coerce Apple into surrendering its iPhone marks to clear the way for his own trade mark registrations, which include within them, at least, the iPhone trade mark.

35. Does this mean that the applications for cancellation are an abuse of process? I remind myself the test is whether it has been shown:

> "*…that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all.*"

36. I find that the cancellation applications were brought for an ulterior purpose without which these proceedings would not have been commenced. Further, the ulterior purpose is an improper purpose, at least in the sense that it is improper purpose for these proceedings, in other words, they are an abuse of process.

37. The cancellation applications will be struck out.

21. Finally turning to the application to strike out on the Jameel principle the Hearing Officer declined to decide the point on the basis that it was unnecessary (paragraph [39] of the Decision). That decision is not the subject of any challenge and therefore I say no more about it.

22. As Mr Radu did not attend the hearing the question of costs were not dealt with in the Decision instead directions were given for submission on the question of costs. Subsequently the Costs Decision was issued in which Mr Radu was ordered to pay Apple £19,389 in respect of their costs.

The Appeal

23. By a TM55P dated 13 January 2025 Mr Radu appealed the Decision. The Statement of Grounds is unconventionally drafted over 11 pages. In essence what Mr Radu sets out in his Grounds of Appeal:

    (1) That the mark iPhone is '*indisputably descriptive*' (paragraph 1).

    (2) That Apple cannot claim acquired distinctiveness for two reasons (a) because the term iPhone has '*always been used in a descriptive context together with descriptive indications, not as a badge of origin'* and (b) has '*always been used together with trade marks that by contrast, do have distinctive character like "Apple" and/or a fruit logo*' (paragraph 2, emphasis omitted).

    (3) That the letter of 6 June 2024 from the UKIPO informed Mr Radu that the strike out application was going to be refused and had he not be informed of that he '*would have introduced evidence in my skeleton of argument of 24/07/24 that the descriptive terms "iPhone" is used in a descriptive context together with descriptive indications and not as a badge of origin*' (paragraph 3). Similar points also being made in paragraph 4 of the Statement of Grounds.

    (4) That the applications for invalidity were based on the EUIPO's decision of 8 December 2020 in case W10923726 (iPhone) and therefore could not be regarded as an abuse of the process (paragraph 5).

    (5) That Apple '*owns 23 trade marks consisting of the single verbal element "iPhone" in the UK and 12 at the EUIPO. Therefore, filing cancellations against 23 "iPhone" marks doesn't affect [Apple's] capability to defend his trade mark "iPhone . . . "*' (paragraph 6). In addition, Mr Radu (a) made allegations with regards to the filing activities of Apple with respect to "iPhone" filings (paragraph 6); and (b) suggested that the Hearing Officer was not impartial on the basis that there was a reference (it would seem in paragraph 6c) of the Costs Decision) that the activities of Mr Radu 'remain' unclear

    (6) That the Hearing Officer had received '*false*' information with respect to whether the invalidity proceedings in the EUIPO with respect to EUTM 005341301 iPhone had been suspended (paragraph 7).

(7) That the case iFoneYou and other cases referred to by the Hearing Officer were '*obsolete*' in light of the judgment in Case T-520/16 Gifflar (paragraph 8).

(8) Paragraphs 9 to 13 of the Statement of Grounds refer to opposition proceedings relating to filings of trade marks made by Mr Radu and opposed by Apple.

(9) Paragraph 14 refers to the Hearing Officer's '*accusation of coercion*' being '*unacceptable*' on the basis that '*the descriptive term "iPhone" has already been used in a descriptive context together with descriptive indications, not as a badge of origin*'.

(10) That the Hearing Officer's '*statement that [Apple's] iPhone marks are famous and distinctive is not supported by any evidence given the evidence submitted by [Apple] shows that [its] iPhone mark has always been used together with trade marks that, by contrast, do have distinctive character like "Apple" and/or a fruit logo*' (paragraph 15).

