



Neutral Citation Number: [2024] EWCA Civ 1386

Case No: CA-2024-000458

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, CHANCERY APPEALS (ChD)

Mr Justice Holgate
[2024] EWHC 319 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 November 2024

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE BAKER
and
LORD JUSTICE ARNOLD

Between :

EXTREME NETWORKS LIMITED

**Opponent/
Appellant**

- and -

EXTREME E LIMITED

**Applicant/
Respondent**

Aaron Wood (of Brandsmiths) for the Appellant
Ashton Chantrielle (instructed by Bird & Bird LLP) for the Respondent

Hearing date: 6 November 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 14th November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Arnold:

Introduction

1. On 31 May 2019 Extreme E Ltd (“the Applicant”) filed Application No. 3403664 (“the Application”) to register the device shown below as a United Kingdom Trade Mark in Classes 4, 9, 12, 14, 16, 18, 25, 28, 32, 35-39, 41-43 and 45.



2. On 10 September 2019 Extreme Networks Ltd (“the Opponent”) filed an opposition to the Application so far as it related to Classes 41 and 43. The opposition was based upon section 5(2)(b) of the Trade Marks Act 1994 (likelihood of confusion). The Opponent relied upon its earlier European Union Trade Mark No. 17994806 (“the Earlier Mark”) consisting of the device shown below registered with a filing date of 30 November 2018 and a registration date of 22 May 2019 in respect of certain services in Classes 41 and 43.



3. It is common ground that the opposition has not been affected by the subsequent departure of the UK from the EU, or the consequential replacement of the Earlier Mark, so far as the UK is concerned, by a comparable UK Trade Mark.
4. No evidence was filed by either party. Following a hearing on 31 May 2023, Stephanie Wilson acting for the Registrar of Trade Marks (“the hearing officer”) issued a decision dated 21 August 2023 (BL O/800/23) holding that there was a likelihood of confusion, and therefore the opposition succeeded, in relation to some of the services in Class 41 and all of the services in Class 43 covered by the Application. The opposition failed in relation to the remainder of the services in Class 41 specified in the Application.
5. The Applicant appealed to the High Court on six grounds. Ground 1 was that the hearing officer had been wrong to hold that certain services in Class 41 of the Application were similar to the service specified in the Earlier Mark relied upon by the Opponent. The appeal was heard by Holgate J (as he then was, “the judge”) on 7 February 2024. On 12 February 2024 the judge gave judgment ([2024] EWHC 319

(Ch)) allowing the appeal on ground 1, but dismissing grounds 2-6. The result was that the opposition failed in relation to additional services in Class 41.

6. I granted the Opponent permission for a second appeal on the basis that the grounds of appeal raised important points of principle as to the correct approach to the assessment of similarity of services and as to the correct approach to appeals on such issues where, as is often the case, the hearing officer's reasoning is highly compressed.

The legislative framework

7. Section 5(2)(b) of the 1994 Act implemented successive EU Directives culminating in what is now Article 5(1)(b) of European Parliament and Council Directive 2015/2436/EU of 16 December 2015 to approximate the laws of the Member States relating to trade marks (recast), which enables the proprietor of an earlier trade mark to object to the registration of a later trade mark where the identity or similarity of the trade marks and the similarity or identity of the respective goods or services gives rise to a likelihood of confusion on the part of the public. Parallel provisions are contained in what is now Article 8(1)(b) of European Parliament and Council Regulation 2017/1001/EU of 14 June 2017 on the European Union trade mark (codification). Similarly, section 10(2) of the 1994 Act implemented what is now Article 10(2)(b) of Directive 2015/2436 (infringement where there is a likelihood of confusion). Parallel provisions are contained in Article 9(2)(b) of Regulation 2017/1001.
8. Section 5A of the 1994 Act, which implemented Article 7 of Directive 2015/2436 corresponding to Articles 42(1) and 47(5) of Regulation 2017/1001, provides:

“Where grounds for refusal of an application for registration of trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

Accordingly, if there is a likelihood of confusion within section 5(2)(b) with respect of some of the goods or services specified in the application, but not others, then an opposition on that ground must be upheld and the application refused in relation to the former, but the opposition must be rejected and the application allowed to proceed to registration in relation to the latter.

