

TRADE MARKS ACT 1994

IN THE MATTER OF:

OPPOSITION No. 408077


IN THE NAME OF MATCH GROUP LLC (FORMERLY MATCH.COM LLC)

TO TRADE MARK APPLICATION No. 3183533

IN THE NAME OF ADIL AKHTER

D E C I S I O N

1. On 1st September 2016, Adil Akhter ('the Applicant') applied under number 3183533 to register **MUSLIM MATCH** as a trade mark for use in relation to a wide range of services in Class 45.
2. The application for registration was opposed by Match Group LLC (formerly Match.com LLC) ('the Opponent') under ss.5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 on the basis of the earlier rights to which it was entitled by virtue of registration and through use of the following trade marks:

Opponent's trade marks	Services relied on
<p data-bbox="225 309 459 342">UK TM 3097217</p>  <p data-bbox="225 562 592 595">Filing Date: 3 March 2015</p> <p data-bbox="225 674 730 707">Registration Date: 31 October 2015</p>	<p data-bbox="828 309 1385 1223">Class 45: Providing social introduction and date-arranging services; administering personality and physical attractiveness testing and creating personality and physical attractiveness profiles of others; dating agency services; match-making services; computer dating services; provision of dating agency services via the Internet; provision of dating agency services via television, radio and telephone; agency services which arrange personal introductions; social escorting services; information and advisory services relating to the aforesaid services; providing information regarding on-line dating and introduction services.</p>
<p data-bbox="225 1245 496 1279">EU TM no. 182253</p> <p data-bbox="225 1357 523 1402">MATCH.COM</p> <p data-bbox="225 1491 560 1525">Filing date: 1 April 1996</p> <p data-bbox="225 1547 683 1581">Registration date: 9 March 2004</p>	<p data-bbox="828 1245 1374 1391">Class 42: Information and consultancy services in the nature and field of on-line dating and introduction services.</p>

3. For the purposes of her decision issued under reference BL O-062-18 on 26th January 2018, the Registrar's Hearing Officer (Ms. June Ralph) separated the services covered by the contested application for registration into two groups: those

which in paragraphs 50 to 52 of her decision she found to be '*identical or at least highly similar*' to the services listed in the Opponent's earlier registrations (I shall refer to this as 'Group A') and those which in paragraph 53 of her decision she found to be '*not similar to the opponent's services*' (I shall refer to this as 'Group B').

4. The services which she placed in Group A were as follows:

Match-making services; computer dating services; provision of dating agency services via the internet; dating agency services; dating services; dating services provided through social networking; internet based dating, matchmaking and personal introduction services; internet based matchmaking services; internet dating services; matchmaking services; online social networking services; online social networking services accessible by means of downloadable mobile applications; personal introduction agency services; personal introduction services by computer; providing information regarding on-line dating and introduction services; providing information and advice on relationships; providing social introduction services; social introduction agencies; social networking services; video dating services; dating agency services; dating services; dating services provided through social networking; providing information and advice on marriage; providing marriage-arranging services; organising and arranging marriages; marriage bureau services; marriage agency services; personal advice services relating to matrimonial matters (non-legal); organising and arranging marriages; marriage agencies; marriage bureau services; marriage bureaus; matrimonial agencies.

5. The services which she placed in Group B were as follows:

Relationship counselling; marriage guidance counselling; marriage counselling and coaching; marriage guidance counselling; marriage guidance services; divorce mediation services; adoption agency services; legal advice; legal advice and representation; legal information services; mediation; organization of religious meetings; personal gift selection for

others; personal legal affairs consultancy; providing clothing to needy persons [charitable services]; providing information about religion; providing wedding officiant services; provision of emotional support for families; social work services; wedding chapel services; religious services.

