

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NUMBER 3674547

BY BUMBLE HOLDINGS LIMITED

TO REGISTER THE FOLLOWING MARK IN CLASSES 9 and 45



## **Background**

1. On 28 July 2021, Bumble Holdings Limited (“the applicant”) applied to register the above figurative mark for the following goods and services in Class 9 and 45:

*Class 9: Application software for social networking services via internet; computer software platforms for social networking; computer application software for mobile phones; computer software for use as an application programming interface (api); instant messaging software; downloadable instant messaging software; computer application software for mobile telephones; computer software to enable the transmission of photographs to mobile telephones; downloadable applications; downloadable mobile applications.*

*Class 45: Online social networking services; dating services provided through social networking; online social networking services accessible by means of downloadable mobile applications; personal introduction services; matchmaking services; internet dating services; dating services; personal and social introduction, personal and social networking, dating, relationships provided via a software application for portable electronic devices.*

2. On 20 August 2021 the Intellectual Property Office (“IPO”) issued an examination report in response to the application. In that report, an objection was raised under sections 3(1)(b) of the Trade Marks Act 1994 (“the Act”):

*Section 3(1)(b)*

*The application is not acceptable in Classes 9 and 45. There is an objection under Section 3(1)(b) of the Act as the mark is devoid of any distinctive character. This is because the mark consists of a rectangle in the colour of Pantone 123 C, and it is considered that without education, the average consumer would perceive such a sign as too banal to be able to function as a trade mark.*

*In order to function as a trade mark, a sign must be capable of distinguishing your goods from those of another undertaking. Given that your mark purely contains a single colour rectangle, the average consumer would not attribute any trade mark significance and would look elsewhere to establish the commercial origin of the products.*

*When a sign is devoid of any distinctive character, it is considered that it cannot function as a badge guaranteeing the commercial origin of the goods and services and does not distinguish your goods or services from those of another undertaking.*

3. In line with standard IPO procedure, a period of two months was allowed for the applicant to respond.

4. On 8 October 2021 Pinsent Masons LLP, the attorney acting on behalf of the applicant requested an extension of time in which to gather evidence to demonstrate that the mark had acquired distinctive character through use. This was agreed and a new response date set at 20 December 2021. A second extension of time was requested on 15 December 2021 which was agreed and a new response date set at 20 February 2022.

5. On 18 February 2022 the attorney submitted evidence to demonstrate that the mark had acquired distinctive character through use. The evidence consisted of a witness statement of Natasha Hinds-Payne, the head of IP and Brand Protection of Bumble Holdings Limited (the applicant), together with exhibits NHP1 to NHP17. The examiner assessed the evidence but did not consider it sufficient in demonstrating that the mark had acquired distinctiveness through use and maintained the objection in their letter of 16 March 2022.

6. A hearing was requested on 11 May 2022 which took place on 21 June 2022 with the Hearing Officer, Martyn Jefferiss acting for the Registrar and Ms Triona Desmond of Pinsent Masons LLP representing the applicant. Prior to the scheduled hearing, the attorney submitted further evidence consisting of a second witness statement of Natasha Hinds-Payne and exhibits NHP18 to NHP20. Having considered the submissions made at the hearing and all of the evidence provided so far, Mr Jefferiss did not consider that it demonstrated the mark had acquired distinctiveness through use and consequently maintained the objection. Mr Jefferiss's main concern with the evidence was that in his view the mark applied for was not being used as a trade mark, that is, as a means of identifying the goods and services as those of a single undertaking. During the hearing with Mr Jefferiss the attorney had suggested that the applicant may consider filing survey evidence to further support their claim that the mark had acquired distinctiveness through use. Mr Jefferiss informed the attorney that when commissioning a survey it must be conducted in accordance with the *Whitford Guidelines*. I shall refer to the guidelines in more detail later.

7. The hearing report was issued on 4 July 2022 and a period of two months allowed for Ms Desmond to respond.

8. On 3 November 2022 a third witness statement of Natasha Hinds-Payne was received together with exhibits NHP1 to NHP10. Mr Jefferiss considered this additional evidence in conjunction with the evidence previously submitted but concluded that it did not assist in demonstrating that the mark had acquired distinctiveness through use and maintained the objection in his letter of 20 December 2022.

