

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF INTERNATIONAL REGISTRATION NUMBER 1,354,634 AND
THE REQUEST BY MEZRIN LURII VALERIIOVYCH TO PROTECT THE MARK IN
THE UNITED KINGDOM

AND IN THE MATTER OF AN APPEAL FROM THE DECISIONS OF MARK BRYANT
DATED 22 JANUARY 2019 (O/44/19)

DECISION

Introduction

1. This is an appeal from the decision of Mr Mark Bryant, for the Registrar, dated 22 January 2019, in which he dismissed the opposition of O₂ Worldwide Limited to the request of Mezrin Lurii Valerilovych for an international trade mark to be protected in the United Kingdom. The opposition was based on ss 5(2)(b) and 5(3) of the Trade Marks Act 1994. O₂ appeals.
2. The international registration (No 1,354,634) is for the mark:

content guru

3. The application for protection is for services in classes 35, 41 and 42.
4. The opposition was based on six earlier marks; as two of the earlier marks were closer to the mark in suit only these were considered by the Hearing Officer. Accordingly, the only earlier marks relevant for the appeal are the word mark O2 GURU (EUTM 16,057,011) in Classes 9, 35, 36, 37, 38, 39, 41, 42, 43, 44 and 45. and the series mark GURU/Guru (UK 3,024,436) in Classes 35, 36, 37, 38, 41 and 42. It was accepted before me by Mr Stobbs that if the Appellant did not succeed on these word marks it could not succeed on the figurative marks and so I need not consider them further.

Standard and grounds of appeal

4. The standard of appeal is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision 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 was wrong. The relevant principles were set out by in *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17 by Daniel Alexander QC and more recently, but less fully, by the Supreme Court in *Actavis Group PTC EHF v ICOS Corporation* [2019] UKSC 15. I will apply these principles

5. The appeal is on the basis that the Hearing Officer's decision was wrong. The Appellant submitted that the comparison of the marks went wrong for a blunderbuss full of reasons most of which were little more than an attempt to reopen arguments which were lost before the Hearing Officer. Nevertheless, I will go through each in turn.

Ground 1: Similarity of services

6. The Hearing Officer found many of the services covered by CONTENT GURU to be identical to services to covered by the earlier marks. Save in one respect, the Appellant does not challenge these findings. However, the Appellant submits that the finding (Decision, paragraph 24) that there is no service identical to "club services [...education]" covered by the earlier GURU mark was incorrect as that mark's specification included "Education". I accept that "club services [education]" is identical to education services covered by the earlier mark GURU.
7. The Hearing Officer concluded there was no likelihood of confusion between the mark in suit and the earlier marks even when services were identical (Decision, paragraph 50). Accordingly, the Hearing Officer's error in this regard becomes material only if his decision is flawed in other respects.

Ground 2: Enhanced distinctiveness and reputation

8. The Appellant submitted that the Hearing Officer was wrong in his conclusions on GURU and O2 GURU. The relevant part of the Decision is at paragraphs 44 and 45:

44) Most of the evidence referred to above illustrates use of the mark "O2 GURU" either alone or as part of the cloud logo (as shown in the '887 mark). There are numerous references to "GURU" alone by Mr Holmes in his witness statement and in some of the non-customer facing exhibits such as *PowerPoint* presentations reporting the results of independent research, however, there is much less use of GURU alone in the customer-facing material. Where GURU alone is used, it is normally in the context of discussing the opponent's "O2 GURU" service. When taking this into account, together with the other evidence highlighted above, I conclude that the level of inherent distinctive character is not enhanced through such use.

45) The use shown in respect of the '887 mark ("O2Guru" and cloud device) is sufficient to illustrate that it does benefit from some enhanced distinctive character. However, because I would not characterise this enhancement as being such as to influence the outcome of my considerations. I find that, even with this enhancement, its level of distinctive character is average.

9. Mr Stobbs submitted that the Hearing Officer must have realised that O2 is the house mark and GURU is a successful sub-brand. Accordingly, he said, if the reputation was sufficient for O2 GURU then it must also have been sufficient for GURU. I reject this argument for two reasons.
10. First, the submission is little more than saying the conclusions the Hearing Officer drew from the evidence should have been different. It is a classic example of an appellant asking for different findings of fact simply because the conclusions drawn do not support its case. This is clearly not within the scope of a review.
11. Secondly, just because GURU *could* develop distinctiveness when it is used in conjunction with O2 in the mark O2 GURU (see C-353/03 *Nestlé v Mars* [2005] ECR

I-6135) it does not mean that it has done so. It requires evidence of some sort that the consumer sees GURU as a sub-brand of O2 when it is used alone. No such evidence existed in this case. Accordingly, I reject this ground of appeal.

