BL O/1140/25

THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NUMBER 3,859,511 IN THE NAME OF GALAXY MOBILITY INNOVATIONS TECHNOLOGY CO LTD

AND IN THE MATTER OF THE OPPOSITION UNDER NO 441,004 IN THE NAME OF WINORA-STAIGER GMBH

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF STEPHANIE WILSON (O/549/25) DATED 18 JUNE 2025

DECISION

Introduction

1. This is an appeal from the decision of Stephanie Wilson, for the Registrar, dated 18 June 2025 (O/549/25). Winora-Staiger Gmbh unsuccessfully opposed the trade mark application of Galaxy Mobility Innovations Technology Co Ltd (No 3,859,511) under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994.

2. On 15 December 2022, Galaxy Mobility applied to register the word mark heybike uk (No 3,859,511) in Class 12 for the following goods:

> Electric bicycles; Folding electric bicycles; Motorized bicycles; Electrically powered scooters; Mobility scooters; Self-balancing one-wheeled electric scooters; Self balancing unicycles.

3. The application was opposed by Winora-Staiger based on its earlier mark HAI BIKE (No 906,498,505) in Class 12 for "bicycles". This mark was more than 5 years old on the relevant date, but Galaxy Mobility did not require Winora-Staiger to prove use under section 6A of the Trade Marks Act 1994.

4. The Hearing Officer dismissed the opposition in its entirety and Winora-Staigher appeals. The appeal was determined based only on written submissions from the Appellant as the Respondent did not take part in the appeal.

Standard of appeal

5. The standard of appeal is by way of review. Neither surprise at a Hearing Officer's conclusion nor a belief that the Hearing Officer has reached the wrong decision will suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer's findings were rationally insupportable. The principles to be applied were summarised by Joanna Smith J in *Axogen Corporation v Aviv Scientific Ltd* [2022] EWHC 95 (Ch), [24] and further explained in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, [49] and

Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc [2025] UKSC 25, [93] and [94].

6. When considering this appeal, and applying these principles, it is important to remember the high bar set.

Grounds of appeal

7. The Appellant challenges the Hearing Officer's decision on three grounds. First, the Appellant argues that the Hearing Officer did not apply the correct test when determining whether there would be a likelihood of confusion between the two marks. In particular it is claimed the Hearing Officer gave too much weight to the visual differences between the marks. Secondly, it is submitted that the Hearing Officer erred in her assessment of whether there is a link between the two marks for the purposes of section 5(3) of the Trade Marks Act 1994. Finally, it is suggested that the Hearing Officer's reasoning in relation to the opposition under section 5(4)(a) of the Act was insufficient.

Ground 1: Too much weight to visual comparison

8. When considering the purchasing process, the Hearing Officer found that advice might be sought on the purchase of the goods and that there may be word-of-mouth recommendations and so, she said, the aural component of the mark may "play a part": [29]. She went on to find that the elements HAI and HEY are, at best, aurally similar to a medium degree: [36].

9. In her consideration of whether there would be a likelihood of confusion, she made it clear that she "did not discount an aural component": [51(c)]. She then went on to conclude that "there are sufficient differences between the marks both visually, aurally and conceptually to avoid one being mistaken for the other" (at [52]) before concluding, in relation to indirect confusion at [54] that:

> For the avoidance of doubt, even if I am wrong in my finding that the letters HAI in the opponent's mark will not be pronounced in the same way as the word HAY, that would not make any difference to my overall finding. This is because even if the aural similarity between the marks were higher, the visual differences would still avoid direct or indirect confusion occurring. Given that the purchasing process is predominantly visual, the average consumer would have sight of the marks at the point of purchase and would, therefore, be able to distinguish between them.

10. The Appellant's criticism of the Hearing Officer is that she erred by giving disproportionate weight to the visual differences between the marks when she was undertaking her global assessment. The Appellant goes on to say that where two marks are aurally similar above a medium degree and visually similar up to a medium degree, a finding that the marks are not sufficiently similar for there to be a likelihood of indirect confusion constitutes a gap in logic.

11. First, it should be noted that contrary to the Appellant's suggestion the Hearing Officer found the marks to aurally similar to at best a medium degree and not "above" a medium degree. I note, however, that in a related case HAI BIKE and HEY BIKE were found to be aurally similar at a medium to high degree: *Heybike* (O/953/25), [35]. It is not

clear if the Appellant is confusing the two cases, but in any event the finding of another Hearing Officer in a different case (albeit concerning comparable marks) is not material to this case.

12. Secondly, as Arnold LJ highlighted in *Tvis Ltd v Howserv Services Ltd* [2024] EWCA Civ 1103 at [35]:

> …while it is conventional for first instance tribunals in trade mark cases to articulate their assessment of the degree of visual and aural similarity between signs and trade marks using words such as "high", "medium" or "low", there is no legal requirement for tribunals to do so. All that is required is for the tribunal to assess the nature and extent of any similarities. This is because what matters is not the verbal label that is applied to the assessment, but whether the similarities in conjunction with the other factors which must be taken into account lead to a likelihood of confusion. It is possible for there to be no likelihood of confusion despite a relatively high degree of visual and aural similarity. Equally it is possible for there to be a likelihood of confusion despite a relatively low degree of visual and aural similarity. It depends on the other factors that are in play.

13. Accordingly, an appellant who suggests little more than that a particular label describing aural similarity plus another label describing visual similarity should have led to a finding by a Hearing Officer that there is likelihood of confusion, is unlikely to be successful. Indeed, submissions based around a Hearing Officer giving "disproportionate weight" to one factor over another are invariably an attempt to reopen a value judgment, or multifactorial assessment; where appellate tribunals need to be particularly cautious: see, for instance, *Okotoks Ld v Fine & Country Ltd* [2013] EWCA Civ 672, [2014] FSR 11, [50].

