

BL O/513/20

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION 3421175

BY LOVE SALCOMBE LIMITED

TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 9, 16, 18, 25, 35, 39, 41:

LOVE SALCOMBE

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IN THE MATTER OF APPLICATION NUMBER 3421175
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TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 9, 16, 18, 25, 35, 39, 41:**

LOVE SALCOMBE

Background

1. On 14 August 2019, Love Salcombe Limited (“the applicant”) applied to register the above mark for the following goods and services:

Class 9

Mobile apps; computer software; computer software in the form of applications and for use on mobile telephones, smartphones and on other mobile devices; videos; electronic publications; podcasts; downloadable publications.

Class 16

Printed matter; books; newspapers; periodicals; publications; magazines (journals); photographs; prints; stationery.

Class 18

Luggage; bags; travel cases; travelling bags; vanity cases; rucksacks, backpacks; handbags; beach bags; shopping bags; suit cases; briefcases; portfolio cases; school bags; clutch purses; wallets; purses.

Class 25

Clothing; footwear; headgear.

Class 35

Advertising; marketing and sales promotions; provision of advertising space and materials; advertising and marketing services by means of online blogging; business assistance; business management; business administration; promotional services; customer loyalty services for commercial, promotional and/or advertising purposes; retail services connected with the sale of clothing, footwear, headgear, luggage, bags, travel bags, vanity cases, backpacks, handbags, beach bags, shopping bags, suit cases, briefcases, portfolio cases, schoolbags, clutch purses, wallets and purses.

Class 39

Providing tourist information services; providing tourist travel information; providing information to tourists relating to excursions and sightseeing; travel booking, reservation and information services; offering third party travel packages; provision of tourist travel information; travel guide and travel information services.

Class 41

Photography; photography services; ariel photography services; photo editing services; news reporting services; promotion services; online publication services; information and advisory services relating to all of the aforesaid.

2. On 21 August 2019, the Intellectual Property Office (“IPO”) issued an examination report in response to the application. In that report the following objection was raised under section 3(1)(b) of the Trade Marks Act 1994 (“the Act”):

The application is not acceptable in Classes 9, 16, 18, 25, 35, 39 and 41. There is an objection under Section 3(1)(b) of the Act as the mark is devoid of any distinctive character. This is because the expression merely serves a promotional function i.e. the relevant public would perceive the expression ‘LOVE SALCOMBE’ as a promotional message with the purpose of highlighting a positive attribute of the area Salcombe.

It is considered that the average consumer would not perceive the expression ‘LOVE SALCOMBE’ as a trade mark, capable of distinguishing the goods and services of this applicant from those of another undertaking. It is considered that they would instead perceive the sign as an enticement to enjoy the area of Salcombe.

When a sign is purely promotional in nature it is considered that it cannot function as a badge guaranteeing the commercial origin of the services and does not distinguish your services from those of another undertaking.

3. On 17 October 2019, McDaniel & Co Solicitors (“the representative”) acting on behalf of the applicant requested an extension of time (“EOT”) for two months and stated that the applicant wishes to gather and prepare evidence in an attempt to prove acquired distinctiveness. The EOT was duly granted.
4. On 17 December 2019, the representative on behalf of the applicant filed substantive arguments for acceptance of the application in the *prima facie*, namely:
 - For an objection to be raised under Section 3(1)(b) it is necessary that the relevant public will make a direct connection between the term and the goods and services covered without any further reflection.
 - The average consumer’s level of attention is likely to vary according to the category of goods and services in question (*Lloyd Schuhfabrik Meyer C-342/97*, paragraph 26).
 - The goods and services are aimed at an average consumer who is reasonably well-informed, observant and circumspect.
 - The average consumer would not immediately perceive the sign as a term used in connection with the goods and services.
 - The relevant public will be able to distinguish, without any possibility of confusion, the applicant’s goods and services from those of a different commercial origin and the mark is inherently registerable.

As well as the above, the applicant also made “state of the register”-type arguments based on previously accepted UK and EU marks which were considered comparable.

5. If the examiner was not persuaded that the application was acceptable in the *prima facie*, a Witness Statement along with thirteen exhibits (JW1 – JW13) was also submitted to prove acquired distinctiveness.
6. On 23 January 2020, the examiner responded by contending that the sign is devoid of any distinctive character and that the earlier registrations referred to in the correspondence are not binding on the registrar. Therefore, the examiner maintained the objection for all goods and services in the *prima facie*. The examiner then proceeded to assess the merits of the evidence but concluded that it does not demonstrate acquired distinctiveness for several reasons being:
 - The evidence showed use only in London, Plymouth, Exeter, Kingsbridge and Torquay.
 - The use is not sufficiently widespread.
 - The number of Instagram followers does not show that the mark is recognised as a trade mark.
 - The mark hasn't been used on any of the goods in classes 18 and 25
 - Use of the mark could not be found in respect of all (or most of the goods and services) in classes 9, 16, 35, 39 and 41.
7. On 20 March 2020, a hearing was requested where the representative would be in attendance on behalf of the applicant.
8. Prior to the hearing taking place, the representative sent correspondence to the Hearings Clerk to inform the registrar that the applicant no longer wished for a representative to attend the hearing and a decision should therefore be taken from the papers.
9. On 24 April 2020, I wrote to the representative explaining that a decision will be made from the papers already on file but, due to Covid19, I was unable to access the government building where the physical evidence was being stored and my assessment would unfortunately be delayed. I clarified that once the restriction had been lifted, I would assess the evidence accordingly and issue my decision.
10. On 7 July 2020, I issued my decision made from the papers (**Annex A – Hearing Report**) and refused the application under section 37(4) of the Act. I maintained the objection under section 3(1)(b) of the Act against all goods and services in the *prima facie* and I was not persuaded that the evidence demonstrated distinctiveness acquired through use.
11. On 13 August 2020, the representative submitted a form TM5 ‘Request for a statement of reasons for registrar’s decision’.

12. Whilst preparing my statement of grounds, I further considered the range of goods and services and reassessed my rationale for maintaining the section 3(1)(b) objection in the *prima facie*. For the reasons given later in this decision, on 9 September 2020, I wrote to the representative confirming that the following goods and services are now deemed to be acceptable as filed:

Class 18

Luggage; travel cases; travelling bags; vanity cases; rucksacks; backpacks; suitcases; briefcases; port[f]olio cases; school bags.

