



Neutral Citation Number: [2019] EWHC 3357 (Ch)

Appeal Ref: CH-2019-000139

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
ON APPEAL FROM THE UK INTELLECTUAL PROPERTY OFFICE
(Mr Mark King on behalf of the Registrar of Trade Marks)

The Rolls Building
7 Rolls Buildings, Fetter Lane
London, EC4A 1NL

Date: 12 December 2019

Before:

MR. DAVID STONE
(Sitting as a Deputy High Court Judge)

Between:

MULTI-ACCESS LIMITED

Appellant/Proprietor

- and -

**GUANGZHOU WONG LO KAT GREAT
HEALTH BUSINESS DEVELOPMENT CO LTD**

Respondent/Applicant

Mr Christopher Hall (instructed by **Shakespeare Martineau LLP**) for the
Appellant/Proprietor

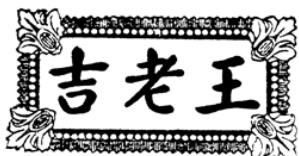
Mr Martin Krause of **Haseltine Lake Kempner LLP** for the **Respondent/Applicant**

Hearing date: 29 October 2019, with further written submissions filed on 5 November 2019
and 13 November 2019

APPROVED JUDGEMENT

Mr David Stone (sitting as a Deputy High Court Judge):

1. This is an appeal from decision BL O-220-19 of Mr Mark King, a Hearing Officer of the United Kingdom Intellectual Property Office (“UKIPO”), acting on behalf of the Registrar of Trade Marks, dated 29 April 2019 (“the Decision”). By the Decision, the Hearing Officer revoked two United Kingdom trade mark registrations numbered 1495166 and 1495167 (individually, “166” and “167” and collectively, “the Registrations”) on the grounds of non-use under section 46 of the Trade Marks Act 1994 (“the Act”). The registered proprietor of the registrations at the time of the Decision was Multi-Access Limited (“the Proprietor”), who is the appellant in these proceedings.
2. The Registrations were each registered for the following sign (“the Trade Mark”):



Each of the Registrations included the description “The transliteration of the Chinese characters appearing in the mark is “Wong Lo Kat” meaning “King Old Lucky”. They were registered for different goods:

- (a) 166 was registered in Class 5 of the Nice Classification for the specification “Beverages for medicinal purposes; all included in Class 5”; and
 - (b) 167 was registered in Class 32 of the Nice Classification for the specification “Beverages; all included in Class 32”.
3. The applications to revoke the Registrations were filed by Guangzhou Wong Lo Kat Great Health Business Development Co Ltd (“the Applicant for Revocation” or “the Applicant”) and were given proceeding numbers 502021 and 502022, which were then consolidated. Revocation was sought in relation to various periods of non-use:

Registration No:	Section 46(1)(a) period	Section 46(1)(b) period
166	10 July 1993 – 9 July 1998 Revocation to take effect 10 July 1998	23 March 2013 – 22 March 2018 Revocation to take effect 23 March 2018
167	3 July 1993 – 2 July 1998 Revocation to take effect 3 July 1998	23 March 2013 – 22 March 2018 Revocation to take effect 23 March 2018

Whilst the Hearing Officer referred in the Decision to two periods of non-use, being the section 46(1)(a) period and the section 46(1)(b) period, it is clear from the face of the Decision that he was aware that the section 46(1)(a) periods differed by a number of days as between 166 and 167, and so nothing turns on it.

4. In the proceedings below, only the Proprietor filed evidence. There was no request for a hearing, so the Hearing Officer issued his Decision “following a careful consideration of the papers”. In summary, the Hearing Officer found that the Registrations had not been put to genuine use in the United Kingdom for the goods for which they were registered, and ordered that 166 be revoked from 10 July 1998 and that 167 be revoked from 3 July 1998. He also ordered that the Proprietor pay the Applicant’s costs in the sum of £1600.
5. The Proprietor appealed to this court, and I heard the parties on 29 October 2019. The Proprietor was represented at the hearing by Mr Christopher Hall of counsel, and the Applicant was represented by Mr Martin Krause of Haseltine Lake Kempner LLP. I also had the benefit of detailed written skeleton arguments, for which I am grateful. At my invitation, the Proprietor filed further written submissions on 5 November 2019 dealing with a number of points raised in the course of the hearing and the Applicant responded to those submissions in writing on 13 November 2019. That day, the Proprietor indicated it would not be filing any further submissions in reply.

Nature of an appeal to the High Court

6. The approach which the Court should take on an appeal from the Registrar of Trade Marks was not in dispute. Floyd J (as he then was) summarised the approach in *Galileo International Technology, LLC v European Union (formerly European Community)* [2011] EWHC 35 (Ch) at [11] to [14]:

“11. This is an appeal brought pursuant to section 76 of the Act. Such appeals are not by way of a rehearing but are a review. The principles were set out by Robert Walker LJ in *Bessant and others v South Cone Inc* [2003] RPC 5, at paragraphs 17 to 30. Robert Walker LJ said at [28]:

“The appellate court should in my view show real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle.”

12. At paragraph 29, Robert Walker LJ said this:

“The appellate court should not treat a judgement or a written decision as containing an error principle simply because of its belief that the judgement or decision could have been better expressed.”

13. In that case the High Court judge had reversed the decision of a Hearing Officer. The Court of Appeal held that he had been wrong to do so. Robert Walker LJ in dismissing the appeal said this:

“I consider that the Hearing Officer did not err in principle, nor was he clearly wrong.”

14. I conclude that, unless I am satisfied that the Hearing Officer made an error of principle, I should be reluctant to interfere. I should interfere if I consider that his decision is clearly wrong, for example if I consider that he has drawn inferences which cannot properly be drawn, or has otherwise reached an unreasonable conclusion. I should not interfere if his decision is one which he was properly entitled to reach on the material before him.”

7. Counsel for the Applicant also drew my attention to a recent decision of the Supreme Court in *Actavis Group PTC EHF and others v ICOS Corporation and another* [2019] UKSC 15 at [78] to [81] (per Lord Hodge JSC, with whom Lady Hale PSC and Lord Kerr, Lord Sumption and Lord Briggs JJSC agreed):

“78. Finally, before addressing directly the question whether the Court of Appeal was entitled to reverse Birss J’s finding of non-obviousness, I remind myself of the limits of an appellate court’s power to overturn the evaluation of a trial judge in this field. Where inferences from findings of primary fact involve an evaluation of numerous factors, the appropriateness of an intervention by an appellate court will depend on variables including the nature of the evaluation, the standing and experience of the fact-finding judge or tribunal, and the extent to which the judge or tribunal had to assess oral evidence: *South Cone Inc v Bessant, In re Reef Trade Mark* [2002] EWCA Civ 763; [2003] RPC 5, paras 25-28 per Robert Walker LJ.

79. An experienced patent judge faced with a challenge to a patent on the ground of obviousness, and who has heard oral evidence including cross-examination, carries out an evaluation of all the relevant factors, none of which alone is decisive but each of which must be weighed in the balance in reaching a conclusion. In *Biogen Inc v Medeva plc* [1997] RPC 1, 45, Lord Hoffmann emphasised the need for appellate caution in reversing the judge’s evaluation of the facts where the application of a legal standard involved no question of principle but was simply a matter of degree. He held that it would be wrong to interfere with the judge’s assessment if no question of principle were involved.

80. What is a question of principle in this context? An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. What is the nature of such an evaluative error? In this case we are not concerned with any challenge to the trial judge’s conclusions of primary fact but with the correctness of the judge’s evaluation of the facts which he has found, in which he weighs a number of different factors against each other. This evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge’s conclusion is outside the bounds within which reasonable disagreement is possible: *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR 577, paras 14-17 per Clarke LJ, a statement which the House of Lords approved in *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46 per Lord Mance.

81. Thus, in the absence of a legal error by the trial judge, which might be asking the wrong question, failing to take account of relevant matters, or taking into account irrelevant matters, the Court of Appeal would be justified in differing from a trial judge’s assessment of obviousness if the appellate court were to reach the view that the judge’s conclusion was outside the bounds within which reasonable disagreement is possible. It must be satisfied that the trial judge was wrong: see, by way of analogy, *In re B (A Child) (Care Proceedings Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911, paras 90-93 per Lord Neuberger, para 203 per Lady Hale.”

Relevant sections of the Act

8. So far as is relevant, section 46 of the Act provides as follows:

“46. Revocation of registration.

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

- (a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;
- (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
- (c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;
- (d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

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

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

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that—

- (a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and
- (b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

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

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

- (a) the date of the application for revocation, or
- (b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

9. Section 100 of the Act provides as follows:

“100. Burden of proving use of trade mark.

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

The Decision of the Hearing Officer

10. The Decision is set out in 46 paragraphs. After having summarised the background to the applications for revocation, the Hearing Officer set out the evidence filed by the Proprietor at [5] to [19] of the Decision.

