BL O/1141/25

THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION NUMBER 3,742,755 IN THE NAME OF ONYINYE UDOKPORO

AND IN THE MATTER OF AN APPLICATION FOR DECLARATION OF INVALIDITY UNDER NO 507,337 IN THE NAME OF ENRICH INTERNATIONAL LTD

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF KATHRYN SERRAVALLE (O/648/25) DATED 16 JULY 2025

DECISION

Introduction

1. This is an appeal from the decision of Kathryn Serravalle, for the Registrar, dated 16 July 2025 (O/648/25). Enrich International Ltd successfully opposed the trade mark application of Onyinye Udokporo (No 3,742,755) under section 5(2)(b) of the Trade Marks Act 1994.

2. On 13 January 2022, Ms Udokporo applied to register the following mark (No 3,742,755) in Classes 9, 16 and 41:

3. This mark was registered on 13 May 2022. On 13 May 2024, Enrich International Ltd applied to declare this mark invalid based on its earlier mark (No 3,480,751) in Class 41:

4. The application for invalidation was successful in respect of all goods and service save "Entertainment and sports" in Class 41, which remains on the register.

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's Grounds of Appeal include arguments and matters which are largely irrelevant, but I will nevertheless attempt to address each argument in turn. The first ground of appeal is that the Hearing Officer failed to take account of the Respondent's delay in making its application for a declaration of invalidity. The second ground of appeal is that the Hearing Officer made an error in the assessment of the aural similarity between the marks. The third ground was the Hearing Officer failed to properly consider evidence regarding the use of the marks in the "actual marketplace". The fourth ground of appeal was that the Respondent's delay in bringing its application for invalidation led to procedural unfairness.

Ground 1: Failure to take into account the Respondent's delay

8. The Appellant suggests that because the Respondent did not apply for invalidation until two years after the Appellant's mark was registered it should be barred from relief on the grounds of laches and equitable acquiescence. I will not address all the arguments in the Grounds of Appeal on this point because they are repetitive and largely irrelevant, but I will explain briefly why this ground of appeal is without merit.

9. First, there is a scheme under section 48 of the Trade Marks Act 1994 which precludes the owner of an earlier right from applying for a declaration of invalidation after five years acquiescence. The period of acquiescence runs from "once the proprietor of the earlier trade mark becomes aware of the use of the later trade mark, and the later trade mark is in fact registered, whether or not the proprietor of the earlier trade mark is aware of the registration of the later trade mark": *Industrial Cleaning Equipment (Southampton) Ltd v Intelligent Cleaning Equipment Holdings Co Ltd* [2023] EWCA Civ 1451, [79].

10. It would fundamentally undermine this scheme if a shorter period of acquiescence, such as two years, precluded a declaration of invalidity.

11. Secondly, a declaration of invalidity is not an equitable remedy but a legal right. Accordingly, equitable doctrines are not able to bar a person from applying for, and being granted, a declaration of invalidity. This is for the same reason a claim for copyright infringement was not barred after 38 years of inaction in *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764. As it was explained by Lord Neuberger at [7] and [8]:

> …there is a crucial difference in principle between the exercise of an undoubted right of property and resort for its protection to discretionary remedies. In so far as Mr Fisher may seek to restrain what the other joint owner may do in the exercise of its share of the copyright by means of injunctions, he will be subject to the court's discretion. Unconscionable delay may well have a part to play in the court's decision whether or not he is entitled to such a remedy. But it would be a very strong thing, in the absence of a proprietary estoppel, to deny him the opportunity of exercising his right of property in his own share of the copyright.
>
> The law of property is concerned with rights in things. The distinction which exists between the exercise of rights and the obtaining of discretionary remedies is of fundamental importance in any legal system. There is no concept in our law that is more absolute than a right of property. Where it exists, it is for the owner to exercise it as he pleases. He does not need the permission of the court, nor is it subject to the exercise of the court's discretion. The benefits that flow from intellectual property are the product of this concept…

12. I therefore reject this ground of appeal.

Ground 2: Material error in aural similarity assessment

13. The second ground of appeal was that, because the word "Learning" is not negligible, the Hearing Officer erred when she considered that the word "Learning" in the Appellant's mark would not be articulated when it was spoken. In reaching this conclusion, the Hearing Officer reminded herself what the Court of First Instance (now General Court) had said in T-183/02 *El Corte Inglés, SA* [2004] ECR II-965, [83].

> …it should again be emphasised that the attention of the consumer is usually directed to the beginning of the word. Those features make the sound very similar.

