O-195-16

TRADE MARKS ACT 1994

TRADE MARK APPLICATION NO 3030490

BY LONDON CITY AIRPORT LIMITED

DECISION

Introduction

1. This is an appeal against the decision of Mrs Carol Bennett, acting for the Registrar, dated 5 August 2015 (O-370-15) in which she partially refused registration for the mark LONDON CITY AIRPORT in Class 39 under Section 3(1)(b) and 3(1)(c) of the Trade Marks Act 1994 ("***the 1994 Act***").

2. At the hearing of the Appeal London City Airport ("***the Applicant***") was represented by Mr. Jonathan Moss instructed by Gill Jennings & Every LLP. The Registrar did not attend the hearing but Mr. Nathan Abraham on behalf of the Registrar filed a skeleton Argument in lieu of attendance. I was grateful for the written arguments submitted by both parties and the succinct and clear arguments put forward by Mr. Moss at the hearing.

The Application

3. On 13 November 2013 the Applicant filed an application for the mark LONDON CITY AIRPORT in respect of a variety of services in classes 35, 39 and 45. The full list of the services applied for was set out in paragraph 1 of the Hearing Officer's Decision and is reproduced in Annex A hereto.

4. The majority of the services were accepted for registration.

5. However by letter dated 3 December 2013, the Examiner on behalf of the Registrar, raised a partial objection under Sections 3(1)(b) and 3(1)(c) of the 1994 Act in respect of the following services in Class 39:

> Transport; travel arrangement; transport and travel services; airport passenger shuttle services between the airport and airport parking facilities; provision of flight information; car parking, car parking booking and information services; advisory and information services relating to travel; tour operator services and tourist agency services; ticket booking and reservation services for travel; transport of passengers; booking and reservation of travel; arranging travel and

information therefor; arranging travel and information therefor, all provided on-line from a computer database or the Internet; provision of travel information; providing electronic information concerning travel and travel destinations; car hire services.

6. The basis of the objection was that '*the mark consists exclusively of the term "London City Airport" being a sign which may serve in trade to designate the kind of the services e.g. services relating to London City Airport*'.

7. On 3 April 2014, an *ex parte* hearing was requested on behalf of the Applicant. On 17 June 2014 a hearing took place before the Hearing Officer. At the hearing the Applicant was represented by Mr. Mark Devaney of Gill, Jennings & Every LLP.

8. The objection was maintained at the hearing but a period of three months was granted in order that the Applicant could consider (1) the decision by Professor Annand in CARDIFF AIRPORT and BELFAST INTERNATIONAL AIRPORT Trade Marks (O-386-13); (2) whether to submit a limited specification for further consideration; and (3) whether it wished to file evidence in support of a claim for distinctiveness acquired through use.

9. No further submissions were made and no evidence was filed. However, on 23 July 2014, in light of Professor Annand's decision the Applicant requested that the Hearing Officer identify those terms in Class 39 which still faced objection. By official letter dated 30 July 2014 the Hearing Officer indicated that the following services in Class 39 were still the subject of the objection:

> Transport; travel arrangement; transport and travel services; airport passenger shuttle services between the airport and airport parking facilities; car parking, car parking booking and information services; ticket booking and reservation services for travel; transport of passengers; booking and reservation of travel; arranging travel and information therefor; arranging travel and information therefor, all provided on-line from a computer database or the Internet; provision of travel information; providing electronic information concerning travel and travel destinations.

The letter went on to state that the Section 3(1) objection had been waived in respect of the following services in Class 39:

> Provision of flight information; advisory and information services relating to travel; tour operator services and tourist agency services; car hire services.

10. Subsequently the Applicant requested, pursuant to Section 76 of the 1994 Act and Rule 69 of the Trade Mark Rules 2008, that the Hearing Officer provide reasons for her Decision.

The Hearing Officer's Decision

11. There is no suggestion that the Hearing Officer did not correctly identify the relevant legal approach that she was required to take under Sections 3(1)(b) and 3(1)(c) of the 1994 Act and therefore I do not therefore reproduce the paragraphs that identified the legal approach in her Decision.

12. The Hearing Officer identified the main objection to registration as being under Section 3(1)(c) of the 1994 Act and therefore began by considering that objection.