Class 25

Footwear.

Class 35

Business assistance; business management; business administration; retail services connected with the sale of footwear, luggage, travel bags, vanity cases, backpacks, suitcases, briefcases, portfolio cases, school bags.

13. I confirmed that the objection is maintained against the remaining goods and services and I provided the applicant with two options 1) allow the application to proceed to publication in the Trade Marks Journal for the acceptable goods and services and the fee of £100 (TM5) would be refunded accordingly, or 2) accept that the objection has been waived in connection with the above goods and services but continue with the request for the registrar's decision for the remaining goods and services. On 23 September 2020, the representative confirmed that their client wished to continue with the request for a statement of reasons.

14. Thus, I am now asked under section 76 of the Act, and Rule 69 of the Trade Mark Rules 2008, to state the grounds of my decision and the material used in arriving at it, for the remaining goods and services as follows:

Class 9

Mobile apps; computer software; computer software in the form of applications and for use on mobile telephones, smartphones and on other mobile devices; videos; electronic publications; podcasts; downloadable publications.

Class 16

Printed matter; books; newspapers; periodicals; publications; magazines (journals); photographs; prints; stationery.

Class 18

Bags; handbags; beach bags; shopping bags; clutch purses; wallets; purses.

Class 25

Clothing; headgear.

Class 35

Advertising; marketing and sales promotions; provision of advertising space and materials; advertising and marketing services by means of online blogging; promotional services; customer loyalty services for commercial, promotional and/or advertising purposes; retail services connected with the sale of clothing, headgear, bags, handbags, beach bags, shopping bags, clutch purses, wallets and purses.

Class 39

Providing tourist information services; providing tourist travel information; providing information to tourists relating to excursions and sightseeing; travel booking, reservation and information services; offering third party travel packages; provision of tourist travel information; travel guide and travel information services.

Class 41

Photography; photography services; ariel [aerial] photography services; photo editing services; news reporting services; promotion services; online publication services; information and advisory services relating to all of the aforesaid.

The *prima facie* case for registration under section 3(1)**The Law**

15. Section 3(1) of the Act reads as follows:

3. - (1) *The following shall not be registered –*

(a) ...

(b) *trade marks which are devoid of any distinctive character,*

(c) ...

(d) ...

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.

The relevant legal principles – section 3(1)(b)

16. There are a number of judgements of the Court of Justice of the European Union (“CJEU”) which deal with the scope of article 3(1)(b) of the Directive and Article 7(1)(b) of the Regulation, whose provisions correspond to Section 3(1)(b) of the UK Act. I derive the following main guiding principles from the cases below:

- An objection under Section 3(1)(b) operates independently of objections under section 3(1)(c) – (*Linde AG (and others) v Deutsches Patent-und Markenamt*, Joined Cases C-53/01 to C-55/01, paragraphs 67 to 68);
 - For a mark to possess a distinctive character it must identify the product (or service) in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product (or service) from the products (or services) of other undertakings (*Linde* paragraphs 40-41 and 47);
 - A mark may be devoid of distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive (*Postkantoor* paragraph 86);
 - A trade mark's distinctiveness is not to be considered in the abstract but rather by reference to the goods or services in respect of which registration is sought and by reference to the relevant public's perception of that mark (*Libertel Group BV v Benelux Merkenbureau*, Case C-104/01 paragraphs 7277);
 - The relevant public must be deemed to be composed of the average consumer who is reasonably well-informed and reasonably observant and circumspect (*Libertel* paragraph 46 referring to Case C-342/97 *Lloyd Schuhfabrik Meyer*).
17. The Court of Justice of the European Union ('CJEU') has repeatedly emphasised the need to interpret the grounds of refusal of registration listed in Article 3(1) and Article 7(1), the equivalent provision in Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark, in the light of the general interest underlying each of them (*Bio ID v OHIM*, C-37/03P paragraph 59 and the case law cited there and, more recently, *Celltech R&D Ltd v OHIM*, C-273/05P).
18. The general interest to be taken into account in each case must reflect different considerations according to the ground for refusal in question. In relation to section 3(1)(b) (and the equivalent provision referred to above) the Court has held that "...the public interest... is, manifestly, indissociable from the essential function of a trade mark", *SAT.1 SatellitenFernsehen GmbH v OHIM*, C-329/02P. The essential function thus referred to is that of guaranteeing the identity of the origin of the goods or services offered under the mark to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin (see paragraph 23 of the above-mentioned judgement). Marks which are devoid of distinctive character are incapable of fulfilling that essential function.
19. Section 3(1)(b) must include within its scope those marks which, whilst not designating a characteristic of the relevant goods and services (i.e. not being necessarily descriptive), will nonetheless fail to serve the essential function of a trade

mark in that they will be incapable of designating origin. In terms of assessing distinctiveness under section 3(1)(b), the ECJ provided guidance in *Koninklijke KPN Nederland NV v Benelux-Merkenbureau (Postkantoor) C-363/99* where, at paragraph 34, it stated:

“A trade mark’s distinctiveness within the meaning of Article 3(1)(b) of the Directive must be assessed, first, by reference to those goods or services and, second, by reference to the perception of the relevant public, which consists of average consumers of the goods or services in question, who are reasonably well informed and reasonably observant and circumspect (see inter alia Joined Cases C-53/01 to 55/01 Linde and Others [2003] ECR I- 3161, paragraph 41, and C-104/01 Libertel [2003] ECR I-3793, paragraphs 46 and 75).”

20. This establishes the principle that the question of a mark being devoid of any distinctive character is answered by reference firstly, to the goods and services applied for, and secondly, to the perception of the average consumer for those goods or services. In relation to identifying the relevant consumer, it is reasonable to assume that the goods and services claimed in this application can be described as being directed towards a non-specialist general public who would demonstrate a moderate level of attention when considering their purchase.
21. One must also be aware that the test of distinctive character is one of immediacy or first impression, as confirmed by the European Court of First Instance (now the General Court) which, in its decision on *Sykes Enterprises v OHIM, T-130/01(Real People Real Solutions)*, stated the following:

“...a sign which fulfils functions other than that of a trade mark is only distinctive for the purposes of Article 7(1)(b) of Regulation No 40/94 if it may be perceived immediately as an indication of the commercial origin of the goods or services in question, so as to enable the relevant public to distinguish, without any possibility of confusion, the goods or services of the owner of the mark from those of a different commercial origin.”

