



Neutral Citation Number: [2020] EWHC 3558 (Ch)

Case No: CH-2020-000157

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**

**ON APPEAL FROM THE REGISTRAR OF TRADE MARKS**  
**OF THE UNITED KINGDOM INTELLECTUAL PROPERTY OFFICE**

Royal Courts of Justice  
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 22/12/2020

**Before:**

**MR JUSTICE MORGAN**

**Between:**

**YELLOW BULLDOG LIMITED**  
**- and -**  
**A P & CO LIMITED**

**Appellant**

**Respondent**

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**Jamie Muir Wood** (instructed by **Wedlake Bell LLP**) for the **Appellant**  
**Andrew Marsden** of **Wilson Gunn** for the **Respondent**

Hearing dates: 25 November 2020  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MORGAN

**Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 10.30 am 22 December 2020.**

**MR JUSTICE MORGAN:**

*Introduction*

1. This is an appeal by Yellow Bulldog Ltd (“YBL”) against the decision, dated 4 June 2020, of Beverley Hedley, the Hearing Officer for the Registrar of Trade Marks at the United Kingdom Intellectual Property Office.
2. The Hearing Officer’s decision dealt with three applications for the registration of trade marks. One of the applications was made by a predecessor of YBL and the benefit of the application was assigned to YBL. Nothing turns on the fact of an assignment and, for simplicity, I will refer to this application as having been made by YBL. The second application was made by YBL itself, rather than by a predecessor. These two applications were opposed by A P & Co Ltd (“AP”). The third application was made by AP and was opposed by YBL.
3. The Hearing Officer upheld AP’s opposition to the applications made by YBL and YBL’s applications for the registration of trade marks were refused. The hearing officer did not uphold YBL’s opposition to the application made by AP and AP’s application for the registration of a trade mark succeeded.
4. YBL now appeals to the High Court pursuant to section 76(2) of the Trade Marks Act 1994 and contends that the Decision of the Hearing Officer should be set aside and that the court should determine that YBL’s applications for the registration of trade marks should succeed and the application by AP for registration of a trade mark should fail.
5. Mr Muir Wood appeared on behalf of YBL and Mr Marsden appeared on behalf of AP. Both Mr Muir Wood and Mr Marsden had appeared at a hearing before the Hearing Officer on 6 November 2019.

*YBL’s applications for registration*

6. On 29 March 2018, YBL applied to register the following trade mark:  
  
Trade Mark No: 3300610 (“610”)



Class 35: Retail services in connection with the sale of games software, video game programs, video game software, bags adapted to carry video apparatus, computer games programs downloaded via the internet [software], computer games programs [software], computer games software, video game computer programs, video game cartridges, headsets, wireless headsets, batteries, battery charges, cd's. dvd's, mugs, cups, stationery, figurines, bags, holdalls, wallets, clothing, footwear and headwear, t-shirts, caps, video game joysticks, video games apparatus, role playing games, hand held units for playing video games, hand held video games, handheld computer games, hand-held computer games, toys and playthings.

7. On 26 June 2018, YBL made a second application to register the following trade mark (the mark is identical to the above but the retail services in class 35 differ):

Trade Mark No: 3320527 (“527”)

Class 35: Retail store services, including online retail services, in connection with candles, special occasion candles, key rings (made of metal), metal statuettes, figurines (of common metal), video games, video game software, computer games, CDs, DVDs, battery charging equipment, disk storage wallets, remote control devices, magnets, gaming peripherals and accessories, cases and covers for mobile phones, tablets, laptop computers and netbooks, lap top bags, lanyards (straps) for mobile phones, Christmas lights, precious metals and their alloys, jewellery, precious and semi-precious stones, horological and chronometric instruments, cufflinks, key chains, coins, clocks and watches, decorative key rings, paper and cardboard, printed matter, bookbinding material, photographs, stationery and office requisites, except furniture, adhesives for stationery or household purposes, drawing materials and materials for artists, paintbrushes, instructional and teaching materials, plastic sheets, films and bags for wrapping and packaging, printers' type, printing blocks, stickers, transfers, posters, notebooks and journals, luggage and carrying bags, suitcases, bags, drawstring bags, messenger bags, travel bags, weekend bags, shopping bags, hiking bags, cosmetic bags, wash bags, hand bags, gym bags, canvas bags, school bags, tote bags, bum bags, game bags, sports bags, leather bags, backpacks, metal and plastic

luggage tags, leather luggage straps, wallets, purses, credit card holders, leather key rings, costumes for animals, statues, figurines, works of art and ornaments and decorations made of plastic or wood, storage units, plastic key rings, coat hooks, non-metallic key rings, statues, figurines, plaques and works of art made of glass, gardening articles, tableware, cookware and containers, glasses, drinking vessels and barware, coin banks, articles for animals and pets, cups, mugs, plastic drink coasters, bottle openers, coasters, cookie jars, incense burners, statuettes, clothing, footwear and headgear, wristbands, jumpers, socks, hats, t-shirts, bathrobes, slippers, caps, beanies, snapbacks, hoodies, onesies, badges for wear, novelty badges, charms (other than for jewellery, keys, rings, or chains), carpets, rugs and mats, artificial ground coverings, floor mats, floor mats made of rubber, sporting articles and equipment, festive decorations and artificial Christmas trees, toys, games, playthings and novelties, video game apparatus, Christmas tree ornaments, Christmas baubles, snow globes, plush toys, peripherals and controllers for game consoles, arcade game machines, and miniature arcade game machines.