13. Having acknowledged the submissions made on behalf of the Applicant with regard to equal treatment on the basis of a number of earlier trade mark registrations (paragraphs 7 and 9 of the Decision) the Hearing Officer went on to make clear that:

    (1) It was necessary for her to assess the mark on its own merits and therefore attached limited significance to the fact that other 'airport' trade marks had been registered (paragraph 9 of the Decision); and

    (2) That as regards the earlier registrations she was unaware of the circumstances surrounding their acceptance and therefore considered them to be of little assistance in determining the outcome of the application (paragraph 10 of the Decision).

14. Having identified the legal approach to the assessment that she was required to make under Section 3(1)(c) of the 1994 Act (paragraphs 11 to 14) the Hearing Officer made the following findings with regard to the average consumer in paragraph 15 of her Decision:

> Having regard to identifying the relevant consumer, it is reasonable to assume that the services claimed can be described as being directed towards both the general public (which regularly uses public transport in order to go about its daily business, whether that be a short bus trip to a local shopping centre, or a flight to a holiday destination) and a more specialist consumer seeking to use road, rail and air services in order to engage in business activity. Either way, although the level of attention paid in selection of such services may vary a little, it is reasonable to assume that a moderate level of attention will be paid and that the average consumer will be reasonably well informed, observant and circumspect.

15. The Hearing Officer then turned to analyse the mark and to make the assessment under Section 3(1)(c) as follows:

> 16. The mark applied for consists of three words that would be readily understood by the average consumer without the need of any specialist knowledge or technical understanding. However, for the sake of completeness, and to avoid any doubt as to their exact meanings, I refer to the following definitions taken from Collins English Dictionary:
>
> > **London** noun 1. the capital of the United Kingdom, a port in S England on the River Thames near its estuary on the North Sea: consists of the City (the financial quarter), the West End (the entertainment and major shopping centre), the East End (the industrial and former dock area), and extensive suburbs.
> >
> > **City** noun: 1. Any large or populous place.
> >
> > **Airport** noun: a landing and taking-off area for civil aircraft, usually with surfaced runways and aircraft maintenance and passenger facilities.
>
> 17. The section 3(1) objection was raised in full accordance with guidance published in the IPO's 'Addendum to the Examination Guide' which is accessible on the IPO website at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406241/M anual_of_trade_marks_practice.pdf where, at page 264 and under the heading 'Airport', the following is stated:
>
> > "AIRPORT
> > Names of airports such as BIRMINGHAM AIRPORT will normally be acceptable for services without the need for evidence of distinctiveness to be filed. Objection should only be taken under section 3(1)(b) and (c) where specifications include 'transport services' such as shuttle buses, taxis etc. as it is likely that consumers would expect there to be more than one undertaking providing transport services to and from an airport and would therefore be descriptive of the destination/intended purpose of the services."
>
> 18. Having established that each word has a separate meaning, I am required to decide whether the combination of those words falls foul of the requirements set out in sections 3(1)(b) and (c). With that in mind, I do not believe the combination can lay claim to any grammatical or linguistic imperfection or peculiarity such as might help to escape its inherent descriptiveness. In my view, the term 'London City Airport'

would commonly and on first impression be understood to describe an airport based within the boundaries of London.

19. The section 3(1)(c) objection is therefore based on the premise that the term 'London City Airport', when used in respect of those services set out at paragraph 4 above, would be understood as a descriptive reference to their inherent characteristics. For example, in respect of a claim to transport services at large, the protection would likely encompass transport services to and from the airport by bus, coach, etc. In this type of scenario, the sign would do no more than serve to designate either the destination of the transport services or their geographical origin. Such services are frequently provided by undertakings which have no official connection to the airport and, when used in this context, the term would merely designate a characteristic of the services. Similarly, in respect of 'car parking' the term would serve to designate facilities located at, near to, or suitable for, an airport based in the City of London. The same logic can be applied to 'booking or reservation of seats/tickets for travel' where, in my view, the term would merely serve to designate that the services are again provided from an airport based within the boundaries of London. In this respect, it is not unusual for several different tour operators to be based at airports, all of whom will offer booking and reservation of seats and tickets for travel from within the airport. This is what the Examiner was referring to in his original Examination Report when he stated, by way of further explanation around the section 3(1)(c) objection, that the sign describes services which "*...relate to London City Airport*".