Application of legal principles – section 3(1)(b)

22. When assessing a mark’s distinctiveness, it is necessary to consider the perception of that mark by the average consumer, who I have identified at paragraph 20 above as being the public at large, who would purchase such goods and services with a moderate level of attention and knowledge. As I explained in my hearing report, I consider that the relevant consumers of the goods and services are likely to be tourists and holidaymakers and prospective tourists and holidaymakers, given that Salcombe is a well-known geographical location within the United Kingdom, as confirmed below.
23. The mark applied for is word only and therefore contains no artistic embellishments or stylisation. The mark consists of two separate words ‘LOVE’ and ‘SALCOMBE’ to create the word combination ‘LOVE SALCOMBE’. The Oxford Dictionary of English defines the word ‘love’ as follows:

love (noun)

- *an intense feeling of deep affection*
- *a great interest and pleasure in something*
- *a person or thing that one loves*

love (verb)

- *like or enjoy very much*

When a mark consists, even in part only, of a geographical place name, it is of course prudent to research the area's characteristics (*Windsurfing Chiemsee (C-108/97)*). My internet research revealed that 'Salcombe' is clearly a tourist destination, with entries in Wikipedia and the local tourist board describing the geographical location as follows:

Salcombe is a popular resort town in the South Hams district of Devon, south west England. The beautiful coastal town of Salcombe sits on the banks of the Kingsbridge Estuary making it one of the prettiest towns in South Devon.

Located within the South Devon Area of Outstanding Natural Beauty, Salcombe is known for its outstanding coastal views and rolling surrounding countryside, as well as a centre for sailing. Salcombe is a great base for holidays spent messing about on the water or at the water's edge, or just for a day trip - either way you will fall in love with this beautiful town.

With its estuary location, Salcombe is a water sports haven - whether it be sailing, kayaking, surfing or paddle boarding - everyone wants to get in the crystal blue waters. The local beaches are nothing short of outstanding, with golden sand and turquoise sea. In Town, Salcombe South Sands and North Sands are ideal family beaches, and just across the estuary you will find East Portlemouth, best accessed via ferry from Salcombe. To the west lies the beaches of Bigbury on Sea and Bantham and the famous Burgh Island which is accessed at high tide via a sea tractor.

With the South West Coast Path on the doorstep, you can discover the area's spectacular coastline at your leisure – a walk to Start Point Lighthouse is an ideal way to spend a day admiring the views.

Salcombe town is lined with boutique shops, high street brands and independent producers, as well as local art galleries and gift shops - you can spend hours browsing through the town. Some of the best restaurants and bars are located in Salcombe, serving locally caught fresh seafood and locally farmed produce. Don't forget to try some delicious Salcombe Dairy Ice-cream or the award winning Salcombe Gin - both have in town shops and distilleries you can visit.

24. In my opinion the general public will, even if not entirely, recognise that Salcombe is a place name with an association with tourism especially. Against the backdrop of the dictionary definition and what the location is known for, the expression 'LOVE SALCOMBE' is merely a non-distinctive sign expressing that consumers will love

Salcombe, or an expression that they love Salcombe. The mark is comprised of English words which will be readily understood by the average consumer. Whilst I accept that the sign could be perceived as being slightly elliptical or terse as, for example, it is not 'I love Salcombe' or 'You will love Salcombe'; nevertheless, in my view, this does not imbue the sign with a distinctive trade mark character. I believe that the sign gives an immediate and clear message that will be easily understood by average consumers visiting, or considering a visit, to Salcombe or even expressing some affinity or affection for the area. In my opinion, the sign conveys a clear message, of a promotional nature only and in plain language, that could apply to any undertaking and consumers are unlikely to attribute any trade mark significance to the sign.

25. In this regard, I am mindful of the comments made by Geoffrey Hobbs QC sitting as the Appointed Person in '*INNOVATE – HELPING INVENTORS*' (O-119-17):

In my judgment, the phraseology is too ordinary, too general, and too plainly explanatory to enable the statement to stand on its own two feet as an indication of trade origin in the absence of distinctiveness acquired through use.

26. In my view, the expression 'LOVE SALCOMBE' is too typical (especially in relation to tourist destinations) and too mundane to act as an indicator of trade origin, as the message received by average consumers is simply that they will love Salcombe due to all that it has to offer.
27. As stipulated in the above case law, I must assess the mark applied for against the goods and services for which registration is sought.
28. I recognise that the grounds of the objection may vary somewhat given the variety of goods and services applied for, but I also deem them to be an intrinsically linked range of goods and services that consumers would expect when visiting, or considering a visit, to Salcombe. Similarly, I also consider them to be an intrinsically linked range of goods and services for any undertaking wishing to promote and market the tourist area of Salcombe to people within the United Kingdom, and possibly beyond.
29. As referred to in my hearing report, I applied the section 3(1)(b) objection by grouping together the goods and services into, what I believe to be, "homogenous categories", which addresses the slight variations in consumers likely perceptions of the sign (see Geoffrey Hobbs QC in *MAKE GIVING COUNT* (O-069-19) page 11, line 14-20).
30. In relation to the services in class 39, in my opinion, the average UK consumer will merely perceive the mark 'LOVE SALCOMBE' as a non-distinctive intimation that they will love Salcombe and everything that it has to offer as a tourist town. After researching the geographical area of Salcombe, in correlation with services such as '*tourist information; travel booking; travel guides services*' the sign clearly serves to promote and advertise the area of Salcombe by encouraging tourism.