8. In due course, AP opposed YBL's applications. In this judgment, all references to sections are to sections of the Trade Marks Act 1994. AP relied on the absolute ground for refusal in section 3(6) and the relative ground for refusal in section 5(4)(a).
9. As will be seen, the Hearing Officer upheld AP's opposition pursuant to section 5(4)(a) and she then considered the opposition pursuant to section 3(6) in the light of that conclusion. Accordingly, I will refer to the opposition under section 5(4)(a) before I refer, briefly, to the opposition under section 3(6).
10. In relation to its opposition pursuant to section 5(4)(a), AP contended that it had used the sign **GEEKCORE** throughout the UK since November 2014. AP said that it had used its sign in relation to:

“Retail and wholesale services including on-line and mail order retail and wholesale services in connection with the sale of video games, video games cartridges, video game software, video game apparatus, gaming apparatus and instruments, computer games, computer games software, handheld video games, handheld computer games, headsets for video and computer games, batteries, battery charges, compact discs, digital versatile discs, audiovisual recordings, cases for smartphones and tablet computers, clothing, footwear and headgear, toys, games, playthings, watches, ties, gloves, cufflinks, fancy dress costumes, jewellery, bags, wallets, purses, swimwear, electronic gadgets, usb drives, lighting equipment and apparatus, magazines, comics, printed matter, books, stationery, Christmas decorations, mugs, textile goods, blankets, rugs, towels, bedding, linen, kitchenware products, household and kitchen utensils, cutlery, office equipment, office desk toys and gadgets, posters, stickers, umbrellas, key rings, novelty gift items, food and drink, alcoholic beverages, board games, figurines, plush toys, biscuit containers, cups, corkscrews, cooking apparatus and instruments.”

AP contended, for the purposes of section 5(4)(a), that use by YBL of its proposed trade marks would lead to misrepresentation and damage to the goodwill of AP's business by virtue of loss of sales.

11. In relation to its opposition pursuant to section 3(6), AP referred to earlier dealings between YBL and AP and asserted that YBL had been aware of AP's sign when it applied for registration of its suggested trade marks and this amounted to bad faith on the part of YBL. There was evidence before the Hearing Officer as to the earlier dealings between YBL and AP. The Hearing Officer dealt with the opposition pursuant to section 3(6) after she had dealt with the opposition under section 5(4)(a). She held that it was not necessary to consider the opposition pursuant to section 3(6) but she expressed the view that the opposition under section 3(6) did not have any stronger prospects of success than the opposition under section 5(4)(a). If she had not upheld the opposition pursuant to section 5(4)(a), she would not have upheld the opposition pursuant to section 3(6). On YBL's appeal against the Hearing Officer's conclusion as to section 5(4)(a), AP no longer seeks to rely on its earlier opposition under section 3(6) and it is not necessary for me to refer any further to the opposition under section 3(6), or the Hearing Officer's findings in relation to it, for the purpose of dealing with YBL's appeal.
12. YBL filed a counterstatement in relation to AP's opposition to YBL's applications for registration. YBL did not admit that AP had the requisite goodwill for the purposes of section 5(4)(a) or that there would be misrepresentation or damage.

*AP's application for registration*

13. On 10 August 2018, AP filed an application to register the following trade mark:

Trade Mark No: 3330815 ("815")

**GEEKCORE**

Class 25: Clothing, footwear and headgear, belts, socks, gloves.

Class 35: Retail and wholesale services including on-line and mail order retail and wholesale services in connection with the sale of video games, video games cartridges, video game software, video game apparatus, gaming apparatus and instruments, computer games, computer games software, handheld video games, handheld computer games, headsets for video and computer games, batteries, battery charges, compact discs, digital versatile discs, audiovisual recordings, cases for smartphones and tablet computers, clothing, footwear and headgear, toys, games, playthings, watches, ties, gloves, cufflinks, fancy dress costumes, jewellery, bags, wallets, purses, swimwear, electronic gadgets, usb drives, lighting equipment and apparatus, magazines, comics, printed matter, books, stationery, Christmas decorations, mugs, textile goods, blankets, rugs, towels, bedding, linen, kitchenware products, household and kitchen utensils, cutlery, office equipment, office desk toys and gadgets, posters, stickers, umbrellas, key rings, novelty gift items, food and drink, alcoholic beverages, board games, figurines, plush toys, biscuit containers, cups, corkscrews, cooking apparatus and instruments; advertising, marketing and publicity services; provision and operation of customer loyalty card membership schemes.

14. In due course, YBL opposed AP's application for registration. YBL relied on section 5(2)(b) of the 1994 Act and its own two applications for registration. AP filed a counterstatement. It admitted that the mark which was the subject of its application and the marks the subject of YBL's application were similar. AP also accepted that the parties' respective retail services in class 35 were identical or at least similar and that AP's goods in class 25 were similar to the corresponding retail and wholesale services referred to by YBL. AP referred to the oppositions it had filed against YBL's two trade mark applications.
15. The three oppositions were consolidated. Both parties filed evidence. AP relied on a witness statement from Mr Adam Symonds, a director of AP. YBL relied on two witness statements from Mr Benjamin Grant, a director of YBL. There was an oral hearing before the Hearing Officer at which YBL was represented by Mr Muir Wood and AP was represented by Mr Marsden. The witnesses were not cross-examined. I was provided with a transcript of the hearing but I was not referred to anything recorded in it. It appears that Mr Muir Wood took the Hearing Officer in detail through the witness statement of Mr Symonds and made detailed submissions as to the evidence contained in it.

*The decision of the Hearing Officer*

16. In her decision, the Hearing Officer set out her summary of the evidence contained in Mr Symond's witness statement and its exhibits. I will set out in full the Hearing Officer's description of this evidence. A part of what follows primarily relates to the prior dealings between the parties which were relied on for the purposes of section 3(6) but I have left that evidence in this extract in so far as these dealings might throw light on the scale of AP's business. The Hearing Officer said of this evidence:

"12) This comes from Mr Adam Symonds, co-founder and director of [AP].