Ground 3: Failure to consider multiple meanings of “guru”

12. Mr Stobbs then submitted that the Hearing Officer was wrong when he found GURU used alone is likely to mean spiritual leader, but when used in conjunction with another word it is more likely to mean “popular expert” (Decision, paragraph 49). The appellant says these findings were made without proper basis.
13. The simple fact is that if a Hearing Officer, as a fact finder, needs to determine how one or more words are interpreted in the absence of any evidence then it is going to be based on that fact finder’s own interpretation of the word or words. Just because a party puts forward two different meanings for a mark does not mean the Hearing Officer has to accept both or, indeed, either.
14. On appeal, a finding a party does not like cannot then be challenged as being made without “evidential basis”. In strict terms no evidence was relied upon by the Hearing Officer when he came to his conclusion, but that is the nature of proof by judicial notice. Providing the matter is something which can be proved by means of notice, and no relevant evidence was actually filed, such a finding cannot subsequently be criticised for lacking supporting evidence.
15. Similarly, where a finding of fact has been made by judicial notice, an appellant cannot submit that a finding is incorrect merely on the basis that it is “far more likely” consumers would view a mark differently. This would turn a review into a rehearing. What needs to be established is that the finding was manifestly wrong. Furthermore, when a Hearing Officer is reliant only on his or her own experience when attributing one accepted meaning of a word over another accepted meaning, it is difficult to see how this can be “wrong” and so subject to challenge on appeal.
16. I accept that words can mean different things to different people, but this does not mean that every potential meaning of a word has to be considered by a Hearing Officer at every stage of his or her decision; rather, the analysis should be confined to those meanings which she or he finds would be attributed to the mark by a significant proportion of the relevant public (see *Interflora Inc & Anor v Marks and Spencer Plc* [2014] EWCA Civ 1403, paragraph 129 per Kitchin LJ).
17. In this case, the Hearing Officer concluded how GURU would be interpreted by the average consumer. In light of *Interflora*, he could have concluded that the word GURU had one meaning for one significant proportion of consumers and another for another significant proportion. He did not do so and for the reasons outlined above it would be inappropriate for me to do so on appeal.

Ground 4: Failure to consider different meanings of “content”

18. In addition to the Hearing Officer finding the word GURU to have two meanings, the Appellant also suggested that CONTENT had two possible meanings. The first meaning, namely information on a website, was the only one used by the Hearing Officer. The second meaning, proposed by Mr Stobbs, was that “content” related to a person’s state of mind, such that the Guru was in a state of peaceful happiness or satisfaction. In simple terms, his submission was that CONTENT GURU would mean happy guru (grammatically, of course, it would be “contented guru” but trade mark do not always follow grammatical rules). This second meaning was not considered by the Hearing Officer, Mr Stobbs complained, and he argues that if it had been then the outcome of the case would have been different.
19. While it is true that “content” might be seen as referring to the state of mind of a guru for some services (for instance, mediation services or yoga for instance), there was no evidence before the Hearing Officer that this was how the mark might be seen by the average consumer for the services in issue. Nevertheless, I do accept that the different meaning of “content”, as it was put forward by Mr Stobbs during proceedings below, should have been addressed by the Hearing Officer.
20. In the absence of any other evidence, it is my view that in the context of the services seeking to be protected by the mark CONTENT GURU, the average consumer would consider the CONTENT element to refer to informational content and not to a state of mind. The use of the term “content” in connection with websites, computing and the internet is ubiquitous and so the average consumer would have to have a reason to disregard this meaning before going on to give it any other meaning. My findings are the same for other services which relate to generating words or audio-visual material, such as “writing of publicity texts”, “translation” or “videotaping”.
21. In relation to some services, such as “negotiation and conclusion of commercial transactions by third parties” the link to informational content is less apparent, but in relation to all services it is still more likely that the relevant consumer will see content to mean information rather than state of mind.
22. Accordingly, I do not consider that the Hearing Officer’s failure to set out any reasons rejecting the alternative meaning of “content” would be material to the conclusions he reached. I therefore reject this ground of appeal.