31. In connection with photography services in Class 41, it is reasonable to conclude that photographs will be taken of the sights and attractions of the popular resort town, which is an Area of Outstanding Natural Beauty (AONB). In my view, the resulting photographs maybe used as a promotional tool to entice visitors to Salcombe and to promote that consumers will “love Salcombe” due to its attractive and picturesque scenes, thus encouraging visitors to the area. As a side point, whilst not being entirely determinative of my view of the mark in the *prima facie*, the applicant’s website and internet presence indicates that they take photographs of Salcombe for promotional purposes, which does seem to corroborate my view of the mark in the *prima facie*.
32. As stated previously, I must consider the geographical location in question and what it is known for throughout the UK. It is beyond dispute that businesses within popular tourist destinations specialise in, and trade in, tourist items such as souvenirs and gifts. So, I must consider what items would plausibly be sold in and around Salcombe. I believe it is entirely reasonable to consider these would be goods in class 16 being books, photographs, prints and stationery (pens, pencils, erasers, rulers etc), in class 18, items such as beach bags, shopping bags, wallets and purses, and class 25, products such as t-shirts and caps, as souvenirs and/or gifts. These items, in my opinion, would simply act as a memento of ones visit to Salcombe or even one’s affinity with the area. The sign ‘LOVE SALCOMBE’ merely commemorates visitors and holiday makers’ time in Salcombe and acts as a way of expressing that they loved their stay and the area. In my opinion, such habitual trade practices are carried out in tourist destinations throughout the world in relation to “souvenir”-type and “gift”-type goods. I do not believe that the mark would function as a badge of trade origin, but rather as a non-distinctive solely promotional sign which is devoid of any distinctive character.
33. With regards to the tourist and holiday related services in class 39, I consider the class 9 and class 16 goods to be ancillary to those services, as they are intrinsically linked. It is reasonable to conclude that leaflets, brochures and promotional information etc. would be made available, both in paper (class 16) and electronic (class 9) form, as a means of promoting and advertising Salcombe. Also, mobile applications are a popular means for disseminating and holding information. To my mind, the app would merely contain information, including photographs, regarding the area of Salcombe and therefore the mark will be perceived as being devoid of distinctive character. Similarly, in connection with videos (whereby the content is merely a recording of the sights and attractions of Salcombe used to promote the area), the sign remains devoid of any distinctive character.
34. In class 35 for the services which centre around advertising, marketing and promotion, the sign ‘LOVE SALCOMBE’, used in this context, simply acts as a promotional statement. Operators (including the local council perhaps) of a given tourist destination would wish to advertise and promote the tourist town to the rest of the United Kingdom (and beyond). Therefore, the sign does not in my opinion guarantee single commercial origin, due to its only and exclusively promotional and non-distinctive connotations.

35. I also deem it entirely plausible that many shops and businesses would sell (or may wish to sell in the future) a number of different gift and souvenir-type products. Akin to the goods themselves, if the mark is encountered by consumers within a retail environment, the sign must still be considered devoid of any distinctive character, when purchased as a memento or gift.
36. I now refer to the applicant's "state of the register"-type arguments cited by the representative in their correspondence dated 17 December 2019 below:

It is clear that the geographical location of SALCOMBE is inherently registerable. There are 30 EU and UK registrations which include the word SALCOMBE together with a description of the goods or services covered by the application/registration, for example:

*EU017361239 SALCOMBE GIN
UK2234166 SALCOMBE DAIRY
UK2354534 SALCOMBE SAILS
UK3015976 SALCOMBE LIFE
UK3325316 THE SALCOMBE BOBBLE HAT*

Furthermore, there are currently numerous examples on the UK and EU trade Mark Registers of registrations including the word LOVE registered together with a geographical area or a description of the goods and services covered in the application, including:

*EU9004193 LOVE VALENCIA in classes 9, 16, 35, 39 and 41
EU9319138 LOVE ART in classes 9, 41 and 42
UK3323300 LOVE YOUR ENERGY including class 37 installation of energy saving apparatus*

37. The only registration which may be considered on a par with the application in suit is 'LOVE VALENCIA (EU9004193)'. However, it should be noted that the application and subsequent registration would not have been administered by the UKIPO. Nevertheless, the legal position with such marks raised as comparators has been recently clarified in relation to the mark *BREXIT* (O-262-18), where James Mellor QC stated:

11. In addition, just because a mark is on the Register does not mean it will be held valid when challenged. Furthermore, if the touchstone for registration was to be a comparison with marks already on the register, then registration would come to depend on the lowest common denominator. In any event, it is quite clear that the application of the section 3(1)(b) ground requires an assessment not against other marks on the register, but against the standard laid down in that provision, as interpreted in the case law.

...

21. *The Hearing Officer referred to the previous registrations as 'precedents'. Strictly they are not precedents for the reasons explained above, but I appreciate the desire to maintain consistency in approach.*

38. At paragraph 11 above, I indicated that in connection with a small number of goods and services, the objection under section 3(1)(b) of the Act had been waived in the *prima facie*. Whilst re-evaluating my rationale for the purposes of preparing this statement of grounds, I concluded that the objection could not realistically and reasonably apply to such goods and services.
39. It is of course important that I am convinced that the objection applies to all goods and services applied for. If there are any goods or services specified which are free from the objection under section 3(1)(b) of the Act, then they must be allowed to proceed. Whilst applying the legal principles to this case and considering my reasoning for maintaining the objection in the *prima facie* (as well as the principles concerning partial refusals), I felt that the acceptable goods and services [12] could not be grouped together with the unacceptable goods and services [14].
40. In respect of the acceptable goods in classes 18 and 25, upon reflection, I did not consider them to be souvenir or gift related products. I conducted a thorough and stringent assessment and although I deemed, *inter alia*, t-shirts, caps, pens, pencils, purses, wallets to be purchased as mementos or gifts, I could not comfortably reach the same conclusion for the acceptable goods. Under the same rationale, I have allowed the retail of such goods to proceed also. For the specific 'business services' applied for in class 35, I did not consider them to be on a par with advertising and promotional services. When considering 'advertising' and 'promotion' in their broadest sense, this surely encompasses encouraging and influencing average consumers to visit Salcombe; but it seems nonsensical that a solely promotional expression such as 'LOVE SALCOMBE' could reasonably apply to such business services. Thus, I deemed those goods and services listed at paragraph 12 to be acceptable in the *prima facie*.
41. In relation to the unacceptable list of goods and services specified at paragraph 14, I believe that, for the above reasons, the average consumer will view the sign as being origin neutral rather than origin specific. The combination of words 'LOVE SALCOMBE', given their meanings and relevance, will merely be perceived as a laudatory statement conveying that consumers have, or will have, a great attachment and affection for the tourist area. Applying the relevant legal principles, and considering my own findings, I have concluded that the mark applied for will not be recognised as a trade mark, without first educating the general public to perceive it as such.