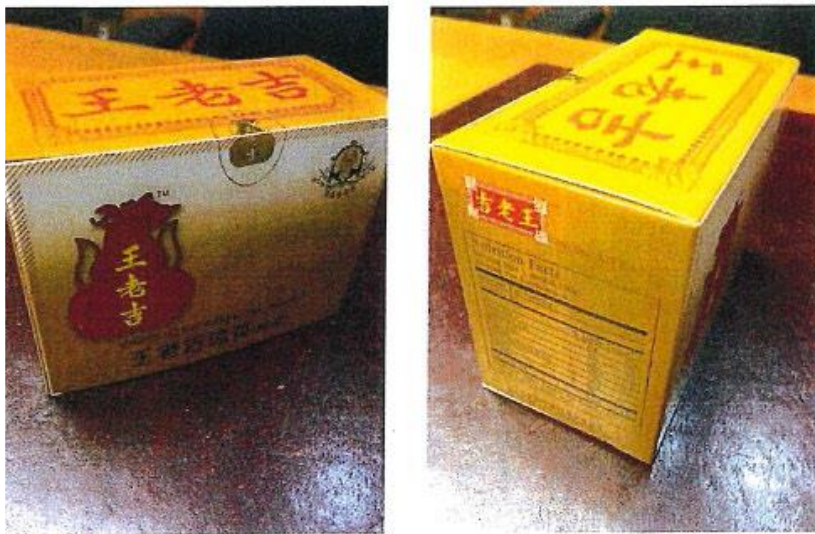
The Evidence

- 11. The evidence before the Hearing Officer comprised four witness statements.
- 12. Ms Wong Kin Yee Agnes signed a witness statement on 17 September 2018. Ms Wong is a director of Wong Lo Kat (Enterprises) Limited. She is a descendant of Mr Wong Chak Bong, commonly known as Wong Lo Kat, the creator in the early 1900s of a secret formula for a herbal tea known as Wong Lo Kat. Ms Wong has been involved in the family herbal tea business since 1971. Her evidence was only in relation to dry goods: teabags, tea extracts and instant tea mix.
- 13. By a written licence dated 24 June 2016, the Proprietor granted a licence from 1 June 2011 to use the Trade Mark, including in the United Kingdom. The Hearing Officer referred to this as the WKLE Licence: it was annexed to Ms Wong’s witness statement. The WKLE Licence expressly listed the Registrations, and licensed their use in relation to:
 - (a) Herbal and/or medicinal teabags;
 - (b) Herbal and/or medicinal tea extract;
 - (c) All kinds of instant drink mixes; and
 - (d) All kinds of confectionary products.
- 14. Ms Wong also exhibited to her witness statement nine invoices dated between 24 February 2013 and 6 July 2015 issued by Wong Lo Kat (Enterprises) Limited to Kwai Hong (HK) Ltd at an address in Hong Kong, which Ms Wong stated “in turn exports the products to various overseas importers including W Wing Ying Plc in the United Kingdom”. The Hearing Officer noted (at [8]) that all of the invoices are in Hong Kong dollars and include product descriptions of either tea bags or instant tea. Two of the invoices are before the section 46(1)(b) period and after the section 46(1)(a) period. The other seven invoices are dated between 7 October 2013 and 6 July 2015 for tea bags sold in packs of 50 or 100, and instant tea sold in boxes. The Hearing Officer summarised the invoices as amounting to approximately 33 50-pack tea bags, 71 100-pack tea bags and around 122 boxes of

instant tea. The Hearing Officer noted that the invoices have labels placed on the front which Ms Wong said were for “administrative purposes”. Each invoice includes a label stating “W Wing Ying Plc” with an address in Birmingham, UK, but six of the invoices also include a label with an address outside of the UK. The Hearing Officer noted that none of the invoices included the Trade Mark. Further, Ms Wong exhibited “representative images of the packaging referred to in the invoices”, as follows:



Wong Lo Kat Herbal Tea (tea bag)

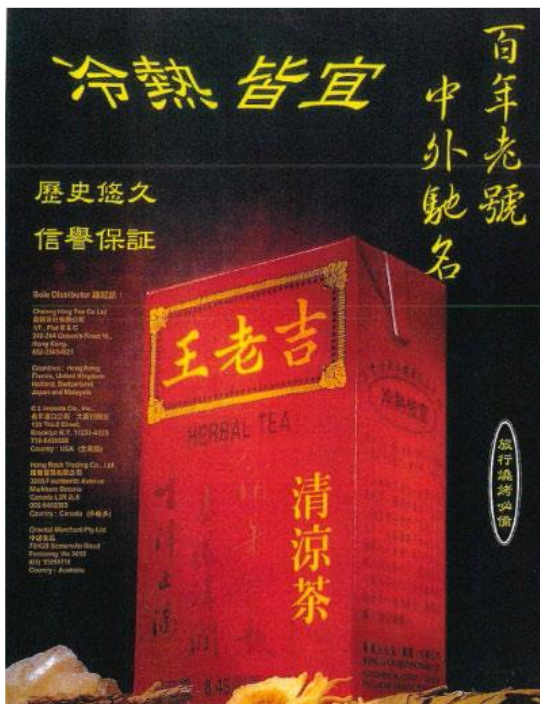


Wong Lo Kat Herbal Tea (instant)

- Ms Wong also exhibited historical screenshots of the website to be found at www.tradewindsorientalshop.co.uk (“the Tradewinds website”) obtained from the Internet Archive for 16 March 2015, 16 January 2017 and 24 June 2017, as follows (showing the example from 16 March 2015; the others are relevantly identical):



16. Ms Wong also exhibited an undated poster, which lists Cheong Hing Tea Co Ltd as the UK distributor, stating that it was used to advertise sales of paper-packed herbal tea drinks from 1995:



17. The second witness statement relied on by the Proprietor was that of Mr Chan Hung To dated 19 September 2019. The Hearing Officer referred to him as Mr To, but the parties referred to him as Mr Chan, and so will I. Mr Chan’s witness statement was written in Chinese, and an English translation was provided under a witness statement signed by Ms Lo Pui Shan, a professional translator. There was no criticism of her translation, and the parties worked from the English language version of Mr Chan’s witness statement.
18. Mr Chan is a director of the Proprietor. His evidence was in relation to canned herbal tea products in liquid form. He exhibited (among others) two further written licences:
- (a) a non-exclusive licence between the Proprietor and Hung To (Holdings) Company Limited also dated 24 June 2016 but said to be effective from 26 April 2005 to use the Trade Mark in relation to “all kinds of herbal and/or medicine drinks in liquid form” (which the Hearing Officer referred to as the “HTHC Licence”); and
 - (b) a non-exclusive licence between Hung To (Holdings) Company Limited and Guangdong Jiaduobao Drink & Food Co Ltd also signed on 24 June 2016 but also said to be effective from 26 April 2005 to use the Trade Mark in relation to “all kinds of herbal and/or medicinal drinks in liquid form”.
19. The Hearing Officer noted comments in Mr Chan’s statement that due to the various licences in place, any goods bearing the Trade Mark used the Trade Mark with the consent of the Proprietor. Mr Chan provided sales figures for “canned herbal tea products” manufactured and sold pursuant to the HTHC Licence and exported to customers in the UK as follows:

Year	Quantity (Cartons)	Price (USD)
2010	27,120	\$257,000
2011	33,900	\$322,000
2012	20,340	\$193,000
2013	2,260	\$22,000

20. Mr Chan further exhibited what he described as designs for the packaging applied to the canned herbal tea products exported to the UK, and dated August 2009, October 2010, March 2012 and November 2012, the earliest of which is shown here (but the others are relevantly identical):



21. Mr Chan also exhibited copied of invoices dated between 8 January 2010 and 28 March 2013 and shipping documentation dated prior to 11 April 2013, and stated that these demonstrate sale and shipment of products to the UK importer, Interlink Direct Ltd (“Interlink”), a UK-based importer of “oriental food and beverages”. The Hearing Officer noted that these invoices were addressed to the UK and include reference to “Wong Lo Kat Canned Herbal Drink” but that they do not include the Trade Mark.
22. The fourth and final witness statement relied on by the Proprietor was signed by Mr Fu Kit Kwok on 19 September 2019. The Hearing Officer referred to him as Mr Kwok, but the parties referred to him as Mr Fu, and so shall I. Mr Fu is a director of Interlink. Mr Fu’s evidence was also in relation to canned herbal tea products in liquid form. Mr Fu exhibited invoices dated between 15 January 2010 and 11 April 2013 for “Wong Lo Kat Canned Herbal Tea” which, the Hearing Officer noted, demonstrated that the products were shipped from Hong Kong to the UK. Mr Fu stated that the products were then sold by Interlink to its customers in the UK under a mark which he set out in his witness statement. That mark is a version of the Trade Mark with the first and third characters reversed.

Legislation and case-law relating to revocation

23. At [20] to [22] of the Decision, the Hearing Officer set out the relevant sections of the Act which I have excerpted above, and the summary of the law relating to genuine use of trade marks in Arnold J’s (as he then was) decision in *Walton International Ltd & Anor v Verweij Fashing BV* [2018] EWHC 1608 (Ch) (“*Walton*”) at [114] and [115]. No criticism was made of the Hearing Officer’s explication of the law or the relevant test he had to apply.

Decision

24. At [23] to [36] of the Decision, the Hearing Officer set out his findings of facts and his application of the law on genuine use to those facts. He started by reminding himself of the relevant periods to which evidence of genuine use must relate.
25. In relation to the section 46(1)(a) periods, the Hearing Officer noted the evidence of the origins of Wong Lo Kat herbal tea, and commented that it was sold around the world, including in the UK. He noted the comment of Ms Wong that no invoices or purchase orders for sales in the UK during the section 46(1)(a) period had been kept, except for the undated poster. He stated at [24] “[t]his clearly does not demonstrate use of the [Trade Mark] during the [section] 46(1)(a) periods”.
26. In relation to the section 46(1)(b) period, the Hearing Officer noted that the Act provides for the situation where use is commenced or resumed after the expiry of a five-year use period but before the application for revocation has been made – such use is sufficient to avoid revocation for non-use. He then examined the evidence of use during the second period, being 23 March 2013 to 22 March 2018.
27. In doing so, the Hearing Officer cited two decisions of Mr Daniel Alexander QC sitting as an Appointed Person. First, in *Awareness Limited v Plymouth City Council* (Case BL O/236/13) (“*Awareness*”), Mr Alexander said this:

“22. The burden lies on the registered proprietor to prove use... However, it is not strictly necessary to exhibit any particular kind of documentation but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly

demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

and further at paragraph 28:

“28. ... I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as “tuition services”, is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to “tuition services” even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted.”