9. A second hearing was requested on 9 January 2022 to discuss the applicant's claim of acquired distinctiveness and following the departure from the office of Mr Jefferiss, the case was allocated to me in his stead.

10. Before proceeding, I think it necessary to record that on the application form the type of mark was recorded as 'figurative' with the image shown as a yellow coloured rectangle which was how the examiner had first responded. However, at the first hearing held on 21 June 2022 Ms Desmond had referred to the *Libertel* decision in which it was held that colours can function as badges of origin. I have taken this to mean that in fact Ms Desmond had considered the mark to be a 'colour' mark so I have also considered the distinctiveness of the mark as if it were an abstract colour mark rather than a figurative rectangular device. The use shown throughout the evidence would support this approach.

11. I took the hearing on 1 February 2023 with the attorney Mr Florian Traub representing the applicant. I had considered all of the evidence in conjunction with Mr Traub's submissions but I did not consider the evidence had demonstrated that the mark had acquired distinctiveness through use. At the hearing I informed Mr Traub that three batches of evidence had already been submitted which in my opinion did not come close to demonstrating that the mark had acquired distinctiveness through use, therefore, I did not consider there to be any merit in allowing further time to provide additional evidence which was likely to be more of the same, therefore, the application was refused.

12. A form TM5 (Request for a statement of reasons for registrar's decision) was received on 24 February 2023.

13. Having received a request for a statement of reasons for the registrar's decision, I am now obliged to set out the reasons for my decision.

## **The Law**

14. The relevant parts of section 3 of the Act read as follows:

*3.-(1) The following shall not be registered –*

*(a) ...*

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

*(c) ...*

*(d) ...*

*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.*

## **The relevant legal principles**

15. The principles to be applied under article 7(1)(b) of the CTM Regulation (which is now article 7(1)(b) of the EUTM Regulation, and is identical to article 3(1)(b) of the Trade Marks Directive and s.3(1)(b) of the Act) were conveniently summarised by the CJEU in OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG (C-265/09 P) as follows:

*“29..... the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or*

service (*Joined Cases C-456/01 P and C-457/01 P Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

30. Under that provision, marks which are devoid of any distinctive character are not to be registered.

31. According to settled case-law, for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (*Henkel v OHIM*, paragraph 34; *Case C-304/06 P Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and *Case C-398/08 P Audi v OHIM* [2010] ECR I-0000, paragraph 33).

32. It is settled case-law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67). Furthermore, the Court has held, as OHIM points out in its appeal, that that method of assessment is also applicable to an analysis of the distinctive character of signs consisting solely of a colour per se, three-dimensional marks and slogans (see, to that effect, respectively, *Case C-447/02 P KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78; *Storck v OHIM*, paragraph 26; and *Audi v OHIM*, paragraphs 35 and 36).

33. However, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (see *Joined Cases C-473/01 P and C-474/01 P Proctor & Gamble v OHIM* [2004] ECR I-5173, paragraph 36; *Case C-64/02 P OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 34; *Henkel v OHIM*, paragraphs 36 and 38; and *Audi v OHIM*, paragraph 37)."

16. I refer also to the CJEU's judgment in *Libertel Groep BV and Benelux-Merkenbureau*, Case C-104/01 and in particular paragraphs 64 to 67 which refers to colour marks as follows:

*“64. Account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind (see, in different contexts, *Lloyd Schuhfabrik Meyer*, paragraph 26, and Case C-291/00 *LTJ Diffusion* [2003] ECR I-2799, paragraph 52).*

*65. The perception of the relevant public is not necessarily the same in the case of a sign consisting of a colour per se as it is in the case of a word or figurative mark consisting of a sign that bears no relation to the appearance of the goods it denotes. While the public is accustomed to perceiving word or figurative marks instantly as signs identifying the commercial origin of the goods, the same is not necessarily true where the sign forms part of the look of the goods in respect of which registration of the sign as a trade mark is sought. Consumers are not in the habit of making assumptions about the origin of goods based on their colour or the colour of their packaging, in the absence of any graphic or word element, because as a rule a colour per se is not, in current commercial practice, used as a means of identification. A colour per se is not normally inherently capable of distinguishing the goods of a particular undertaking.*

*66. In the case of a colour per se, distinctiveness without any prior use is inconceivable save in exceptional circumstances, and particularly where the number of goods or services for which the mark is claimed is very restricted and the relevant market very specific.*

*67. However, even if a colour per se does not initially have any distinctive character within the meaning of Article 3(1)(b) of the Directive, it may acquire such character in relation to the goods or services claimed following the use made of it, pursuant to Article 3(3) of the Directive. That distinctive character may be acquired, inter alia, after the normal process of familiarising the*

*relevant public has taken place. In such cases, 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 (Windsurfing Chiemsee...).*”

## **Application of the law**

17. As mentioned in paragraph 10, the mark consists of the colour yellow, Pantone reference 123C. The application includes Classes 9 and 45 covering goods and services indicated in paragraph 1.

