



Neutral Citation Number: [2023] EWHC 1167 (Ch)

Case No: CH-2022-000176

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

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

Date: 17/05/2023

Before :

SIR ANTHONY MANN

Between :

Stitch Editing Limited	<u>Appellant</u>
- and -	
TikTok Information Technologies UK Limited	<u>Respondent</u>

Iain Purvis KC (instructed by **Haseltine Lake Kempner LLP**) for the **Appellant**
Guy Hollingworth (instructed by **Taylor Wessing**) for the **Respondent**

Hearing date: 29th March 2023

Approved Judgment

Remote hand-down: This judgment will be handed down remotely by circulation to the parties or their representatives by email and release to The National Archives. The deemed time and date of hand down is 10.00 am on 17th May 2023.

.....
SIR ANTHONY MANN

Sir Anthony Mann :

Introduction

1. This is an appeal from a determination by the Hearing Officer (Ms June Ralph) dated 24th August 2022, in which she determined that the opposition of TikTok Information Technologies Ltd (“TikTok”) to a mark applied for by Stitch Editing Ltd (the applicant) succeeded so that registration should be refused (as she put it). The mark in question is the word mark “STITCH”, which I shall call “the mark”.

The registration, the opposition and the decision below

2. Stitch applied to register the mark on 28th October 2020. The mark was accepted and published in the Trade Mark Journal on 12th February 2021 for the following services in class 41:

“Editing of music, television programs, films, commercials, internet videos, and video programs; music, film and video production; providing advice and information for music, video and film concept and script development; multimedia entertainment services in the nature of development, production and post-production services in the fields of video and films; post-production editing services in the field of music, videos and film; production of visual effects for videos, commercials, dvds, pre-recorded optical discs featuring music, television programs, films, commercials, internet videos, and video programs; television production for internet web sites; video editing; videography services.”

3. This mark was opposed by TikTok on the following Trade Marks Act 1994 section 3 bases:

“3.— Absolute grounds for refusal of registration

(1) The following shall not be registered—

...

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

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade”

4. While contesting the applicability of those provisions, the applicant relied on the following proviso to that provision:

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

5. The Hearing Officer decided against the applicant on all issues, and it is from that that the appellant appeals. Mr Iain Purvis KC appeared for the applicant (the appellant); Mr Guy Hollingworth appeared for TikTok.

The approach to an appeal such as this

6. The correct approach to appeals such as this has recently been confirmed in the decision of Richards J in *Instagram LLC v Meta 404 Ltd* [2023] EWHC 436 (Ch). In that case (which was another trade marks appeal case) the judge followed the guidance to be applied in appeals generally and set out in *Volpi v Volpi* [2022] EWCA Civ 464

“i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.”

7. So far as the decision below is evaluative, an appellate court should also approach the appeal with caution:

“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". (*Re Sprintroom Ltd* [2019] EWCA Civ 932)

8. And last, as Richards J observed in *Instagram*, proper respect should be paid to the decision of an expert tribunal in the field in question:

“26. Finally, it is relevant to observe that this is an appeal from a tribunal with particular expertise. As Lady Hale observed in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at paragraph 30, the court should approach the appeal on the basis that it is probable that an expert tribunal, charged with applying the law in their specialist field, has probably got it right.”

I shall approach this appeal with those principles in mind.

The decision of the Hearing Officer - section 3(1)(c)

9. The Hearing Officer started by considering the mark's inherent characteristics under section 3(1)(c). She referred to the leading authority of *Starbucks (HK) Ltd v British Sky Broadcasting plc* [2012] EWHC 3074, itself citing extensively from the CJEU decision in *Technopol v OHIM* [2011] ETMR 34. She found that:

“26 ... a sign is caught by the exclusion from registration in [section 3(1)(c)] if at least one of its possible meanings designates a characteristic of the goods or services concerned [two authorities referred to]”

And she then cited *Matratsen Concord AG v Hukla Germany SA* Case C-421/04:

“24. In fact, to assess whether a national trade mark is devoid of distinctive character or is descriptive of the goods or services in respect of which its registration is sought, it is necessary to take into account the perception of the relevant parties, that is to say in trade and or amongst average consumers of the said goods or services, reasonably well-informed and reasonably observant and circumspect, in the territory in respect of which registration is applied for (see Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 29; Case C-363/99 *Koninklijke KPNNederland* [2004] ECR I-1619, paragraph 77; and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 50).”