14. And then she referred herself to T-206/12 *GRE*, EU:T:2013:342, [44]. However, there is a better explanation of the principle from *GRE* in T-544/12 *Pensa Pharma v OHIM*, EU:T:2015:355, [107]:

> the relevant public generally pays greater attention to the beginning of a sign than to the end. In those circumstances, that public will focus its attention on the element 'pensa' in the contested mark and not on the element 'pharma' in that mark. It may be presumed that that public, which generally tends to contract long marks consisting of two words into a single word, will not pronounce the word 'pharma', inasmuch as that word is superfluous because of the nature of the goods and services covered by the contested mark, namely pharmaceutical goods and services

15. The General Court continues to take the view that secondary or descriptive elements of marks are not necessarily spoken: see T-68/2021 *Hauz 1929 v EUIPO*, EU:T:2021:127, [40]; T-560/20 *Yadex International v EUIPO*, EU:T:2021:714, [75]; T-357/21 *Jose Alfonso Arpon v EUIPO*, EU:T:2022:405, [52]; T-1144/23 *Enedo Oyj v EUIPO*, EU:T:2025:207, [88]. These cases follow the general pattern of the jurisprudence before the UK left the EU and so they remain strongly persuasive, and I therefore consider them as reflecting English law: see *Lipton v BA Cityflyer Ltd* [2024] UKSC 24, [158].

16. In my view, the principle that descriptive or secondary elements in a mark may not be pronounced when the mark is spoken is distinct from the rule that negligible elements of marks can be disregarded in the comparison of marks (see C-3/03/P *Matratzen Concord* [2004] ECR I-3657). The former is a reflection of the fact that in everyday life people often say things in a simplified or shortened form (even though they may be aware of the entire mark). The latter principle, on the other hand, reflects the fact that negligible or insignificant elements of the mark will be forgotten (or not memorised in the first place).

17. Accordingly, if Philip Harris, sitting as the Appointed Person, in *Purity Wellness Group v The Stockroom (Kent)* (O/115/22), [31]-[32] was suggesting (and I am not sure he was) that all descriptive elements of a mark must be considered as spoken in the aural comparison (unless those elements are negligible) I disagree with him; rather, I consider that I should follow the approach of the General Court outlined above.

18. Accordingly, it was open to the Hearing Officer to treat the word "LEARNING" as descriptive in relation to education-related services. And in light of this finding, it was likewise perfectly acceptable for the Hearing Officer to conclude that this element of the mark would not usually be verbalised. I therefore reject this ground of appeal.

Ground 3: Failure to consider actual market evidence

19. The Appellant submits that the Hearing Officer should have considered the real world evidence relating to the parties' concurrent use of the mark in the marketplace. This ground is flawed for various reasons, but the most fundamental issue is that there was *no* evidence filed by either party (see Decision, [7]; and factual statements in submissions are not admissible for this purpose). Accordingly, there was nothing for the Hearing Officer to consider regarding the coexistence of the marks. I therefore need not consider this ground further.

Ground 4: Procedural Unfairness and failure to oppose

20. The Appellant suggests that the Respondent failing to oppose the mark, but rather opting for invalidation after a silent interval, was procedurally unfair. And, the Appellant goes on to say, the Hearing Officer should have exercised her discretion not to allow the application. A related submission was made that inaction by the Respondent, after being notified of the potential conflict between the marks by the registrar (see Trade Marks Rules 2008, r 14), should be taken to be implied consent to the registration.

21. There is no legal basis for the submission that a failure to oppose an application (even where there is knowledge of its existence) precludes a declaration of invalidity. Further, a Hearing Officer has no discretion to refuse to grant such a declaration where the grounds are made out. Likewise, there is also no basis for suggesting that inaction in these circumstances should be treated as implied consent.

22. In short, there is nothing procedurally unfair about the Respondent exercising its statutory right to apply for a declaration of invalidity. The observations from *Fisher v*

Brooker set out above also fundamentally undermine this ground of appeal. Accordingly, it is also dismissed.

23. I therefore have dismissed all the Grounds of Appeal.

Fabricated references and quotes

24. The Grounds of Appeal in this case were another unfortunate example of a party putting forward fabricated references in their submissions. The Grounds included citations for numerous cases, including two cases that do not exist.

25. The first was *Combit Software GmBH v Commit Business Solutions* [2014] EWHC 3605 where it is claimed by the Appellant "the court acknowledged that even a minor consonant change can affect aural perception, and recognizes that even slight linguistic differences can be sufficient to prevent a likelihood of confusion, especially when they introduce a new conceptual meaning".

26. The second case cited was *Speciality European Pharma Ltd v Doncaster Pharmaceuticals Group Ltd* [2015] EWHC 2556, which was said to be about comparing the marks NOVA and SUPERNOVA.