She rejected the Opponent's contention that these services were '*highly similar to their own*' for the reasons shortly stated in paragraph 53 of her decision (with emphasis added):

The opponent identified the above services as being highly similar to their own on the basis that they focus on personal relationships and interpersonal skills. In my experience the above services are usually provided by trained professionals with a particular specialism. The respective purpose of the services differs and they are unlikely to share trade channels. I cannot see that there is any competitive or complementary relationship in play and there is nothing in the evidence before me to indicate otherwise. These services are not similar to the opponent's services.

6. The Hearing Officer addressed: the 'Opponent's Evidence' in paragraphs 7 to 35; the legal criteria applicable to 'Proof of Use' in paragraphs 36 to 43; and 'Sufficiency of Use' in paragraph 44, where she concluded that: '*There is evidence to support that the earlier EU trade mark is used for all the services it is registered for. I am more than satisfied that there has been genuine use of the EU mark including longstanding and extensive use in the UK*'.
7. She considered the 'Distinctive Character of the Earlier Marks' in paragraphs 67 to 69, where she concluded that they possessed a low level of inherent distinctiveness for services of the kind covered by the earlier registrations, but that: '*bearing in*

*mind my earlier comments made in the context of assessing proof of use, I am satisfied that the extent to which the **Match.com** mark has been used in the UK is such that it enjoys a high degree of enhanced distinctiveness in relation to online dating services’.*

8. Her conclusions on ‘Comparison of the Marks’ were as follows:

64. In a visual comparison of the marks, the point of similarity is the word **MATCH**. It is the only word of the opponent’s UK mark and the first word of the EU mark. It is the second word of the applicant’s mark. There are points of visual difference such as the heart device and domain name suffix in the opponent’s mark and the additional word **Muslim** in the applicant’s mark. Overall I find there to be a medium degree of visual similarity between the applicant’s mark and both of the opponent’s marks.

65. In an aural comparison, the applicant’s mark will be vocalised in full as **Muslim Match**. The opponent’s UK mark will be vocalised as **match**. It is unlikely that the device will be vocalised. The EU mark will be vocalised in full including the domain suffix ‘.com’. In each case the word **match** will be pronounced in the same way. I find there to be a medium degree of aural similarity between the applicant’s mark and both of the opponent’s marks.

66. In a conceptual comparison, the opponent’s marks will bring to mind the concept of a match or matching something or someone. The heart device may bring to mind the concept of love. The addition of the internet domain name suffix ‘.com’ in the opponent’s EU mark will also impart a message of being a website address. For the applicant’s mark, the concept will be that of something or someone being a match in relation to Muslims. Overall I find there to be a medium degree of conceptual similarity.

9. She addressed the ‘Average Consumer and Purchasing Act’ in paragraphs 54 to 57.

She stated her conclusions on this in paragraph 57:

57. It is feasible that consumers can now access online services quickly and more easily through portable devices, and may therefore be able to multitask in the manner suggested by the opponent. However I do not accept that a lower level of attention will be paid. A dating/introduction site user will likely be paying a subscription fee and will be interacting with their own and other user's profiles. I would expect at least a normal level of attention to be paid by the consumer when using such services. The purchasing act will be mainly visual by consumers browsing websites, or the images and content generated by users. However I do not discount that aural considerations such as word of mouth recommendations may also part a part.

10. The Opponent's objection to registration under s.5(2)(b) was upheld in relation to the Group A services upon the basis of what the Hearing Officer determined to be the existence of a likelihood of 'indirect confusion': *'the applicant's mark is likely to be perceived as a brand extension of the opponent's mark. Consumers are likely to be confused into believing that the respective services come from the same or linked economic undertakings on the basis that the applicant's services are merely an extension of the opponent's services that are targeted specifically at the Muslim community'*.
11. The objection under s.5(2)(b) was rejected in relation to the Group B services for the reason stated in paragraph 75 of the decision:

As for the applicant's services which I found not to be similar to the opponent's services, there can be no likelihood of confusion in respect of those services as per the decision in Waterford (Waterford Wedgwood plc v. OHIM – C-398/07P (CJEU))

This rested on the proposition (affirmed and re-affirmed by the CJEU in a number of cases, one being Case C-398/07P Waterford Wedgwood plc EU: C: 2009: 288 at para. [34]) that s.5(2)(b) is inapplicable to situations in which the goods or services in issue are neither identical nor similar. The legality of the decision to reject the objection thus depended entirely on the posited lack of similarity between the services in Group B and *'the opponent's services'*.