28. Second, the Hearing Officer noted Mr Alexander’s comments in *Guccio Gucci SpA v Gerry Weber International AG* (Case O/424/14) as follows (original emphasis):

“The Registrar says that it is important that a party puts its best case up front - with the emphasis both on “best case” (properly backed up with credible exhibits, invoices, advertisements and so on) and “up front” (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. [...] The rule is not just “use it or lose it” but (the less catchy, if more reliable) “use it - and file the best evidence first time round - or lose it””.

29. At [28], the Hearing Officer cited Mr Alexander’s comments in *Awareness* and said this (original emphasis):

“If any question arises in UK proceedings as to the use to which a UK registered trade mark has been put, it is for the proprietor to show what use has been made of the mark. Therefore, the applications to revoke the registrations for non-use places a burden of proof on the proprietor to prove the use which has been made of the mark during the relevant period. It is clear from the guidance that a number of factors must be considered when assessing whether genuine use of the mark has been demonstrated by the evidence filed. The responsibility is on the proprietor to provide sufficiently solid evidence to counter the applications for revocation, a task which should be relatively easy to attain.”

30. Against that background of the nature of the assessment of genuine use, the Hearing Officer reviewed the Proprietor’s evidence:

- (a) In relation to the invoices exhibited to Ms Wong’s witness statement, the Hearing Officer found that two were from before the relevant period. He found that none of the invoices contained the Trade Mark, and “the quantity of goods sold is low”. He noted that the prices were in Hong Kong dollars, and no estimate in Pounds Sterling was provided. He noted that six of the seven invoices from during the relevant period also included a label for an address

outside the UK, and that there was no evidence about how many of the goods described in the invoices (if any) were in fact sold on to the UK importer identified on the labels. Relying on Mr Alexander's decision in *Awareness*, the Hearing Officer stated "I do not find this exhibit to be particularly persuasive".

- (b) In relation to the screenshots of the Tradewinds website the Hearing Officer noted that "herbal tea" had been placed on a UK facing website (it being at .co.uk and advertised in Pounds Sterling). He noted that there was no indication of how many products were sold via this website, nor any corroborating evidence to show that sales actually took place, nor the extent of any sales. He also noted the absence of evidence that the entity operating the website was doing so with the consent of the Proprietor. He concluded that if the goods were obtained from a third party independently obtaining products from China/Hong Kong, this would not amount to genuine use of the Trade Mark by the Proprietor.
- (c) In relation to the invoices to Interlink dated 8 January 2010 to 28 March 2013, the Hearing Officer noted that all except the last of these is dated before the relevant period. He acknowledged that he could take into consideration evidence which casts light on the circumstances during the relevant period. He found that invoices before rather than during the relevant period suggested that use had ceased.
- (d) For the same reason, the Hearing Officer noted that Mr Fu's evidence of goods sold in the period from 2010 to 11 April 2013 "does little (if anything) to assist the [P]roprietor". The Hearing Officer noted at [34] that "Mr [Fu] evidences a sale in April 2013 and states that there are subsequent sales until 2014 but no evidence to support this was filed."

31. At [33] to [36] of the Decision, the Hearing Officer said this:

"33. All bar the 28 March 2013 invoice [to Interlink] are before the relevant period. Whilst I acknowledge that I may take into consideration evidence which casts light on the circumstances during the relevant period, invoices before rather than during the relevant period suggest that use has ceased. For the same reasons the evidence [that goods were sold between 2010 and 11 April 2013 and Mr Fu's statement that goods were sold until June 2014] does little (if anything) to assist the [P]roprietor.

34. I note that Mr [Fu] evidences a sale in April 2013 and states that there are subsequent sales until 2014 but no evidence to support this was filed. I also note that Mr [Chan], director for [sic] the [P]roprietor, provides invoices and sales figures for the period 8 January 2010 to 28 March 2013, but these merely overlap the beginning of the relevant five-year period by a few weeks. Further, the price of the goods during 2013 (\$22,000) are considerably less than prior years (\$193,000 for 2012, \$322,000 for 2011 and \$257,000 for 2010). It is reasonable to form the view that sales took place up to April 2013 and no further. If sales had taken place after this period, it is likely that such material and knowledge of the sales would exist and could have been submitted as evidence.

35. Notwithstanding the above, the evidence as a whole does not create an overall picture that the registrations have been genuinely used in the UK. There is an absence of evidence that one would hope to see when assessing genuine use. For example, there are no sales figures for the UK, nor are there any advertising figures or examples of how the goods are being advertised in the UK with the consent of the [P]roprietor. The only example of the product being placed for sale in the UK is the advert placed on one UK website, apparently by a third party (see above).

36. Taking all of the above into account, I am entirely satisfied that the [P]roprietor has not demonstrated that it has used the registrations in a way that is warranted to maintain or create a market for the registered goods during the relevant section 46(1)(b) period of 23 March 2013 – 23 March 2018.”

Specification argument

32. At [37] of the Decision, the Hearing Officer noted “this is typically the end of the matter”. However, he nevertheless went on to deal with an argument in relation to the specification. The Applicant had argued that even if the Proprietor had been able to establish genuine use, the use established would not have been for the goods covered by the Registrations. The Applicant argued before the Hearing Officer that most of the invoices related to “herbal tea” in the form of tea bags, instant tea and tea extracts. These products, the Applicant argued, are classified in Class 30 of the Nice Classification, not in Class 5 or Class 32. Thus, even if the use alleged had been established, the Registrations would still be vulnerable to revocation for non-use.
33. The Hearing Officer then set out extracts from Henry Carr J’s judgment in *Pathway IP Sarl v Easygroup Ltd* [2018] EWHC 3608 (Ch) (“*Pathway*”), and noted at [40] of the Decision:
- (a) Henry Carr J’s decision was “provisional” “indicating that he did not think that the matter was clear cut”;
 - (b) the guidance is to consider the class number only where the meaning of the disputed term is not sufficiently clear and precise;
 - (c) where a term is sufficiently clear and precise on its face, the fact that the term covers goods/services that may also (or should have been) registered in other classes is irrelevant to the scope of protection afforded to the term, or to questions of use of the mark in relation to those goods/services; and
 - (d) where the terms are not sufficiently clear and precise, the Nice Classification may be relied on to construe the scope of protection.
34. The Hearing Officer then found (at [42]) that the specifications “beverages for medicinal purposes; all included in Class 5” and “beverages; all included in Class 32” did not lack clarity and precision. He held that they do not cover herbal tea either in bag or instant form “which are added to water (usually hot) to produce the end consumable product”. Therefore, even if he had found genuine use of the Trade Mark in relation to these goods, they are not the goods covered by the Registrations. The Hearing Officer then decided:

“And even if I am wrong about this, the respective [R]egistration[s] include the following restrictions, “all included in [C]lass 5” and “all included in [C]lass 32”. Therefore, the wording of the specification itself means that the use of the [Trade M]ark in relation to goods classified in other classes is irrelevant. Tea for making up into beverages, including herbal tea, is proper to [C]lass 30. This was also the position at the date of the applications which led to the [R]egistrations. In these circumstances, the judgment in *Pathway* ... makes no difference.”

Grounds of Appeal

35. The Proprietor appealed the Decision on five grounds:
- (a) Having correctly identified the section 46(1)(b) period, the Hearing Officer erred in law at [33] and [34] of the Decision (“at least”) by substituting an arbitrary period of less than five

years in place of the correct five-year period, and by misdirecting himself to consider whether use of the Trade Mark stopped during the relevant period, as opposed to whether or not use occurred during that period;

- (b) Having correctly identified the principles relevant to the assessment of genuine use, the Hearing Officer erred at [35] of the Decision by applying a different test, namely whether the evidence created an “overall picture” that the Registrations had been put to genuine use;
- (c) The Hearing Officer failed to take proper account of the evidence, in particular:
 - (i) on several occasions he failed to differentiate between evidence and exhibits, for example, at [32] and [34] of the Decision;
 - (ii) at [32] of the Decision, the Hearing Officer wrongly stated that there was no evidence that the activities at the Tradewinds website were with the consent of the Proprietor;
 - (iii) the Hearing Officer wrongly focused on the need for evidence of sales (for example at [31] and [32] of the Decision), where no such need is established in law; and
 - (iv) the Hearing Officer failed to appreciate the totality of the evidence that was before him;
- (d) The Hearing Officer’s *obiter* conclusion at [42] of the Decision that the Proprietor had not shown use of the Trade Mark in relation to the goods for which the Registrations were registered was wrong; and
- (e) Therefore, the Hearing Officer was wrong to find:
 - (i) that there had been no genuine use within the section 46(1)(a) periods;
 - (ii) that use had not commenced or resumed after the section 46(1)(a) periods; and
 - (iii) that the Proprietor had failed to show genuine use during the relevant period under section 46(1)(b).

36. The Grounds of Appeal, the parties’ skeleton arguments and the submissions at and following the hearing all focussed on the section 46(1)(b) period. I therefore asked counsel for the Proprietor whether it pressed its appeal in relation to the section 46(1)(a) period and was told that it did, but “not too highly”.

Ground 1 – arbitrary period of less than five years and consideration of use “stopping” rather than “occurring”

37. This ground of appeal applies only to the section 46(1)(b) period.

38. Under its first ground of appeal, the Proprietor expressly accepted in its Grounds of Appeal that the Hearing Officer correctly identified the relevant five year period under section 46(1)(b) but submitted that the Hearing Officer then substituted an arbitrary period of less than five years in place of the correctly identified period. This was said to have occurred in [33] and [34] of the Decision, which I have set out in full above.

39. There is nothing in these paragraphs which suggests that the Hearing Officer had in mind any period other than the relevant period which he had correctly found at [2] and repeated at [23] of the

Decision. He further set out the relevant period at [25]. He correctly calculated the relevant period at [31], at [33] and again at [34]. He again set out the correct dates for the relevant period at [36]. There is nothing in his review of the evidence, his comments at [33] or [34] or indeed elsewhere in the Decision that supports the notion that he misunderstood the period, or applied a different period. To the contrary, having correctly set it out, he correctly used it throughout the Decision.