10. At paragraph 28 she observed that it was appropriate to take account of technical meanings known to the trade, but if a specialised public to whom a particular meaning would be known forms only a negligible part of the relevant public, that would not be sufficient to sustain an objection under subsections 3(1)(b) and (c). This is not a point which arises in this case.
11. At paragraphs 29 and 30 she observed that:

“29 ... the reaction of average consumers to uses of the mark which are possible in theory but unlikely in practice do not need to be factored into the assessment.

30. The relevant public for the services at issue in these proceedings are specialised businesses, specifically those in the creative industries”.

There was no dispute about those principles either.

12. In the following paragraphs the Hearing Officer summarised the evidence on the use of the word “Stitch”, finding that:

“At its most basic level I find that STITCH is a way of joining things together”

And that as a result of usage in technology (by a camera manufacturer), patents and in various forums concerned with digital images and videos:

“32. At the hearing the applicant accepted that the word STITCH was descriptive in relation to photography, meaning to join still photographs together to form a panorama shot and in its skeleton, it accepted that the word has been used in a video editing context 'to some degree'.... STITCH then has moved into the technology field with the same basic level definition of joining things together... STITCH therefore appears to be the apt word to use in this descriptive sense of joining images.

33. This usage describing the stitching together of images, film and music also appears to be prevalent in the informal comments and postings made in [user forums]... The use of the word STITCH in forums like those evidenced suggest a shared understanding of what the word means in creative editing or post production context."

13. Then she reached her short conclusion on the case under section 3(1)(c):

"34. Taking all of the above into consideration I find that the word STITCH is descriptive of the kind and intended purpose of the applied for services and therefore objectionable under section 3(1)(c) of the Act."

The appeal in relation to section 3(1)(c)

14. Mr Purvis does not dispute the principles set out by the Hearing Officer but he submits that she misapplied principle and other legal requirements in reaching her conclusion. He accepted that the word "Stitch" was an apt descriptive word to use in the sense of joining images, but that did not take the case very far. His skeleton argument seemed to make much of the fact that in that context "Stitch" was a metaphor and not a word with a technical meaning, but he did not dwell on that point in his oral submissions, and in my view rightly so. The question is one of its taken meaning in the relevant public, metaphorical or not.
15. He went on to submit that the Hearing Officer made the following errors. First, she treated all the services within the specification in the same way and made no attempt to consider each separately, as she was obliged to do. Second, she failed to consider in any detail the question of whether the word used, even in its apt sense, was actually descriptive of the intended purpose of the applied for services. Thus, for example, "Stitch" was said not to describe any particular kind of "film and video production service", as opposed to describing a potential technique which might be used at some stage in the course of providing that service (if editing was involved). This point was said to apply to all the services described in the specification. Since she made no finding as to what each of the services actually involved (and none of them seem to describe a purely image/video/music stitching service) she did not address the question of how the word was descriptive of the services or part of them. Third, there was a real and unaddressed question of whether a word which was descriptive of a technique within a service could be described as being a service or descriptive of the service or whether a word which was associated with a service could go further and be descriptive of it. The Hearing Officer's key paragraph 34 jumped from considering that the word "Stitch" could be used to describe a process within a service (which in the end Mr Purvis did not dispute) to a conclusion that it was descriptive of the service itself in the mind of the average consumer. That was an unjustifiable jump, at least in the absence of some intervening reasoning, which was absent.
16. Mr Hollingworth defended the findings of the Hearing Officer, pointing out that they demonstrated that she had the correct legal principles in mind and had the appropriate deemed target of the mark (the relevant consumer) in mind as well. Her conclusion was the result of the application of those tests. He addressed Mr Purvis's points about "stitching" not necessarily encompassing or describing the precise formulation of the services by pointing to what he said was the principle that "characteristics" can include