12. Although the Opponent had raised and pursued objections to registration under ss. 5(3) and 5(4)(a) of the Act in relation to all of the services covered by the opposed application for registration, the Hearing Officer curtailed those objections by deciding to consider them only in relation to the Group B services. This will have been a case management decision. I infer that the Hearing Officer decided of her own motion to limit her consideration of the s.5(3) and s.5(4)(a) objections to the Group B services for reasons of 'procedural economy'. So far as I can tell from the papers before me, she adopted that approach in the course of preparing her decision, without prior notice or warning to the parties and without giving them an opportunity to be heard in relation to any impact it might have on their respective positions in the proceedings: c.f. the observations of the Appointed Person (Professor Ruth Annand) in airblue Trade Mark BL O/600/18 (24th September 2018) at paragraph 65 and footnote 3.
13. The Hearing Officer addressed the Opponent's objection to registration under s.5(3) in relation to the Group B services in paragraphs 78 to 85 of her decision. She noted the legal criteria applicable to objections to registration under 'Section 5(3)' in

paragraphs 78 and 79; in paragraph 81 she stated: *'Given my earlier finding regarding use of MATCH.COM, I find that this mark has the required reputation in respect of online dating services and that the reputation is a strong one'*; she reminded herself of the case law relating to the establishment of a 'Link' of the kind required for the purposes of s.5(3) in paragraphs 82 and 83; she then applied the law to the facts in paragraphs 84 and 85.

14. In paragraph 84 she observed as follows, with reference to the factors non-exhaustively identified as relevant by the CJEU in paragraph [42] of its Judgment in Case C-252/07 Intel Corporation v. CPM United Kingdom Ltd EU: C: 2008: 655:

84. Most of the above factors have already been assessed under section 5(2)(b). Regarding the first factor, I have found the marks to be visually, aurally and conceptually similar to a medium degree. As to the second factor, the respective services are not similar. In respect of the third and fourth factors, the opponent's mark has a strong reputation and a high degree of distinctiveness through the use made of it in relation to online dating services. Lastly as regards the fifth factor I have found there to be no likelihood of confusion in respect of the relevant services.

In paragraph 85 she concluded as follows in relation to the Group B services:

85. Considering all of the factors, I have come to the view that whilst the earlier mark has a strong reputation and high degree of distinctiveness in relation to online dating services, I do not consider that the mark will be brought to mind by the average consumer in respect of the dissimilar services of the application which have survived the 5(2) ground. This is so despite the medium degree of visual, aural and conceptual similarity between the marks. A link will not be made. In the alternative, if a link were to be made, it is likely to be so weak as to be incapable of giving rise to any heads of damage under

this ground. The common presence of the inherently weak work 'Match' is likely to be put down to mere coincidence and nothing more.

15. The Opponent's objection to registration under s.5(4)(a) was rejected in relation to the Group B services in a single sentence (paragraph 77):

The opponent relies upon the sign MATCH.COM under this ground and its claim is materially the same as that advanced under section 5(2)(b) such that I cannot see that it is any stronger position here against the services which have survived the ground under section 5(2)(b). (emphasis added)

This did not meet the requirements of the case. The relevant objection could not simply be assessed as if it raised a claim for 'infringement of unregistered trade mark' or a claim which necessarily depended for its success upon prior use of the trade mark **MATCH.COM** for services identical or similar to those for which it was protected by registration: JOYSLEEP Trade Mark BL O-257-17 (25 May 2017) at paragraphs [7] to [9] and [16] to [19]. The Hearing Officer should have determined the Opponent's objection under s.5(4)(a) in accordance with the legal requirements for liability under the law of passing off. She omitted to do so and the reason she gave for not making the required determination was fundamentally deficient.