27. There were also quotes from real cases where the quotation is not in the judgment in the form it is quoted.

28. Ms Udokporo filed her own Grounds of Appeal. She admitted that she had used artificial intelligence to write her submissions for an earlier part of the proceedings, but said she had received an (unnamed) lawyer's help in drafting the Grounds of Appeal. I asked her to provide copies of the two judgments and to indicate the source of the quotations. In relation to the fabricated references, she provided links to two similarly named cases.

29. The first case she provided was C-223/15/ *Combit Software GmBH v Commit Business Solutions Ltd*, EU:C:2016:719. This case is largely about whether injunctions can be limited to the parts of the EU where there is a likelihood of confusion between the marks (ie for linguistic reasons). The only discussion in the judgment relating to the comparison of the marks in issue is a summary of the referring court's findings at [19] and [20]:

> It takes the view, however, that there is no likelihood of confusion on the part of the average English-speaking consumer. In its view, the latter can readily understand the conceptual difference between, on the one hand, the English verb 'to commit' and, on the other, the word 'combit', as 'combit' is ma/de up of the letters 'com' for computer and 'bit' for 'binary digit'. It considers that the phonetic similarity between 'Commit' and 'combit' is, from the perspective of the aforementioned English-speaking consumer, cancelled out by that conceptual difference.
>
> The referring court concludes that there is a likelihood of confusion in the German-speaking Member States and that there is no such likelihood in the English-speaking Member States.

30. Even if this had been the finding of the Court, I do not think it has any real connection to the assertion from Ms Udokporo as to what a court with a different citation (albeit the same name) found. I therefore consider that this reference is fabricated.

31. The second case supplied by Ms Udokporo was *Speciality European Pharma Ltd v Doncaster Pharmaceuticals Group Ltd* [2013] EWHC 3624 (Ch). While this case has the same name as that mentioned in the Grounds, it has nothing to do with the trade marks NOVA or SUPERNOVA. In fact, it is a parallel trade case about pharmaceutical repackaging where the generic pharmaceutical company affixed the mark Regurin to the goods. I therefore also consider the original citation in the Grounds of Appeal as fabricated.

32. Ms Udokporo also directed me to where she said the quotations were in respect of two cases where I queried the quotations (*The European Limited v Economist Newspaper Ltd* [1998] FSR 283 and *Maier v Asos Plc* [2015] EWCA Civ 220). There were similarities between the words in the paragraphs she indicated and the words said to be quotations in the Grounds of Appeal, but the differences between the original and the Grounds of Appeal go beyond accidental transcription or typographical errors (and no such error was claimed in any event). This too is unacceptable.

33. Whether Ms Udokporo relied on a lawyer for guidance, used generative artificial intelligence, or wrote the grounds entirely herself, it is entirely improper for a party to provide fabricated sources or quotations to a court or tribunal.

34. It is to be expected that litigants-in-person may put forward arguments that are irrelevant to the issues to be decided or entirely without merit (as happened here). They are not experienced in the complexities of the law and cannot be expected to meet the higher standards that would be expected of professional representatives.

35. However, putting fabricated court references before a tribunal is a very serious matter and being inexperienced can never be a justification for doing it (and neither can blind trust in outputs from generative artificial intelligence). The Divisional Court made clear in *Ayinde, R (On the Application Of) v London Borough of Haringey* [2025] EWHC 1383 (Admin) how serious it is to put forward fabricated references whatever their source.

36. Litigants-in-person who put their name to a document before the registrar or the Appointed Person must be able to provide all the material cited by them and that material must relate to what they are saying, and likewise any quotation they rely upon must be accurate (albeit I accept that innocent transcription or typographical errors are not representative of improper conduct). If a party cannot provide the authorities they rely upon, their conduct is unreasonable within the meaning of Tribunal Practice Notice 1/2023 and "off-scale" costs are usually appropriate: see *Pro Health Solutions* (O/559/25), [23]-[24].

37. The Respondent was professionally represented and played only a limited role in the appeal. It filed what it called a Respondent's Notice, but was in fact a written response to the Grounds of Appeal. If the Respondent wants to apply for its full costs for writing this Notice and considering the Grounds of Appeal then it has until 4pm on 15 December 2025 to provide its Schedule of Costs. Both parties will then have until 4pm on 5 January 2025 to provide any written submissions on the costs order that I should make.

38. If no Schedule of Costs is provided by 15 December 2025, I will make an order that the Appellant do pay the Respondent £750 as a contribution to its costs (which will be in addition to the £820 ordered by the Hearing Officer).

PHILLIP JOHNSON
THE APPOINTED PERSON
5 December 2025

Representation:

The Appellant appeared in person.

The Respondent, Squire Patton Boggs (UK) LLP, filed written observations.