24. Subsequently Apple filed a Respondent's Notice in which it sought to uphold the Hearing Officer's Decision upon additional grounds:

(1) That the finding of the Hearing Officer that Mr Radu knew his cancellation applications were without merit at paragraphs [18] to [27] of the Decision could in addition have:

(a) Relied upon the evidence of Mr Hitchens demonstrating the enhanced distinctive character of Apple's 'iPhone' registrations; and

(b) Expressed in terms that the Hearing Officer was taking judicial notice of the facts set out in paragraph [23] of the Decision.

(2) That the finding in paragraph [36] of the Decision that the cancellation applications were an abuse of the process because they were brought for an ulterior or improper purpose was also supported by one or more of the following:

(a) The Hearing Officer's findings in paragraph [18] of the Decision. In fact, the Hearing Officer made no findings in paragraph [18] of the Decision which simply set out Apple's position and I therefore say no more about this point.

(b) The evidence of Mr Perle as to the significant costs to Apple of defending the cancellation applications and/or the finding at paragraph [26] of the Decision that such costs were '*considerable*'. With respect to the finding said to be contained in paragraph [26] of the Decision no

such finding was made and therefore I say no more about this part of the point being made.

(c) Mr Radu's position recorded in paragraph [32] of the Decision that the outcome of the cancellation applications did not serve any purpose for Mr Radu.

25. Mr Radu elected not to appear at the hearing. However, prior to the hearing Mr Radu filed a 28-page document headed 'Skeleton Argument of Razvan Radu' which was accompanied by 19 exhibits. I shall return to these documents further below.

26. At the hearing of the appeal Mr Christopher Hall instructed by CMS Cameron McKenna Nabarro Olswang LLP appeared on behalf of Apple. Prior to the hearing Mr Hall filed a skeleton of argument.

The Standard on Appeal

27. The Supreme Court most recently restated the approach to appeals of this kind in its judgment in Iconix Luxembourg Holdings SARL v. Dream Paris Europe Inc [2025] UKSC 25 at [94] to [95]

> 94. It is perhaps obvious, and certainly an inevitable conclusion drawn from experience, that reasonable minds, and in particular reasonable judicially trained minds, each faithfully applying the relevant law and principles, will come to different conclusions about the answer to these multifactorial questions. While of course the decision of an appellate court trumps that of the court below, the law has imposed structured constraints designed to prevent a free for all in a higher court whenever a party (with the necessary resources) wishes to challenge the first instance decision of the trial judge. The reasons for these constraints are set out in a string of well-known authorities including, in the intellectual property context, *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, per Lewison LJ at para 114. The reasons there set out relevantly include the following:
>
> > (i) The trial is not a dress rehearsal. It is the first and last night of the show.
> >
> > (ii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court.
> >
> > (iii) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

> 95. In *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8; [2024] Bus LR 532 this court reviewed those constraints in a trade mark context. After citing from the *Fage* case this court in a joint judgment said, at paras 49-50:
>
> > "49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in *In re Sprintroom Ltd* [2019] 2 BCLC 617, paras 72–76. There, in a judgment to which all members of the court (McCombe, Leggatt and Rose LJJ) contributed, the court concluded, at para 76, in terms with which we agree, that on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.
> >
> > 50. On the other hand, it is equally clear that, for the decision to be 'wrong' under CPR r 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation."

28. To adopt the summary from the decision of Thomas Mitcheson KC, sitting as the Appointed Person in SOCIAL WORK NEWS (o-0050-24) at [13]:

> To paraphrase, an appeal should only be allowed where the decision of the lower court was “wrong”. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge’s conclusion was “outside the bounds within which reasonable disagreement is possible”. In the case of a multifactorial assessment and in the absence of a distinct error of principle, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere.

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

The Decision

30. The starting point when considering an appeal is the Grounds of Appeal. It is well established that when compiling Grounds of Appeal, it is important for appellants to have in mind that they should identify errors of principle which would provide a proper foundation for the Appointed Person to overturn the decision the subject of appeal.