Assessment of the likelihood of confusion: basic principles

9. The manner in which the requirement of a likelihood of confusion in what are now Article 5(1)(b) of Directive 2015/2426 and Article 8(1)(b) of Regulation 2017/1001, and the corresponding infringement provisions in the Directive and the Regulation, should be interpreted and applied has been considered by the Court of Justice of the European Union in a large number of decisions. In order to try to ensure consistency of decision making, a standard summary of the principles established by these authorities, expressed in terms referable to the registration context, has been adopted in this jurisdiction. The current version of this summary is as follows:

- “(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come

from the same or economically-linked undertakings, there is a likelihood of confusion.”

The requirement that the respective goods or services be similar

10. In order for there to be a likelihood of confusion, the respective goods or services must be, if not identical, similar: see Case C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* [1998] ECR I-5507 at [22], Case C-106/03 P *Vedial SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2004] ECR I-9573 at [51], Case C-234/06 P *Il Ponte Finanziaria SpA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2007] ECR I-7333 at [48], Case C-142/14 P *The Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2015:371] at [85] and Case C-224/17 P *Hernández Zamora SA v European Union Intellectual Property Office* [EU:C:2017:791] at [5]-[6]. It is important to emphasise, however, that there is a spectrum of similarity ranging from low to high. It follows that, as Arden LJ explained with the agreement of Jacob and Maurice Kay LJJ in *eSure Insurance Ltd v Direct Line Insurance plc* [2008] EWCA Civ 842, [2008] Bus LR 438 at [49]:

“If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered ...”

Assessment of similarity of goods and services: applicable principles

11. Article 39(7) of Directive 2015/2436 and Article 33(7) of Regulation 2017/1001 both provide:

“Goods and services shall not be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification. Goods and services shall not be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.”

Although Article 39(7) of Directive 2015/2436 has not been specifically implemented in the 1994 Act, the principle it codifies is equally applicable under the 1994 Act.

12. In *Canon* the CJEU stated at [23]:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

The CJEU has repeated this in numerous subsequent judgments: see, for example, Case C-416/04 P *The Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237 at [85] and Case C-16/06 P

Les Éditions Albert René SARL v Office for Harmonisation in the Internal Market (Trade Marks and Designs) [2008] ECR I-10053 at [65].

13. As Advocate General Jacobs explained in his Opinion in *Canon* at [45], the UK Government submitted that the following factors should be taken into account in assessing the similarity of goods or services:
 - “(a) the uses of the respective goods or services;
 - (b) the users of the respective goods or services;
 - (c) the physical nature of the goods or acts of service;
 - (d) the trade channels through which the goods or services reach the market;
 - (e) in the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
 - (f) the extent to which the respective goods or services are in competition with each other; that inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”
14. As the Advocate General explained in footnote 17 of his Opinion, this list of factors was taken from *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281 (“*TREAT*”) at 296-297 (Jacob J).
15. It can be seen from *Canon* that a relevant factor is whether the respective goods or services are “complementary”. In Case C-50/15 P *Hesse v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2016:34] the CJEU held at [23] that:

“... although the complementary nature of the goods at issue represents only one factor amongst several others — such as the nature, the method of use or the distribution channels of those goods — in the light of which the similarity of the goods can be assessed, the fact remains that it is an autonomous criterion capable of being the sole basis for the existence of such a similarity.”
16. In Case T-169/03 *Sergio Rossi SpA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2005] ECR II-685 the General Court held at [60] that “complementary goods are goods which are closely connected in the sense that one is indispensable or important for the use of the other so that consumers may think that the same undertaking is responsible for the production of both goods”. The General Court has repeated this in numerous subsequent judgments. As Daniel Alexander QC sitting as the Appointed Person cautioned in *Elliott’s Trade Mark Application* [2014]

RPC 13 at [20], however, “it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together”.