14. It appears to me, therefore, that the Appellant is really trying to have a rehearing (on paper) of the Hearing Officer's assessment of the likelihood of confusion. I see nothing in her reasoning to suggest that there is a fault of logic or flaw in her chain of reasoning. I therefore dismiss the first ground of appeal.

Ground 2: Failure to find a link

15. The Appellant's second ground of appeal is a challenge to the Hearing Officer' finding that one of the requirements of section 5(3) was not met, namely that there would be no link in the mind of the relevant public between the mark HAI BIKE and the mark heybike.

16. The Hearing Officer set out her findings in relation to each of the factors identified by the Court of Justice in C-257/07 *Intel v CPM United Kingdom* [2008] ECR I-8823, [42] for demonstrating whether a link between two marks is likely to exist in the mind of the relevant public, namely: (i) the degree of similarity between the conflicting marks; (ii) the nature of the goods or services for which the conflicting marks were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public; (iii) the strength of the earlier mark's reputation; (iv) the degree of the earlier mark's distinctive character, whether inherent or acquired through use; and (v) the existence of the likelihood of confusion on the part of the public.

17. She then set out her overall conclusion at [67]:

> I have found the purchasing process in this case to be predominantly visual. In light of that, it seems to me that upon encountering the marks (which I have found to be visually similar to only between a low and medium degree), the average consumer is unlikely to make a link between them, even when they are used on identical goods. If a link is made, it will be too fleeting for damage to occur.

18. The Appellant makes three criticisms of the Hearing Officer's approach and conclusions.

19. The first criticism is that she should have found the similarity between the marks is such that a link would be made by the relevant public based on factor (i) alone. This submission relies on a passage in the judgment of Lance Ashworth KC, sitting as a deputy High Court judge, in *easyGroup Ltd v Premier Inn Hotels Ltd* [2025] EWHC 2229 (Ch), [196]. I do not need to set out the passage as it is *not* relating to the assessment of whether there is a link but whether there is sufficient similarity between the marks to engage section 5(3) at all. His discussion of whether there was a link is at [198]-[214] and his findings relating to the various *Intel* factors are at [212]. Accordingly, the passage relied upon by the Appellant does not assist its case as it relates to a different matter. Indeed, I see nothing wrong with how the Hearing Officer dealt with the first *Intel* factor.

20. The second criticism by the Appellant relates to the fifth *Intel* factor. While the Appellant says, quite rightly, that an absence of a likelihood of confusion does not prevent the finding of a link for the purposes of section 5(3), this point does not assist its case greatly. This is because the absence of a likelihood of confusion does make the finding of a link *less likely*. Furthermore, the Hearing Officer is obliged by *Intel* to take into account whether there was a likelihood of confusion between the two marks when determining whether she thinks the relevant public would perceive a link between the two marks.

21. The final criticism of the Hearing Officer's decision in respect of this ground is that she erred by basing her decision upon the visual differences, which would be evident as part of a predominately visual purchasing process. The visual differences, and purchasing process, the Appellant submits, is not relevant to the second, third and fourth *Intel* factor. I also reject this criticism. The Hearing Officer was not, in my view, applying visual considerations to each of the *Intel* factors, rather after weighing all the factors (and, as with all multifactorial assessments, giving more weight to some factors than others) she found that the visual differences were so significant that there would be no link made between the marks in the mind of the relevant public.

22. I therefore dismiss the second ground of appeal.

Ground 3: Insufficient reasoning in relation to section 5(4)(a)

23. The Hearing Officer dealt with the opposition under section 5(4)(a) quite briefly at [71]:

> I can deal with this ground relatively swiftly. The sign relied upon is identical to the mark relied upon under section 5(2)(b), save for the conjoining of the letters/words. In my view, nothing turns on this, as explained above. I find that the opponent had a reasonably strong goodwill for electric mountain bikes at the relevant date in light of the evidence discussed above. The sign relied upon was distinctive of that goodwill. However, in my view, the distance between the

> parties' signs is sufficient to avoid misrepresentation or damage arising (for the same reasons given above), notwithstanding the strength of the opponent's reputation and the (at least in part) identical fields of activity.

24. The Appellant contends that this is inadequate reasoning and criticises the Hearing Officer for not setting out all the relevant law before reaching her conclusion. This, it is submitted, led her not to apply the "right test" for assessing whether there was misrepresentation.

25. The Appellant, indirectly, makes reference to what the Court of Appeal said about inadequate reasoning in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, [19]:

> the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.

26. What I take from *Emery* is that what is important is that Hearing Officers apply the law properly and their reasoning is such that the proper application of the law is evident. On the other hand, whether this has been done is not determined by whether the Hearing Officer has included some formulaic (template) text in their decision, setting out the elements of passing off. Mistakes may be more likely if decision makers do not remind themselves of the law in their written reasoning, but a failure to set out the relevant case or statutory law being applied in itself is not an error.

27. Furthermore, the Hearing Officer considered the three elements of passing off (goodwill, misrepresentation and damage) identified by the House of Lords in *Reckitt & Colman v Borden Inc* [1990] RPC 341 and gave a very clear indication of her reasoning as to why passing off would not be made out: she thought the signs were simply too different to give rise to a misrepresentation. This is a perfectly sensible conclusion which fits squarely with the law in the area.

28. I therefore dismiss this ground of appeal as well.

Conclusion

29. I have dismissed the appeal in its entirety. As the Respondents played no part in the appeal I make no order as to costs.

PHILLIP JOHNSON
THE APPOINTED PERSON
5 December 2025

Representation:

For the Appellant: Alex Sutclife (Reddie & Grose LLP) provided written submissions.

The Respondent did not take part in the appeal.