31. Restatements of the case put before the Hearing Officer on a particular point together with assertions that the Hearing Officer came to the wrong decision is not sufficient. Nor are issues that are immaterial to the decision. See the decision of Iain Purvis KC sitting as the Appointed Person in GREYBOX Trade Mark (O-106-20) at paragraphs [9] and [10]. See further the decision of Iain Purvis KC sitting at the Appointed Person in LACD Trade Marks (O-0725-25) at [33].

32. In the present case as noted above the Grounds of Appeal were not put forward in conventional form. It was not straightforward to identify from that document what may be regarded as the errors of principle relied upon by Mr Radu. The Skeleton of Argument put forward by Mr Radu also did not provide much if anything by way of assistance in this regard and together with the exhibits seemed to include some evidential material that was not before the Hearing Officer. As noted above Mr Radu elected not to attend the hearing.

33. Much of the content of the Grounds of Appeal and the Skeleton of Argument largely reargued the case that had been decided by the Hearing Officer. However, it seems to me that the points relied upon in support of the appeal by Mr Radu can be broadly summarised as follows:

(1) That the Hearing Officer erred in convening the hearing of a Case Management Conference ("***CMC***") having previously decided that the invalidity proceedings were considered valid and that a substantive decision would be determined by a hearing officer.

(2) That the Hearing Officer was not impartial.

(3) That the Hearing Officer relied upon false information.

(4) That the mark iPhone is indisputably descriptive and that the Hearing Officer's conclusion the marks the subject of the contested registrations had acquired distinctiveness or were '*famous and distinctive*' was not supported by the evidence.

(5) That the '*accusation of coercion*' is '*unacceptable*' such that the finding that the cancellation applications were brought for an ulterior purpose without which the applications would not have been commenced was wrong.

(6) There were also some allegations which could be said to be directed to an allegation of '*bad faith*' on the part of Apple however the grounds of invalidity relied upon by Mr Radu were limited to section 3(1)(b) and section 3(1)(c) of the 1994 Act. Any allegation of 'bad faith' therefore has no relevance to the present appeal, and I therefore say no more about such allegations.

34. In addition, there is the issue of the new evidential material that Mr Radu sought to introduce on appeal by way of inclusion in either his Skeleton of Argument and/or the 19 exhibits to that document. To the extent that such evidential material had not been before the Hearing Officer it is not material that I can take into account unless and until it has been admitted into the appeal proceedings. These materials were not the subject of any application by Mr Radu for permission to rely on it on appeal.

35. Mr Hall on behalf of Apple quite rightly submitted that absent any successful application for admission of such materials they could not be taken into account by me for the purposes of determining the appeal. However, he also went on to submit that whether or not such material was admitted into the appeal proceedings it could make no difference to the outcome of the appeal. Having carefully reviewed the material that was put forward by Mr Radu on this appeal it seems to me that Mr Hall is correct with respect to both these points.

36. In my view:

(1) There is no application by Mr Radu to admit further evidence on appeal;

(2) In any event there is nothing in the submissions or exhibits submitted by Mr Radu that provides a proper basis for me to exercise my discretion to admit any new evidential material on an appeal from the Registrar in accordance with the guidance provided by Henry Carr J in Trump International Ltd v. DTTM Operations LLC [2019] EWHC 769 (Ch); [2019] Bus LR 2048 at paragraphs [65] to [67]; and/or

(3) Even were I minded to exercise my discretion and admit such additional evidence into the appeal it would not make any material difference to the outcome of the appeal.

37. For the avoidance of any doubt I should however at this point make clear that the reference to further authorities on the appeal before me form not part of the above ruling which only relates to evidence of fact.

38. Further to the extent that the Grounds of Appeal or the Skeleton of Argument raised or referred to matters that are not relevant to the issues raised by the cancellation applications the subject of the present appeal (in particular other proceedings as between the parties) I have not referred to them in my decision.