13) Mr Symonds states that the domain name [www.geekcore.co.uk](http://www.geekcore.co.uk) was registered on 13 October 2009 and [AP] was set up on 17 September 2010. Supporting documents are provided showing the registration of the domain name and date of incorporation of the business. [Exhibit AS1]

14) Mr Symonds states that [AP] operates under the trading name GEEKCORE and specialises in the on-line retail of a wide range of merchandise particularly licensed products relating to television shows, movies and video games. The products typically include gadgets, clothing, mugs, toys, games, bags, jewellery, costumes, electronic gadgets, plush toys and gaming related goods. [AP] has been trading under the name GEEKCORE since as early as 12 November 2014. In support of this, a print from [www.geekcore.co.uk](http://www.geekcore.co.uk) is provided, showing the 'About Us' page. The mark GEEKCORE (stylised) is present at the top of the page. It is undated aside from the print date of 3 April 2019. [Exhibit AS2]

15) [AP] operates a Facebook page which was created on 19 November 2014, shortly after it began trading in the UK. There are currently just under 19,000 followers. Various adverts on the page show a puzzle, a hoodie, a baseball cap, a bag, spiced rum, a figurine, a mug and Christmas jumpers. The adverts all appear to be recent, emanating from 2019. [Exhibit AS3]

16) Mr Symonds explains that [AP] has business relationships with a number of product suppliers. One of the suppliers it has worked with for a number of years is Rubber Road Limited ('RRL'). [AP] obtained wholesale products from this company during the three years preceding these proceedings (2015-2018). Mr Symonds states that RRL was the original applicant of trade mark applications '610 and '527 and that those applications were subsequently assigned to [YBL]. RRL and [YBL] share the same directors, Benjamin Alun Grant and Matthew Martin Precious. Mr Symonds states that RRL is therefore fully aware of [AP]'s business and activities under the name GEEKCORE. Prints from the IPO database are provided showing that mark '610 was originally applied for by RRL then assigned to [YBL] on 12 July 2018. Mark '527, on the other hand, appears to have been filed by [YBL] (it does not appear that it has ever been in the name of RRL). Prints from Companies House database are also provided showing that RRL has five directors, three of whom are Benjamin Alun Grant, Matthew Martin Precious and Liam Michael Taylor. Party B has three directors, two of whom are Benjamin Alun Grant and Matthew Martin Precious. [Exhibit AS4]

17) Mr Symonds explains that, at a meeting on 18 May 2018 with Liam Taylor, the commercial director for RRL, [AP] was informed by Mr Taylor that RRL intended to rebrand its retail operations as GEEKSTORE. Formerly, RRL used the brand YELLOW BULLDOG for its retail operations. At the meeting, [AP] immediately voiced its concerns and objected to the proposed re-branding, explaining to Mr Taylor that GEEKSTORE was simply too close to its own brand GEEKCORE. Following the meeting, [AP] sent an email to Mr Taylor on 19 May 2018 explaining further its reasons for objecting to the choice of name. No response was received and following the launch of the GEEKSTORE retail operation and the filing of the trade mark applications it has been necessary to take action by filing the subject oppositions. Mr Symonds provides a copy of his email to Mr Taylor dated 19 May 2018 and a number of other emails between [AP] and RRL which he states clearly shows a long business relationship. [Exhibit AS5]

18) Mr Symonds states that RRL and [YBL] have filed the subject applications and commenced trading under the name GEEKSTORE in full knowledge of [AP]'s prior and



longstanding use of the name GEEKCORE and with the intention of benefitting from [AP]'s business.

19) As evidence of [AP]'s trading activity, Mr Symonds provides copies of the company's accounts from 2013 to 2018. [Exhibit AS6]

20) Mr Symonds also provides prints from the Wayback Machine Archive website, which he states shows the number of captures of [AP]'s website between 2013 and 2018. Examples of dated pages are also included. [Exhibit AS7] The website pages bear the mark GEEK CORE. There are numerous pages appearing to emanate from 2014 – 2018. There are a wide range of goods listed on the website including various items of clothing such as Christmas jumpers, bath robes and hoodies, toys, figurines, watches, hats, backpacks and novelty mugs. Many of the goods are branded with the names of movies such as Star Wars and Harry Potter or computer games such [as] Nintendo, Minecraft and Street Fighter.

21) A print from Goggle Analytics showing website traffic to www.geekcore.co.uk is provided from July 2013 to March 2019. [Exhibit AS8] The number of users is 1,005,591 and the number of page views is 3,576,586. 30% of visitors to the site are returning visitors. For each year there are distinct website traffic peaks in the period leading up to Christmas.

22) Mr Symonds provides a spreadsheet of historical sales transactions and copies of ten invoices (these are said to be examples rather than an exhaustive list of all invoices issued by Party A). None of the invoices give any details or description of the item that was purchased. Mr Symonds states that this information has not been provided for privacy reasons. The invoices are dated from July 2016 to April 2017 and are issued to customers in various UK locations such as Dover, Holyhead, Stoke on Trent, Windsor and Milton Keynes. One is to a customer in the Netherlands. The historical list of sales transactions consists of a list of over 60 pages showing, inter alia, the date of purchase, name of purchaser, amount in £ and country (the vast majority of which are in the UK). Again, there is no indication of the kind of item that was purchased for any of the transactions in the list. [Exhibit AS9]

23) Mr Symonds states that [AP] has a rating of 9.7/10 on Trustpilot. He provides a selection of customer reviews dated 2017-2018. Some of the reviews refer to the kind of product that was purchased which are hats, hoodies and jumpers. [Exhibit AS10]

24) Mr Symonds states that the turnover for [AP] has steadily increased since the business commenced trading in 2014. He

provides a graph showing Google Ad marketing spend for December 2014 – December 2018 totalling £111,000. There is also a graph which Mr Symonds states relates to sales from August 2015 to December 2018, totalling £864,172. [Exhibit AS11]

25) Mr Symonds provides a copy of the first public Facebook post for GEEKCORE dated 10 February 2015 urging customers to place an order. Also provided are copies of three advertisements on Facebook dated October 2015 and October 2016 for Christmas jumpers. Mr Symonds states that those jumpers were sourced from RRL. The last advertisement from Facebook, dated January 2017, shows a GEEKCORE branded box being offered as a prize in a competition. The box contains various items including a travel mug and toys/figurines. [Exhibit AS12]

26) Finally, Mr Symonds provides prints from [YBL]’s website, [www.geekstore.co.uk](http://www.geekstore.co.uk), including internet archive captures. He states that the GEEKSTORE website, which did not commence trading until shortly after March 2018, is highly similar in content, layout and general appearance to [AP]’s website. The website pages bear the mark GEEK STORE (stylised in the same manner as applications ‘610 and ‘527). [Exhibit AS13] He states that this supports his belief that [YBL] has copied [AP]’s retail operation and is attempting to imitate the latter’s retail operation and success.”