20. The need for certain geographical designations to remain free for others to use is particularly relevant in the field of transport and travel services where, for example, an airport name is likely to be used in reference to the principal place from where these services stem from, and also as a designation of the geographical destination of the services. In my view, there would be a clear association in the mind of the relevant class of persons between the geographical name and the category of services in question, the net result being that the consumer would not, without prior education, perceive the sign as denoting trade origin.

21. In view of the fact that the terms covered by the objection are extremely broad, it is necessary to assess the distinctiveness of the sign by reference to all of the terms claimed. If there are services specified which are free of objection under section 3(1)(b) and (c), then they must be allowed to proceed. In Case C-239/05 *BVBA Management Training en Consultancy v Benelux-Merkenbureau*, the question being referred to the

CJEU was whether the Directive must be interpreted as meaning that the competent authority is required to state its conclusion separately for each of the individual goods and services specified in the application. The Court answered (see paragraph 38) by confirming that, whilst the competent authority was required to assess an application by reference to all of its individual goods and services, the competent authority may use only general reasoning where the same ground of refusal is given for a category or group of goods or services. In this case, I regard all of the objectionable services to be in the same category (transport and travel services in class 39), and thus rely on general reasoning in refusing the mark for the services specified.

22. In taking a reasonably broad objection against the services claimed, it should be emphasised that the Registrar did provide the applicant with an opportunity to submit a limited specification for further consideration at the ex parte hearing. However, nothing was provided in response other than the agent's previously-documented inquiry as to which services were subject to the outstanding objection.

23. At paragraph 4 above, I referred to the recent Appointed Person decision in *CARDIFF AIRPORT and BELFAST INTERNATIONAL AIRPORT*(BL O-386-13) which, in the interests of completeness, it is useful for me to note that similar objections to those taken in this case were previously considered in that case, and that those objections were confirmed as being appropriate and correct. Paragraph 29 of the decision states that:

> "*In conclusion, the Applicants have not persuaded me that the Hearing Officer was wrong to refuse trade mark registration to CARDIFF AIRPORT and BELFAST INTERNATIONAL AIRPORT in respect of the subject services for the reasons she gave in her decision. Indeed, I agree with her assessments. In the absence of acquired distinctiveness, the trade marks were excluded from registration for the said transport and car parking etc. services under Section 3(1)(c) and 3(1)(b) of the Act.*"

16. Although it was not necessary for her to do so the Hearing Officer also considered the position under Section 3(1)(b) of the 1994 Act. With regard to the Section 3(1)(b) objection the Hearing Officer concluded as follows:

> 28. In my opinion, even if the mark falls short of conveying the requisite level of specificity and objectivity to support an objection under section 3(1)(c), I would nevertheless hold that

> it is not capable of performing the essential function of a trade mark without the relevant public being educated into seeing it that way. In my view, consumers would not consider the mark to denote transport and travel-related services provided by any one specific provider. Rather, it would serve to provide a non-distinctive 'functional' purpose, likely to be used by any number of service providers working in or around London City Airport. On this basis I consider that the section 3(1)(b) objection is also made out.

The Grounds of Appeal

17. The Applicant appealed to the Appointed Person under Section 76 of the 1994 Act. The Grounds of Appeal contend in substance that the Hearing Officer erred in her assessment of the distinctiveness and/or descriptiveness of the mark for the services that she refused on the basis that:

    (1) The Hearing Officer had broken the mark down into its constituent parts and had failed to consider the mark in its entirety;

    (2) The Hearing Officer had not properly considered normal and fair use of the trade mark by third parties and the circumstances in which the term 'LONDON CITY AIRPORT' might be used by third parties but which would not infringe the registered rights of the Applicant should the mark be registered;

    (3) The Hearing Officer had applied different criteria when assessing overall distinctiveness to the services for which an objection was raised as opposed to those services for which the application for registration was accepted; and

    (4) The Hearing Officer had underestimated the sophistication of the average consumer. In particular the average consumer would understand that airports operate a wide range of services and/or the average consumer would understand that the "City" in the context of London refers to a distinct area of London in which the airport is not located.