39. Before turning to the errors as set out above there does not seem in the Grounds of Appeal or the Skeleton of Argument that the Hearing Officer erred in their approach to the legal question that had to be determined on an application to strike out.

40. It was submitted on the appeal that in so far as it was necessary for the Hearing Officer to consider the merits of the cancellation proceedings for the purposes of that assessment the correct approach was whether the applications had a real, as opposed to a fanciful prospect of success (see for example the judgment of Zacaroli J in Alcatel Lucent SAS v. Amazon Digital UK Limited [2024] EWHC 1921 (Pat) at [34]). As Mr Hall correctly pointed out at the hearing before me, although the Hearing Officer did not set out the principles to be applied, it is clear that the correct test was applied from paragraph [24] of the Decision where the Hearing Officer found '*Mr Radu's cancellation cases have no prospect of success*'.

41. Against this background I have proceeded on the basis that the scope of this appeal is directed to the application of the applicable principles to the facts in the cancellation applications and not to any error of law.

42. Of the five errors identified above which need to be considered the first three can be dealt with relatively shortly. The fourth error seems to be the gravamen of Mr Radu's appeal. The fifth error can also be dealt with more shortly. I shall deal with each error in turn.

43. The first error relied upon is that the Hearing Officer erred in convening the CMC having previously stated that the cancellation applications would proceed and a substantive decision determined by a hearing officer. This was not an error. As was made clear in the letter of 6 June 2024 the indication in that letter was a ***preliminary view***. The parties were provided with 14 days to request a hearing if they disagreed with that view.

44. Apple subsequently requested such a hearing by letter dated 19 June 2024. By letter dated 11 July 2024 the parties were informed that a CMC to consider *inter alia* the '*Refusal to strike out request'* had been scheduled for 25 July 2025.

45. Apple filed written submissions and attended the hearing of the CMC. Mr Radu made written submissions for the purpose of that hearing dated 24 July 2024 but did not attend the hearing. Those written submissions contained a section headed '*Strike out request*'. It therefore seems clear that Mr Radu was well aware that no final decision on the strike out request had been made.

46. Further in this connection the written submissions filed by Mr Radu referred to the evidence that he had filed in support of the cancellation applications; and also referred to a '*second witness statement*' which he said would be '*about the fact that this generic term [iPhone] has never been used as a badge of origin based on a General Court decision and evidence. There will also be evidence that consumers have been*

exposed to widespread use of and have become accustomed to trade marks that include the "i-prefix"" but no such witness statement has at any stage been filed by Mr Radu. In this context it is to be noted that (1) Mr Radu had filed his evidence in support of the cancellation applications prior to the strike out application and in the full knowledge of the case that Apple had put forward in answer; and (2) did not file any evidence in answer to the evidence filed by Apple in support of its application to strike out (or any of its other applications).

47. For completeness I should also refer to the fact that in the covering email filing the Skeleton of Argument Mr Radu stated that '*I am glad that I received the possibility to submit a new skeleton argument and to present all my arguments this time*'. Mr Hall sought to rely on this as suggesting the Mr Radu was no longer maintaining this ground of appeal however to my mind this is not entirely clear not least because of the test that is applicable on appeal. More importantly Mr Radu maintains in the body of his Skeleton of Argument that *'if UK IPO (sic) had not informed me that [Apple's] request was going to be refused I would have introduced evidence in my skeleton argument of 24/7/24 that the descriptive term "iPhone" is used in a descriptive context together with descriptive indications and not as a badge of origin'* and that he '*didn't receive the possibility to submit my second witness statement in response to the Proprietor's submissions with evidence that the descriptive term "iPhone" is used in a descriptive context together with descriptive indications and not as a badge of origin'*.

48. I therefore reject the submission that Mr Radu is not pursuing this ground of appeal. However, for reasons set out above I do not accept that the submission that Mr Radu was not aware that no final decision had been made on the application to strike out. There was no procedural irregularity on the part of the UKIPO.