18. The goods in Class 9 include computer software and mobile applications. Some of the listed items specifically relate to either social networking; instant messaging; for use as an application programming interface; or for the transmission of photographs to mobile telephones. The remaining items are unspecified as to their nature. Class 45 includes social networking, dating, personal introductions and matchmaking services. I consider the relevant consumer of the goods and services to be the general public, specifically those who are seeking new friendships and/or a romantic partner, and also people working in business who are seeking to network with other businesses. When considering these goods and services consumers will be looking for an ‘app’ or ‘social network service’ that will enable them to connect with others safely and easily so it is reasonable to assume that the prospective consumer of the applicant’s goods and services would apply at least a moderate level of attention and circumspection when considering whether or not to purchase.

19. In *Libertel* the CJEU confirmed at paragraph 23 that a colour *per se* is capable of constituting a trade mark providing it satisfies the following requirements: 1. That it is a sign; 2. That it is capable of being represented graphically; and 3. That it is capable of distinguishing the goods and services of one undertaking from another. It is my view that the mark satisfies requirements 1 and 2 but not requirement 3. Furthermore, in paragraph 66, it is held that distinctiveness of a colour, without any prior use, is inconceivable except in exceptional circumstances. When seeking to download a mobile dating application from a relevant app store it would not be unreasonable to



suggest that the colour yellow would result in the applicants App to stand out from other similar Apps, but I am of the view that the relevant consumer would not afford it any trade mark significance and will simply take it as the colour of the software application. In terms of the online services, I am also of the view that the relevant consumer will perceive the mark simply as the colour chosen by the applicant to use as part of the design of their website and not as a sign designating the services of a single undertaking.

20. I conclude that the mark as applied for is inherently non-distinctive and without education, the relevant consumer will not perceive it as a sign designating the goods and services as those originating from a single undertaking.

### **Acquired distinctiveness and the relevant legal principles.**

21. As already mentioned in paragraph 14, section 3 of the Act states that a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) of the Trade Marks Act 1994 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.

22. The guiding principles when assessing evidence to demonstrate acquired distinctiveness are set out in *Windsurfing Chiemsee* (Joined cases C-108/97 and C-109/97):

*51. In assessing the distinctive character of a mark in respect of which registration has been applied for, the following may also be taken into account: the market share held by the mark; how intensive, geographically widespread and longstanding use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking; and statements from Chambers of Commerce and industry or other trade and professional associations.*

*52. If, on the basis of those factors, the competent authority finds that the relevant class of persons, or at least a significant proportion thereof, identify*

*goods as originating from a particular undertaking because of the trade mark, it must hold that the requirement for registering the mark laid down in Article 3(3) of the Directive is satisfied. However, the circumstances in which that requirement may be regarded as satisfied cannot be shown to exist solely by reference to general abstract data such as predetermined percentages.*

*53. As regards the method to be used to assess the distinctive character of a mark in respect of which registration is applied for, Community law does not preclude the competent authority, where it has particular difficulty in that connection, from having recourse, under the conditions laid down by its own national law, to an opinion poll as guidance for its judgments (see, to that effect, Case C-210/96 Gut Springenheide and Tusky [1998] ECR I-4657, paragraph 37)"*

23. It is of course understood that the principles set out in *Windsurfing Chiemsee* do not represent a simple ‘tick box’ exercise but that a full evaluation of the totality of the evidence must be undertaken.

24. The way in which an inherently non-distinctive mark may acquire a distinctive character was elaborated upon by the CJEU in Case C-299/99 *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd* [2002] ECR I-5475 at paragraph 64:

*“...the identification, by the relevant class of persons, of the product as originating from a given undertaking must be as a result of the **use of the mark as a trade mark** and thus as a result of the nature and effect of it, which make it capable of distinguishing the product concerned from those of other undertakings.”* (Emphasis added)

25. In other words, an inherently non-distinctive mark can only acquire a distinctive character if the maker or supplier of the goods and services concerned uses the mark in such a way that it comes to guarantee to consumers that the product originates from a particular undertaking.