40. I also do not consider that there is anything in the Proprietor's argument that the Hearing Officer focussed on when use "stopped" rather than when use "occurred". The Proprietor accepted that the Hearing Officer set out the correct provisions of the Act in relation to non-use, and the correct case law. There is nothing in the Hearing Officer's Decision to suggest that he considered that genuine use had to continue throughout the relevant period, or a significant part of the period. What the Hearing Officer did find was that the very small amount of use at the beginning of the relevant period was insufficient to establish genuine use of the Trade Mark. At [33] (one of the two paragraphs of which the Proprietor complains), the Hearing Officer referred to the 28 March 2013 invoice. That invoice is for 2,260 units of "Wong Lo Kat Canned Herbal Drink" addressed to Interlink in Essex, UK. The Hearing Officer clearly did not ignore the evidence, because he referred to it at [33], and also at [17] and [29(c)]. His conclusion that sales took place up to April 2013 and no further does not support the submission that he applied the wrong test – it was merely a shorthand way of referring to his findings that the only sales during the relevant period were those up to April 2013. I will return below to a more detailed analysis of the evidence, as that is a separate ground of appeal.
41. In my judgment, the Hearing Officer applied throughout his Decision the correct section 46(1)(b) period and did not misdirect himself to consider whether use stopped rather than occurred during the relevant period. I reject this ground of appeal.

Ground 2 – wrong test to assess the evidence

42. This ground of appeal applies only to the section 46(1)(b) period.
43. The Proprietor accepted that the Hearing Officer identified the correct legal test at [20]-[22] of the Decision, but submitted that the Hearing Officer erred at [35] when he rejected the evidence of use on the basis that "as a whole [it] does not create an overall picture that the [R]egistrations have been genuinely used in the UK".
44. The Proprietor submitted that the Hearing Officer applied an "overall picture" test, and that that test is not to be found in the Act or case law on genuine use. Further, the Proprietor suggested that the "overall picture" test *may* have related to the Hearing Officer's alleged shortening of the relevant period. I have already found that that is not what the Hearing Officer did, so I need say no more about that submission.
45. The Applicant submitted that, by using the phrase "overall picture", the Hearing Officer was not applying (nor suggesting he was applying) a test different to those he set out at [20]-[22] of the Decision, but rather was expressing the global assessment that he was bound to make in reaching his decision, following the guidance set out at [115(6)] of *Walton*. The Proprietor would appear to accept that the tribunal must assess the totality of the evidence – at paragraph 3(d) of its Grounds of Appeal, it criticised the Hearing Officer for failing "to appreciate the totality of the evidence that was before him".
46. I agree with the Applicant's submissions. *Walton* at [115(8)], referring to Case C-141/13 P *Reber Holding & Co KG v OHIM* [EU:C:2014:2089], notes that not every proven commercial use of a mark may automatically be deemed to constitute genuine use. Rather, the tribunal assessing genuine use must take into account "all the relevant facts and circumstances": *Walton* at [115(6)]. *Walton* enumerates non-exhaustively facts and circumstances which may be relevant – including at (f) "the

evidence that the proprietor is able to provide”. At [35] of the Decision, the Hearing Officer found “an absence of evidence that one would hope to see when assessing genuine use” – and listed sales figures, advertising figures and examples of how the goods were advertised in the UK. These would appear to be references to the decision of Mr Alexander in *Guccio Gucci*, which the Hearing Officer set out at [27] of the Decision.

47. In my judgment, the Hearing Officer did not apply the wrong test – rather, he stated the test correctly and conducted an holistic analysis of the totality of the evidence before him in order to take into account all the relevant facts and circumstances. This is further made clear by his statement at the beginning of [36] – “[t]aking all of the above into account”. The Hearing Officer applied the correct test correctly. I therefore reject this ground of appeal.

Ground 3 – failure to take proper account of the evidence

48. Again, this ground of appeal applies only to the section 46(1)(b) period.
49. In its Grounds of Appeal, the Proprietor particularised this ground as set out above at paragraph 35. In its skeleton argument, and its counsel’s oral submissions, the Proprietor adopted a different approach, working through the evidence, and criticising the Hearing Officer’s findings in relation to it.
50. As noted above, the Proprietor did not avail itself of a hearing before the Hearing Officer. Rather, the Hearing Officer had before him the evidence, and the written submissions of the parties (all of which were also before me). The Proprietor’s submissions before the Hearing Officer state upfront in paragraph 3 “[t]he Proprietor relies on its evidence”. Those submissions then go on to critique the Applicant’s written submissions. Nowhere in those written submissions does the Proprietor set out its positive case of the use which it says it can prove. As section 100 of the Act makes clear, it is for the Proprietor to prove genuine use. Hearing Officers of the UKIPO will be assisted by Proprietors who set out clearly the use that is relied on, the goods/services for which it is claimed that use is made, and where that evidence is to be found in the witness statements.
51. The Applicant for registration accepted that the Hearing Officer’s analysis of the evidence was “pithy” but described that as “not uncommon” in Registry decisions. Further, the Applicant submitted that an absence of detailed analysis did not mean the Hearing Officer overlooked the evidence.
52. The Proprietor’s attack on the Hearing Officer’s treatment of the evidence started with Ms Wong’s evidence. The Proprietor’s main criticism was that the Hearing Officer had failed to recall Ms Wong’s evidence that “[a]ny products bearing the Trade Mark ... manufactured and distributed pursuant to the WKLE Licence and subsequently placed on the United Kingdom market are and have been placed on the United Kingdom market with the consent of Wong Lo Kat (Enterprises) Limited”, as Ms Wong had set out in paragraph 4.7 of her witness statement. Since Wong Lo Kat (Enterprises) Limited was licensed by the Proprietor, any products on the UK market were said to be there with the consent of the Proprietor, an “important evidential point which the Hearing Officer failed to appreciate”. I return to this below.
53. The Proprietor also criticised the Hearing Officer’s treatment of the invoices exhibited to Ms Wong’s witness statement. It relied on Ms Wong’s evidence that the products were exported to W Wing Ying Plc in the UK, because the invoices included a stuck-on label which Ms Wong explained showed where the goods were to be sent. I do not accept this criticism, as it misunderstands the Hearing Officer’s treatment of these invoices. The Hearing Officer dealt with these invoices at [31] of the Decision. He was clear, and the Proprietor did not contest, that two of the invoices dated from before the relevant period. Further, he was also clear that six of the seven invoices also included a sticker to indicate, on Ms Wong’s own evidence, that some of the goods referred to in those invoices

were sent to destinations other than in the UK. The Hearing Officer correctly noted that Ms Wong did not give any evidence as to how many of the goods described in fact made it to the UK. He concluded, quite rightly in my judgment, that it cannot be known from Ms Wong's statement how many of the goods described were in fact sold on to the UK importer, and how many never entered the UK.

54. The Proprietor's criticisms of the Hearing Officer's handling of Mr Chan's evidence started with the submission that the Hearing Officer failed to note that both the WKLE Licence and the HTHC Licence covered use of the Trade Mark in the UK – the WKLE Licence being for tea bags, tea extracts and instant drink mixes (dry goods) and the HTHC Licence covering drinks in liquid form. I do not accept this criticism. The Hearing Officer accurately set out the coverage of the WKLE Licence at [6] of the Decision. Whilst his treatment of the HTHC Licence is not as clear, [13] to [16] of the Decision which deal with the HTHC Licence clearly indicate that the products being referred to are "canned herbal tea products". As no other "drinks in liquid form" are alleged to have been sold under the HTHC Licence, I do not consider that the Hearing Officer can be criticised for referring to "canned herbal tea products" rather than "drinks in liquid form".
55. The Proprietor also criticised the findings of the Hearing Officer in relation to whether the goods on the UK market were sold with the consent of the Proprietor. The Proprietor submitted that there was clear evidence from Ms Wong (referred to above at paragraph 52) and of Mr Chan, which stated, "as a matter of fact" that the Proprietor gave consent to all use in the UK. I also reject this criticism, although not in totality. I start with Ms Wong. The Hearing Officer raised his concerns on this issue at [32] of the Decision in relation to the Tradewinds website. His *primary* criticism of this aspect of Ms Wong's evidence was that there was no indication of how many products were sold, nor any corroborating evidence to show that sales in the UK actually took place, or their extent. In my judgment, this was sufficient for him to reach his conclusion that there was no genuine use of the Trade Mark. As a *secondary* criticism, he held that there was no evidence that the Tradewinds website obtained the relevant product from a company authorised by the Proprietor. That finding was correct as far as it went. But it did ignore the further statement of Ms Wong in paragraph 5.5 of her witness statement that "I confirm that the products shown ... are products manufactured and sold pursuant to the WKLE Licence". So the Hearing Officer did have before him evidence that the products shown on the Tradewinds website were at least initially genuine products, even if there was no evidence of from whom the Tradewinds website had acquired them. However, it is clear from [32] of the Decision that the Hearing Officer considered this to be a reason for a finding of no genuine use *in addition to* the primary reason I have set out above. The Hearing Officer said this (emphasis added):

"it is not clear whether this offer for sale resulted from the [P]roprietor's actions or from a third party independently obtaining products from China/Hong Kong. *If the latter*, this would not amount to genuine use of the mark by the [P]roprietor".

The use of "if" clearly indicates that this was not the primary finding on which the Hearing Officer relied. Therefore, to the extent the Hearing Officer fell into error on this minor point, it is not sufficient to infect his analysis to the extent I could be satisfied that the Decision was "wrong".