49. Moreover, despite what Mr Radu now maintains he could have filed evidence in answer to that filed on behalf of Apple in support of the strike out application but did not do so. That is to say the evidence filed on behalf of Apple was unchallenged.

50. The second error is the suggestion that the Hearing Officer was not impartial. This appears to arise in the context of the Costs Decision. However, the reliance on the reference to the activities of Mr Radu '*remain[ing] unclear*' as suggesting that the Hearing Officer was not impartial is misplaced. Firstly, the reference in paragraph 6c) of the Costs Decision is a quotation from Apple's costs submissions as is made clear from footnote 4 to the Costs Decision. Secondly, the Hearing Officer expressly found that the points raised in paragraph 6 c) added nothing to Apple's other submissions at paragraph [11] of the Costs Decision. No other reference is put forward by Mr Radu to suggest that the Hearing Officer was not impartial and having reviewed the Decision and the Costs Decision I can see no basis for making any such suggestion. I therefore reject this ground of appeal.

51. The third error is an alleged error of fact made by the Hearing Officer. This error concerns a request made by Apple to suspend proceedings in the context of EUIPO

proceedings between the parties as set out in the ninth and final bullet point under paragraph [16] of the Decision. In that paragraph the Hearing Officer recited the evidence of Mr Hitchens filed in support of Apple's strike out application. At the time that evidence was filed on 19 June 2024 the evidence correctly reflected the position that the EUIPO was considering the request.

52. However, it is correct, as Mr Radu says on this appeal, that by letter dated 10 July 2024 the EUIPO informed the parties that Apple's request for a suspension was refused. It is regrettable that ***neither*** side in the present proceedings informed the Hearing Officer of this. However, I cannot see, and Mr Radu has not explained, how this is a material error with regard to anything that was before the Hearing Officer to decide.

53. Turning to the fourth error. This is the Ground of Appeal in which Mr Radu maintains that the Hearing Officer erred in finding that '*Apples iPhone marks are famous and distinctive is not supported by any evidence given that all the evidence submitted by [Apple] shows that his iPhone mark has always been used together with trade marks that, by contrast, do have distinctive character like "Apple" and/or a fruit logo*' (as set out in paragraph 15 of Grounds of Appeal).

54. In this connection Mr Radu relies upon the EUIPO decision of 8 December 2020 in case W10923726 (iPhone); and the judgment of the General Court in T-520/12 Pågen Trademark AB v. OHIM (Gifflar) EU:T:2014:620 ("***Gifflar***").

55. It is to be noted that the Counterstatements filed by Apple put in issue *inter alia* that (1) the contested registrations could not '*acquire any distinctiveness*'; (2) the contested registrations had not acquired distinctive character through use; (3) the contested registrations were '*always preceded by the words "Apple" and followed by numbers or letters*'; and (4) where the contested registrations had been used with another mark, number or letters that such use must be disregarded in considering distinctiveness. In the context of the strike out application Apple filed evidence in support of its pleaded position.

56. Despite the pleaded case and the evidence filed in support of the strike out applications Mr Radu chose in the evidence filed in support of the cancellation applications and his submissions on the strike out application to focus his evidence and submissions almost exclusively on the case of *prima facie* distinctiveness.

57. It is further to be noted that the Hearing Officer found in the Decision that '*whilst the iPhone mark may be prima facie descriptive/non distinctive for internet phones or smart phones, they easily clear the hurdle of acquired distinctiveness for those goods and other closely related goods, such as phone chargers. .....*' (paragraph [23] of the Decision).

58. That is to say the Hearing Officer's Decision was predicated on the basis of the finding of acquired distinctive character. In this connection at the hearing before me

it was made clear on behalf of Apple that '*For the purposes of this appeal, [Apple does] not dispute the first finding of prima facie descriptiveness*' but focuses on the '*second finding in respect of acquired distinctive character*'. In this connection as was submitted to me on behalf of Apple the relevant date for assessing acquired distinctive character is the date of the cancellation applications namely 4 and 5 October 2023.