characteristics that services of the kind specified may optionally possess - see *NMSI's Application (FLYING SCOTSMAN)* [2012] RPC 7; the *Technopol* case [2011] ETMR 34; and *Deepmind Technologies Ltd v EUIPO* T.97/18. So far as the failure to take into account each separate service is concerned, he said that that was justified by *Separode* (O/399/10) at paragraph 5 and the Hearing Officer was entitled to take that course and adopt the view that it was appropriate, in this case. He accepted that the Hearing Officer did not articulate her thinking on the point, but (Mr Hollingworth said) she received submissions on the point.

17. I consider that there are problems with the ultimate determination of the Hearing Officer. As I have indicated, there was common ground as to the underlying principles of the assessment under this section, and it was common ground that the Hearing Officer referred to many of them. Her citation of Arnold J's citation of *Technopol* makes that clear. Her Decision makes it clear that she was aware of the following points (so far as is relevant to the present appeal):

(a) Each ground for refusal must be interpreted in the light of of the general interest underlying it.

(b) The general interest underlying the subsection is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration is sought may be freely used by all traders offering such services.

(c) Descriptive signs referred to in section 3(1)(c) are also devoid of any distinctive character for the purposes of section 3(1)(b), so there is therefore a measure of overlap between those two provisions.

(d) *Technopol* ruled as follows:

"49. The situations specifically covered by Article 7(1)(c) of [the regulation] are those in which the sign in respect of which registration as a mark is sought is capable of designating a "characteristic" of the goods or services referred to in the application. By using in [the Article] the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

"50. The fact that the legislature chose to use the word "characteristic" highlights the fact that the signs referred to in [section 3(1)(c)] are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the court has pointed out, a section can be refused registration on the basis of [section 3(1)(c)] only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics..."

(e) “24. In fact, to assess whether a national trademark is devoid of distinctive character is descriptive of the goods or services in respect of which its registration is sought, it is necessary to take into account the perception of the relevant parties, that is to say in trade and/or amongst average consumers of the said goods or services, reasonably well-informed and reasonably observant and circumspect, in the territory in respect of which registration is applied for...” (*Matratzen Concord AG v Hukla Germany SA* Case C-421/04, cited by the Hearing Officer with her own emphasis).¹

(f) Descriptive uses of the mark which are “practically significant” are to be considered, but uses which in practice are unlikely to be appreciated by the average consumer do not need to be considered (Decision at paragraph 29).

(g) The relevant public in this case was specialised businesses, specifically in the creative industries (Decision paragraph 30).

18. However, quite how she applied these in relation to each of the various services is not clear. She made a clear finding, which is in essence not seriously challenged in this appeal, that the word “Stitch” is apt to describe the joining of media in all sorts of contexts, including audio and video production, but it is not clear how she applied this in relation to each of the services described in the specification. Having set out the legal principles and the fact that “STITCH” had an accepted meaning of joining video and still images, she then jumped to her conclusion in her paragraph 34. What she does not explicitly say is that because STITCH had the meaning attributed to it, the average consumer (in the trade) would take it to describe the activities in each of the listed services in the specification.

19. There are two ways in which that description might be said to occur. The first is that it is descriptive of the actual service in question as a whole. The second (likely to be relevant in the present case in relation to at least some of the specified services) is by its being descriptive of at least part of the services as in *THE FLYING SCOTSMAN* case, (a decision of Mr Geoffrey Hobbs QC, sitting as The Appointed Person) and the various cases cited in that case:

“It is clearly appropriate to examine a sign for registrability with due regard for the characteristics that goods or services of the kind specified in an application for registration may optionally possess.”