56. I turn now to Mr Chan's evidence. I can find in the Decision no criticism of the evidence provided by Mr Chan which suggests that the Hearing Officer found that the products to which he referred were not put on the UK market by or with the consent of the Proprietor. I therefore consider that there is nothing in this criticism.
57. The Proprietor further criticised a number of other findings of the Hearing Officer at [31] and [32] of the Decision – I reject these criticisms for the reasons given below:

- (a) that it was not a relevant criticism for the Hearing Officer to say at [9] that “none of the invoices contain the [Trade M]ark”. The Applicant submitted that the Hearing Officer was merely recording a finding of fact, relevant to his assessment. I agree: if the invoices had contained the Trade Mark, that would have been a relevant consideration. That they did not is also relevant, as extra steps were necessary to show use of the Trade Mark;
 - (b) that the Hearing Officer was right to describe the quantity of goods sold as low in relation to tea bags and instant tea, but that the sales were sufficient to create or maintain a share of the modern “craft” drinks market. As the Applicant pointed out, there was no evidence of a craft drinks market before the Hearing Officer or before me: I am therefore unable to accept this criticism;
 - (c) that it was open to the Hearing Officer to conclude that there was no evidence about how many of the goods described in the invoices were in fact sold into the UK, but the Hearing Officer should have acknowledged that Ms Wong gave evidence that at least some of the goods in each invoice were sold into the UK. As the Applicant submitted, it is difficult to see what else the Hearing Officer could have done. The Hearing Officer had set out Ms Wong’s evidence at [8]. His reference at [31] to Mr Alexander’s comments in *Awareness* clearly indicates that he was “rejecting the evidence as insufficiently solid”. As I have set out above, Mr Alexander noted: “A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive”; and
 - (d) that the absence of evidence of sales from the Tradewinds website was not in and of itself decisive. The Applicant accepted that that criticism is correct as far as it goes. However, in my judgment, the Hearing Officer did not solely rely on the absence of sales in finding no genuine use. I do not accept that the fact that the products remained on the Tradewinds website until 2017 was “a strong indicator” that sales were made.
58. The Proprietor also criticised the Hearing Officer’s treatment of the evidence of Mr Fu, specifically at [34] of the Decision where he records “I note that Mr [Fu] evidences a sale in April 2013 and states that there are subsequent sales until 2014 but no evidence to support this was filed”. The Proprietor submitted that this sentence is internally inconsistent, because it confuses evidence and exhibits. I read the Hearing Officer to be saying here that he had before him Mr Fu’s evidence of subsequent sales, but he did not have any other evidence (such as invoices) to support that statement. I therefore reject this criticism. I also reject the criticism that the Hearing Officer simply rejected Mr Fu’s evidence. I do not consider the Hearing Officer to have rejected Mr Fu’s evidence – rather, what he did, and did expressly, was to consider that insufficient evidence had been adduced to meet the Proprietor’s burden of proving genuine use. This is clear from his reference in the last sentence of [34] to the likely availability of invoices etc if sales had been made.
59. I also reject the Proprietor’s criticism of the Hearing Officer’s reliance on *Awareness*. Counsel for the Proprietor submitted that the Hearing Officer relied on this case to provide justification for rejecting any evidence that was not supported by documentation. In my judgment, that is not what the Hearing Officer did. Rather, he considered the evidence before him carefully, and decided that it did not meet the Proprietor’s burden of proving genuine use.
60. I therefore reject this third ground of appeal.
61. The Hearing Officer did fail to address one area of the evidence and submissions that in my view he ought to have addressed. It is clear from the various images of packaging provided that the evidence of use relied on by the Proprietor was not always use of the Trade Mark as registered. Whilst the Trade Mark appears on the tea bag packaging shown above at paragraph 14 above and on the packaging shown on the Tradewinds website (paragraph 15 above), the sign shown on the instant tea

at paragraph 14 and the poster shown at paragraph 16 shows the first and third Chinese characters reversed. Mr Fu's evidence about canned herbal tea in liquid form related only to the sign with the first and third characters reversed. This was dealt with in both the Applicant's and the Proprietor's written submissions before the Hearing Officer. The Proprietor referred to a decision of Mr Richard Arnold QC sitting as the Appointed Person (as he then was) in *Nirvana Trade Mark* (BL O/262/206) in which Mr Arnold set out the question to ask "whether the sign differs from the registered trade mark in elements which do not alter the latter's distinctive character". The Hearing Officer should have dealt with this issue in his decision, and he did not. However, as neither party relied on that omission before me, it is not a basis on which I can interfere with the Decision. I will say, however, that having read the submissions which were before the Hearing Officer, I do not consider it open to the Proprietor to argue that it does not matter in which order those characters appear because the distinctive character of the Trade Mark is a decorative frame surrounding three Chinese characters. That is not how the Trade Mark will be perceived by Chinese speakers, who the Proprietor submitted are the primary consumers of its products. In my view, use of the sign with the first and third characters reversed is not use of the Trade Mark as registered nor use of a sign which differs from the registered trade mark in elements which do not alter the latter's distinctive character. In my judgment, had the Hearing Officer addressed himself properly to the issue, he ought to have discounted the evidence of the herbal tea extracts, the poster and of Mr Fu as not being evidence of use of the Trade Mark.

62. I should add for completeness that, in the course of preparing for the hearing, during the hearing, and since the hearing, I have reviewed the evidence that was before the Hearing Officer, the submissions he had before him, and the written and oral submissions before me. Had I found that the Hearing Officer had improperly assessed the evidence, I am entirely confident that were I to undertake the analysis myself, I would also have revoked the Registrations for non-use. That is, I am entirely comfortable that the Hearing Officer reached the correct decision.
63. As the Proprietor conceded, at its best, the only evidence in relation to the section 46(1)(a) period was the unchallenged statement by Ms Wong that tea bags, tea extract and instant drink mixes bearing the Trade Mark were sold "to various trading companies which in turn sold those products to companies that imported those product into the United Kingdom". In light of Mr Alexander's comments in *Awareness*, and modern practice before the UKIPO and EUIPO, the mere say so of an interested party, even in a witness statement, is manifestly insufficient to justify continuation of a statutory monopoly in favour of a trade mark proprietor, when unaccompanied by any relevant documentation.
64. In relation to the section 46(1)(b) period, the Proprietor's evidence was better, but it was still scant, uncertain, often uncorroborated and of low value, even when taken in its totality. For a period as recent as 2013 to 2018, and for fast moving consumer goods such as these, had there been use, there ought to have been ample evidence of that use.
65. I therefore have no doubts that the Hearing Officer's conclusion on the evidence was entirely safe – I am certainly not satisfied that in his treatment of the evidence he failed to take into account relevant matters, that he took into account irrelevant matters, or that he was "wrong".

Ground 5 – the specification issue

66. Given my findings above, it is not necessary for me to deal with this ground of appeal. However, as it was argued, and as matters may go further, I set out below my conclusions on this ground of appeal, which applies to both of the Registrations and to both of the section 46(1)(a) periods and to the section 46(1)(b) period.
67. In its Grounds of Appeal, the Proprietor set out its position as follows:

“the Hearing Officer’s *obiter* conclusion in paragraph [42], that the [P]roprietor had not shown use of the [R]egistration[s] in relation to the goods registered, was wrong.”

68. In its written and oral submissions, the Proprietor put its case in more detail. The Proprietor submitted that the Hearing Officer ultimately concluded that he should ask himself whether the words “beverages” and “beverages for medicinal purposes” were “clear and precise”. The Proprietor accepted that the Hearing Officer’s approach was the correct one, and agreed with the Hearing Officer’s conclusion (at [42] of the Decision) that the words were “clear and precise”. The Proprietor then submitted that the tribunal should ask whether the sales of tea bags, tea extracts, and instant tea (dry goods) and/or canned herbal tea (in liquid form) amounted to sales of “beverages” and/or of “beverages for medicinal purposes”. The Proprietor emphasised that this question is to be answered from the perspective of the notional consumer, citing Aldous LJ in *Thomson Holidays Limited v Norwegian Cruise Line Limited* [2002] EWCA Civ 1828.
69. The Proprietor criticised the Hearing Officer for failing to consider the question at all in relation to canned (liquid) herbal tea – and submitted that, had he done so, it would have been “immediately apparent” that a can of liquid herbal tea is a “beverage”. Further, the Proprietor submitted that “it is well known that Chinese herbal tea is *perceived* as having medicinal benefits, at least by a significant proportion of the public”. No evidence was before the Hearing Officer (or me) to this effect.
70. In relation to tea bags, tea extracts and instant tea (dry goods), the Proprietor submitted that the average consumer simply refers to “tea”, and “tea” is a “beverage” - it is irrelevant what form it takes. Thus, the Proprietor submitted that the Hearing Officer ought to have found that the average consumer would consider the evidenced sales to be sales of “beverages” in Class 32 and “beverages for medicinal purposes” in Class 5. The Proprietor therefore submitted that the Hearing Officer’s conclusion at [42] was wrong. There was no criticism of the method by which he got to his conclusion – the Proprietor disagreed only with the conclusion.
71. Although briefly stated (no doubt because, as the Proprietor notes, given the Hearing Officer’s other conclusions these findings were *obiter*), I do not consider the Hearing Officer’s conclusion in relation to tea bags, instant tea or tea extracts (dry goods) to be “wrong”. The Hearing Officer had no evidence before him of how the market perceived tea bags etc, so he needed to reach a conclusion without the benefit of any evidence. He made no error of law or of principle in doing so. He noted that “beverages” do not cover herbal tea in either a bag or instant form, concluding that the goods shown in the evidence were not a sub-category of the goods registered. He had before him no evidence to the contrary. There is nothing in the Proprietor’s submissions to justify interfering with that part of the Decision.
72. As I have noted, the Proprietor also criticised the Hearing Officer for not referring to canned (liquid) herbal tea in his analysis. There is some force in that criticism. The Applicant accepted that the Hearing Officer did not deal with this issue in his Decision. In my judgment, he ought to have. The Applicant made its position clear on this issue in its written submissions which were before the Hearing Officer – the issue was raised in relation to the evidence of Ms Wong, Mr Chan and Mr Fu. It was therefore a criticism raised squarely in relation to the canned (liquid) herbal tea products referred to by Mr Chan and Mr Fu, and it should have been dealt with. The Hearing Officer’s failure to address himself to the canned (liquid) herbal tea was a relevant error. It does not vitiate his decision in relation to tea bags etc, and does not change his overall conclusions in relation to revocation. But it does necessitate that I make findings on whether proof of genuine use of the Trade Mark on canned (liquid) herbal teas would be use of the Trade Mark for the goods for which it was registered.