18. These points were developed by Mr. Moss on behalf of the Applicant in his skeleton argument and oral submissions at the hearing before me.

19. In addition it was noted in the written argument that the text from paragraphs 18 to 26 of the Hearing Officer's decision in CARDIFF AIRPORT and BELFAST INTERNATIONAL AIRPORT' as reproduced in paragraph 13 of Professor Annand's decision on appeal in that case, was in large measure reproduced in paragraphs 17 to 24 of the Hearing Officer's decision in the present case. It was, in my view correctly, made clear at the hearing of the appeal that it was not being contended: (a) that there was anything factually or legally incorrect in paragraphs 17 to 24 of the Hearing

Officer's decision; or (b) that this point formed a separate ground of appeal in the present case.

20. Mr. Abraham on behalf of the Registrar maintained in his skeleton argument that:

(1) The Hearing Officer having broken down the mark into its constituent parts had gone on to consider the mark in its entirety;

(2) The Hearing Officer had correctly identified the public policy underpinning the objection under Section 3(1) of the 1994 Act by reference to Joined Cases C-108/97 Windsurfing Chiemsee (ECLI:EU:C:1999:230) and Case C-191/01 P OHIM v. Wrigley (ECLI:EU:C:2003:579);

(3) The possibility of defences being available to third parties under the 1994 Act should not be taken into account when making the assessment of registrability under Section 3 of the 1994 Act. To support this contention the Hearing Officer relied upon the decision of Geoffrey Hobbs QC sitting as the Appointed Person in AD2000 Trade Mark [1997] RPC 168;

(4) The Hearing Officer was required when considering the objections to consider all normal (or notional) and fair use of the sign the subject of the application;

(5) The Hearing Officer had not applied different criteria dependent upon whether or not she had refused registration for the different services but rather has applied the same criteria with different result;

(6) The presence of the word 'city' did not have a determinative effect on the consumer perception. As found by the Hearing Officer the relevant consumer would perceive the sign as referring to an airport which 'services' the city of London (where the word 'city' could either mean 'The City' as in 'the square mile' or 'the city' meaning the greater area of London). In either case the sign's inherent descriptiveness would remain; and

(7) The relevant perception of inherent distinctiveness could not be founded on an understanding of geographic specifics such as whether or not the airport's location actually falls within the boundaries of its given designation it being noted that in reality most airports are located on the outskirts of the metropolitan area they are named after.

Standard of review

21. The appeal is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that he has reached the wrong decision suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was clearly wrong. See Reef Trade Mark [2003] RPC 5, and BUD Trade Mark [2003] RPC 25.

22. More recently in Fine & Country Ltd v Okotoks Ltd (formerly Spicerhaart Ltd) [2013] EWCA Civ 672; [2014] FSR 11 Lewison LJ said at paragraph [50]:

> The Court of Appeal is not here to retry the case. Our function is to review the judgment and order of the trial judge to see if it is wrong. If the judge has applied the wrong legal test, then it is our duty to say so. But in many cases the appellant's complaint is not that the judge has misdirected himself in law, but that he has incorrectly applied the right test. In the case of many of the grounds of appeal this is the position here. Many of the points which the judge was called upon to decide were essentially value judgments, or what in the current jargon are called multi-factorial assessments. An appeal court must be especially cautious about interfering with a trial judge's decisions of this kind. . . .

23. This approach was reiterated by the Court of Appeal in Fage UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5; [2014] E.T.M.R. 26 at paragraphs [114] and [115]. Moreover in paragraph [115] Lord Justice Lewison said:

> 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.

24. It is necessary to bear these principles in mind on this appeal.

Decision

25. The Applicant raised four grounds of appeal as noted above in paragraph 17 above. None of those grounds suggested that the Hearing Officer had made any error in identifying the law to be applied to the present case. The complaint is rather that the law was erroneously applied by the Hearing Officer.

26. In making his submissions on behalf of the Applicant Mr. Moss took the grounds summarised in paragraph 17(1) and 17(4) above together and I shall do likewise before dealing with the other Grounds of Appeal.