16. The Opponent appears to accept for the purposes of its appeal under s.76 of the 1994 Act that the Hearing Officer's decision was basically correct except in so far as it

allowed the contested application for registration to proceed in relation to the following sub-set of the Group B services:

Relationship counselling; marriage guidance counselling; marriage counselling and coaching; marriage guidance counselling; marriage guidance services; providing wedding officiant services; wedding chapel services

In keeping with the terminology used in the Opponent's Grounds of Appeal, I shall refer to this sub-set as 'the Appealed Services'.

17. These are the Grounds of Appeal which accompanied the Opponent's Form TM55P:

Section 5(2)(b)

Ground 1: Similarity of services

5. The Hearing Officer erred in concluding that the Appealed services are not similar to the Opponent's services (see [53]).
6. The Hearing Officer erred in concluding that "the above services are usually provided by trained professional within a particular specialism" see [53]). In interpreting the scope of the Appealed services in a traditional, narrow and literal way, the Hearing Officer has proceeded on an incorrect foundation for the comparison point. In particular, "*Relationship counselling; marriage guidance counselling; marriage counselling and coaching; marriage guidance counselling; marriage guidance services*" covers general interpersonal services which can occur both at an introductory and early stage of a relationship, as well as later in the relationship when couples are looking to formalise their commitment.
7. Consideration must be given to the interpretation of the Appealed services in different cultures and religions. In some cultures it is standard practice for "marriage guidance and marriage counselling" to include

compatibility advice, relationship advice and marriage preparation classes. Contrary to the Hearing Officer's assumption, here is nothing to suggest that these services would be provided by a "trained professional". The services could just as likely to provide by respected members of a community, especially for those communities which are based around faith and religion.

8. Further or alternatively, the Hearing Officer erred in concluding that "the above [Appealed] services ... are unlikely to share trade channels" (see [53]). "*Relationship counselling; marriage guidance counselling; marriage counselling and coaching; marriage guidance counselling; marriage guidance services*" when interpreted broadly are potentially both directly competing and complementary to the Opponent's services being "*information and consultancy services in the nature of line dating and introduction services*".
9. The Opponent's trade channel is the internet which is a facilitator of many services. "*Relationship counselling; marriage guidance counselling; marriage counselling and coaching; marriage guidance counselling; marriage guidance services; providing wedding officiant services*" can all be offered and engaged with online.

Ground 2: Similarity of the marks

10. The Hearing Officer erred in concluding that the mark applied for by the Applicant was only of a medium degree of similarity to the Opponent's marks; a medium degree of visual similarity (see [64]), a medium degree of aural similarity (see [65]) and a medium degree of conceptual similarity (see [66]). This is despite finding that in the Opponent's earlier registrations "the **match** element is the more dominant and by which the mark is likely to be referred to and which carries the greater weight in the overall impression of the mark" (see [61]) and concluding Muslim in the Applicant's mark "merely indicated that the services are aimed at the Muslim community and serves to qualify the word Match" (see [63]).

11. The Hearing Officer should have concluded that the overall similarity was high, based on the direct overlap in the dominant element Match in the respective marks.

Ground 3: Distinctive character of the earlier marks

12. The Hearing Officer erred in the conclusion that the earlier marks have a low level of inherent distinctiveness (see [68, 69]) but did correctly recognise a high degree of distinctiveness in relation to online dating services for MATCH.COM (see [69]).

Ground 4: Likelihood of confusion

13. The Hearing Officer erred in concluding that there was no direct confusion (see [71]) especially when it has previously been stated that “**Muslim** merely indicated that the services are aimed at the Muslim community and serves to qualify the word **Match**” (see [63]).
14. The Opponent agreed that it was correct for indirect confusion to be found (see [73]).