Pathway

73. Before turning to the facts before the Hearing Officer, it is necessary to address the law in some detail. The question I need to answer is to what extent, if any, is the Nice Classification to be taken into account in interpreting the specification in the Registrations. The starting point is the decision of Henry Carr J in *Pathway*. The opening paragraph of that judgment is as follows:

“Unless familiar with the law of registered trade marks, you might think that it is relatively straightforward. Regrettably, you would be wrong. As illustrated by the recent judgment of Arnold J in *Sky Plc v SkyKick UK Ltd* [2018] EWHC 155 (Ch); [2018] RPC 5 (“the *Sky* case”), trade mark litigation can raise multiple legal issues of Byzantine complexity. In comparison with the *Sky* case, this judgment is a minnow. Nonetheless, it deals with some challenging issues, which require careful consideration.”

74. I note for completeness that neither party wanted me to delay my decision until the Court of Justice rules on the reference to it in the *Sky* case referred to by Henry Carr J, and neither party embraced my offer of a reference on this point to the Court of Justice.

75. It is not necessary or appropriate for me to set out here [47] to [120] of Henry Carr J’s *Pathway* judgment where he dealt with this issue but I gratefully adopt from it the following passages relevant to the issues before me.

76. At [56] of *Pathway*, Henry Carr J summarised the conclusions of the Court of Appeal in *Altecnic Ltd’s Trade Mark Application (No. 2126884)*; *Reliance Water Controls Ltd v Altecnic Ltd* [2001] EWCA Civ 1928 as follows:

“In summary, the Court of Appeal relied upon the practice of the Registry and OHIM [now the EUIPO] in dealing with amendments to an application by treating the class number in the application for registration as part of the application and held that:

- i) The Registrar is entitled to treat the class number in the application as relevant to the interpretation of the scope of the application, for example, in the case of an ambiguity in the specification of goods;
- ii) On ordinary principles of construction, the application has to be read as a whole to determine its meaning and effect and the application includes the class number;
- iii) The fact that the Nice Classification System has been devised to serve exclusively administrative purposes does not mean that the selection of one or more class numbers has to be totally ignored in deciding, as a matter of construction of the application, what the application is for and whether it can properly be amended;
- iv) If the specification expressly refers to the class e.g. “all included in Class X” that is a stronger case for interpretation of the application by reference to the class number;
- v) However, that is not the only kind of case in which the class number can be taken into account by the Registrar, nor should the Registrar have to ignore the class number which the applicant (or his advisers' on his behalf) have included.”

77. Henry Carr J then considered Arnold J’s (as he then was) decision in *Omega Engineering Incorporated v Omega SA* [2010] EWHC 1211 (Ch) (“*Omega 1*”), in which Arnold J questioned whether *Altecnic* was correctly decided, but did not express any view on the issue. Henry Carr J summarised Arnold J’s conclusions as follows (at [67] of *Pathway*):

“In summary, Arnold J considered that the *ratio* of the *Altecnic* case was confined to the proposition that a statement by an applicant for registration in his application form as to the class of the goods in respect of which registration was sought formed part of the application and was to be taken into account in interpreting the scope of the application at least during prosecution; [22]. It did not decide whether the decision applied in the context of infringement, which remained an open question. On this appeal, the appellant reserved the right to contend that *Altecnic* was wrongly decided, but that is not a matter for this court.”

78. Then, having reviewed Arnold J’s decisions in *Omega 1*, *Omega Engineering Incorporated v Omega SA* [2012] EWHC 3440 (Ch) (“*Omega 2*”) and *Fil Ltd & Anor v Fidelis Underwriting Ltd & Ors* [2018] EWHC 1097 (Pat) (“*Fidelis*”), Henry Carr J reviewed the public policy arguments put before him. At [76] and [77] of *Pathway* he said this:

“76. The appellant submits that this conclusion is supported by policy considerations. The public should be able to tell from the specification of goods or services entered on the Register whether or not use will infringe. It would be undesirable if, to determine whether there is infringement or use, the public had to consult the relevant Nice Classification which existed as at the date of the application for registration of the trade mark in question. It suggests that reference to the Nice Classification would cause uncertainty for the following reasons:

- i) The current edition of the Nice Classification Specification is contained in several volumes with over 1000 pages;
- ii) The classes are not unique and mutually exclusive in that the same goods/services may appear in different classes;
- iii) The goods/services listed in any class are not fixed, as the classification may change and indeed has changed over time; and
- iv) There is now no centralised searching service of the Nice Classification.

77. In my view, these are powerful arguments in support of the appellant’s case on this issue. Mr Malynicz submitted that the observations of Arnold J which I have cited were all *obiter*. That is correct in relation to the *Omega 1* and *Omega 2* cases, but I was less convinced that his submission was correct in relation to the *Fidelis* case. Whether or not this is correct, it is far from a complete answer. Arnold J is a very experienced judge and a leading expert in trade mark law, who has thought very carefully about this issue, and has set out full reasons for his view.”

79. At [79], Henry Carr J reached a “provisional view”:

“79. I have reached the provisional view, in the light of the respondent’s arguments, that it is appropriate to use class number as an aid to interpretation of the specification where the words used in the specification lack clarity and precision. This applies to granted registrations as well as to applications, and

therefore applies in the context of infringement actions and revocation claims. My reasons for reaching this conclusion are set out below.

80. Of course, in many cases, it will be unnecessary to use the class number in this way, as the words chosen in the specification will be sufficiently clear and precise. Indeed, in the present case, I consider that the disputed phrase "provision of office facilities" is sufficiently clear and precise, so that its ordinary and natural meaning can be ascertained without reference to the class number."

80. Henry Carr J then set out his "reasons for limiting the scope of the specification by reference to the Nice Classification class number", first by reference to *Chartered Institute of Patent Attorneys* (C-307/10, EU:C:2012:361) (the "*IP Translator* case") (at [81] to [91]). He summarised the propositions established by *IP Translator* at [92] of *Pathway*:

"In summary, the *IP Translator* case established that:

i) Whilst Directive 2008/95 contains no reference to the Nice Classification and, consequently, imposes no obligation or prohibition on Member States with regard to its use for the purposes of registration of national trade marks, the obligation to use that instrument stems from Art.2(3) of the Nice Agreement, which was adopted pursuant to Art.19 of the Paris Convention and Directive 2008/95; recital 13.

ii) The competent Office of the countries of the Special Union, which encompasses almost all the Member States, is to include in the official documents and publications relating to registrations of marks the numbers of the classes of the Nice Classification to which the goods or services for which the mark is registered belong.

iii) The requirements of clarity and precision must be taken into consideration when considering registered trade marks as well as applications;

iv) As well as the competent authorities, economic operators must be able to acquaint themselves, with clarity and precision, with registrations or applications for registration made by their actual or potential competitors, and thus to obtain relevant information about the rights of third parties;

v) General indications of the class headings to identify the goods and services for which the protection of the trade mark was sought were not precluded, provided that such identifications were sufficiently clear and precise to allow the competent authorities and economic operators to determine the scope of the protection sought;

vi) Different approaches to the use of the general indications of the class headings of the Nice Classification might lead to a difference in the extent of the protection of a national trade mark if it is registered in several Member States, and of the protection of the same mark if it was also registered as a Community trade mark. This ran the risk of undermining legal certainty both for the applicant and for its competitors;

vii) Therefore, the use of the general indications of the class headings of the Nice Classification to identify the goods and services for which the protection of the trade mark is sought was not precluded, provided that such identification is sufficiently clear and precise to allow the competent authorities and economic operators to determine the scope of the protection sought."

81. Henry Carr J then said this (emphasis added):

“93. In the light of the *IP Translator* case and its subsequent codification by amendments to the Trade Mark Regulation (EU) 2017/1001 and Trade Mark Directive (EU) 2015/2436, the respondent's case is that class numbers cannot be ignored, as they can play a significant role in designating goods and services with clarity and precision and in ensuring certainty for economic operators when viewing the Register. The respondent does not contend that the class numbers will always be necessary to achieve clarity and precision in the specification, as in many cases the words chosen will be sufficiently clear and precise. In such cases, the scope of the specification will be clear from the ordinary and natural meaning of the words chosen. In those cases, the class number is merely confirmatory and does not change the meaning of the terms used.

94. However, because in some instances the words chosen may be vague **or could refer to goods or services in numerous classes**, the class may be used as an aid to interpret what the words mean with the overall objective of legal certainty of the specification of goods and services. For example, the word "valves" which was considered in the *Altecnic* case can refer to goods which may be included in 11 different classes of the Nice Classification, as Laddie J observed at first instance. This was referred to by the hearing officer in the *Omega One*, in a passage cited with approval by Arnold J at [72] of his judgment (*supra*). The hearing officer explained valves in Classes 7, 10, 11 and 15 are all very different creatures, a valve for a pump, a valve for a heart, a valve for a radiator, a valve for a trumpet. In such a case the lack of specificity of the description means that the class into which the goods have been placed defines the nature of the goods. Mr Malynicz also noted that valves could be registered in Class 9 for the purposes of electrical guitar amplifiers, or as valves for vehicle tyres in Class 12 or as valves for use in baby bottles in Class 10. Without the additional information provided by the class number, a specification for "valves" would not satisfy the requirement of clarity and precision.

95. This could potentially mean that a registered trade mark could be asserted against a competitor in an infringement case in relation to goods that were distant from the proprietor's real area of activity. It also may negatively impact on the proprietor. A trade mark may be descriptive for one sort of valve (e.g. the trade mark Baby Flow for valves in Class 10) but not for another sort of valve (e.g. Baby Flow for valves in Class 11). Ignoring, in such cases, the class in which the trade mark is registered, which is clearly visible on the Register, is, in my view incompatible with the *IP Translator* case, and incompatible with the principle of legal certainty.