17. In Case T-133/05 *Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR II-2737 the General Court stated at [29] (internal citations omitted):

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application ... or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark”

The General Court has repeated this in numerous subsequent judgments. It is common ground that the same approach is applicable to the question of similarity: goods or services can be similar to goods or services falling within a more general category in a specification.

18. There is a large body of pre-Brexit case law of the General Court on similarity of goods and services which, together with relevant domestic case law, is helpfully analysed in Chapter 6 of Fhima and Gangjee, *The Confusion Test in European Trade Mark Law* (OUP, 2019). The authors make two points which are pertinent for the purposes of this appeal and which I would endorse. The first is that, although the factors discussed above are frequently interrelated, it is also common for the factors to point in different directions, with some suggesting that the goods or services are similar and some suggesting that they are not. Some of the factors tend to be more influential than others, but this depends on the particular sets of goods or services under consideration. The significance of this point is that it confirms that the tribunal’s task is an evaluative one, giving such weight to the various factors as appears appropriate in the specific circumstances of each case.
19. The second point is that it is important to ensure that the ultimate question is kept in view: are these goods or services sufficiently similar to give rise to a likelihood of confusion? A finding that the goods or services are not similar at all implies that there is no possibility of confusion no matter how strongly the other factors in the assessment of likelihood of confusion support the existence of a likelihood of confusion. It is therefore important to guard against the mistake of treating goods or services with a low degree of similarity as dissimilar, just as it is important not to make the opposite mistake of treating highly similar goods or services as identical (which may lead to a relative rights conflict being wrongly treated as a double identity case where a likelihood of confusion is presumed).

Interpretation of specifications of goods and services: applicable principles

20. In *Sky plc v SkyKick UK Ltd* [2020] EWHC 990 (Ch), [2020] RPC 16 I considered a number of authorities on the interpretation of specifications of goods and services, and summarised the applicable principles at [56] as follows:

- “(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.
- (2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.
- (3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.
- (4) A term which cannot be interpreted is to be disregarded.”
21. Sub-paragraph (2) of this summary is based on *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 159, [2004] RPC 40. In that case Jacob LJ cited at [43] what he had said when sitting at first instance in *Avnet Inc v Isoact Ltd* [1998] FSR 16 at 19.

The respective services

22. The only service specified in the Earlier Mark which remains relevant to the appeal is “booking of seats for shows” in Class 41.
23. The services covered by the Application which remain in issue are the following three groups of services in Class 41:
- “cultural activities; organization of sporting and cultural events and activities; organization of exhibitions for cultural and educational purposes;
- organization of motor vehicle races; entertainment in the form of live motorsport races; entertainment in the form of live shows and events relating to motoring or motor vehicles; organization of real or virtual sports competitions, particularly mechanical sports competitions;
- organization and conducting of award ceremonies and gala ceremonies for entertainment purposes”.

The hearing officer’s decision

24. The hearing officer’s decision may be summarised as follows. Having outlined the dispute at [1]-[5], set out the legislative framework at [6]-[9] and cited an earlier version of the standard summary at [10], she considered the extent to which the respective services were similar at [11]-[46]. She first set out the applicable legal principles in very similar terms to paragraphs 12 to 17 above. She then proceeded to divide the services in Classes 41 and 43 covered by the Application into 26 groups and in each case either to compare that group with the service(s) specified in the Earlier Mark relied on by the Opponent and assess the extent to which they were similar or to record that the Applicant accepted that they were identical or to record that the Opponent accepted that there was no similarity. She concluded that some of the services in the Application were dissimilar to the services in the Earlier Mark;

some were similar to a medium or moderate degree; some were highly similar; and some were identical.

25. The appeal concerns the following passages in the hearing officer's decision:

"[...] cultural activities; organization of sporting and cultural events and activities; organization of exhibitions for cultural and educational purposes.