The relevant legal principles – acquired distinctiveness

42. The CJEU provided guidance in *Windsurfing Chiemsee* (see judgment of 4 May 1999 in Joined cases C-108/97 and C-109/97) regarding the correct approach to the assessment of distinctive character acquired through use, setting out the relevant test in paragraph 55:

“...the first sentence of Article 3(3) of the First Directive 89/104/EEC is to be interpreted as meaning that:

- *A trade mark acquires distinctive character following the use which has been made of it where the mark has come to identify the product in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product from goods of other undertakings;*
- *In determining whether a trade mark has acquired distinctive character following the use which has been made of it, the competent authority must make an overall assessment of the evidence that the mark has come to identify the product concerned as originating from a particular undertaking and thus to distinguish that product from goods of other undertakings;*
- *If the competent authority finds that a significant proportion of the relevant class of persons identify goods as originating from a particular undertaking because of the trade mark, it must hold the requirement for registering the mark to be satisfied;*
- *Where the competent authority has particular difficulty in assessing the distinctive character of the mark in respect of which registration is applied for, Community law does not preclude it from having recourse, under the conditions laid down by its national law, to an opinion poll as guidance for its judgment.”*

43. I am also mindful of the CJEU decision in *Bovemj Verzekeringen NV v Benelux Merkenbureau* (Europolis) C-108/05, where it was held that a trade mark may be registered on the basis of acquired distinctiveness “...only if it is proven that the trade mark has acquired distinctive character through use throughout the territory of a member state”.

44. The proviso to section 3(1) based on acquired distinctiveness does not establish a separate right to have a trade mark registered. It allows an exception to, or derogation from, the grounds of refusal listed in section 3(1)(b) - (d) and as such, its scope must be interpreted in light of those grounds of refusal – see e.g. case T-359/12 *Louis Vuitton Malletier v OHIM* and case law referred to at para [83]. The established principles to consider when assessing a claim to distinctiveness acquired through use can be summarised as follows:

- Mere evidence of use, even if substantial, does not make the case for acquired distinctiveness.
- A significant proportion of the relevant consumers need to be educated that the sign has acquired distinctiveness.
- If, to a real or hypothetical individual, a word or mark is ambiguous in the sense that it may be distinctive or devoid then it cannot comply with the

requirements of the Act for it will not provide the necessary distinction or guarantee.

- It follows that, with regard to the acquisition of distinctive character through use, the identification by the relevant class of persons of the product or service as originating from a given undertaking must be as a result of the use of the mark as a trade mark. The expression 'use of the mark as a trade mark' in section 3 refers solely to use of the mark for the purposes of the identification, by the relevant class of person, of the product as originating from a given undertaking.
- Acquired distinctiveness cannot be shown by reference only to general, abstract data such as predetermined percentages (see also *Windsurfing Chiemsee* (para [52]) case and others).
- The mark must have acquired distinctiveness through use throughout the territory of the United Kingdom.
- In assessing whether a trade mark has acquired a distinctive character, the competent authority must make an overall assessment of the relevant evidence, which in addition to the nature of the mark may include: (i) the market share held by goods bearing the mark; (ii) how intensive, geographically widespread and long- standing the use of the mark has been; (iii) the amount invested by the proprietor in promoting the mark; (iv) the proportion of the relevant class of persons who, because of the mark, identify the goods or services as emanating from the proprietor; (v) evidence from trade and professional associations; and (vi) (where the competent authority has particular difficulty in assessing the distinctive character) an opinion poll. If the relevant class of persons, or at least a significant proportion of them, identifies goods or services as originating from a particular undertaking because of the trade mark, it has acquired a distinctive character.
- The position must be assessed at the date of application, being 14 August 2019

Application of legal principles – acquired distinctiveness

45. In order to demonstrate that a non-distinctive sign, which has been refused in the *prima facie*, has acquired a distinctive character because of the use made of it, the applicant must provide evidence in a number of key areas. I would stress however that this is not a tick-box exercise where each and every factor set out in *Windsurfing Chiemsee* must be evaluated as having been met. The exercise involves an evaluation of the available evidence as a totality and from which I must be able to infer that the relevant requirement has been met, based on the exposure of the mark as a trade mark.

46. Along with substantive arguments for acceptance of the mark in the *prima facie*, on 17 December 2019 formal evidence to demonstrate acquired distinctiveness was

also submitted. The evidence consisted of a signed Witness Statement along with 13 exhibits (JW1 – JW13):

JW1 – invoices showing the purchase of two domain names (lovesalcombe.co.uk and love Salcombe.com) in February and October 2017 respectively. Also, a printout from Companies House website showing LOVE SALCOMBE LIMITED was incorporated on 3 May 2019 with the nature of the business being 'photography'

JW2 – screenshots taken from the applicant's Instagram account showing the increase of followers from April 2017 up to the filing date (1k – 11.2k). The evidence shows the number of followers to be as high as 12.8k, but these figures go beyond the date of filing

JW3 – Instagram analytics, showing activity on the applicant's account. Information includes age ranges, gender and location of followers including the number of times posts have been viewed, saved and shared. Again, some of the data goes beyond the date of filing (November 2019)

JW4 – photographs taken by the applicant and shared online. Shows the number of likes for each photograph which peaks at around 1,500 but the average for all the photographs would be lower. The printouts also contain comments by viewers.

JW5 – examples of photographs and videos with the hashtag #lovesalcombe and shows the number of followers. The hashtag has been used over 3.3k times

JW6 – copies of blogs shared on third party websites including photographs. Also shown are approaches from third parties to use the applicant's photographs, including an approach from visitsouthdevon.co.uk and Devon County Council.

JW7 – exhibits showing approaches from third parties to use the applicant's photographs

JW8 – screenshots from the applicant's Instagram account showing comments from followers

JW9 – examples of enquiries asking for tourist information

JW10 – examples of the applicant's photographs being used as the subject of paintings which are sold and displayed in local galleries.