96. In the context of revocation applications based on no genuine use, where a specification otherwise lacks clarity and precision, it may be of considerable importance to be able to refer to the class in which the goods or services are registered. It may be unfair to the proprietor not to refer to the class, if it enables clarity and precision to be established. If it is not possible to ascertain with clarity and precision the scope of the specification, then it is very difficult to see how the proprietor can prove use of goods or services within that specification. It may be unfair to the opponent not to refer to the class, if such reference makes clear that the goods or services relied on as having been used by the proprietor are not goods or services properly to be regarded as within the scope of the specification.”

82. Henry Carr J then discussed Article 2(1) of the Nice Agreement, and EUIPO and UKIPO practice. At [103] of *Pathway* the judge said this (emphasis added):

“The manuals both suggest that class number should always be taken into account, together with the ordinary and natural meaning, to see whether the requirement of clarity and precision is satisfied. It is certainly the case that the class number always forms part of the context, and the guidance is consistent with the *Altecnic* case, where Mummery LJ referred to the class number as a part of the context, and ambiguity of language by way of example only. However, that does not mean that the class number is always required to determine the natural and ordinary meaning of the words used in the specification, which may be sufficiently specific so that the scope of the specification is clear and precise. **For the purposes of this appeal it is unnecessary for me to express any view on circumstances where the class number would be relevant where the natural and ordinary meaning of the words used in the specification is clear and precise, as this goes further than the respondent's argument.**”

83. Henry Carr J reached his conclusions at [104] to [107] of *Pathway* under the heading “The judgment in the *Altecnic* case was not confined to the facts” as follows (emphasis added):

104. The respondent challenges the appellant's proposition that the judgment in the *Altecnic* case can be confined to its factual and procedural background. Whilst the issue in that case concerned amendment of the specification, exactly the same considerations would apply when it comes to construing the specification for the purposes of assessing distinctiveness during examination, construing the specification of an earlier mark in an opposition, infringement by a third party or revocation for non-use or deceptiveness. In all of these instances it is necessary to understand the scope of the goods or services covered. **Where the words are neither clear nor precise, for example because they apply to goods or services registrable in multiple classes, the class number must be relevant to resolve ambiguity.**

105. It points out that the reasoning of Mummery LJ was not confined to the facts, or the particular procedural phase then in issue. Rather, it was a case concerning construction of the scope of a specification. The specification can only have one meaning, irrespective of whether it is being considered at the application stage, or in the context of an infringement claim or in an application for revocation. Accordingly, in cases where the class number is to be taken into account when interpreting the scope of the application, it must also be taken into account when interpreting the scope of the granted specification.

106. Furthermore, the appellant concedes that where the specification contains the phrase “all included in class X” it is appropriate to use the class number when interpreting the scope of the specification, but not otherwise. The respondent contends that, where necessary to achieve clarity and precision, it is also appropriate to use the class number which appears on the public register. Indeed, the appellant's argument was expressly rejected by Mummery LJ in the *Altecnic* case.

107. In my provisional view, this submission is correct. If the word “valves” is interpreted at the application stage by reference to its class number as referring to valves for use in baby bottles in Class 10, it cannot be interpreted, once granted, as having a different meaning e.g. valves for vehicle tyres in Class 12. In my view, the Court of Appeal were applying general principles of construction to the

specification in the case before them, which had regard to the context in which the words were used. The reasoning is not confined to the facts of the case.”

84. I respectfully agree with Henry Carr J’s conclusions, for the reasons he gives. I also add the following comments:
- (a) The system of trade mark registration requires for its utility that traders consulting the register are able to tell, without any great difficulty, what is registered and what is not. Searching the register would be next to impossible without some form of classification system. Much of the world has chosen the Nice Classification system for use with trade mark applications and registrations. For trade marks filed with the UKIPO and the EUIPO, the Nice Classification is mandatory – it cannot be avoided – but it is for the applicant for a trade mark to say in which Class or Classes it wishes to specify the goods and/or services for which it has applied.
 - (b) The Nice Classification breaks all goods and services into 45 classes: it seeks to give every type of good and service a home within a single Class. Like most good classification systems, it seeks to give each particular good or service only one home. Properly used, trade mark applicants, and the UKIPO and EUIPO, are able to allocate a good or service to a home within the classification system. If goods and services have been properly classified, other traders are able to find the trade marks to which they relate.
 - (c) Traders seeking to use a mark also know where in the classification to look to find marks which might be registered for *similar* goods/services. It is to be remembered that this is a separate activity to classifying, because a trade mark registration protects against use of an identical mark on identical goods/services, but also protects against use of an identical or similar mark on similar goods/services where there is a likelihood of confusion. Thus, a practice has developed of searching in what are described as “related classes”. Thus, for example, a trader wishing to launch a new brand of sparkling water will be keen to see what prior marks have been registered in Class 32, but also related classes which include similar goods, such as Class 5 (medicinal beverages), Class 29 (milk), Class 30 (coffee and tea) and Class 33 (alcoholic beverages).
 - (d) Therefore, for the trade mark registration system to work, goods and services must be classified where they would be expected to be found, even if the scope of protection granted to the trade mark registration covers a broader range of goods or services, some of which may be classified in other Classes.
 - (e) The result is that classification will often not be obvious to the casual observer. But there is a logic to where goods/services are placed, often based at least in part on the history of the Nice Classification, and/or the development of the goods/services in question. The Nice Classification thus runs to a vast number of pages, although electronic search tools make it swift and easy to find where particular goods or services are to be properly classified. Officials meet regularly to update the Nice Classification, especially in relation to new products or services that emerge (in-line skates and movie streaming might be two examples – there are many others). There are also many examples in the Nice Classification Class headings of goods which were once important in trade, but which modern consumers may fail to identify (meerschaum and gutta-percha may be examples).
 - (f) As Henry Carr J noted in *Pathway*, there are types of products which will be classified into different Classes depending on their function – he gave the example of valves, which can be classified, he said, in 11 different Classes depending on their function. A trader consulting the register knows which type of valve is meant, in that example, by where it has been classified. So the trader in bottles for babies will know that registrations for “valves” in

Class 10 may be relevant, but will be content to ignore registrations for “valves” in Class 15 which relate to musical instruments (which are not similar goods to bottles for babies).

- (g) Therefore, for the system to work, it is essential that, from the time a trade mark application is filed, the applicant, the relevant Office and all third party traders know what exactly has been applied for. The mark must be clear and precise, and the specification of goods/services must be clear and precise. Part of the precision of the goods/services comes from the words used, and in many cases, part of it will come from the Nice Classification. As Henry Carr J said in *Pathway* at [104] (emphasis added): “[w]here the words are neither clear nor precise, **for example because they apply to goods or services registrable in multiple classes**, the class number must be relevant to resolve ambiguity.” It seems to me that this will be the case more often than not. The decision on whether or not reference to the Nice Classification is necessary cannot be resolved by simply asking “are the words in the specification clear and precise”. The word “valves” is, on its own, clear and precise – and could readily refer to trumpet valves or valves for bottle for babies. But that is not the end of the investigation. The tribunal must ask itself whether valves are registerable in multiple classes, and, as they are, then apply the Nice Classification to discover which type of valves are claimed. An easier approach would be to look at the Nice Classification in every case, and work from there. For some goods and services, the meaning of the words will be the same, whether assessed by the ordinary consumer or by the tribunal reviewing the Nice Classification. But for many goods and services, it is only by knowing the Class in which the application was filed that it is possible to determine a clear and precise meaning for the words used in the specification.
- (h) Classification practice before the UKIPO used to involve indicating the Class number in the specification itself – such was the case in 1992 when the Registrations in this case were filed. Thus, the specifications in this case are “beverages for medicinal purposes; all included in Class 5” and “beverages; all included in Class 32”. This was done at the time to emphasise that beverages that fell in other Classes could not be covered by specification in these Classes. Thus, neither specification includes alcoholic beverages, which were and are classified in Class 33. That practice has fallen out of fashion, in large part, I imagine, because it is accepted that goods or services that fall in other Classes cannot fall into the Class in question.

85. The consequences of any other approach were addressed by Henry Carr J, and I respectfully agree with him. If the Nice Classification were irrelevant to interpretation of a trade mark specification, then an unscrupulous trader in, say, valves for bottles for babies would be able to file a trade mark in Class 15, thus hiding it from other baby bottle valve traders with a watch service covering Class 10. When challenged by a trumpet valve vendor, the unscrupulous trader could simply say “I only want to use the mark for baby bottle valves”. Use for baby bottle valves would keep the Class 15 registration alive. But it would also enable the unscrupulous trader to prevent use of an identical or similar mark in relation to pump valves, heart valves, radiator valves, tyre valves, amplifier valves and trumpet valves, all of which fall in different classes. It is simply not good enough to say “valves” is clear and precise – that is all the tribunal needs to decide.
86. It would be a further consequence of the Proprietor’s approach in this case that UK law would diverge from EU law, and identical UK and EU trade marks would end up having different consequences in this jurisdiction. EUIPO practice is clearly to interpret trade mark specifications by reference to the Nice Classification. The UKIPO has also adopted this approach for many years. Were the UK to adopt a new approach, it would create significant uncertainty in relation to UK trade marks, and a position divergent to that which would apply in this jurisdiction in relation to EU trade marks.