And Mr Hobbs then cited various authorities in which that was apparently done and registration refused.

20. Mr Hollingworth relied on this authority as getting him home in this case, on the footing that “stitching” was part of the process of the various services even if it was not the entirety of any service described in the specification. For his part Mr Purvis pointed out, by way of example, that it was hard to see how the mark could be descriptive of services such as “providing advice and information for music, video and film concept and script development”. In addition, his distinction between services on the one hand and a technique used in the course of providing services on the other seems to me to go to this point.
21. Which of these techniques for matching the services to the mark, and to what extent, was applied by the Hearing Officer, and to what extent, is not apparent from her Decision. Her actual decision paragraph (paragraph 34) merely recites that she has “[taken] all of the above into consideration”. The “above” can be taken to include her accurate statements of legal principle, and her finding as to the available meaning of STITCH, which would be ingredients which would be steps on the way to her final decision, but she does explicitly address the all-important question of whether the average consumer would take the word to be descriptive of the services bearing in mind that that has to be addressed in relation to each service. That seems to me to be a crucial stepping-stone to a final conclusion, but it would seem to be missing. Unless it is appropriate to take all the specified services together (as to which see below) it is necessary to consider whether the word would be descriptive of each of the services, either in whole or as to a part which would create the association in the mind of the relevant public. It is no answer simply to point to the use of the word STITCH in media editing and leave it at that.
22. This is not an exercise in relation to which the answer is entirely obvious. While some instances are clearer than others, such as the first service (“Editing of music, television programs, films, commercials, internet videos, and video programs”), others are not obviously services that will inevitably contain a “stitching” activity which would lead to the average consumer considering the word to be descriptive (for example, “music, film and video production”). To some extent the answer to that question depends on what the average consumer would consider to be encompassed within that activity, which is likely to be a matter of evidence. The Hearing Officer does not refer to such evidence, and as far as I can see she does not seem to have received any. It is only by considering such matters that one can consider whether the principle applied in *THE FLYING SCOTSMAN* would be applicable.
23. Because the Hearing Officer did not carry out this exercise I consider her decision to be flawed. It is not clear how she jumped from her conclusion as to the potential meanings of STITCH to her conclusion as to descriptiveness in relation to all the services. As I have just indicated, descriptiveness may be easier to find in some of the services than in others, but since none of this detail was considered I consider the matter will have to be remitted so that it can be, unless the same result can be seen to be justified under the other heads of section 3 under which the Hearing Officer found

against the applicant. This exercise will include the extent to which it is right to apply the *FLYING SCOTSMAN* analysis.

24. It may be helpful to refer to one further aspect of the exercise. As I have pointed out, the Hearing Officer did not seem (at least overtly) to consider each of the services separately. Generally speaking the mark has to be considered in relation to each of the services applied for unless there is a justification for taking them together. As Mr Geoffrey Hobbs QC (sitting as The Appointed Person) said in the matter of Opposition No. 97505 (*SEPARODE*) Ref O-399-10:

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

25. That case involved opposition under section 5(2)(b), but the principle is the same under section 3(1)(c). If the Hearing Officer treated the specified services in the present case globally on the possible basis referred to by Mr Hobbs, she did not say so or specify why it would be right to do so. For my part I find it hard to see how it can have been right to do so. If she considered them all separately then she did not articulate why each failed, and she ought to have done that.
26. It follows that the decision on section 3(1)(c) is flawed. I consider the consequences of that for this appeal below.