17. Next, the Hearing Officer summarised the evidence of Mr Benjamin Grant of YBL. Mr Grant’s first witness statement dealt with the allegation that YBL’s applications for registration were made in bad faith. In view of the fact that that allegation is not relevant to this appeal, I will not set out the Hearing Officer’s summary of this evidence. However, in fairness to YBL, I should state that Mr Grant gave detailed reasons as to why that allegation should be rejected. Mr Grant did say that AP had not dealt directly with YBL but had dealt with a distribution partner of RRL. He referred to the fact that AP had contacted RRL in December 2015 because AP wished to obtain a supply of Christmas jumpers. In his second witness statement, Mr Grant said that the commercial team at RRL had engaged with AP to help AP grow its sales by obtaining stock for AP from RRL’s distribution partner.
18. The Hearing Officer then explained that she would deal first with AP’s opposition to YBL’s applications for registration and she considered the legal principles to apply in relation to opposition based on section 5(4)(a). She set out the legal principles in detail and included citations from the authorities to which she referred. The relevant principles are all well established and the authorities are well known. On this appeal, YBL did not submit that the Hearing Officer had misstated any of the legal principles which were to be applied in this case. In these circumstances, I will refer to the legal principles as described by the Hearing Officer.
19. The Hearing Officer set out section 5(4)(a) and then referred to the summary of the principles as to passing off in the speech of Lord Oliver in *Reckitt & Colman*

*Products Ltd v Borden Inc* [1990] RPC 341 which had been cited in *Discount Outlet v Feel Good UK* [2017] EWHC 1400 (IPEC). Those principles refer to the questions arising as to goodwill or reputation, misrepresentation leading to deception or a likelihood of deception and damage resulting from the misrepresentation. As to deception, the court must assess whether a substantial number of the potential customers of a claimant (asserting passing off) is deceived: *Interflora Inc v Marks and Spencer plc* [2013] FSR 21. The burden of proving passing off in this case was on AP.

20. The Hearing Officer then directed herself that, in this case, the relevant date for assessing the issue of passing off was the filing date of the application for registration and those dates were 29 March 2018 for trade mark “610” and 26 June 2018 for trade mark “527”; on this point, the Hearing Officer referred to *Advanced Perimeter Systems Ltd v Multisys Computers Ltd* BL O-410-11.
21. The Hearing Officer then referred to the classic definition of goodwill in *IRC v Muller & Co’s Margarine* [1901] AC 217. Then she referred to two cases which commented on the evidence needed to establish the existence of goodwill, for the purpose of considering the issue of passing off when dealing with opposition pursuant to section 5(4)(a). The two cases were the decision at first instance in *South Cone Inc v Bessant, The REEF TM*, [2002] RPC 19 and *Minimax GmbH & CO KG v Chubb Fire Ltd* [2008] EWHC 1960 (Pat). Those cases discussed the sort of evidence which might helpfully be put forward in this context. The second of these cases stated that it was essential that the evidence should show, at least prima facie, that the opponent’s reputation extended, at the relevant date, to the goods comprised in the specification of goods put forward by the applicant for registration.
22. The Hearing Officer then cited authority as to the extent to which goodwill must be shown to exist and whether a small business could have relevant goodwill. She directed herself that the law of passing off did not protect goodwill of a trivial extent. On these issues, she cited the often cited cases of *Hart v Relentless Records* [2002] EWHC 1984 (Ch), *Stacey v 2020 Communications* [1991] FSR 49, *Stannard v Reay* [1967] FSR 140, *Teleworks v Telework Group* [2002] RPC 27 and *Lumos Skincare Ltd v Sweet Squared Ltd* [2013] EWCA Civ 590. Mr Muir Wood for YBL also cited these cases on the appeal although he did not contend that the Hearing Officer had misdirected herself in relation to the legal principles. I add to this citation of authority, the decision of the Appointed Person in *Advanced Perimeter Systems Ltd v Multisys Computers Ltd* (to which the Hearing Officer had referred on another point) which contains, at [23]-[26], a helpful discussion as to the nature of the evidence required to establish goodwill in the present context.
23. At [50] in her decision, the Hearing Officer said:

“50) [AP]’s evidence is not without deficiencies. I am particularly mindful of the lack of any indication of the kind of goods that were the subject of the invoices and transactions listed in Exhibit AS9. That said, I remind myself that it is not a case of considering each piece of evidence in isolation but rather, I must stand back and view the evidence collectively. There are numerous captures of [AP]’s website spanning 2014-2018. The primary sign used on that website appears to have

been the mark GEEK CORE/GEEKCORE. Over that time the website has listed a variety of goods for sale, many of which accord with those specified by Mr Symonds in his statement (Exhibit AS7). The website appears to have been in operation since at least November 2014. The website traffic data indicates that the website has attracted a steady number of visitors since that time with peaks leading up to the Christmas period every year. [AP] has also spent a not inconsiderable [sum] on Google Adword advertising and has generated sales of more than a trivial amount in the four years prior to the relevant dates (Exhibit AS11). Viewing the evidence in the round, I am satisfied that, it is more probable than not that, [AP] had a protectable goodwill at both relevant dates of, at least, a moderate level. On the basis of the evidence before me, I accept that the goodwill was in an online retail business connected with the sale of clothing, bags, toys, figurines and novelty mugs (at least) and the sign which was associated with, or distinctive of, that business was GEEKCORE.”