Application to the specification

87. At paragraph 31 of *Thomson Holidays*, Aldous LJ noted that “the court should inform itself of the nature of the trade and then decide how the notional consumer would describe such use”. In oral argument, counsel for the Proprietor urged me to undertake that assessment as at the date on which the Registrations were filed – that is, in 1992. But he was unable to point me to any evidence to shed light on the nature of the trade in canned (liquid) herbal tea in the UK in 1992, although he did hand up a document showing sales of canned tea in the United States around the relevant time. He submitted that the notional consumer of canned (liquid) herbal tea in 1992 would consider that product to be both “beverages for medicinal purposes; all included in Class 5” and “beverages; all included in Class 32”.
88. I am not convinced that this assessment can or should be made as at the date on which the trade mark was filed. In any event, in the absence of evidence from 1992, it makes no difference. I must do the best I can with the evidence before me.
89. I can deal briefly with the “medicinal” point. There was no evidence before the Hearing Officer or before me to demonstrate the medicinal qualities of the canned herbal tea product. All the packaging before the Hearing Officer and before me was in Chinese characters and not translated into English. All I had to guide me was the submission from counsel for the Proprietor that “it is well known that Chinese herbal tea is *perceived*, at least by a significant proportion of the public, as having medicinal benefits”. Counsel for the Proprietor asked me to take judicial notice of that “fact”. I am unable to do so. It is not something that is obvious to me (either in 1992 or 2019). Further, as Mr Alexander set out in *Awareness*, the Proprietor must evidence its case on use. There was no evidence before the Hearing Officer or before me that the particular products sold had, claimed, or were perceived to have medicinal properties. Doing the best I can, I am not satisfied that the notional consumer of canned (liquid) herbal tea, in 1992 or now, would consider it properly to be described as “beverages for medicinal purposes”.
90. In relation to 166, I need also to deal with the part of the specification which reads “all included in Class 5”. Counsel for the Proprietor urged me to consider this expression from the point of view of the notional consumer (in 1992). I find this submission troubling – as I put it to him at the hearing, it is very doubtful indeed that the notional consumer of anything other than trade mark filing services would have any idea about the Nice Classification at all. Counsel for the Proprietor sought to avoid this by an ingenious, but flawed, argument. He put it like this: the tribunal first asks whether the notional consumer would consider canned (liquid) herbal tea to be a beverage for medicinal purposes. If he/she does, then those goods fall within Class 5, and so are “all included in Class 5”. This argument is obviously self-fulfilling, and I reject it. In my judgment, “all included in Class 5” is not something that can be left to the interpretation of the notional consumer, as the notional consumer will have no idea at all what the expression means. Rather, “all included in Class 5” is to be interpreted by the tribunal by reference to the Nice Classification itself.
91. This appeared to be the position taken by Jacob J (as he then was) in *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281 (at page 289):
- “Generally there is no difficulty in identifying which class is relevant for a particular article. But borderline cases are not infrequent. For these the Registrar often uses the practice of describing the goods or services and adding the words included in this Class or included in Class X. He did that here. The effect of this is to confine the specification to goods which fall within the description and which also were, at the time of registration, put in that class by the Registrar. Thus in *GM TM*, Graham J held that a registration for “Electrical machinery included in this Class” did not cover electrical switchgear: even though it was admittedly electrical machinery it was not at the time of registration put in the class concerned.”

92. Jacob J returned to the question in *Avnet Inc v Isoact* [1998] FSR 16, where he said (at page 19):

“These words “included in class X” in a specification of goods not infrequently cause difficulty. You have to look at the specification preceding these words to see whether what the defendant is doing is within the scope of that and then you have to ask the extra question: are they included in class X?”

It is settled, at least at first instance, that to answer that second question one has to look at the Trademark Registry practice to see whether the Registrar in practice at the time of registration included the particular service or goods within that class (see *GE Trade Mark* [1969] RPC 418 at 458). This is not always easy, especially if the kind of goods or services did not exist at the time of registration.”

It is thus clear that “all included in Class X” is not a matter for the notional consumer.

93. At the time that 166 was applied for, the 6th edition of the Nice Classification was in force. In relation to Class 5, the relevant part of the Class heading was “dietetic substances adapted for medical use”. The explanatory note stated “This Class includes mainly pharmaceuticals and other preparations for medical purposes”. The Class 30 heading included “tea” and the explanatory note stated that not included in Class 30 were “medicinal teas and dietetic substances adapted for medical use (Class 5).”

94. In my judgment, it is plain on the face of the Nice Classification that in order to be included in Class 5, a tea has to be “medicinal” or “adapted for medical use”. As I have noted above, there is no evidence to support this position in relation to the canned (liquid) herbal tea in this case. It is therefore clear to me that there has been no use in relation to medicinal beverages, or in relation to goods included in Class 5.

95. Therefore, in my judgment, even if the Proprietor had been able to prove genuine use of canned (liquid) herbal tea, this would not have been use to support the 166 Registration in relation to “beverages for medicinal purposes; all included in Class 5”.

96. I turn now to 167. In my judgment, canned (liquid) herbal tea would be considered by the notional consumer, in 1992 and now, to be a beverage. But that is not the relevant test, and I reject the Proprietor’s submission that it is for the reasons set out above. As Henry Carr J made clear, the words of the specification will not be “clear and precise” where “they apply to goods or services registerable in multiple classes”. In such a case, “the class number must be relevant to resolve ambiguity”. In my judgment, that is clearly the case here – because beverages are registerable in multiple classes (for example, Classes 5, 29, 30, 32 and 33), it is essential to look to the classification of the 167 Registration to resolve the ambiguity. It thus follows that, in my judgment, the expression “beverages” is not clear and precise – although I do accept that the expression “beverages; all included in Class 32” is clear and precise. In other words, “beverages” becomes clear and precise once the Class 32 specification is applied, because traders are able to discern that beverages that fall in Classes 5, 29, 30, 31 and 33 are excluded.

97. In 1992, the Class 32 heading read:

“Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.”

The explanatory note read:

“This class includes mainly non-alcoholic beverages, as well as beer.

Includes, in particular:

- De-alcoholised drinks.

Does not include, in particular:

- beverages for medical purposes (Cl. 5);
- milk beverages (milk predominating) (Cl. 29);
- beverage with coffee, chocolate or cocoa base (Cl. 30).”

98. The Proprietor relied on the ordinary meaning of the class heading and the explanatory note to submit that canned (liquid) herbal tea fell within “other non-alcoholic drinks”, and was not expressly excluded by the exclusion for “beverages with coffee, chocolate or cocoa base”. Therefore, the Proprietor said, it was included. Further, the Proprietor went on to say that the specific exclusion of tea-based drinks from Class 32 was not introduced into the Nice Classification until the 10th edition released in 2014, and submitted that the 10th edition in effect changed the classification of tea-based beverages from Class 32 to Class 30.
99. I disagree. It is not sufficient to look at the Class 32 explanatory note, but rather, it is important to look at where tea and tea-based beverages are actually classified. Whilst the “does not include” is helpful, it is qualified by “in particular”, which means that the list set out is not exhaustive. Nor could it be – alcoholic beverages fall within Class 33, and beverages for pets fall within Class 31. It is therefore necessary to look at where tea was classified: as now, in 1992 tea was classified in Class 30. The class heading expressly lists “tea”. Only medicinal teas are excluded by the explanatory note – they are proper to Class 5. Therefore, in my judgment, in 1992, had the Proprietor applied for “canned (liquid) herbal tea”, the Registrar of Trade Marks would have classified those goods in Class 30. They are thus not “beverages” within Class 32.
100. In its written submissions filed after the hearing, the Applicant drew my attention to various third party trade marks filed at the UKIPO between 1 January 1992 and 31 December 1996 – the period during which the 6th edition of the Nice Classification was in use in the United Kingdom. These consistently classify “tea beverages” in Class 30. I do not need for the purposes of this case to decide whether state of the register evidence is relevant, but it is consistent with my findings above.
101. As the Court of Appeal held in *Altecnic*, there is a “stronger case” for interpretation of the application by reference to the class number where “all included in Class X” appears in the specification. I have found that “canned (liquid) herbal tea” was not proper to Class 32 in 1992, and so the reference in the 167 specification to “all included in Class 32” further serves to underline my finding above.
102. Therefore, in my judgment, even if the Proprietor had proved use of the Trade Mark on canned (liquid) herbal tea, that would not have supported continuing registration of 167.
103. Counsel for the Proprietor urged me to consider preserving 167 for a narrower specification (although none was formally offered) and, if necessary, transferring the narrower specification from Class 32 to Class 30, relying on Rule 54 of the Trade Mark Rules 2008. I have upheld the Hearing Officer’s finding that there was no proof of genuine use of the Trade Mark with respect to “beverages; all included in Class 32” – this submission therefore does not arise. But it seems to me to underline the difficulties with the Proprietor’s case. It would not be appropriate for me to narrow the Class 32 specification to “tea”, because I would then need to transfer it to Class 30, in circumstances where tea has clearly been included in Class 30 since before the 167 Registration was filed in 1992.

Ground 4 – overall findings of no use

104. As set out above, the evidence of use in relation to the section 46(1)(a) period was manifestly inadequate, and whilst the Proprietor did not withdraw this aspect of its appeal, it did not press it with great vigour. I reject it.
105. Also as set out above, the Hearing Officer made no error of law or principle in his assessment of the evidence in relation to the section 46(1)(b) period. I therefore uphold his conclusions.
106. At the hearing, counsel for the Proprietor sought to suggest that if revocation was to be ordered it should be from a later date. He submitted that the Hearing Officer had found use that fell between the section 46(1)(a) period and the section 46(1)(b) period. Reference was made to the Hearing Officer’s finding at [34] that “sales took place up to April 2013”. This finding of the Hearing Officer relied on by the Proprietor related to the evidence of Mr Chan and Mr Fu, which related only to the canned (liquid) herbal tea. The Hearing Officer failed to address himself to the issue of whether this was use for the goods for which the Trade Mark was registered, and I have therefore set out my findings above. I have found that use with respect to canned (liquid) herbal tea was not use in relation to the specifications in Class 5 or Class 32. The date of revocation issue submitted by the Proprietor therefore does not arise. In my judgment, the Trade Mark has never been used for the goods for which it was registered.

Conclusions

107. For the reasons set out above, I dismiss the appeal.