The appeal in relation to section 3(1)(b)

27. The fate of this part of the decision is effectively determined by the decision in relation to section 3(1)(c). In her short reasoning on the point the Hearing Officer cited *OHIM v BORCO-Marken-Import Matthieson GmbH & Co KG* (C-265/09 P) and then said:

“36. Trade marks which are excluded from registration because they describe a particular characteristic of the services also lack the distinctive character required to avoid objection under section 3(1)(b) as they do not serve to identify the services applied for as originating from a particular undertaking, and cannot distinguish that product from those of other undertakings.

Therefore I find that [the] applied for mark is also objectionable under section 3(1)(b).”

28. This finding is obviously linked to, and based on, her finding in relation to section 3(1)(c). Since the former needs to be revisited, so does this one.

The appeal in relation to section 3(1)(d)

29. In this section of her Decision the Hearing Officer considered *Telefon & Buch Verlagsgesellschaft GmbH v OHIM* Case T-322/03, and concluded:

“38. For a section 3(1)(d) objection to apply, the following tests must then be satisfied. That is whether STITCH has become customary in the current language or in the bona fide and established practices of the trade to designate the services in respect of which registration of the mark is sought. The opponent’s evidence has sought to demonstrate the word STITCH is used in the language of patent applications and in various technical applications relating to photography, audio and video editing techniques as a bona fide term to describe a way of stitching or joining digital files together. The opponent has also sought to demonstrate that the relevant public, i.e. users of video editing technologies, regard the mark as descriptive of a type of service that of joining together digital images. To my mind this evidence has satisfied the section 3(1)(d) test that STITCH is customary language in the editing and production environment. Therefore I find that applied for mark is also objectionable under section 3(1)(d).”

30. This conclusion presents the same flaws as her previous conclusions. She does not make it clear how that is applied to each of the services in the specification. For the reasons appearing above she ought to have undertaken that exercise.

The determination of acquired distinctive character.

31. Having reached her conclusion that the mark was objectionable under the rest of section 3, the Hearing Officer went on to consider the position under the proviso. She set out certain passages from *Windsurfing Chiemsee Produktions v Huber* [1999] ETMR 585 (paragraphs 51-53) as providing the guidance that she felt she needed and then turned to the evidence, which was a witness statement from Mr Leo King, a director and co-

founder of the applicant. She noted the previous use of the mark itself (in two different forms) in the past, and described elements of the evidence she received as follows:

- (a) A list of creative awards.
- (b) Instances of specific use of the mark in the press.
- (c) Emails from clients.
- (d) A list of YouTube videos in which the applicant was credited as the editor or edit house.
- (e) A list of work undertaken between 2010 and 2022 for various brands in addition to the list of production companies commissioning the jobs, and a list of jobs in which the applicant was “involved”, involving a number of household names.

32. Then she said:

“55. In my consideration of the applicant’s evidence, I return to the criteria set out in Windsurfing. Firstly I note that the applicant has used the mark since 2010 which favours the applicant in terms of long standing use. However it has not produced any turnover figures or any figures for advertising expenditure. The applicant states it has a website and social media accounts but does not present any figures around web traffic or numbers of users/followers of its accounts. At the hearing the applicant pointed to the list of awards it had won for its work as evidence of its market share. Whilst I do not doubt the credibility of the award bodies nor deny that industry awards are given for excellence in the particular endeavour, it is not apparent to me from the evidence how widespread the nominee field is, or what the criteria is for nominees so I cannot judge this activity as being indicative of a market share.

56. In terms of geographical spread, mentioned as one of the Windsurfing factors, the applicant states its base is in London and it has some business interests in California, USA. It has not stated where its clients, i.e. the commissioning companies, are based. At the hearing the applicant pointed to the number of times, 416 million, just one of the YouTube videos had been viewed. I accept that this number of views is extremely high but believe it is a very tenuous link to suggest that these views equate to a geographically widespread use of the contested mark or even indicative of the number of viewers actually exposed to the mark, for example if they did not read the credits.