24. The Hearing Officer then turned to the questions of misrepresentation and damage for the purposes of a claim in passing off. She cited *Neutrogena Corp v Golden Ltd* [1996] RPC 473 on the subject of deception. She cited *Harrods Ltd v Harrodian School Ltd* [1996] RPC 697 for the proposition that a common field of activity was not a prerequisite to establishing a passing off claim.
25. The Hearing Officer summarised the submissions for YBL as to the alleged similarity of the marks applied for by YBL and AP’s sign. At [56], she said:

“56) I would expect the sign GEEKCORE to be immediately perceived as a distinctive whole but also, at the same time, as two well-known English words conjoined i.e. GEEK and CORE. In terms of the contested marks, the device (of the blue background, the box containing various items and the black circle) is a distinctive element and makes a strong contribution to the overall impression of the mark; it is striking on the eye and takes up a large proportion of the mark as a whole. GEEK STORE is also a distinctive element of the mark (although, within that element, more focus is likely to be placed upon the word GEEK than STORE given the relatively greater descriptive nature of the latter word as compared with the former). I would expect GEEK STORE and the device to have roughly equal impact on the consumer. There is a clear point of similarity between the sign and the contested marks, owing to the common presence of the word GEEK. There are also differences given the presence/absence of the respective words CORE and STORE (although those words do share the same three letters ‘ORE’) and the presence of the device element in the contested marks which have no counterpart in the earlier sign. I find there to be a low degree of visual similarity between the contested marks and the earlier sign. In terms of the aural

aspect, the comparison is between GEEK STORE and GEEK CORE. There is clearly a high degree of aural similarity. Turning to the conceptual position, I would expect GEEK STORE to be perceived as a shop for geeks. GEEKCORE, as a whole, does not have any clear meaning but I would expect the idea of something geeky or geek related to be retained in the consumer's mind. On that basis, I find a medium degree of conceptual similarity."

26. In relation to the retail services the subject of YBL's application for registration and the retail services in which AP had goodwill, the Hearing Officer said at [57]-[58]:

"57) Both of [YBL]'s applications are in respect of retail services (which includes online retail services) connected with the sale of various goods. A number of those retail services (bearing in mind the specific goods to which they relate) are identical to the retail services in which [AP] has satisfied me that it has the requisite goodwill. The relative [*I interpose that this might be a typo for "relevant"*] field of activity is, to that extent, therefore identical.

58) I now turn to [YBL]'s retail services which relate to other kinds of goods (e.g. video games, Christmas decorations, homeware, jewellery etc.). Although [AP]'s evidence has not satisfied me that it has goodwill in online retail services related to all of the types of goods claimed in its notice of opposition, the evidence nevertheless suggests that the nature of its retail business is of one which offers a wide selection of goods. It would be no stretch of the imagination for it to also provide retail services connected with the sale of all the various goods covered by [YBL]'s applications. In particular, I note that a number of [AP]'s goods tend to relate to video games/movies (i.e. t-shirts bearing images from said games and movies). There is a clear link here between the nature of the goods in which it has goodwill and [YBL]'s retail services connected with the sale of video games, for example."

27. The Hearing Officer then considered the question of damage caused by the misrepresentation to which she had referred. At [59], she said:

"59) Bearing in mind the degree of similarity between the earlier sign and the contested marks, the identity, and overlap, between the respective services, together with the moderate level of goodwill in [AP]'s business, I find that a substantial number of [AP]'s customers, or potential customers, are likely to believe that the services provided under [YBL]'s marks are the responsibility of [AP]. A misrepresentation will arise in respect of all the services applied for. The damage that follows is likely to be in the form of loss of sales for [AP], with customers using [YBL]'s services instead. Damage can also come in other forms. In *Ewing v Buttercup Margarine*

*Company, Limited*, [1917] 2 Ch. 1 (COA), Warrington L.J. stated that:

“To induce the belief that my business is a branch of another man's business may do that other man damage in various ways. The quality of goods I sell, the kind of business I do, the credit or otherwise which I enjoy are all things which may injure the other man who is assumed wrongly to be associated with me.” ”

28. At [60], the Hearing Officer concluded that YBL was liable to be prevented from use of the trade marks for which it had applied under the law of passing off with the result that AP's opposition pursuant to section 5(4)(a) succeeded in relation to both of the trade marks applied for by YBL. These findings produced the further result that YBL's opposition (based on section 5(2)(b)) to the application for registration made by AP failed. Accordingly, the Hearing Officer refused YBL's applications for registration and held that AP's application for registration could proceed to registration.

*The approach on appeal*

29. CPR rule 52.21 provides for the approach to be adopted in relation to the present appeal. Rule 52.21(1) provides that, unless the court considers that it would be in the interests of justice in this case to hold a re-hearing, this appeal will be limited to a review of the decision of the lower court. YBL does not submit that the court should proceed by way of a re-hearing and so this appeal will involve a review only of the decision under appeal. Rule 52.21(3) provides that the appeal court will allow an appeal where the decision of the lower court was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court. YBL does not suggest that there has been any irregularity in this case. Accordingly, the question for the court is whether it should conclude, on a review of the decision of the Hearing Officer, that the decision was wrong.
30. Most of the grounds of appeal in this case relate to the evaluation on the part of the Hearing Officer of the evidence which had been adduced by AP. That evidence constituted the primary facts in this case. That evidence was not challenged by any cross-examination and so the evidence as to primary fact which is before the appeal court is identical to the evidence of primary fact before the Hearing Officer.
31. The role of the appeal court, when it is asked to review the evaluation of a lower court or tribunal, is now clearly established by authority. Although there were earlier authorities, some of which are cited in the authorities to which I will refer below, it is useful to begin by referring to the decision of the Court of Appeal in *South Cone Inc v Bessant, The REEF TM* [2003] RPC 5. In that case, a Hearing Officer was required to make an evaluative judgment as to whether there was a likelihood of confusion between two marks. The Hearing Officer concluded that there was no sufficient likelihood of confusion. On appeal to the High Court, the judge reversed that finding. The Court of Appeal in turn reversed the judge, holding that he ought not to have interfered with the evaluative judgment of the Hearing Officer. Robert Walker LJ commented as follows at [28]:

“In this case the hearing officer had to make what he himself referred to as a multi-factorial comparison, evaluating similarity of marks, similarity of goods and other factors in order to reach conclusions about likelihood of confusion and the outcome of a notional passing-off claim. It is not suggested that he was not experienced in this field, and there is nothing in the Civil Procedure Rules to diminish the degree of respect which has traditionally been shown to a hearing officer’s specialised experience. (It is interesting to compare the observations made by Lord Radcliffe in *Edwards v Bairstow* [1956] A.C. 14 at pp.38–39, about the general commissioners, a tribunal with a specialised function but often little specialised training.) On the other hand the hearing officer did not hear any oral evidence. In such circumstances an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle.”