26. Furthermore, in *Societe de Produits Nestle v Cadbury UK Ltd* [2017] EWCA Civ 358 (the 'Kit Kat' case), it states at paragraph 78:

*".....We are concerned here with a mark, the three-dimensional shape of a chocolate product, that has no inherent distinctiveness. A shape of this kind is not inherently such that members of the public are likely to take it as a badge of origin in the way they would a newly coined word or fancy name. Now assume that products in that shape have been sold on a very large scale under and by reference to a brand name which is inherently highly distinctive. Assume too that the shape has in that way become well-known. That does not necessarily mean that the public have come to perceive the shape as a badge of origin such that they would rely upon it alone to identify the product as coming from a particular source. They might simply regard the shape as a characteristic of products of that kind or they might find it brings to mind the product and brand name with which they have become familiar. These kinds of recognition and association do not amount to distinctiveness for trade mark purposes, as the CJEU has now confirmed in its decision in this case"*

27. Consequently, even if the goods and services of the applicant have been sold on a very large scale under the trade mark BUMBLE and the colour has come to be very well known, the evidence must show that the relevant consumer perceives the colour as a badge of origin. Simply recognising the colour and associating it with the applicant is not enough to demonstrate acquired distinctiveness through use. The colour may serve to allow the consumer to recognise and associate the mark with the BUMBLE trade mark but it must be proved that the consumers regard the colour itself as a badge of trade origin, which means that the consumers would rely on the colour alone to purchase the products, if the colour was used on its own without any of the BUMBLE trade marks.

28. In Case C-353/03 *Société des Produits Nestlé SA v Mars UK Ltd* [2005] ECR I-6135 the CJEU has also held that a non-distinctive mark may have acquired distinctive character if it has been used as part of or in conjunction with a registered trade mark.

26. *In regard to acquisition of distinctive character through use, the identification, by the relevant class of persons, of the product or service as originating from a given undertaking must be as a result of the use of the mark as a trade mark (judgment in Philips, paragraph 64).*

27. *In order for the latter condition, which is at issue in the dispute in the main proceedings, to be satisfied, the mark in respect of which registration is sought need not necessarily have been used independently.*

28. *In fact Article 3(3) of the directive contains no restriction in that regard, referring solely to the ‘use which has been made’ of the mark.*

29. *The expression ‘use of the mark as a trade mark’ must therefore be understood as referring solely to use of the mark for the purposes of the identification, by the relevant class of persons, of the product or service as originating from a given undertaking.*

30. *Yet, such identification, and thus acquisition of distinctive character, may be as a result both of the use, as part of a registered trade mark, of a component thereof and of the use of a separate mark in conjunction with a registered trade mark. In both cases it is sufficient that, in consequence of such use, the relevant class of persons actually perceive the product or service, designated exclusively by the mark applied for, as originating from a given undertaking.”*

29. I refer also to the comment in *Bach and Bach Flower Remedies Trade Marks* [2000] RPC 513 at paragraph [49] (per Morritt LJ with whom Thorpe and Chadwick L.JJ agreed):

*“... use of a mark does not prove that the mark is distinctive. Increased use does not do so either. The use and increased use must be in a distinctive sense to have any materiality.”*

30. I must therefore assess the evidence and determine whether a significant proportion of the relevant consumer has come to perceive the mark as designating the

goods and services of a single undertaking and that it serves to distinguish those goods and services from those of other undertakings as a result of the use made of it. In that respect, such use must be use as a trade mark.

31. The evidence consisted of three Witness Statements of Natasha Hinds-Payne, the Head of IP and Brand Protection of Bumble Holdings Limited (Ms Hinds-Payne company). The first witness statement was dated 17 February 2022 and included exhibits NHP1 to NHP17; the second was dated 16 June 2022 and included exhibits NHP18 to NHP20, and the third was dated 2 November 2022 and included exhibits NHP1 to NHP10 (these are different to those of the same reference number that accompanied the first witness statement.)