57. I note the applicant's jobs list at exhibit LZK11 and that in its witness statement it claims that the brand owners were its clients. At the hearing the opponent rebuffed this claim, saying that the applicant's clients were not the brand owners themselves but were in fact the production companies commissioning the work. I do not find anything turns on this particular issue. Customers for the kind of specialist services provided by the applicant are likely to come from the creative industry rather than

brand owners themselves. I note that many of the commissioning companies are repeat customers which goes some way to establishing that a proportion of the relevant class of persons who, because of the mark, identify the services as originating from a particular undertaking. However this appears to be the high point of the applicant's evidence.

58. Taking all these factors into account and regarding the evidence as a whole, I find it is insufficiently solid, according to the Windsurfing criteria. Therefore I find that the applicant has not sufficiently demonstrated that the mark STITCH has acquired distinctive character."

33. This was an evaluative assessment of the evidence overall and so is subject to the normal constraints on appeals which I have identified above.

34. Mr Purvis's starting point for his criticism is that the judge omitted to cite two paragraphs of the judgment in *Windsurfing Chiemsee* which preceded the three paragraphs actually cited. Those additional paragraphs are:

"49. In determining whether a mark has acquired distinctive character following the use made of it, the competent authority must make an overall assessment of the evidence that the mark has come to identify the product concerned as originating from a particular undertaking, and thus to distinguish that product from goods of other undertakings.

50 In that connection, regard must be had in particular to the specific nature of the geographical name in question. Indeed, where a geographical name is very well known, it can acquire distinctive character under Article 3(3) of the Directive only if

there has been long-standing and intensive use of the mark by the undertaking applying for registration. A fortiori, where a name is already familiar as an indication of geographical origin in relation to a certain category of goods, an undertaking applying for registration of the name in respect of goods in that category must show that the use of the mark — both long-standing and intensive — is particularly well established.”

35. There is nothing in this criticism. The second of those paragraphs relates to a particular factor which does not really arise in this case, and the first sets out a general test and approach of which the Hearing Officer was obviously well aware. Mr Purvis said paragraph 49 identifies the “interdependency” of the evidence and distinctiveness, which it does, but there is no suggestion that the Hearing Officer did not realise that. She claimed to have reached her decision as a result of reviewing all the evidence, which is what she had to do.
36. Next he criticised the decision as being over-reliant on the particular factors appearing in the cited paragraphs of *Windsurfing Chiemsee*. He said they were just possible factors, and not a sort of complete checklist which is how the Hearing Officer treated them. She inappropriately trammelled her consideration by relying on the particular factors listed in *Windsurfing Chiemsee*.
37. I do not consider this to be an entirely fair criticism. While her paragraph 55 indicates that she was going to rely on the *Windsurfing* points, the material she considered thereafter shows a consideration of matters that do not easily fit into those particular points. Furthermore, paragraph 58 indicates that she considered the evidence as a whole, and it would be right to assume that she did.
38. Next Mr Purvis essentially criticised her approach to the evidence. She is said to have “nitpicked” evidence about the relevance of awards, and failed to give any real effect to Mr King’s clear statement that the brand “Stitch” was recognised by clients and the industry generally as signifying the applicant’s business services (paragraphs 13, 14 and 30 of his witness statement) which was not challenged by any counter-evidence and which was actually supported by the evidence he produced. It was highly unlikely that the extensive list of projects for well-known brand names could have been achieved without the company’s having gained the reputation under its name on which it relied. No-one challenged any of this primary evidence; no-one picked up the gauntlet thrown down by Mr King.
39. I should first deal separately with points made by Mr Purvis about the non-existence of evidential challenges to Mr King’s evidence. It is true there was no counter-evidence, but Mr Hollingworth sought to diminish the significance of this by pointing out that the

point was only formally raised at the hearing itself and not before. Acquired distinctiveness was not formally raised as an issue in the equivalent of pleadings in the IPO, a point which was made at the hearing. The first thing that the Decision does is rule on whether the point could be raised at all. The Hearing Officer allowed an amendment which formally permitted the applicant to raise it, pointing out that Mr King's evidence plainly went to the point and it had been challenged in non-evidential documents. For my part I would observe that TikTok did not seek an adjournment so as to be able to put in its own evidence on the point once it had been raised. I therefore consider that Mr Purvis is entitled to take the point for what it is worth, though as he accepted he still has the burden of proof at the end of the day.