Section 5(3)

Ground 5: No link found

15. The Hearing Officer has erred in the assessment under Section 5(3) by incorrectly concluding that “the respective services are not similar ... and there is no likelihood of confusion” (see [84]). The arguments outlined above at paragraphs 5-9 are relevant here.
16. Further and alternatively, had the Hearing Officer correctly concluded that a link existed, it is wrong to conclude that the link “would be so weak as to be incapable of giving rise to any heads of damage under this ground”. Damage would exist through a wrongful assumption of an association with the Applicant as concluded by the Hearing Officer in the “indirect confusion” finding (see [73]).
17. At present the Opponent is likely to request that the Appeal decision be made from the written submissions, subject to the response from the Applicant.

18. The Applicant took no part in the appeal. His agents of record (Trade Mark Wizards Ltd) did not reply to emails sent to them by this Tribunal during the pendency of the appeal. The Opponent opted to rely on written submissions in lieu of attending a hearing. The appeal thus falls to be determined on the basis of the papers on file. I record at this point that the papers before me contain no application for permission to rely on further evidence on appeal.

19. The Opponent's written submissions make no reference to the evidence on file in support of the assertions put forward in its Grounds of Appeal. Moreover, its written submissions contain extensive additional assertions of a factual nature for which either no supporting references are given to the evidence on file or new material which does not form part of the evidence on file is referenced by way of substantiation:

8. There are currently no general requirements for marriage guidance counsellors or relationship counsellors in the UK to have any form of accreditation, qualification or registration. There are no laws to regulate counselling either in the UK or Europe wide. Anyone can therefore claim to be a "counsellor" or "coach".

9. The British Association for Counselling and Psychotherapy (BACP) is the only readily identifiable association for "members of the counselling profession in the UK". This is a charitable organisation and membership of the association is voluntarily not obligatory as is the case with most professional organisations. A search of the website did not make reference to the provision of any of the Appealed Services, The focus appears to relate to children,

young people and families, workplace coaching and spiritual guidance. An extract is shown at Annex A.

10. Whilst it is understandable that the Hearing Officer would have anticipated that counsellors would have been professionally trained, indeed, it is encouraging to think that this is the case, in reality the Appealed Services relating to counselling, coaching and guidance are delivered in an unregulated industry.
11. Furthermore, in interpreting the Appealed services in a traditional, narrow and literal way, the Hearing Officer has proceeded on an incorrect foundation for the comparison point. In particular, “*Relationship counselling; marriage guidance counselling; marriage counselling and coaching; marriage guidance counselling; marriage guidance services*” could cover premarital counselling. Premarital counselling can help ensure that the couple has a stronger, healthier relationship, giving the marriage a better chance of being stable and secure. This type of counselling occurs between single people before the relationship is confirmed (whether legally or religiously) and thus should absolutely be considered as highly similar to the Appellant’s services being “*information and consultancy services in the nature and field of on-line dating and introduction services*”.
12. Premarital counselling services may also be offered through religious institutions. The Duke and Duchess of Cambridge reportedly received premarital counselling from the Bishop of London, Dr. Richard Chartres, and the Archbishop of Canterbury, Dr. Rowan Williams. Whilst all are learned men of the cloth, this is not the same as being professional trained counsellors. Many religious institutions offer marriage preparation classes, an example of the Catholic offering is shown in Annex B, but again there is nothing to indicate any professional qualification in counselling or coaching services.
13. Consideration must be given to the interpretation of the Appealed services in different cultures and religions. “Wedding officiant services” and “wedding chapel services” will be provided by an “officiant” who is a person who presides and officiates at a religious ceremony. The services could be provided by

respected members of a community, especially for those communities which are based around faith and religion and not necessarily by a “trained professional within a particular specialism”.