21. Mr Wood submitted that these terms could include the provision of theatre shows and that there is, therefore, some similarity with 'booking of seats for shows' in the opponent's specification. I agree. The same businesses that provide and organize shows are also likely to provide services for the booking of seats. There is an overlap in user. I also consider the services to be complementary. The nature, purpose and method of use differ. Consequently, I consider the services to be similar to a medium degree.

Organization of motor vehicle races; entertainment in the form of live motorsport races; entertainment in the form of live shows and events relating to motoring or motor vehicles; organization of real or virtual sports competitions, particularly mechanical sports competitions.

22. I accept that the organization of different types of events would also involve the provision of a booking service for seats at that event. Consequently, there would be some overlap in nature, user, method of use and purpose with the opponent's 'booking of seats for shows'. I do not consider it likely that the trade channels would overlap significantly, nor do I consider there to be complementarity or competition. Consequently, I consider there to be a medium degree of similarity.

...

Organization and conducting of award ceremonies and gala ceremonies for entertainment purposes.

43. I consider that the same reasoning applies to these services as set out in paragraph 22 above. Consequently, these services are similar to a medium degree."
26. Having considered similarity of services, the hearing officer went on to consider the average consumer and their degree of attention at [47]-[49], the extent of the similarity between the respective trade marks at [50]-[57], the distinctive character of the Earlier Mark at [58]-[60] and likelihood of confusion at [61]-[63]. Her overall conclusion was that there was a likelihood of confusion in respect of all services which she had found to be identical or similar.

The judge's judgment

27. The only part of the judge's judgment which it is necessary to consider is the section dealing with the Applicant's first ground of appeal, but it is necessary to set out his reasoning on that ground at some length. Earlier in his judgment, the judge had noted

at [6] that the hearing officer had summarised a number of “well-established legal principles” in her decision at [6]-[10]. The judge did not discuss those principles, no doubt because the Applicant had not taken issue with the hearing officer’s statements of the law.

28. Having explained that counsel for the Applicant relied upon Jacob J’s statement in *Avnet v Isoact* as to the correct approach to the interpretation of specification of services, the judge continued:

“28. Ms. Blythe [counsel then appearing for the Applicant] submitted that organisers of sporting and cultural activities and events and of exhibitions may sell tickets to their own events or shows but they do not sell tickets to events or shows of third parties or in the market generally. They are not competing for a share in that market. They do not operate, for example, as a ticket agency. The selling of a ticket for the event being organised is incidental to the core business of organising the relevant activities. It is not clear that *Avnet* was relied upon in submissions before the Officer but the respondent does not object to the appellant advancing its submissions in this way.

29. Ultimately, Mr. Wood’s [the Opponent’s trade mark attorney’s] response to that submission was that in the third sentence of paragraph 21 of the decision, the Officer was stating that organisers of shows are likely to provide for the booking of seats not only for their own events but also those of third parties. But Mr. Wood very fairly accepted that if paragraph 21 of the decision is not to be read in the way he suggests, in other words it means that the organisers of shows sell seats for their own events but not third party events, then the Officer ‘probably fell into error’. With respect he did not advance any submissions against the analysis by Ms. Blythe as such.

30. From the transcript of the hearing before the Officer it is plain that it was not suggested to her that organisers of shows or events would sell any tickets other than for their own shows and events.

31. Although both parties agreed that the Officer was entitled to come to her own view of the matter and that would not involve procedural unfairness, there is nothing in the decision to indicate that her reasoning was based on organisers of shows or events selling seats for third party events. If she had taken that wider view, in my judgment, she would have been bound to say so in express terms, partly in order to comply with her duty to give reasons (see rule 69 of the Trade Marks Rules 2008 SI 2008 No.1797). In my judgment parties familiar with the issues and submissions in this case would have no reason to think that the Officer had taken that wider view of the activities proposed for the contested mark. If I had considered that it was possible to read paragraph 21 in the wider manner contended for by Mr. Wood, in other words as covering seat sales for third party shows and events, I would have had no hesitation in concluding that there was failure to give adequate reasons, applying established principles, and I would have upheld this first part of ground 1 on that basis.