40. I therefore return to the Hearing Officer's consideration of the point and whether, despite my rejecting certain of Mr Purvis's criticisms, the Hearing Officer's approach was somehow relevantly flawed.
41. I have come to the conclusion that it was, because it would seem that she did not consider some of the evidence in the correct manner. At paragraphs 41 to 53 she lists the nature of the evidence relied on without, at that point, saying anything much about its relevance or significance, and in particular not referring to the fact that Mr King had referred to it for a particular purpose or in a particular context. When she turned to consider the impact of the evidence in paragraphs 55 -58 she does not deal with all of the sets of evidence. She deals only with some factors, including geographical spread (which was not particularly relied on one way or another in this case). This seems to me to be a flawed approach to the evidence.
42. Thus Mr King refers to Facebook, stationery, other logo use, brand engagement and awards, and says:

“As a result of the way we have promoted our business, we are known as “Stitch” by our clients within the industry. This can be seen by email exchanges with our clients as well as references to us in the trade press [exhibited]...”
43. Thus the emails, stationery and the like are relied on as demonstrating something, as is the manner of self- promotion by use of the name “STITCH”. The Hearing Officer does not really deal with the way this was put, and it seems to me to be something that needed to be considered. Thus, for example, Mr King did not just exhibit emails and trade press articles; he exhibited emails which are said to demonstrate that the brand was recognised by clients and the industry as signifying his company's business services (paragraph 14). The emails might be said to demonstrate that, as might the press coverage. The Hearing Officer does not seem to have considered them in that light. So far as the awards are concerned, the Hearing Officer seems to focus on the awards as being relied on as indicative of market share, whereas the evidence actually

relied on them as demonstrating the link between the brand and the services, because “they are all awards that will be recognised by those in the fields in which we operate”.

44. I am aware that a judgment is not impeachable just because it does not expressly articulate each and every little step towards a conclusion, and overall assessments are permitted without specifying all their ingredients, but the way this Decision is expressed leads to the conclusion that the omission to consider the way in which the evidence was put is or might well be because the point was not fully considered. That makes the Decision impeachable on an appeal.
45. It is unnecessary to consider one or two other aspects of the evidence which did not apparently receive proper consideration by the Hearing Officer because the foregoing is sufficient for the purposes of this appeal. It has been demonstrated that the Hearing Officer apparently adopted a flawed approach to the evidence because she did not approach it in the right light.
46. That means that the Hearing Officer’s decision on acquired distinctiveness cannot stand.

Conclusion

47. I have therefore concluded that this appeal should be allowed. The Hearing Officer’s reasoning and decisions on section 3 are not satisfactory as reasons for refusing registration, and the decision on acquired distinctiveness is flawed for the reasons given above. That means that the matter has to be reviewed anew.
48. At times Mr Purvis suggested that I could make my own decision, on this appeal, in relation to the points that arose, and of course he urged me to accept his client’s case. I shall not accede to that invitation. So far as the points arising under section 3(1)(b), (c) and (d) are concerned, the matter requires consideration on a service by service basis, and the right way to approach that is by having a fresh hearing and determination (despite the fact that I consider that the position in relation to at least some of the services is likely to be tolerably clear) and a fresh consideration of the proviso point is more properly carried out by a Hearing Officer in a fresh hearing which focuses on the detail of that case.
49. This appeal is therefore allowed and the matter will therefore be remitted to a Hearing Officer for a fresh determination of the relevant points.