32. In the first witness statement Ms Hinds-Payne reports that the mark was first used by the applicant in 2014 and has over 100 million users worldwide. She states that her company's BUMBLE mobile application (the "App") is available around the world including the UK. No market share specifically within the UK was provided, and while Ms Hinds-Payne stated that the App is the 'market leader' in romantic, business and friendship connections it is not clear whether that is market leader within the UK or worldwide. Ms Hinds-Payne also stated that the 'App' regularly ranks in the top ten lifestyle apps on both the *App Store* and *Google Apps*. At paragraph 26 of her witness statement she stated that it is clear from the evidence that her company's App has a huge recognition amongst the relevant public and given that the mark is used as the primary colour not only on the App but also on their website and within all other branding Ms Hinds-Payne contends that it is also clear that the mark has achieved huge recognition amongst the relevant public in relation to the goods and services to the extent that it has acquired distinctive character.


33. The global revenue for the dating App in 2020 was reported to be \$3.08 billion but no separate figure pertaining to turnover in the UK was provided. In terms of advertising and marketing it was shown that in the three years 2018, 2019 and 2020 the amount spent on global advertising and marketing was £63.2m, £97.2m, and £110.2m, respectively. There is no doubt that these figures are high but no breakdown was provided to indicate how much the applicant had spent in the UK in respect of advertising and marketing. Absent UK turnover and advertising and marketing figures

it was not possible to determine the full extent to which the mark has been used within the UK or to what extent the consumer has been exposed to it.

34. Exhibits NHP1, NHP1A, NHP3 and NHP4 all show the mark appearing on the applicant's websites and mobile App. It is immediately apparent from the images appearing here that the colour yellow is prominently featured as a background of the web page and on the mobile App. The images of building interiors show the colour used in respect of wall coverings. The figurative logo and the trade mark 'Bumble' are also presented in the colour yellow. However, I do not consider use of the colour in this context to be trade mark use, nor has the colour been drawn to the attention of the consumer to educate them that it is the applicant's trade mark.

35. Exhibit NHP2 includes a copy of the company's Brand Design Guidelines of 2020. Exhibit NHP1 (received November 2022) includes Bumble's Brand Guidelines for 2019, 2020 and 2021. The guidelines state that 'Bumble yellow' is the primary colourway (70%) and Bumble black is the secondary brand colour (20%). These documents certainly play a part in demonstrating how the colour yellow was chosen by the applicant and also that it is an integral part of their branding strategy but they do not assist in demonstrating acquired distinctiveness. What matters is how the mark is being used and the perception of it by the 'relevant consumer' and not how the colour has come to be chosen. It is clear from the other evidence that the use of the colour yellow has been adopted by the applicant on its App and website and all forms of advertising but the colour is not being used as a means of identifying the goods and services of a single undertaking to the extent that the consumer would perceive it as such.

36. Exhibit NHP5, NHP6 and NHP7 includes extracts taken from various websites including [www.appfigures.com](http://www.appfigures.com), [www.appannie.com](http://www.appannie.com), [www.similarweb.com](http://www.similarweb.com), [www.statista.com](http://www.statista.com), and [www.sensortower.com](http://www.sensortower.com). These show that the BUMBLE App was the second highest grossing App amongst the top 1000 Lifestyle Apps on the iOS App Store in 2020 and 2021, and was the twelfth most popular free Lifestyle App in the UK in 2020 rising to number 10 in 2021. Also in 2021 the BUMBLE App was the eighth highest grossing App in the UK and was the top free dating App. It was the second highest grossing dating App amongst all dating Apps on the *Google Play Store*

in the UK. In November 2021, the applicant's website ranked at 5,059 amongst all websites globally. In the category of romance and relationships it was placed at number twenty. These extracts also state that between June 2021 and November 2021 the applicant's website received 14.45 million visits with 6.05% visitors located in the UK. While this information supports a finding that the applicants BUMBLE App is well known both globally and within the UK, they do not demonstrate that it is the colour in and of itself that serves to identify the applicant's App but it is the trade mark BUMBLE and the applicant's logo  that are the trade marks that identify the applicant's App.