32. I derive further assistance from what was said by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] ETMR 26 at [114]-[115]:

“114 Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] R.P.C.1; *Piglowska v Piglowski* [1999] 1 W.L.R. 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 W.L.R. 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 W.L.R. 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

- i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
- ii. The trial is not a dress rehearsal. It is the first and last night of the show.
- iii. Duplication of the trial judge’s role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

- iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
- v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
- vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115 It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] Fam. 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135.”

33. The authorities were collected again in *Re Sprintroom Ltd* [2019] BCC 1031 where the Court of Appeal said, at [76]:

“76. So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge’s treatment of the question to be decided, “such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion”.”

34. On this appeal, I will apply the summary given in *Re Sprintroom* as to the correct approach.

#### *The appeal*

35. In its appellant’s notice, YBL referred to the following findings of the Hearing Officer:
- i) AP owned goodwill under the sign, GEEKCORE, for online retail services for clothing, bags, toys, figurines and novelty mugs: at [50];



- ii) the sign, GEEKCORE, had a low degree of visual similarity to the mark applied for by YBL: at [56];
  - iii) the sign, GEEKCORE, had a high degree of aural similarity to the mark applied for by YBL: at [56];
  - iv) the sign, GEEKCORE, had a medium degree of conceptual similarity to the mark applied for by YBL: at [56];
  - v) certain of the goods for which the YBL's applications seek registration are identical to those for which goodwill subsists: at [57];
  - vi) there is an overlap between the remaining goods for which the YBL applications seek registration: at [58]; and
  - vii) accordingly, the average consumer would be deceived by the use of the mark applied for by YBL for the services for which the YBL applications seek registration: at [59].
36. By its appeal, YBL challenged the findings at (i), (iii), (iv) and (vi) above and, if those challenges were upheld, YBL sought reconsideration of the findings at (v) and (vii) above.

### *Goodwill*

37. YBL submitted that the Hearing Officer was wrong to conclude that the evidence demonstrated goodwill as set out at paragraph [50] of her decision, or at all. YBL invited the court to conduct its own assessment of the evidence contained in the exhibits to Mr Symonds' witness statement. YBL submitted that the evidence was barely sufficient to demonstrate use of AP's sign for the services relied on. In particular, YBL relied on the following matters in an attempt to show that the Hearing Officer reached a conclusion which no reasonable Hearing Officer could have reached:
- i) the evidence showed that a website displaying AP's sign existed since November 2014 (at [14]) and that it offered items of clothing, backpacks, toys, figurines and novelty mugs for sale (amongst other things) (at [20]) but there was no evidence to demonstrate how many sales (if any) of those items (or any specific items) AP had made;
  - ii) the evidence showed a Facebook page existed (at [15]) but only three posts were in the relevant period and all related to Christmas jumpers (at [25]), the fourth, referred to at [25], did not relate to the sale of any products;
  - iii) the Hearing Officer wrongly stated that '*some*' reviews referred to '*hats, hoodies and jumpers*' (at [23]) when in fact three individual reviews referred to sales of a single hat, a single hoodie and a single jumper: these were the only sales for which there was any evidence at all; and
  - iv) whilst AP provided its accounts, these showed that it was loss making until 2017 (which the Hearing Officer failed to mention), that it was trading in some

other capacity before starting to trade under its sign in November 2014 and did not, in fact, evidence any specific sales under the sign at all;

- v) the Hearing Officer failed to grapple with this or to consider whether or how the sales figures provided by the Respondent (at [24]) could be married with those accounts or, absent any detail, how those sales figures could be deemed to relate to the goods for which goodwill is asserted; and
  - vi) whilst the Hearing Officer noted, in passing, that some of the evidence was outside the relevant period, she failed to take this into account when determining the question of goodwill.
38. Earlier in this judgment, I set out the relevant parts of the decision of the Hearing Officer. The evidence which was relevant to the issue of goodwill was provided by Mr Symonds' witness statement. The Hearing Officer summarised that evidence. Subject to one very minor point, namely, the reference to "some reviews" in paragraph [23] of the decision, YBL does not say that the Hearing Officer misdescribed the evidence set out in the witness statement.
39. An important part of the evidence was what Mr Symonds had said in paragraph [4] of his witness statement, which the Hearing Officer summarised at paragraph [14] of her decision. In that paragraph, Mr Symonds referred to the on-line retail of a wide range of merchandise. He then said what that merchandise included. This evidence was not merely an interpretation by an uninvolved person who was seeking to summarise what was shown in the exhibits to the witness statement. The evidence in paragraph [4] was freestanding evidence. Even if the general statements in paragraph [4] of the witness statement were not supported by the exhibits, the evidence in paragraph [4] was still evidence unless it was contradicted by the exhibits. If that evidence had been contradicted by the exhibits, then it might have been open to the Hearing Officer to prefer the specific evidence revealed by the exhibits to the general evidence in paragraph [4] of the witness statement. However, the general evidence in paragraph [4] of the witness statement was not contradicted by the exhibits. That evidence therefore provided part of the primary facts of the case to be evaluated by the Hearing Officer.
40. The Hearing Officer's principal findings as to goodwill were in paragraph [50] of her decision, which I set out earlier. The Hearing Officer commented on the deficiencies in AP's evidence in relation to goodwill. The Hearing Officer was right to do so. The evidence was sometimes general and sometimes patchy. If the hearing had involved an actual claim in a court for an injunction and damages for passing off, one would expect that the evidence would have been much more thorough and detailed. One would also expect that it would have been tested by cross-examination. Cross-examination of Mr Symonds' general and patchy evidence might have served to reduce the utility of his evidence or, conversely, might have given him the opportunity to fill in the gaps in that evidence. In the absence of cross-examination, the witness statement and the exhibits must be taken for what they were and it is not to be presumed that the evidence would have fared better or worse, if there had been cross-examination.
41. The Hearing Officer said that she should consider all of the evidence collectively. She was right to do so. She referred to the website as to the goods being offered for sale.