59. Turning first to the EUIPO decision of 8 December 2020 this was expressly addressed by the Hearing Officer at paragraphs [19] to [22] of the Decision. This was said by the Hearing Officer to be the basis of the only submission by Mr Radu with respect to acquired distinctiveness through the use of the contested registrations. The Hearing Officer declined to follow the decision of the EUIPO as they were entitled to do for the reasons given by the Hearing Officer.

60. Turning to the judgment in Gifflar this was not a judgment that Mr Radu had referred to in his written submissions to the Hearing Officer and therefore any criticism of the Hearing Officer for failing to refer to that judgment is misplaced.

61. On this appeal Mr Radu used the judgment in Gifflar to submit that the cases relied upon by the Hearing Officer in support of the finding that the contested registrations had acquired distinctive character '*were erroneous*' on the basis that '*the descriptive term "iPhone" is used in a descriptive context together with descriptive indications and not as a badge of origin'*.

62. The relevant part of the judgment in Gifflar are those which are concerned with the approach to the assessment of acquired distinctive character through use (see paragraphs [33] *et seq*).

63. The question whether or not a mark has acquired distinctive character is a matter of fact. It is a question of whether the relevant public as a result of such use comes to believe that the goods or services identified by the trade mark come from a particular company. The fact that a mark may have been used as part of or together with another trade mark does not prevent such a mark from acquiring distinctive character if perceived as such by the relevant public. See Gifflar at paragraph [42]. See also by way of example Case C-12/12 Colloseum Holding AG v. Levi Strauss at paragraph [27].

64. That requires an analysis of the particular position in any given case. That the mark applied for in Grifflar was found, on the basis of the evidence in that particular case, not to have met the requirements of acquired distinctive character is therefore not of assistance in the present invalidity applications. Nor does it render as a matter of principle the decisions relating to 'iPhone' '*obsolete*' or the reliance on such cases '*erroneous*' in the manner suggested by Mr Radu.

65. In this connection it was maintained by Mr Radu that Apple had not submitted any evidence that the mark 'iPhone' had been used as a badge of origin as there was no

evidence that the mark 'iPhone' had been used without the trade mark 'Apple' and/or the 'fruit logo'.

66. This is not correct.

67. Although not expressly referred to by the Hearing Officer it is implicit that the Hearing Officer was aware of the evidence not least because as part of the Decision the Hearing Officer gave permission to admit updated versions of Mr Hitchens' statement (see paragraphs [5] to [7] of the Decision).

68. In any event as identified in the Respondent's Notice and as further pointed out in the Mr Hall's skeleton of argument and submissions before me there was evidence that 'iPhone' had been used without the trade mark 'Apple' and/or the 'fruit logo' and indeed referred to alone as an indication of origin by both Apple and third parties (see the contents of Exhibit BH-8 to the first witness statement of Ben Hitchens).

69. In order to maintain the required distance between the role of the decision taker at first instance and the decision taker on appeal it is necessary for this Tribunal to proceed on the basis that the Decision below should stand unless the matters on which the opponent relies are by force of what they reveal sufficient to establish that the Decision is vitiated by error. See the Decision of Geoffrey Hobbs KC sitting as the Appointed Person at paragraph [19] of LADY LOUISA WATERFORD TM (O-0646-24).

70. I have reviewed the Hearing Officer's findings in the light of the criticisms made by Mr Radu. Having done so it seems to me that the conclusion that the Hearing Officer reached, having regard to all the material that had been filed, that the contested marks had acquired distinctive character through use such that the cancellation applications had no prospects of success was one that it was open to them to reach. I also consider that it was open to the Hearing Officer in such circumstances in the exercise of their case management powers to strike out the cancellation applications.

71. Finally turning to the fifth error. This related to the alternative finding that the bringing of the cancellation actions was an abuse of the process on the basis that the cancellation applications were brought for an ulterior purpose without which these proceedings would not have been commenced.