27. With regard to the Hearing Officer's analysis of the mark applied for, whilst it is true that the Hearing Officer first examined each of the words that made up the mark, it does not seem to me to be correct that the Hearing Officer did not consider the mark as a whole. In fact it is clear from paragraph 18 of the Decision where the Hearing Officer expressly stated that she was '*required to decide whether the combination of [the] words falls foul of the requirements set out in sections 3(1)(b) and (c)*' and her reference to '*the term "London City Airport"*' in paragraphs 18 and 19 of the Decision that the Hearing Officer has firmly in mind that her assessment should proceed, as her analysis then set out was, on the basis of the mark as a whole.

28. With regard to the assessment of the mark it was submitted on behalf of the Applicant that:

    (1) '*the sophistication of the average consumer*' had been '*underestimated*' by the Hearing Officer;

    (2) 'London City' was not a common way of describing London;

    (3) The inclusion of the word 'city' in the case of airport and related transport services added a high level of distinctiveness such word being as distinctive as any other made up word when interposed between the words 'London' and 'Airport'; and

    (4) The words 'London City Airport' would primarily be seen as a reference to the business activities of the Applicant.

29. However it was, in my view rightly, accepted on behalf of the Applicant, *inter alia*, that:

    (1) The word 'London' designates a place;

    (2) The word 'city' designates a city and that London is a city;

    (3) Within the city of London there is an area known as 'the City of London'; and

    (4) It was intrinsic in the words 'London City Airport' that it was a reference to a 'destination'.

30. Further, it is to be noted that the present application is to be determined on the basis of the inherent registrability of the mark no evidence of distinctiveness acquired through use having been filed.

31. In these circumstances it seems to me that the Hearing Officer was entitled to find that the term 'LONDON CITY AIRPORT' would commonly and on first impression be understood by the average consumer to describe an airport within the boundaries of London.

32. I do not accept that the submissions made with regard to the alleged underestimate of the sophistication of the average consumer changes this. Firstly, in paragraph 15 of her Decision the Hearing Officer made clear findings with regard to the characteristics of the average consumer. Those findings seem to me to be correct. Moreover they do not seem to be directly challenged on this appeal. Secondly, the fact that the average consumer may be or is aware that airports operate a wide variety of services does not, detract from the position that the average consumer would, as accepted by the Applicant, also understand the term 'LONDON CITY AIRPORT' to be a reference to a destination. Such consumers would expect more than one undertaking (possibly including the airport operator) to provide for example transport services to and from the airport; or parking services at or close to the airport. In such circumstances the term 'LONDON CITY AIRPORT' would be descriptive of the geographical destination/intended purpose of those services.

33. It follows from that finding that, in the absence of any education, the Hearing Officer was correct to find that the public would or could regard the sign as a reference to a geographical destination i.e. that the average consumer would not or may not perceive the sign as denoting trade origin.

34. It was further submitted, on behalf of the Applicant, by way of an alternative, that if consumers understood the word 'city' in context of London to refer to a distinct area of London ('the square mile'), an area in which the airport is not located, that would be such as to confer distinctive character on the mark. I do not accept that submission.

35. Firstly, because for the reasons set out above it seems to me that the Hearing Officer was entitled to find as she did that the word 'city' in the context of the words 'London' and 'airport' would be understood by the average consumer to be a reference to the whole of London.

36. Secondly, because even if the reference was understood by the average consumer to be a reference to 'the square mile' it seems to me that, as pointed out in paragraph [34] of CANARY WHARF Trade Mark [2015] FSR 34 (a decision of Iain Purvis Q.C. sitting as Deputy Judge of the High Court), geographic terms commonly involve a certain 'penumbra' and in those circumstances '*the need to keep free principle*'

being an encapsulation of the policy behind Section 3(1)(c) of the 1994 Act applies to both the literal area and the penumbra.

37. In this connection, it seems to me that the point is of particular force, for the reasons identified on behalf of the Registrar, and not challenged by the Applicant, that in the case of airports the relevant perception of inherent distinctiveness could not be founded on an understanding of geographic specifics, such as whether or not the airport's location actually falls within the boundaries of its given designation, in circumstances where most airports are located on the outskirts of the metropolitan area they are named after.