JW11 – examples of third parties requesting to use the applicant's photographs

JW12 – examples of posts which have been shared from the applicant's account to third party accounts

JW13 – examples of how the applicant advertises local businesses via her online account

47. To my mind, the burden of proof that is required to demonstrate that distinctive character through use has been accomplished, is massive and onerous. It requires that a significant proportion of the relevant consumer has been educated to perceive the mark as a trade mark, the essential function of which is to guarantee the trade origin of the goods and services specified.
48. In order to demonstrate acquired distinctiveness, it stands to reason that the applicant must have actually used the sign on the goods and services concerned as a trade mark. If the applicant has not used the sign on those goods and services, then acquired distinctiveness cannot be proven. By the applicant's own submission at point 4 of the Witness Statement, use of the sign has not been made in connection with classes 18 and 25. Also, after a thorough assessment of the evidence filed, I have determined that use has only been made in respect of the following services:

'advertising, marketing, promotion; providing tourist information services, providing tourist travel information, providing information to tourists relating to excursions and sightseeing, provision of tourist travel information, travel guide and travel information services; photography'

49. The applicant first used the mark in February 2017. The application was filed on 14 August 2019. Therefore, the applicant has had two and a half years to expose the non-distinctive sign to the general public and transform it into an indicator of single commercial origin.
50. It is clear from the evidence that the applicant's activities are invariably taking photographs of Salcombe and using them to promote the area. The evidence shows that third parties such as Devon County Council who requested to use one of the applicant's photographs, does so with the intention of using it to promote Salcombe also. In my opinion, the fact that Devon County Council may purchase a photograph from the applicant does not confirm that they regard the words 'LOVE SALCOMBE' as a trade mark guaranteeing the origin of the goods and services concerned.
51. The evidence filed, in essence, consists of pages and pages of screenshots and printouts from Instagram. Whilst the evidence comprises circa 400 pages, in my opinion, it lacks quality in terms of demonstrating to the registrar the active steps taken by the applicant to educate consumers and to show that the mark has become distinctive as a trade mark through use. Whilst the evidence shows that the sign has indeed been used in connection with the above services only [48], it fails to demonstrate the perceptions and recollections of the general public whilst encountering the sign. The reams of pages predominately centre around well wishes and compliments from followers regarding the applicant's photographs of Salcombe. Given the applicant's intention to promote Salcombe through picturesque photographs of the area, the exhibits do not demonstrate that the sign would be perceived as anything other than a non-distinctive statement. The use of the mark as filed does not indicate to me that consumers perception of the mark has changed, or that the applicant has adopted educative steps to displace the non-distinctive message with a material trade mark meaning. As stated in the case law, mere use of

a sign does not mean that consumers accept it as a guarantee of single commercial origin and proving that it does fulfil this function is especially acute and burdensome.

52. In terms of how geographically widespread the applicant's use is, I turn to exhibit JW3. This indicates that use has been made of the mark in London, Plymouth, Exeter, Kingsbridge and Torquay. Whilst the case law does not stipulate of course that all four corners of the country must be covered, a *significant* proportion of the United Kingdom must be targeted. I deduce from the evidence before me that consumers in Scotland, Wales, Northern Ireland, the north of England and the Midlands have not been exposed to the mark in question and acquired distinctiveness cannot be proven if a *significant* proportion of average consumers have not been exposed to the mark. Use of the sign must be widespread throughout the United Kingdom but the evidence simply does not demonstrate that this is the case, which in my view is a fundamental flaw when considering the evidence in its entirety.
53. Further criticisms of the evidence can also be made: i) a small number of exhibits postdate the filing date rendering them inadmissible as evidence ii) the applicant appears to be most active on Instagram with 11.2k followers – this is not a significant number of followers and, in any case, the evidence has demonstrated that these followers are not located throughout the United Kingdom iii) a registered trade mark is a national right and therefore to prove acquired distinctiveness use and education must be throughout the UK; however, the applicant's communications with followers and businesses is very localised.
54. Considering the principles laid down in *Windsurfing Chiemsee*, no financial information pertaining to the applicant's turnover or advertising spend have been forthcoming. Also, the applicant has not provided any indication as to market share. In the absence of such figures, I cannot ascertain the size of the applicant's business within the relevant marketplace. Again, whilst such data is not a prerequisite to finding acquired distinctiveness, it is to my mind, a fundamental part of the evidence as a whole. I simply do not know the applicant's revenue, so I am unable to gauge how successful the company is, and I am unaware of how much the applicant has invested in exposing the sign to consumers through direct advertising and marketing strategies. Thus, I am unable to determine if the applicant has a healthy market share in the relevant sector.
55. As I stated in my hearing report, I acknowledge that the sign has been used and any internet presence nowadays is always likely to foster a degree of attention from the general public, especially given the picturesque photographs taken by the applicant. Nevertheless, in my opinion, such attention is completely insufficient in terms of the test for demonstrating distinctiveness acquired through use.
56. The mark rates as a non-distinctive laudatory statement and following a thorough assessment of the evidence as a whole, I conclude that the applicant has not educated a significant proportion of the UK public to perceive the mark applied for as a guarantee of single trade origin.

57. As noted in the hearing report, following an assessment of the mark in the *prima facie* and the evidence filed, I refused the application. Given the significant deficiencies in the evidence overall, I did not believe that they could be easily remedied.

Conclusion

58. In this decision, I have considered all documents filed by the applicant and all arguments submitted to me in relation to this application. Having done so, and for the reasons given above, the application is *partially* refused because it fails to qualify under section 3(1)(b) of the Act in the *prima facie*:

Acceptable Goods and Services

Class 18

Luggage; travel cases; travelling bags; vanity cases; rucksacks; backpacks; suitcases; briefcases; port[f]olio cases; school bags.

Class 25

Footwear.

Class 35

Business assistance; business management; business administration; retail services connected with the sale of footwear, luggage, travel bags, vanity cases, backpacks, suitcases, briefcases, portfolio cases, school bags.

Unacceptable Goods and Services

Class 9

Mobile apps; computer software; computer software in the form of applications and for use on mobile telephones, smartphones and on other mobile devices; videos; electronic publications; podcasts; downloadable publications.

Class 16

Printed matter; books; newspapers; periodicals; publications; magazines (journals); photographs; prints; stationery.

Class 18

Bags; handbags; beach bags; shopping bags; clutch purses; wallets; purses.

Class 25

Clothing; headgear.

Class 35

Advertising; marketing and sales promotions; provision of advertising space and materials; advertising and marketing services by means of online blogging; promotional services; customer loyalty services for commercial, promotional and/or

advertising purposes; retail services connected with the sale of clothing, headgear, bags, handbags, beach bags, shopping bags, clutch purses, wallets and purses.

Class 39

Providing tourist information services; providing tourist travel information; providing information to tourists relating to excursions and sightseeing; travel booking, reservation and information services; offering third party travel packages; provision of tourist travel information; travel guide and travel information services.