32. However, I prefer to say that the Officer did not reach a conclusion in paragraph 21 by relying upon a point which is not contained in the decision at all, and which would have involved a breach of the duty to give reasons. Instead, she proceeded on the basis that organisers sell tickets for their own events but not third party events. In these circumstances, I agree with Ms. Blythe's analysis based on *Avnet*. The same analysis applies to paragraphs 22 and 43 of the decision. In my judgment it follows that none of the appellant's activities described in paragraphs 21, 22 and 43 of the decision could be reasonably said to be similar to an activity covered by the existing mark, in particular the booking of seats for shows.
33. On the submissions before me, the mere fact that seats may be booked for shows by members of the public cannot create a material overlap sufficient to support a finding of similarity. In relation to the existing mark, seats may be booked for shows organised by third parties, but that activity does not include the organising of shows. In relation to the contested mark, the core or substance of the activity relates to the organising of shows (and events) for which the booking of seats (where available) is merely incidental and no booking of seats for third party shows (and events) is involved."
29. The judge went on:
- "35. I will briefly deal with the remaining points which concern sport related matters. Ms. Blythe's submissions applied to the organising of sporting events under paragraph 21 and the whole of paragraph 22. I do not accept her suggestion that the word 'show' is used for the existing mark only in the sense of a theatrical show. The term would include such a show, but it would also embrace shows of all kinds whether inside a building or outside. A show could include a display or exhibition or a spectacle or entertainment of some kind, but it would have to be something for which seats could be booked. Although a sporting event may well be watched by spectators, that is insufficient to make it a show.
36. To the average consumer the core or substance of a sporting event is a game or activity which involves physical exercise and/or skill. A football or rugby match would not ordinarily be described as a show, even in the case of an exhibition tennis match the focus is still on the sport. The Officer's decision does not supply any reasoning as to why a sporting event or motor sport event should be considered as a show. There is nothing to suggest that these issues were considered. The point was not advanced by the respondent. The decision in paragraphs 21 and 22 in relation to sport-related matters cannot stand.
37. In addition, I accept Ms. Blythe's submission that sporting events do not necessarily involve the use of seats or, even where they do, seating which is bookable. It does not appear from the decision that those matters were taken into consideration by the Officer. Certainly she

gave no reasoning in relation to them. To that extent also ground 1 succeeds.”

The correct approach to appeals from the Trade Marks Registry in cases such as the present

30. The assessment of likelihood of confusion involves a multi-factorial evaluation. It follows that an appellate tribunal can only intervene if the hearing officer erred in law or in principle: compare *Magmatic Ltd v PMS International Group plc* [2016] UKSC 12, [2016] Bus LR 371 at [24] (Lord Neuberger of Abbotsbury) and *Actavis Group PTC EHF v ICOS Corp* [2019] UKSC 15, [2019] Bus LR 1318 at [78]-[81] (Lord Hodge). In the absence of any error of law, the appellate tribunal must ask whether the hearing officer’s decision was wrong by reason of an identifiable flaw, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion. It is not enough that the appellate tribunal might have arrived at a different decision: see *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, [2024] Bus LR 532 at [46]-[50] (Lord Briggs and Lord Kitchin). In my judgment the same approach applies to the assessment of similarity between goods or services.
31. It is common for hearing officers when assessing the similarity of goods or services to express their reasoning in highly compressed form. There are a number of reasons for this: first, their extensive experience in the field; secondly, comparison of goods or services is a routine exercise for them to have to undertake when writing decisions; thirdly, it is frequently necessary for them to have to undertake multiple comparisons in each decision; and fourthly, it is often the case that no evidence has been adduced by either party (leaving the hearing officer to rely upon their own knowledge and experience as a consumer) and that the parties have addressed the issue quite briefly in their submissions. In such circumstances the principles summarised by Lord Hamblen in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, [2022] 1 WLR 3784 at [72] apply *mutatis mutandis* to the hearing officer’s evaluation:
- “It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
- (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
 - (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account: see *MA (Somalia)*

v Secretary of State for the Home Department [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.