38. In these circumstances, it follows from the case law cited by the Hearing Officer in paragraphs 12 and 13 of her Decision that the general interest or public interest in keeping descriptive terms free for third parties to use where there is a sufficiently direct and specific relationship between the sign and the characteristics of the goods or services specified applies.

39. On the basis of the findings that the Hearing Officer had made that the mark would be or could be perceived as a reference to a geographical destination, the Hearing Officer was required to consider all normal (or notional) and fair use of the sign the subject of the application. The Hearing Officer was required to make that assessment in respect of each of the services for which registration was sought.

40. In the present appeal, the question to be considered is whether the line between those services that are open to objection and those which are not has been correctly drawn by the Hearing Officer.

41. The Hearing Officer found that '*all of the objectionable services to be in the same category (transport and travel services in class 39)*' (paragraph 21 of the Decision). She made that finding having specifically noted that the services specified were very broad and that the Applicant had been provided with an opportunity to limit the specification at the *ex parte* hearing which it had chosen not to do.

42. The Hearing Officer considered that the objectionable services were of a sufficiently homogeneous category that it was appropriate for her to rely upon general reasoning as the basis for her decision. It is not suggested by the Applicant, that as a matter of law, that this was not the correct approach. Instead, the gravamen of the complaint by the Applicant is that some of the services included in Class 39 have been allowed to proceed to registration whereas others, which in some cases are almost identical, have not and that accordingly different criteria must have been applied to the assessment by the Hearing Officer.

43. I have carefully considered the parts of the specification that have been allowed to proceed to registration, which the Applicant drew my attention to, and compared them

to the services which have been refused and I have some sympathy with the Applicant's position. However, as noted by Professor Annand in paragraph [33] of her Decision in CARDIFF AIRPORT and BELFAST INTERNATIONAL AIRPORT Trade Marks the findings that certain parts of the specification are registrable do not make the trade marks any less descriptive or more registrable with respect to the services in issue on appeal. The services for which the registration has been allowed to proceed are no part of this appeal and I express no opinion in relation to them.

44. It seems to me that in the light of the Hearing Officer's finding that the term 'LONDON CITY AIRPORT' would commonly and on first impression be understood by the average consumer to describe an airport within the boundaries of London, i.e. to describe a destination, legally and logically results in a finding that such a term may be descriptive of the destination or intended purpose of the services for which registration was refused, for example as the use of a taxi, train or bus destination or in respect of car parking services to be provided at or near to the airport. That is all the more the case given the breadth of a number of the parts of the specification to which objection was taken by the Hearing Officer in respect of which all normal and fair use falls to be considered.

45. In those circumstances, it is my view that the Hearing Officer was entitled to reject the application for the services in Class 39 that she did for the reasons she gave in her Decision (see in particular the reasoning in paragraphs 19 and 20).

46. Finally, turning to the ground of appeal with regard to the normal and fair use of the sign 'LONDON CITY AIRPORT' by third parties. For the reasons set out in the decision of Geoffrey Hobbs QC sitting as the Appointed Person in AD2000 Trade Mark [1997] RPC 168 and Case C-51/10 P Agencja Wydawnicza Technopol sp. z o. o. v. OHIM [2011] ECR I-1541 referred to by Professor Annand in CARDIFF AIRPORT and BELFAST INTERNATIONAL AIRPORT) the role of the Registrar is to prevent the granting of undue monopolies and therefore the possibility of defences being available to third parties under the 1994 Act should not be taken into account when making the assessment for registrability under Section 3 of the 1994 Act. In the circumstances I also reject this ground of appeal.

47. Given my findings in relation to the Appeal under Section 3(1)(c) of the 1994 Act it is not necessary for me to go on to consider the positon under Section 3(1)(b) of the 1994 Act. However, it seems to me that the Hearing Officer was also entitled to make the findings that she did for the reasons that she gave with regard to the objection under Section 3(1)(b) of the 1994 Act.

Conclusion

48. In the end, it is in my view clear that each case must be determined on its own facts and in accordance with the law. The Applicant has not persuaded me that the Hearing

Officer was wrong to partially refuse the trade mark application for the reasons given in her Decision. In my view it was open to the Hearing Officer to come to the conclusions that she did.