Class 41

Photography; photography services; ariel [aerial] photography services; photo editing services; news reporting services; promotion services; online publication services; information and advisory services relating to all of the aforesaid.

59. The application is therefore refused in respect of the unacceptable goods and services because the applicant has failed to demonstrate that the sign has acquired a distinctive character through use, pursuant to the proviso to section 3(1).

Dated this 16th day of October 2020

**Matthew Davies
For the Registrar
The Comptroller-General**

Annex A – Hearing Report

Hearing Decision:

Prima facie

I must determine if the average consumer would immediately perceive the mark as being a sign which indicates single commercial origin of the goods and services concerned i.e. will the sign be viewed as emanating from a single trade entity and is it capable of fulfilling the essential function of a trade mark, which is to distinguish the goods and services of one undertaking from those of another.

When assessing an objection under section 3(1)(b), certain principles are very well-established in trade mark law. In particular, whether a mark possesses inherent distinctive character must be assessed by reference to the goods or services for which registration is sought and by reference to the perception of the relevant consumer of such goods or services. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect.

In this instance, the applied for goods and services cover seven classes and include, inter alia; Class 9 software, Class 16 printed matter, Class 18 bags and purses, Class 25 clothing, Class 35 advertising, promotion and retail, Class 39 tourist and travel services, Class 41 photography. It is clear what the applicant does by way of business from the internet and the submissions made – it is fair to say that the applicant's goods and services relate to the geographical area of Salcombe. In essence, the goods and services listed are either souvenirs, provide information relating to Salcombe, or encourage tourism and travel to the geographical location of Salcombe. Therefore, the relevant consumers of the goods and services are likely to be tourists and holidaymakers, and prospective tourists and holidaymakers.

Having considered the applicant's business activities and who the relevant public are, I must consider the effect and impression that the sign 'LOVE SALCOMBE', in normal and fair use, in relation to the applied for goods and services has on them.

In the context of the classes applied for, they merely include an intrinsically linked range of goods and services that consumers would expect when visiting, or considering a visit, to Salcombe. When the average consumer is confronted by the mark in connection with the goods and services in question, in my opinion, it will merely be perceived as an easily understood expression, rendering it too mundane to function as a guarantee of trade origin.

The word 'LOVE' has a laudatory nature meaning to have a great attachment to and affection for, or passionate desire, longing or feeling for something or someone and, in my view, it is an entirely appropriate word to use when promoting a popular tourist destination, such as 'SALCOMBE'.

The word combination 'LOVE SALCOMBE' will simply be perceived by average consumers as a non-distinctive promotional exhortation, affirming that they will love Salcombe. The sign applied for merely serves as a promotional enticement to encourage tourism, and the phrase as a whole expresses that consumers will love and enjoy the geographical location of Salcombe.

I recognise that the grounds of the objection may vary somewhat given the range of goods and services applied for; however, for the sake of completeness I will address these slight variations.

In connection with printed matter (and the electronic version thereof) the mark 'LOVE SALCOMBE' will simply be seen by consumers as information promoting the attractions and sights of Salcombe and expressing that consumers will love the location. In respect of Class 18 and Class 25, the goods (and retail thereof) simply act as souvenirs or serve as a memento of one's visit or holiday to Salcombe, and merely expresses that the tourist loved the destination. For advertising and promotional services in Class 35, which are designed to expose and publicize the area of Salcombe, the sign 'LOVE SALCOMBE' would act as an enticement to visit the place by expressing that tourists and/or potential tourists will love the location. Similarly, for travel and tourist services and information in Class 39, the mark will portray that consumers will love and enjoy the area and simply acts as an encouragement to visit and holiday in Salcombe. In connection with photography services, it is reasonable to conclude that photographs will be taken of the sights and attractions of the popular resort town, which is an Area of Outstanding Natural Beauty (AONB). Therefore, the resulting photographs may be used as a promotional tool and as an enticement to encourage visitors to Salcombe and consumers will 'LOVE SALCOMBE' due to its attractive and picturesque scenes.

Due to the marks purely promotional connotations, it is incapable of acting as a badge of single commercial origin, unless consumers have been educated to see it as such.

To my mind, 'LOVE SALCOMBE' simply sends a laudatory message and the grammatically correct structure of the expression is one that would be considered by the average consumer to be normal and not fanciful. In respect of the goods and services concerned, the phrase 'LOVE SALCOMBE' has strong extolling connotations when advertising and promoting a popular tourist destination. Taken as a whole, I do not consider the sign, in the minds of the general public, to be origin specific.

In my view, the sign, which is composed of everyday language, has a conceptual relevance with the full range of goods and services being offered by the applicant. In connection with goods and services aimed at tourists and potential tourists to Salcombe, the sign 'LOVE SALCOMBE' is simply too mundane and too ordinary, and consequently origin neutral. The mark is devoid of any distinctive character in the prima facie and the sign will not be perceived by consumers as anything other than a trite promotional statement.

Regarding the earlier registrations referred to in the applicant's letter dated 17 December 2019, the legal position with such marks raised as comparators or "state of the register" arguments has been recently clarified in BREXIT BL O-262-18, see paras [11, 21, 46-48]:

11. In addition, just because a mark is on the Register does not mean it will be held valid when challenged. Furthermore, if the touchstone for registration was to be a comparison with marks already on the register, then registration would come to depend on the lowest common denominator. In any event, it is quite clear that the application of the section 3(1)(b) ground requires an assessment not against other marks on the register, but against the standard laid down in that provision, as interpreted in the case law.

Nevertheless, as I am not privy to the circumstances surrounding the acceptance of the previous registrations, I cannot comment further.