- (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out: see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope of Craighead.”

The appeal to this Court

32. The Opponent appeals on no less than seven grounds, but its core contention is that the judge was not justified in interfering with the hearing officer’s decision as to the similarity of the relevant services because she directed herself correctly as to the legal principles to be applied and made no error of principle in her assessment.
33. The starting point in considering this contention is that, as explained above, the hearing officer was undertaking a multifactorial evaluation. It can be seen from the relevant paragraphs of her decision that she considered (i) the nature of the services, (ii) their intended purpose, (iii) their method of use, (iv) their users, (v) whether they were likely to be provided through the same trade channels and (vi) whether they were in competition or complementary. The Applicant has not suggested that there were any relevant factors that she omitted to consider.
34. The hearing officer did not cite any authorities as to the interpretation of specifications of goods and services, nor did she discuss the interpretation of the respective specifications. This is not surprising. Decisions as to the similarity of goods or services, as opposed to whether they are identical, rarely turn upon questions of interpretation of the respective specifications. (Counsel for the Applicant in this Court relied on *Aveda Corp v Dabur India Ltd* [2013] EWHC 589 (Ch), [2013] ETMR 33 as an example of a case where there was an issue of interpretation, but it can be seen from my reasoning at [54]-[62] that the question arose because of an issue as to the extent to which Aveda had proved use of its trade mark in Class 3.)
35. On the appeal to the High Court, the Applicant contended by its first ground of appeal that the hearing officer had been wrong to conclude that the three groups of services in the specification of the Application which I have set out in paragraph 25 above were similar to “booking of seats for shows” in the specification of the Earlier Mark and that she should have concluded that they were dissimilar. Although paragraph 10 of the Applicant’s grounds of appeal contended in the alternative that the hearing officer ought to have found that the respective services were similar to a low degree, this was expressly abandoned in the Applicant’s skeleton argument for the hearing.
36. The Applicant advanced two arguments in support of this ground. Like the judge, I will consider these separately.

The non-sporting services in the Application

37. The Applicant expressed the first argument in its grounds of appeal as follows:

“5. The Hearing Officer wrongly interpreted the [Opponent’s] term ‘booking of seats for shows’ in Class 41 at paragraphs 21 and 22 of the Decision. Given its natural interpretation, that term covers the specific service of booking seats for the shows of third parties. When a show organiser offers tickets itself, that is not a distinct service of booking seats. The service of booking of seats for shows is a separate service to that being offered by the event organiser and is provided by entities such as Ticketmaster which offers the service of booking seats for multiple shows (from multiple different event organisers).

6. In the premises, the Hearing Officer was wrong to conclude at paragraph 21 that the same businesses that provide and organise shows are the same business that offer the specific service of booking seats for shows. Thus, the Hearing Officer should not have found that there was an overlap in user.”

38. In the Applicant’s skeleton argument the conclusion drawn from the premises was slightly different: it was not asserted that the hearing officer should not have found that there was an overlap in users, but rather that the hearing officer should not have found that the services were complementary. The premises relied on for this conclusion were the same, however.

39. This argument conflates two different questions. The first is what is meant by “booking of seats for shows” in the specification of the Earlier Mark. The Opponent does not dispute that this refers to a service of the kind provided by a ticket agency in which the agency sells seats for shows organised by third parties. As the Opponent points out, the hearing officer would have been well aware that a description of a service such as this refers to a service provided as a separate offering. She did not need to expressly state this.

40. The second question is whether “booking of seats for shows”, so understood, is similar to the services in the specification of the Application in issue. It is convenient to begin with “cultural activities; organization of ... cultural events and activities; organization of exhibitions for cultural and educational purposes”. The Applicant does not dispute that these expressions embrace organising theatre shows, among other things. I shall follow the hearing officer’s example of concentrating on theatre shows, but it should be borne in mind that the same analysis would apply to, say, musical shows. The relevance of this will become clear when I come to the example of Ticketmaster discussed below.