37. Ms Hinds-Payne stated that her company is the UK's top ranking social networking mobile application and to evidence this she provided at exhibit NHP8, NHP10 and NHP20 various articles published between 2015 and 2021 in UK national magazines and publications including *ELLE*, *Cosmopolitan*, *Forbes*, *Metro* and the online website *businessinsider.com* to name a few. It is clear from these articles that the Bumble App is indeed popular but they refer to the App by the trade mark 'Bumble' and while this is presented in the colour yellow, the colour is not being used as a trade mark. These press articles do not assist in demonstrating that the colour has acquired distinctiveness through use. As mentioned above, there is no denying that the colour yellow is heavily featured in all of the articles but in my opinion it will be seen as nothing more than a striking and eye catching background and not as a trade mark. In some articles I noted the spelling of the word 'color' and 'center' which suggests to me that these articles could have originated in the USA so have little weight when attempting to demonstrate acquired distinctiveness in the UK.

38. Exhibit NHP9 provides articles detailing the many awards won by the applicant since 2014 in respect of their App and also the company's ethos, brand and marketing campaigns. These establish that the Bumble App is obviously very popular and that the applicant has achieved success in their field, but even though the colour is featured in the articles it is not being used as a trade mark in my opinion. Evidence of these awards do not assist in demonstrating acquired distinctiveness through use. Moreover, many of the awards were won outside of the UK (USA and Germany) so they have little weight when attempting to demonstrate acquired distinctiveness in the UK.

39. Exhibit NHP11 provides details of the applicants advertising expenditure where it can be seen that it increased year on year rising to \$140,00,000 in 2020. The applicant's marketing expenditure in 2020 was reported to be \$153,000,000. These figures are hugely impressive but they relate to worldwide advertising and marketing and are not specific to the UK so it was not possible to determine to what extent the consumer had been exposed to the mark through advertising in the UK. Exhibits NHP13, NHP14, NHP15, NHP17, NHP19, and NHP7 (received November 2022) all provide examples of the applicants advertising and promotional campaigns including at events such as *London Fashion Week*, *Edinburgh Fringe Festival* and various music festivals. The mark also appears on telephone boxes, bus shelters, buses and on posters at London's underground tube stations. It is true that these examples incorporate the colour yellow, mainly as a background colour and as the colour of the letters in the word Bumble, but they do not show use of the colour yellow, in and of itself, being used as a means of identifying the goods and services of a single undertaking.


40. The applicant has a strong presence on social media including *Facebook*, *Instagram*, *TikTok* and *Twitter*. Exhibits NHP12, NHP18 and NHP6 (received November 2022) provided examples of the colour appearing on these platforms but they all show use of the trade mark 'Bumble' as well as the logos shown below. While they appear in the colour yellow, it is not the colour, in and of itself, that is being used as the trade mark.



41. Exhibit NHP16 includes recruitment adverts of the applicant's brand ambassador programs in the UK and related press coverage. Brand ambassadors are tasked with spreading the word on women's empowerment, respect, kindness and gender equality. The images shown in this exhibit clearly embrace the colour yellow in various ways, including the colour of the letters in the word Bumble and other text, as a



background, for clothing items, and also in the applicant's logo, but it is my view that it is the trade mark Bumble that the reader will take to be the trade mark and not the colour in and of itself.

42. Exhibits NHP2, NHP3, NHP4 and NHP5 (received November 2022) include various information in respect of consumer habits in the field of mobile Apps and how colour is a key factor in their decision making and selection. When purchasing a dating App for the first time I would expect the consumer to search the App store by inputting the type of App they are interested in, for example, 'dating'. Once the list of relevant Apps appears the consumer would then consider those of interest to them and proceed to download the one they want. In respect of the applicant's dating App, it is possible that the colour of the App may attract users given that yellow is considered to be a bright and cheerful colour, but that is not to say that the colour per se is being used as a brand indicator. In my mind, it is the word Bumble appearing alongside the icon that they will take as indicating the origin of that particular mobile App. Furthermore, mobile App icons themselves are generally perceived by consumers as indicators of brand origin so the applicant's icon,,  will also be taken by the consumer as indicating origin rather than its colour. Once the consumer has downloaded the Bumble App to their device, the colour yellow may enable them to easily locate it amongst others displayed on their screen, but it is the totality of the icon, which includes the honeycomb, that will assure them that it is the Bumble App they have selected. The colour yellow, in and of itself, is not functioning as an indicator of origin but when searching the Apps on their device for a yellow one it will serve only to narrow down their visual search.

43. At the hearing, Mr Traub contended that the result of the survey clearly highlights the recognition of the colour yellow as a source identifier in the UK. He clarified that the survey consisted of two elements, the first was Bumble's overall brand recognition (NHP8 and NHP9) and the second relates to the relevance of colour (NHP10).