14. Further or alternatively, the Hearing Officer erred in concluding that “the above [Appealed] services ... are unlikely to share trade channels” (see [53]). The Appellant’s trade channel is primarily the internet which is a facilitator of many online services. There are a plethora of online platforms which make video and web conferencing frictionless. These platforms provide secure video, audio and messaging functions which can be accessed from mobile or desktop computers and thus removes the historic need for counselling services to be provided from the same location, let alone, the same room. Two way, three way and group video or audio conferencing sessions means the provision of virtual counselling and coaching sessions can easily occur and indeed is sometimes favoured in today’s time pressured and geographically dispersed society. The channels of trade therefore overlap directly.
15. *“Relationship counselling; marriage guidance counselling; marriage counselling and coaching; marriage guidance counselling; marriage guidance services”* can all be offered and engaged with online.
16. The Appellant maintains that the Appealed Services are highly similar with *“information and consultancy services in the nature and field of on-line dating and introduction services”*.
- ...
23. ... The Appealed Services are all services which focus on interpersonal relationships and connecting people. As explained at paragraphs 14-16, it is common practice for the Appealed Services to be provided through a variety of online media platforms. Often a use of an online social media platform, online dating services or chatroom forum, will find a variety of advertising material present. Furthermore, it is common for the online activity to be personalised through the use of cookies and cached websites, and so the consumer’s online activity will trigger specific

types of advertisements or hits. Therefore it is likely, that when using the Respondent's services, and on encountering the Appealed Services, the consumer would establish a link to the earlier reputed mark given the strength of the Respondent's reputation.

20. I pause at this point to take stock of the Opponent's situation with regard to the presentation of its case on appeal:

- (1) It has not challenged the Hearing Officer's failure to determine all 3 of the pleaded grounds of objection in relation to all of the various services listed in the contested application for registration.
- (2) It has not challenged the Hearing Officer's rejection of its objection to registration under s.5(2)(b) in relation to any services in Group B other than those in the sub-set comprising the Appealed Services.
- (3) It has not challenged the Hearing Officer's rejection of its objection to registration under s.5(3) in relation to any services in Group B other than those in the sub-set comprising the Appealed Services.
- (4) It has not challenged either the reasoning or result of the Hearing Officer's flawed rejection of its objection to registration under s.5(4)(a).
- (5) It has not sought or been granted permission to rely on further evidence in support of its appeal and its attempt to rely on factual matters extending

beyond the scope of the evidence filed in the Registry proceedings cannot be accepted.

21. The Opponent also cannot expect or require this Tribunal to work through the papers and proceed as if it was sitting inquisitorially to decide the opposition *de novo* in relation to the Appealed Services. The question for determination on this appeal is, in essence, whether it was open to the Hearing Officer, on the evidence and materials before her, to conclude as she did for the reasons that she gave that the Appealed Services were not caught by the Opponent's objections to registration under ss.5(2)(b) and 5(3) of the 1994 Act. The Grounds of Appeal define and limit the scope of the enquiry by identifying the particular matters which the Tribunal is called upon to consider in that connection.
22. I understand the Opponent to be contending that the Hearing Officer's reasoning and conclusions in relation to s.5(2)(b) (see paragraphs 6 to 10 above) were correct as far as they went with regard to the Group A services and no less applicable to the Appealed Services. The Hearing Officer decided otherwise for the reasons she gave in paragraphs 53 and 75 of her decision, which need to be read together. I have quoted paragraph 75 and commented upon it in paragraph 11 above. It does not appear from the Opponent's Grounds of Appeal or its written submissions that there is any challenge directed to paragraph 75 independently of its challenge to paragraph 53 of the decision.
23. Paragraph 53 of the decision is quoted in paragraph 5 above. It is clear from what the Hearing Officer said in that paragraph that she was mindful of the Opponent's

arguments based on *'personal relationships and interpersonal skills'* and it is clear from what she went on to say in paragraph 57 of her decision (quoted in paragraph 9 above) that she was mindful of the role of the internet as a facilitator of services in the areas of commercial activity she was considering. She nevertheless concluded with regard to the Group B services (including the Appealed Services) and the Opponent's services: *'I cannot see that there is any competitive or complementary relationship in play and there is nothing in the evidence before me to indicate otherwise. These services are not similar to the opponent's services'*.