41. The hearing officer held in [21] that “booking of seats for shows” was similar to a medium degree to organising theatre shows. As part of her reasoning, she stated in the third sentence of that paragraph that “[t]he same businesses that provide and organize shows are also likely to provide services for the booking of seats”.

42. It can be seen from the judge's decision that there was a debate before him as to whether the hearing officer meant that businesses that organise shows are also likely to provide services for the booking of seats at third party events. The judge concluded at [32] that the hearing officer must have meant that businesses that organise shows are likely to sell tickets for their own shows, but not third party shows.
43. Although one of the Opponent's grounds of appeal challenges that conclusion, I consider that the judge was right about this. In [22] the hearing officer was explicit that "the organization of different types of events would also involve the provision of a booking service for seats *at that event* [emphasis added]", and there is no reason to think that she meant anything different in [21]. Furthermore, as the judge noted, it had not been suggested to her that organisers of shows or events would sell tickets other than for their own shows or events, and one would expect her to have explained why she took that view if she did.
44. The Opponent argues that it does not matter if, as I have concluded, the judge was correct about the meaning of the hearing officer's statement in the third sentence of [21]. In considering this argument, it is necessary to begin by elucidating that statement. As I understand it, the point the hearing officer was making was a straightforward one. The organiser of a theatrical show will typically provide a facility that enables consumers to book tickets for that show either by telephone or online, and a consumer who uses that facility will typically be charged a booking fee for doing so (whereas a consumer who goes to the venue and purchases a ticket in person typically will not). Thus a service for the booking of seats is provided, and charged for, by the organiser of the show. This explains the hearing officer's use of the word "also". In fairness to the judge, I should make it clear that the Opponent did not advance this explanation of the hearing officer's statement before him.
45. I would add that a service for booking of seats is also provided, and charged for, by a ticket agency if the consumer books seats for a theatrical show via the agency rather than directly with the organiser.
46. The conclusion that the hearing officer drew from the fact that organisers of theatrical shows also provide services for the booking of seats was that there was an overlap between users of "booking of seats for shows" and users of the organisation of theatre shows. She also concluded that these services were complementary.
47. As I have explained, the Applicant did not challenge the first of these conclusions before the judge, but did challenge the second one. Counsel for the Applicant in this Court confirmed that this remained the Applicant's position.
48. As the judge recorded at [28], the basis of the Applicant's challenge to the second conclusion was an argument that the sale of tickets by the organiser of a show was incidental to the core activity of organising the show. The judge accepted this argument at [32], and went on to hold at [33] that this meant that there was no "material overlap" between "booking of seats for shows" and "cultural activities; organization of ... cultural events and activities; organization of exhibitions for cultural and educational purposes".
49. It is clear from what the judge said at [29] that he was not greatly assisted by the Opponent's trade mark attorney's submissions on this issue. In addition to raising the

red herring as to what the hearing officer had meant by the third sentence of [21], those submissions left the judge with impression that, if he was against the Opponent on that question, then the Opponent did not seriously dispute that the hearing officer had erred in her assessment of similarity. The transcript confirms that the judge correctly recorded what the Opponent's trade mark attorney said, but in this Court the latter explained that he had not intended to concede this. Counsel for the Applicant fairly accepted that the judge had not proceeded on the basis that the issue had been conceded, but had gone on to accept the correctness of the Applicant's argument.