72. Having already found that it was open to the Hearing Officer to strike out the cancellation applications under their case management powers it is not strictly necessary for me to go on to consider the fifth error. However, for completeness I shall also briefly address this ground.

73. The gravamen of this ground of appeal is the Hearing Officer's finding in paragraph [34] that Mr Radu's activities points to an attempt to 'coerce' Apple into surrendering its iPhone marks. In this context in his Skeleton of Argument Mr Radu largely

repeats the points made with respect to the descriptiveness of the term "iPhone" which have already been addressed above.

74. Neither in his Grounds of Appeal nor his Skeleton of Argument does Mr Radu dispute any of the facts that the Hearing Officer set out in paragraphs [29] to [33] of the Decision upon which the conclusion in paragraph [34] are based. Mr Radu does correctly point out that form TM26(I) indicates that not providing a proprietor of a trade mark with a reasonable opportunity to surrender them can result (if the application is undefended) in a successful applicant in not being awarded costs. However, that makes no material difference to the assessment of the factors set out in paragraphs [29] to [33] of the Decision upon which the conclusion in paragraph [34] was based.

75. In line with the approach set out above on the basis of the decision in LADY LOUISA WATERFORD TM, I have reviewed the Hearing Officer's findings in the light of the criticisms made by Mr Radu. Having done so it seems to me that the conclusion that the Hearing Officer reached, having regard to all the material that had been filed, was one that it was open to the Hearing Officer to make.

76. I am confirmed in my view by the quotation from Mr Radu's skeleton of argument below quoted by the Hearing Officer at paragraph [34] of the Decision and relied upon by Apple it its Respondent's Notice that *'. . . it doesn't change anything for me if Apple's "iPhone" marks are cancelled or not*'. That view is further confirmed by (1) paragraph 6 of the Grounds of Appeal quoted at paragraph 23(5) above; and (2) reiterated in the statement in Mr Radu's Skeleton of Argument before me that ' . . . *filing cancellations against 2 of [Apple's] 23 "iPhone marks doesn't affect [Apple's] capability to defend his mark "iPhone" . . . '.*

77. In the circumstances I dismiss the appeal against the finding that the cancellation applications were an abuse of the process and should be struck out.

Conclusion

78. On the basis of my findings above it does not seem to me that Mr Radu has identified any error of principle or material error in the Hearing Officer's Decision. Moreover, it is not in my view appropriate to interfere with the evaluations that the Hearing Officer made in reaching the conclusion that they did. In the result the appeal fails and is dismissed.

79. In circumstances where there was no freestanding appeal, with respect to the costs (or the level of costs) awarded by the Hearing Officer below, the order made by the Hearing Officer stands. That is to say that the order that Razvan Radu pay to Apple Inc the sum of £19,389. However, I will not make an order for the payment of that sum by Mr Radu until I have determined the issue of the costs of the appeal.

80. This is my conclusion on the merits of the appeal and the costs of the proceedings before the Hearing Officer. There remains the issue of the costs of the appeal.

81. As Mr Radu did not attend the hearing I indicated at the hearing that the question of the costs of the appeal would be determined after I had issued my decision on the merits of the appeal. As the appeal has been dismissed Apple is entitled to a contribution towards the costs of the appeal.

82. Accordingly, I direct as follows:

(1) Apple has 14 days from the date of this Decision to file written submissions about the appropriate order for the costs of this appeal together with any accompanying evidence or materials upon which it seeks to rely in support of such an application.

(2) Mr Radu has 14 days from the date of receipt of Apple's submission to make written submissions in response.

(3) Apple has 14 days from the date of receipt of Mr Radu's submission to make written submissions, if any, strictly in reply.

83. Unless either party informs me that they wish to be heard within 7 days of the expiry of the time for Apple to file evidence in reply I shall proceed to make my decision on costs on the basis of the papers before me.

EMMA HIMSWORTH KC
APPPOINTED PERSON
26 August 2025