Ground 5: Improper assessment of distinctiveness

23. The next argument raised by the Appellant was that the Hearing Officer improperly concluded that consumers would not attribute any trade mark significance to GURU in CONTENT GURU. This argument fails for the same reason as the third ground. It is a factual finding and Mr Stobbs put forward no reason why it was not open to the Hearing Officer to reach his conclusion. Essentially, the argument put forward was that a different finding of fact might be reasonable, but even if this is right it does not mean that the Hearing Officer’s finding of fact is unreasonable and so wrong. I, accordingly, reject this ground of appeal as well.

Ground 6: Failure to consider multiple groups of consumers

24. The Appellant next submitted that the Hearing Officer failed to consider the possibility there might be groups of consumers other than those he had identified; in other words, those who say GURU as meaning spiritual teacher when used with CONTENT and those who see CONTENT as meaning happy or satisfied.
25. This reasons why this ground should be rejected are implicit in what I have already said. In short, the Hearing Officer could have found that one significant proportion of the population thought GURU in combination meant spiritual leader and another significant proportion thought it meant popular expert. He did not. He found only that the average consumer (that is a significant proportion of the relevant public) would consider GURU when used in combination as meaning popular expert. His finding implicitly rejects the existence of any other significant proportion of the relevant public seeing the word GURU in a different way. And as I have already indicated I do not believe that a significant proportion of the relevant public for any of the services would consider CONTENT to mean happy or satisfied.
26. A Hearing Officer is only obliged to consider interpretations of marks which she or he has concluded would be used by a significant proportion of the relevant public. There is no obligation to consider interpretations which might be given to a mark by a smaller part of the relevant public. Accordingly, there was no reason for him to consider any of the other interpretations of the words GURU or CONTENT. I therefore reject this ground of appeal.

Ground 7: Likelihood of confusion on conceptual similarity only

27. The Appellant submitted that there was an error of principle by reason of the Hearing Officer relying on conceptual dissimilarity alone to determine there was no likelihood of confusion. This submission is clearly wrong. The Court of Justice in *C-361/04 Claude Ruiz-Picasso v OHIM* [2006] ECR I-643, paragraph 20 held that sufficient conceptual difference can overcome visual and aural similarity. It was therefore open to the Hearing Officer to determine that the medium level of visual and aural similarity might not be enough to create a likelihood of confusion if there was low or no conceptual similarity. I therefore also dismiss this ground.

Ground 8: Section 5(3)

28. The Appellant submitted that its earlier right in the mark GURU had sufficient reputation to engage section 5(3). As I have upheld the Hearing Officer's finding that the mark GURU has no enhanced distinctiveness, it follows that it has insufficient reputation to engage section 5(3).
29. In addition, Mr Stobbs argued that the Hearing Officer did not properly consider the section 5(3) ground in relation to O2 GURU. In paragraph 60 of his Decision he held:
Taking all of the above into account, I accept that, as a result of the common occurrence of the word "Guru" in both marks, the holder's mark may bring the opponent's mark to mind in circumstances where the respective services are identical. However, whilst this is sufficient to establish the requisite link, I find that the link is likely to be so fleeting and weak that it is very unlikely that use of the holder's mark will result in any detriment or unfair advantage.

30. The Appellant's case was that after finding the link the Hearing Officer should have gone on to consider the elements of unfair advantage and the fact that the earlier mark has a "young, trendy and cool image" which would be taken advantage of. While his reasons are short, the Hearing Officer did consider the issue and he set out why he found no detriment or unfair advantage, namely that the link is fleeting. There is nothing wrong with his conclusion and it is consistent with the rest of his decision.

Conclusion

31. While I found that the Hearing Officer did make a mistake regarding the specification (Ground 1) and that he should have explained why he dismissed the alternative meaning of CONTENT (Ground 4) neither mistake would have changed his final conclusions. Accordingly, I uphold his decision and dismiss the appeal.

32. The holder of the international registration did not take part in the appeal proceedings. Therefore, I make no order as to costs.

PHILLIP JOHNSON
APPOINTED PERSON
11 JULY 2019

Representation

Appellant: Julius Stobbs of Stobbs IP

Respondent: Did not appear and was not represented