50. I do not accept the Applicant's argument for the following reasons. First, the distinction between core and incidental services may be important when considering whether services are identical, but it is of little relevance to an assessment of similarity. As the Opponent submits, the problem with this approach can be seen from the judge's reasoning in [33]. The judge's reference to there being no "material overlap" between the respective services amounts to a test of identity, not similarity. This is confirmed by the absence of any reference by the judge in this paragraph to the *Canon* or *TREAT* factors.
51. Secondly, the Applicant's argument does not demonstrate that the hearing officer erred in principle in finding that the services were complementary. It was open to the hearing officer to conclude that the service of booking of seats for shows provided by an agency is closely connected with the organisation of theatrical shows in the sense that one is important, if not indispensable, for the use of the other. It was also open to the hearing officer to conclude that consumers may think that the same undertaking is responsible for the provision of both services. The example of Ticketmaster relied on by the Applicant before the judge illustrates this. Ticketmaster is part of Live Nation Entertainment, which both sells tickets for third party events via Ticketmaster and owns and operates entertainment venues, particularly venues used for musical performances.
52. Thirdly, the hearing officer's unchallenged finding that there was an overlap in users and her tenable finding that the services were complementary provided a sufficient basis for her conclusion that the services were similar to at least some degree. The Applicant does not challenge the hearing officer's assessment of the degree of similarity as being medium, having abandoned that ground of appeal before the judge. In any event, that assessment was a matter for the hearing officer, and did not betray any error of principle. Furthermore, it would make no difference if the degree of similarity were to be regarded as low. That would still require an assessment of likelihood of confusion. The Applicant did not contend that a change in the degree of similarity from medium to low would have had made a material difference to that assessment.
53. It follows that the hearing officer made no error of principle in finding at [21] that "cultural activities; organization of ... cultural events and activities; organization of exhibitions for cultural and educational purposes" were similar to "booking of seats for shows". There is no dispute that the same conclusion should apply to the hearing officer's finding at [43] concerning "organization and conducting of award ceremonies and gala ceremonies for entertainment purposes".

The sport-related services in the Application

54. The Applicant's second argument in support of its first ground of appeal to the High Court concerned "organization of sporting events and activities" and the group of services in the Application which the hearing officer considered at [22]. The Applicant submitted that these services were even further removed from "booking of seats for shows" than the other services in issue for two reasons. First, such sports-based events were not "shows". Secondly, such sports-based events did not necessarily have seats.
55. As can be seen from his judgment at [35]-[37], the judge accepted both submissions. I respectfully disagree.
56. So far as the first submission is concerned, the judge did not accept that "shows" in the Earlier Mark was confined to theatre shows. He said, and I agree, that it would "embrace shows of all kinds whether inside ... or outside" and that it "could include a display or exhibition or a spectacle or entertainment of some kind". He nevertheless said that a sporting event such as a motor vehicle race was not a "show". Given the breadth of the judge's definition of "show", it is hard to see why not. Furthermore, it does not appear to have been drawn to the judge's attention that the second group of services includes "entertainment in the form of live *shows* and events relating to motoring or motor vehicles [emphasis added]."
57. As for the second submission, the judge said that "sporting events do not necessarily involve the use of seats or, even when they do, seating which is bookable". That is no doubt true, but I do not see the relevance of this point. Seats are available for watching most sporting events, and they are usually bookable.
58. It follows that the hearing officer made no error of principle in finding that "organization of sporting events and activities" and "organization of motor vehicle races; entertainment in the form of live motorsport races; entertainment in the form of live shows and events relating to motoring or motor vehicles; organization of real or virtual sports competitions, particularly mechanical sports competitions" were similar to "booking of seats for shows" as alleged by the Applicant. I would comment that some of the hearing officer's reasoning in [22] could be argued to be inconsistent with her reasoning in [21]; but that was not a ground of appeal advanced by the Applicant on its appeal to the High Court.

Respondent's notice

59. The Applicant contends by way of a respondent's notice that, if the judge was correct to hold that the hearing officer had made an error of principle which justified intervention by the High Court, but wrong to conclude that it necessarily followed that the respective services were dissimilar, then a proper analysis of the *Canon/TREAT* factors would lead to that conclusion. Since I have concluded that the hearing officer made no error of principle, this does not arise.

Conclusion

60. For the reasons given above, I would allow the appeal and reinstate the decision of the hearing officer.

Lord Justice Baker:

61. I agree.

Lady Justice Asplin:

62. I also agree.