44. When considering the survey evidence I have taken into consideration the aforementioned *Whitford Guidelines* which were recently endorsed in the Glaxo Wellcome UK Ltd & Anor v Sandoz Ltd & Ors [2019] EWHC 2545 judgment at paragraph 219:

“The basic guidelines, often referred to as ‘*the Whitford Guidelines*’, were formulated by Whitford J in 1984 in *Imperial Group plc v Philip Morris Ltd* [1984] RPC 293. These were more recently endorsed by the Court of Appeal in *Interflora Inc v Marks & Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21. In that case Lewison LJ summarised the guidelines at [61] as follows:

*i) if a survey is to have any validity at all, the way in which the interviewees are selected must be established as being done by a method such that a relevant cross-section of the public is interviewed;*

*ii) any survey must be of a size which is sufficient to produce some relevant result viewed on a statistical basis;*

*iii) the party relying on the survey must give the fullest possible disclosure of exactly how many surveys they have carried out, exactly how those surveys were conducted and the totality of the number of persons involved, because otherwise it is impossible to draw any reliable inference from answers given by a few respondents;*

*iv) the questions asked must not be leading; and must not direct the person answering the question into a field of speculation upon which that person would never have embarked had the question not been put;*

*v) exact answers and not some sort of abbreviation or digest of the exact answer must be recorded;*

*vi) the totality of all answers given to all surveys should be disclosed;*

*vii) the instructions given to interviewers must also be disclosed.*

45. Exhibit NHP8 is the report of the internal brand awareness survey in the United Kingdom, conducted on behalf of the applicant by *Morning Consult Intelligence* during the period 26 March 2021 to 31 October 2022. It was conducted online among a

sample of 94803 respondents across 585 polls. The survey revealed that 45% of the general public were aware of the Bumble brand. It is my opinion that while this would support the applicant's view that Bumble is very well known it has not shown that it is the colour yellow that they perceive as the trade mark.

46. A further survey was conducted by market research company GfK UK in August 2022 and was designed to give an unbiased and comprehensive view on the following:

1. Which colour associations, if any, do the public have with the specific shade of yellow?
2. In relation to dating apps, which colour associations, if any, do the public have in relation to the specific shade of yellow? Specifically, is Bumble associated with yellow?
3. Which are the distinct image and personality attributes do the public associate with brands in the dating app space?

47. Exhibit NHP9 (received November 2022) includes a document titled '*IMAGE ASSOCIATIONS WITH THE BRAND "BUMBLE" IN THE UNITED KINGDOM*' and covers point 3 above, while exhibit NHP10 (received November 2022) includes a document titled '*COLOUR ASSOCIATIONS WITH THE BRAND 'BUMBLE' IN THE UNITED KINGDOM, NORTHERN IRELAND, AND THE REPUBLIC OF IRELAND*' and covers points 1 and 2.

48. Having considered the two reports of this survey and the questions asked, it is my view that questions 1a, 4 and 8 of report 1 and questions 4 and 8 of report 2 were suggesting that the colour is a brand and therefore 'lead' the respondents to name the brand associated with the colour. I do not consider these questions to be in accordance with point 4 of the Whitford Guidelines. The questions are shown below:

### Report 1

*Question 1a – which brand do you associate with this colour? (brown, pink and yellow shown one at a time)*

*Question 4 - In the context of dating apps, which brand do you associate with this colour? (yellow colour shown).*

*Question 8 – Do you associate this particular colour with any of the below dating apps?*

## Report 2

*Question 4 - In the context of dating apps, which brand do you associate with this colour? (yellow colour shown).*

*Question 8 - Do you associate this particular colour with any of the below dating app brands?*

49. At the hearing, Mr Traub accepted that the word 'brand' was used in the questions but he argued that the word would not be considered a legal term in the same way that 'trade mark' is. I agreed with Mr Traub's view that there is a difference in law between a brand and a trade mark but I am of the view that the people participating in the survey would not understand the legal difference and would consider them to be one and the same. I am therefore of the view that use of 'brand' in the survey questions directed the respondent to name a trade mark. Mr Traub had argued that the word 'brand' was used to contextualise the question and while he accepts that questions should be 'open' he further argued that it would be difficult to devise a question without including any context. Mr Traub had remarked that you would not simply ask the respondents what they think when they see the colour yellow because the question has to have some context and that is what GfK were attempting to achieve when using the word 'brand'. It is noted that the survey revealed that 56% of the general population surveyed were aware of Bumble as a brand. This increased to 70% of dating App users.