In relation to the sales which had been made, she referred to exhibit AS11. Part of that exhibit showed reasonably substantial figures for sales, particularly in the run up to Christmas in various years. The Hearing Officer would appear to have been fully entitled on the basis of all the evidence to conclude that AP had generated sales of more than a trivial amount in the four years before the relevant dates.

42. YBL's first criticism is that the specific evidence about the website did not show the extent of sales. That may be so but the Hearing Officer referred to other evidence as to the extent of the sales, in particular, in exhibit AS11.
43. As part of its first criticism, YBL said that the website evidence did not show which goods were sold. This criticism is also relevant to a later ground of appeal but I will consider it at this point in the judgment.
44. The website evidence showed which goods were available for sale and so YBL is right to point out that that evidence on its own does not show which goods were sold. However, the Hearing Officer had the evidence of Mr Symonds in paragraph [4] of his witness statement as to the goods sold by AP. A fair reading of that paragraph is that it is referring to sales of goods and not just the offering of goods for sale.
45. The Hearing Officer referred, in various places in her decision, to the goods sold by AP as part of the business in which it had shown it had goodwill. These references were:
  - i) at paragraph [14], she referred to Mr Symonds' evidence at paragraph [4] of his witness statement where he said that AP sold "a wide range of merchandise particularly licensed products relating to television shows, movies and video games" and that the goods sold "typically include gadgets, clothing, mugs, toys, games, bags, jewellery, costumes, electronic gadgets, plush toys and gaming related goods";
  - ii) at paragraph [50], she referred to a business "connected with the sale of clothing, bags, toys, figurines and novelty mugs (*at least*)" [my emphasis]; this finding does not spell out what other items were sold by AP in addition to those expressly mentioned but, as appears from paragraph [58] of the decision, her list in paragraph [50] was not an exhaustive list;
  - iii) at paragraph [57], she said that a number of the goods listed in YBL's applications for registration were identical to the goods sold by AP as part of its business, in which it had shown it had goodwill; in this paragraph, she did not specify the goods which were identical;
  - iv) at paragraph [58], she referred to "other kinds of goods" in YBL's lists of goods "e.g. video games, Christmas decorations, homeware, jewellery etc."; she therefore appeared to hold that these specific goods were not sold by AP;
  - v) at paragraph [58], she said that the nature of AP's business was "one which offers a wide selection of goods" but she did not set out a list of such goods;
  - vi) at paragraph [58], she commented that AP's evidence had not satisfied her that it had goodwill in relation to all of the types of goods claimed in AP's

opposition to YBL's applications for registration; this is a reference to the goods claimed in AP's opposition, which I set out at paragraph [10] of this judgment; the Hearing Officer was right that Mr Symonds' evidence at paragraph 4 of his witness statement and in the exhibits did not extend to all of those goods; this finding was not a rejection of any of the evidence in paragraph 4 of the witness statement.

46. In so far as the point raised about the extent of the goods sold by AP is relevant to YBL's challenge to the Hearing Officer's finding as to goodwill, she was entitled to make the above findings as to the nature of the goods sold based on the totality of the evidence before her, which evidence was not confined to the evidence as to the website.
47. YBL's second specific criticism, in relation to the Hearing Officer's finding as to goodwill, referred to her summary of the evidence as to AP's Facebook page. However, this comment on the evidence does not invalidate any finding made by the Hearing Officer as to goodwill at [50] of the decision.
48. YBL's third specific criticism related to the way in which the Hearing Officer described matters at [23] of the decision. In that paragraph, she referred to customer reviews as referring to "the kind of product" that was purchased and she then described the kind of product as "hats, hoodies and jumpers". These three nouns were in the plural. YBL pointed out that if one read all of the reviews, it was generally not possible to know what product had been purchased by the reviewer and one could only find references to the purchase of one hat, one hoodie and one jumper. This is a somewhat pedantic point and, in the first instance, it can be met by a pedantic answer. The Hearing Officer was referring to "the kind of product" that was purchased and she was entitled to refer to "the kind of product" in the way in which she did, whatever the precise number of sales. In any case, given the other evidence as to the level of sales made by AP, it was almost certainly not the case that AP sold only one hat, one hoodie and one jumper. More importantly, the way in which the Hearing Officer described the reviews does not affect her findings as to sales and goodwill at paragraph [50] of the decision.
49. The fourth and fifth specific criticisms related to AP's accounts. In fact, the accounts were not particularly revealing. Nonetheless, the Hearing Officer had other evidence as to the extent of the sales, exhibit AS11, and it was that evidence to which she referred at paragraph [50] of the decision.
50. The sixth specific criticism related to evidence as to sales outside the relevant period. The Hearing Officer had correctly directed herself as to the relevant dates. She was aware that some of the evidence related to sales outside the relevant period. She made her finding at paragraph [50] of the decision and specifically referred to sales in the four years prior to the relevant dates. There is no reason to suppose that the Hearing Officer made any error in this respect.
51. Having considered each of the specific criticisms made by YBL in relation to the finding of goodwill, I am not able to accept any of them.
52. YBL then submitted that the evidence relied upon by AP could not, in law, suffice, as evidence of goodwill for the purposes of a claim in passing off. YBL submitted that

the fact of a sale, or sales, was not enough to demonstrate goodwill, absent evidence that the brand is known by the public for the specific goods or services relied upon.