24. I decline to analyse and assess the Opponent's additional assertions of a factual nature extending beyond the scope of the evidence filed in the Registry proceedings (paragraph 19 above) with a view to exploring whether they might have been sufficient to support a different conclusion if the case had proceeded differently at first instance and on appeal. The position I reach, having regard to the way in which the case has actually proceeded, is that the Opponent has not established to my satisfaction that it was not open to the Hearing Officer on the evidence and materials before her to come to the conclusion she did in relation to the Group B services (including the Appealed Services) for the reasons stated in paragraphs 53 and 75 of her decision.
25. I understand that the Opponent accepts the Hearing Officer's reasoning and conclusions in relation to s.5(3) (see paragraphs 13 and 14 above) with regard to all of the Group B services other than those within the sub-set comprising the Appealed Services. I do not see in its Grounds of Appeal relating to "*Section 5(3). Ground 5:*

No link found” any contention to the effect that its objection under s.5(3) ought to have been upheld in relation to the Appealed Services **even if** “*the respective services are not similar ... and there is no likelihood of confusion*”.

26. It appears from paragraph 15 of the Grounds of Appeal and paragraphs 22 and 23 of the Opponent’s written submissions that its challenge to the finding in paragraph 53 of the Hearing Officer’s decision (reiterated in paragraph 84 of her decision) is directed to establishing the existence of ‘similarity of services’, both for the purposes of its appeal under s.5(3) and for the purposes of its appeal under s.5(2)(b). As to that, the reasons I have given for rejecting the Opponent’s challenge to that finding under s.5(2)(b) are no less applicable to its challenge to the same finding under s.5(3).

27. Paragraph 16 of the Grounds of Appeal and paragraph 25 of the Opponent’s written submissions invoke the finding of a likelihood of confusion made in relation to the Group A services in paragraph 73 of the Hearing Officer’s decision. That finding was made in relation to the Group A services on the premise that they were ‘*identical or at least highly similar*’ to the Opponent’s services for the purposes of s.5(2)(b). The Hearing Officer declined to deal with the Group B services (including the Appealed Services) on the same footing because she considered that they were ‘*not similar*’ to the Opponent’s services. It is not clear from the Grounds of Appeal whether the Opponent is contending that the Hearing Officer’s reasoning as to the existence of a likelihood of confusion should be regarded as transposable to the

Appealed Services **even if** (as the Hearing Officer found and I have not contradicted) they are '*not similar*' to the Opponent's services.

28. This lack of clarity is particularly unfortunate in circumstances where the Opponent has not appealed against the rejection of its objection to registration under s.5(4)(a) (passing off) and is seeking to buttress its position by relying on additional assertions of a factual nature extending beyond the scope of the evidence filed in the Registry proceedings (paragraph 19 above). Again, I decline to analyse and assess the additional assertions with a view to exploring whether they might have been sufficient to support a different conclusion if the case had proceeded differently at first instance and on appeal. Having considered the Opponent's criticisms of her treatment of its objection under s.5(3) within the parameters I have identified in paragraphs 20 and 21 above, I am not prepared to say that it was not open to the Hearing Officer on the evidence and materials before her to come to the conclusion she did in relation to the Group B services (including the Appealed Services) for the reasons stated in paragraphs 84 and 85 of her decision.
29. For the reasons I have given, the appeal is dismissed. Since I have no reason to believe that the Applicant has incurred any or any significant costs in connection with the appeal, it stands dismissed with no order as to costs.

Geoffrey Hobbs QC

7th January 2019

O/014/19

Ms. Rosalyn Newsome of Barker Brettell LLP filed written submissions on behalf of the Opponent.

The Applicant took no part in the appeal.

The Registrar took no part in the appeal.