50. The survey forms only a small part of the overall evidence provided to demonstrate acquired distinctiveness through use so even if I am wrong in my assessment of the survey it nonetheless has very little weight in my overall assessment of the evidence and that in and of itself is not enough to support a claim of acquired distinctiveness through use when the remaining evidence fell short. It is my opinion that *'taking the evidence as a totality'* it came nowhere near in demonstrating that the mark had acquired a distinctive character through use. It had not shown that a significant proportion of the relevant public had come to perceive the goods and services as originating from a particular undertaking because of the use of the colour as a trade mark, as opposed to any other mark present. (*Philips*). It cannot be disputed that the applicant has significant presence in the dating App field, but the colour itself is not being used as an indicator of brand origin. Even when the colour appeared in combination with the trade mark BUMBLE or with the figurative honeycomb logo, I do not consider the colour itself served to identify the goods and services as originating from single undertaking.

51. The evidence showed that BUMBLE is extremely well known among dating App users but it has not demonstrated as required by the case law (*Kit Kat*) that the colour yellow in and of itself is used as a trade mark or that the relevant consumer perceive it as such. The evidence did not demonstrate that the mark applied for had acquired a distinctive character as a result of the use made of it.

52. I did not consider it appropriate to invite more evidence as in my view 'more of the same' would not suffice in demonstrating acquired distinctiveness through use. I refer to the comment in *Bach and Bach Flower Remedies Trade Marks* [2000] RPC 513 at paragraph [49] (per Morritt LJ with whom Thorpe and Chadwick L.JJ agreed).

*"... use of a mark does not prove that the mark is distinctive. Increased use does not do so either. The use and increased use must be in a distinctive sense to have any materiality."*

53. In that regard I also considered the appeal in the *Vibe Technologies Limited* decision (O-166/08) and the comments of Richard Arnold KC, acting as the Appointed Person in which he says:

15. *As the Registrar's representative acknowledged at the hearing before me, it is evident that, in deciding to give the applicant a yet further opportunity to file evidence in support of the application, the hearing officer overlooked the comments of Jacob LJ in Bongrain SA's Trade Mark Application [2004] EWCA Civ 1690, [2005] RPC 14 at [31]:*

*The applicants also sought to support the application on the grounds of Art.3.3 – that the shape was distinctive in fact. The Registry gave them an overgenerous series of opportunities to do so. The applicants successively put forward one scrap of evidence after another, submitting each time that it was enough, and, when told it was not, asking for more time to improve matters. The Registry is entitled to be firmer with this sort of thing; it should have regard to the public interest in disposing of applications one way or another. One must never forget that a pending application for an intellectual property right hangs over the public at large. A pending application, even if ultimately refused, may act as a real commercial deterrent while it 'pends'. It is not fair on the public to allow the applicant to string things out.*

16. *It is not obvious why an applicant should have more than one opportunity, or at most two opportunities, to file evidence of acquired distinctiveness in support of an application. By the time of the hearing the present application had been pending for over 18 months since the original application date and the applicant had already filed three rounds of evidence in support of it. In my judgment the course which the hearing officer should have adopted in the light of her conclusion that the evidence filed by the applicant did not demonstrate that the mark had acquired a distinctive character was to refuse the application.*

54. In the present case the applicant had provided three rounds of evidence which in my assessment did not come close to demonstrating that the colour applied for had acquired distinctiveness through use. I therefore did not consider it appropriate to invite more. My main concern was that the evidence did not show the mark being used as a trade mark, that is to say for the purposes of identifying the goods and

services of a single undertaking. The evidence has failed to demonstrate that a significant proportion of the relevant consumer have come to regard the sign as a trade mark guaranteeing the origin of the goods and services.

## **Conclusion**

55. In this decision, I have considered all documents filed by the applicant, and all arguments submitted to me in relation to this application. Having done so, and for the reasons given above, the application is refused because it fails to qualify under section 3(1)(b) of the Act.

**Dated this 11<sup>th</sup> day of May 2023**

**Helen Davies**

**For the Registrar**

**The Comptroller-General**