53. In support of this submission, YBL referred me to what Lord Oliver had said in *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341 at 406 as to what a claimant must establish:

“a goodwill or reputation attached to the goods which he supplies in the mind of the purchasing public by association with the identifying “get-up” ... under which his particular goods or services are offered to the public such that the get-up is recognised by the public as distinctive specifically of the plaintiff’s goods or services”. [YBL’s emphasis]

54. YBL also referred to what was said by Lord Neuberger in the Supreme Court in *Starbucks (HK) Ltd v British Sky Broadcasting Group plc* [2015] 1 WLR 2628, at [20], that the authorities:

“have consistently held that it is necessary for a claimant to have goodwill in the sense of a customer base in this jurisdiction”. [YBL’s emphasis]

55. On the findings of the Hearing Officer, AP did have a section of the public which purchased AP’s goods and it had a customer base for its goods. The section of the public or the customer base were aware of the association of the sign GEEKCORE with AP’s goods by reason of the various communications referred to in the evidence in this case. These communications included the website, the Facebook page and the advertising paid for by AP. The Hearing Officer specifically referred to the website and the advertising in paragraph [50] of the decision where she reached her conclusion that AP had demonstrated the requisite goodwill. Therefore, there was evidence on which the Hearing Officer could reach her findings. Her finding is to the effect that AP’s sign had a goodwill or reputation in the mind of a section of the purchasing public. The Hearing Officer’s findings are not vitiated by any error of law.
56. The result is that I find that the Hearing Officer had evidence on which she could make her findings and YBL is unable to show that her findings were not open to her. There is no other basis on which the appeal court could disturb her evaluation in relation to the issues as to AP’s goodwill.

### *Misrepresentation*

57. YBL’s further grounds of challenge to the decision of the Hearing Officer were presented under the headings of “similarity” and “overlap”. In order to deal with these grounds of challenge, I will also use those headings. However, it must be remembered that the further ingredients of a claim in passing off which AP needed to establish were misrepresentation and damage and the questions of similarity and overlap are being considered for the purpose of assessing whether AP has established the necessary misrepresentation.

### *Similarity*

58. YBL challenges the Hearing Officer's findings as to similarity between YBL's mark and AP's sign to the effect that there was a high degree of aural similarity and a medium degree of conceptual similarity.
59. YBL says that the Hearing Officer made the wrong comparison because she regarded AP's sign as being GEEK CORE (two words) rather than GEEKCORE (one word). In fact, the Hearing Officer referred to both GEEK CORE and GEEKCORE because, from the evidence she referred to, both forms appeared to be in use.
60. When considering aural similarity, the Hearing Officer referred to GEEK CORE but the aural similarity is the same whether one considers GEEK CORE or GEEKCORE. When considering conceptual similarity, the Hearing Officer took the sign to be GEEKCORE.
61. I consider that the Hearing Officer did not make any mistake as to what the sign was when assessing aural and conceptual similarity.
62. The question of similarity between YBL's mark and AP's sign was a clear case of evaluation by the Hearing Officer. There is no basis for the appeal court to interfere with her evaluation.

*Overlap*

63. YBL challenges certain findings of the Hearing Officer in paragraphs [58], [59] and [60] of the decision.
64. At [58], the Hearing Officer said:

“It would be no stretch of the imagination for [AP] to also provide retail services connected with the sale of all the various goods covered by [YBL]'s applications. In particular, I note that a number of [AP]'s goods tend to relate to video games/movies (i.e. t-shirts bearing images from said games and movies). There is a clear link here between the nature of the goods in which it has goodwill and [YBL]'s retail services connected with the sale of video games, for example.”
65. At [59], the Hearing Officer said that, bearing in mind “the overlap” between the goods the subject of YBL's applications for registration and the level of goodwill in AP's business, a substantial number of AP's customers, or potential customers, was likely to believe that the services provided under YBL's marks were the responsibility of AP.
66. At [60], the Hearing Officer held that AP's opposition pursuant to section 5(4)(a) succeeded “in full” against YBL's applications for registration.
67. When YBL made its submissions on the question of overlap, it did so on the basis that the Hearing Officer's findings as to the goods sold by AP were much narrower than her actual findings on that question. I will consider her reasoning on the basis of her actual findings as to the goods sold by AP.

68. It must also be remembered that the question of the overlap between the goods sold by AP and the goods referred to in YBL's applications for registration is being considered for the purpose of assessing whether AP has demonstrated the ingredient of misrepresentation for the purposes of a claim in passing off.
69. Earlier in her decision, the Hearing Officer had correctly directed herself as what was required to show a misrepresentation for the purposes of a claim in passing off. She had also referred to *Harrods Ltd v Harrodian School Ltd* [1996] RPC 697, correctly, as authority for the following two propositions:
- i) a common field of activity is not a prerequisite to establishing a passing off claim; and
  - ii) the presence of a common field of activity is clearly a highly important factor.
70. When I considered the appeal in relation to the Hearing Officer's findings of goodwill earlier in this judgment, I set out the various findings which she made as to the goods sold by AP. She did not draw up an exhaustive list of such goods. However, she accepted AP's evidence that they sold "a wide selection of goods" and she referred to a number of the goods within that selection. When considering the critical question of misrepresentation, she made two essential findings. The first was that no stretch of the imagination would be involved for AP to sell all of the various goods covered by YBL's applications. The second finding was that a substantial number of AP's customers, or potential customers, was likely to believe that the services provided under YBL's marks were the responsibility of AP. The Hearing Officer obviously considered that it was not necessary for her to draw up a comprehensive list of all of the goods previously sold by AP in order for her to reach her conclusions. I am not able to say that her findings and her evaluation of the situation were not open to her.
71. If I were to carry out my own evaluation in relation to the question of misrepresentation, I would no doubt start with her findings as to the goods sold by AP. I might, or might not, prefer to have more specific findings from the Hearing Officer as to the goods sold by AP. With, or without, more specific findings I would then have to consider whether I would agree that a substantial number of AP's customers, or potential customers, was likely to believe that the services provided under YBL's marks were the responsibility of AP. It is possible that I might come to the same conclusion as the Hearing Officer as to all of the goods referred to in YBL's application for registration and it is also possible that I might make a finding of misrepresentation in relation to some of the goods, but not all of them.
72. However, as was made clear by the authorities to which I have referred as to the right approach of an appeal court, it is not my function to make my own evaluation of the issue of misrepresentation. Instead, I have to ask whether the decision of the Hearing Officer was wrong by reason of some identifiable flaw in her treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. I am not able to find an identifiable flaw of this kind in relation to her treatment of the issue of misrepresentation. I am not able to say that her conclusion was one which no reasonable Hearing Officer, properly directing themselves as to the law, could reach.

*The result*

73. I have not accepted YBL's grounds of appeal in relation to goodwill or misrepresentation (by reference to similarity and overlap). It follows that I will dismiss the appeal.