49. In the circumstances, in the absence of any evidence of acquired distinctiveness the trade mark application should be partially refused pursuant to Sections 3(1)(b) and 3(1)(c) of the 1994 Act.

50. The appeal from the Hearing Officer's Decision is dismissed. In accordance with the usual practice, the appeal is dismissed with no order as to costs.

Emma Himsworth Q.C.

Appointed Person

14 April 2016

Mr. Jonathan Moss instructed by Gill Jennings & Every LLP appeared on behalf of the Applicant.

Mr. Nathan Abraham provided written submissions on behalf of the Registrar.

ANNEX A

Class 35:

Advertising; business management; business administration; office functions; business advisory services; airport administration services; provision of business assistance for airport facilities; promotional services; providing space for the advertising/promotion of goods and services to others; business consulting and management services in the field of travel, travel planning and the operation of travel-related businesses; the development and management of retail operations, commercial undertakings and airports and advisory and consultancy services relating thereto; retail consultancy services; duty free retail services in connection with the sale of perfumes, cosmetics, cigarettes, alcohol, clothing, bags, luggage, luggage accessories, jewellery, watches, books, stationery, newspapers, magazines, toiletries, health and beauty products, confectionery, drinks, electrical and electronic products, coffee and beverages, food; retail services provided at airports and/or travel terminals in connection with the sale of perfumes, cosmetics, cigarettes, alcohol, clothing, bags, luggage, luggage accessories, jewellery, watches, books, stationery, newspapers, magazines, toiletries, health and beauty products, confectionery, drinks, electrical and electronic products, coffee and beverages, food, money exchange services, shoe shine services, car rental services and chauffeur services; retail services provided in retail outlets at airport and/or travel terminals in connection with the sale of perfumes, cosmetics, cigarettes, alcohol, clothing, bags, luggage, luggage accessories, jewellery, watches, books, stationery, newspapers, magazines, toiletries, health and beauty products, confectionery, drinks, electrical and electronic products, coffee and beverages, food, money exchange services, shoe shine services, car rental services and chauffeur services; the bringing together, for the benefit of others, of a variety of goods and services, namely perfumes, cosmetics, cigarettes, alcohol, clothing, bags, luggage, luggage accessories, jewellery, watches, books, stationery, newspapers, magazines, toiletries, health and beauty products, confectionery, drinks, electrical and electronic products, coffee and beverages, food, money exchange services, shoe shine services, car rental services and chauffeur services enabling customers to conveniently view and purchase those goods and services in airport/travel terminals or airport/travel terminal retail outlets, tax or duty free outlets, shopping malls or from an Internet web site; organisation, operation and supervision of sales incentive schemes, loyalty and/or promotional incentive schemes; hire, leasing or rental of office space and office equipment; advisory and consultancy services in connection with the aforesaid services.

Class 39:

Transport; packaging and storage of goods; travel arrangement; transport and travel services; airport services; airport ground support services; ground and air traffic control services; airport baggage check-in services (not including security inspection); airport baggage handling; storage, handling and holding of luggage and goods; airport passenger shuttle services between the airport and airport parking facilities; ground support freight handling services provided at airports; cargo and freight handling; aircraft runway and aircraft parking services; airfield management services; aircraft stand allocation; aircraft apron services; aircraft trucking; inspection of aircraft; aircraft fuelling services; aircraft handling; provision of reception and waiting areas

for passenger departure and arrival; provision of flight information; passenger check-in services; passenger and/or freight transport by air; car parking, car parking booking and information services; airport information services and flight information services; advisory and information services relating to travel; tour operator services and tourist agency services; sightseeing services; tourism services; provision of tourism and travel information; ticket booking and reservation services for travel; tourist offices; transport of passengers; arranging of air travel; organisation and management of tours; travel agency services; booking and reservation of travel; arranging travel and information therefor; arranging travel and information therefor, all provided on-line from a computer database or the Internet; provision of travel information; providing electronic information concerning travel and travel destinations; car hire services.

Class 45:
Security services for the protection of property and individuals; surveillance services, airport fire services; airport security services; safety services; airport baggage security inspection services; baggage screening services; screening of individuals for security purposes; information and advisory services in the field of security and/or safety; chaperoning and escort services; personal shopper services.