Acquired Distinctiveness

I have examined the evidence submitted to support the claim to distinctiveness acquired through use; however, I am not persuaded to accept the application on this basis. It is beyond dispute that the test of acquired distinctiveness is an onerous and massive one, involving the education of a significant proportion of the relevant persons throughout the UK. As I see it, there are several fundamental principles in relation to acquired distinctiveness, as stated in the case law:

- mere evidence of use, even if substantial, does not make the case for acquired distinctiveness;*
- if a mark is non-distinctive or descriptive then it cannot comply with the requirements of the Act for it will not provide the necessary distinction or guarantee. It is in that sense that any non-distinctive or descriptive meanings must be displaced;*
- it follows that, with regard to the acquisition of distinctive character through use, the identification by the relevant class of persons of the product or service as originating from a given undertaking must be as a result of trade mark use. The expression 'use of the mark as a trade mark' refers solely to use of the mark for the purposes of the identification, by the relevant class of person, of the product or service as originating from a given undertaking;*
- the mark must have acquired distinctiveness through use throughout the territory of the United Kingdom;*
- in assessing whether a trade mark has acquired a distinctive character the competent authority must make an overall assessment of the relevant evidence, which in addition to the nature of the mark may include (i) the market share held by goods bearing the mark, (ii) how intensive, geographically widespread and long-standing the use of the mark has been, (iii) the amount invested by the proprietor in promoting the mark, (iv) the proportion of the relevant class of persons who, because of the mark, identify the goods or services as emanating from the proprietor, (v) evidence from trade and professional associations and (vi) (where the competent authority has particular difficulty in assessing the distinctive character) an opinion poll. If the relevant class of persons, or at least a significant proportion of them, identifies goods or services as originating from a particular undertaking because of the trade mark, it has acquired a distinctive character;*
- the position must be assessed prior to the date of application.*

Consistent with the above principles, I am required firstly to make an assessment of the nature of the mark. The words 'LOVE SALCOMBE' must rate as an entirely nondistinctive combination of words, in a grammatically correct sequence, when used in the context of the goods and services concerned. The effect of this analysis is that the educative burden on the applicant to show that these purely promotional words have transformed into an indicator of origin of a single undertaking is especially acute and burdensome. There is, as the case law stipulates, no grounds for ambivalence here and the relevant consumer must regard the words as indicating trade origin, and not merely as a non-distinctive promotional formula. Any possible non-distinctive meaning must, according to the case law, be displaced by a material trade mark meaning.

As defined in the case law, I should not make an assessment of evidence based solely on abstract figures and predetermined percentages. However, turnover figures and advertising spend (when considered as part of the evidence as a whole) are a good barometer for how well-known and exposed the mark is to the average UK consumer. No turnover or advertising figures have been provided. Also, no market share data has

been forthcoming and in the absence of any turnover figures, it is impossible to determine any potential market share. With no advertising figures present, I am unsure how much the applicant has invested in publicizing the mark and I cannot ascertain if significant steps have been made to educate consumers that the sign is, in fact, a brand.

A lot of the evidence simply contains hundreds of pages of threads from the applicant's own website. However, evidence of this nature does not indicate to me the actual perceptions or recollections of the relevant consumer. The exhibits seem to only contain "commentary" advertising and not the specific efforts made by the applicant to directly educate the general public that the sign is a trade mark. As stipulated in trade mark law, mere use of a sign does not equate to distinctiveness. Whilst the evidence demonstrates that the mark is being used, it is insufficient in terms of showing that a significant proportion of the average UK consumer perceives 'LOVE SALCOMBE' as a trade mark.

In terms of how geographically widespread use of the mark is, exhibit JW3 page 33, shows visitors to the applicant's Instagram® account being from London, Plymouth, Exeter, Kingsbridge and Torquay. With 90% of the applicant's audience being from the UK, the above list of locations does not indicate substantial geographical exposure of the mark throughout the whole of the United Kingdom (or a significant proportion thereof). The above list of locations reached by the applicant has not been challenged or disputed and therefore I can only deduce from the evidence filed that Northern Ireland, Scotland, Wales, the Midlands and the North of England have not been targeted (or in any case, negligibly). Whilst the case law does not require that all four corners of the UK should be covered, it does however, require that use as a trade mark should be widespread throughout the country. Unfortunately, more criticisms of the evidence can be made:

- *the applicant's first use of the mark was February 2017 and the application was filed on 14 August 2019, giving circa 2 and a half years use. When considered as part of the evidence as a whole, it is not a particularly significant period of time to be able to demonstrate that the mark has acquired a distinctive character*
- *a proportion of the evidence postdates the filing date of the application i.e. some of the evidence intended to prove acquired distinctiveness is dated beyond the application date, which is unacceptable*
- *JW2 shows that the number of Instagram® followers at the date of filing was 11.2 thousand – this is not a significant number worthy of demonstrating widespread exposure*
- *JW4 – JW13 predominantly indicate local activities and do not demonstrate national coverage, as required*
- *the evidence doesn't demonstrate use on all goods and services applied for – this was expressly stated in the applicant's Witness Statement at point 4 in connection with classes 18 and 25. It is not possible to prove acquired distinctiveness in respect of goods and services for which the mark has not been used*
- *the evidence appears to demonstrate use in respect of advertising, marketing, promotion; providing tourist information services, providing tourist travel information, providing information to tourists relating to excursions and sightseeing, provision of tourist travel information, travel guide and travel information services; photography. For these specific services, the evidence is deemed to be deficient and lacking for the reasons given*

While, in my view, the applicant has a good and credible business, it should be borne in mind how stringent the test is for proving distinctiveness acquired through use. The scale of the applicant's business, as reflected by the evidence filed, is simply not on a

large enough scale to meet the requirements for acquired distinctiveness, at this time. The onerous test as stated by the Courts, is that a significant proportion of the relevant consumer must be educated to perceive the sign as a brand. This is not the case here.

I've considered the mark on the scale of distinctiveness and it is below the threshold for acceptance and the evidence does not demonstrate active steps by the applicant to displace the marks material non-distinctive promotional meaning.

In view of the above, whilst I acknowledge that the mark has clearly been used, there is nothing to show that the use made of the sign has resulted in it becoming recognised as a badge of trade origin throughout the United Kingdom.

Conclusion:

I therefore conclude that, for the above reasons, the mark is devoid of any distinctive character and thus excluded from prima facie acceptance. Consequently, the objection raised under section 3(1)(b) of the Act is maintained.

Taking all legal principals and case law into account, I consider the Witness Statement and the accompanying exhibits, as a whole, to be insufficient and they do not prove that before the date of application, the mark had acquired a distinctive character as a result of the use made of it.

Allowing more time for further submissions or for the filing of any additional evidence would be futile in this case. The evidence is significantly lacking for the above reasons and any further submissions would, in my view, be extremely unlikely to satisfy the requirements laid down for proving acquired distinctiveness. Therefore, the application is hereby refused.

Matthew Davies
Hearing Officer