



Neutral Citation Number: [2026] EWHC 2730 (ChD)

Case No: CH-2025-000115

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY DIVISION
APPEALS LIST

ON APPEAL FROM decision no. O/0257/25 of Allan James, Hearing Officer for the Registrar, dated 20 March 2025, under s76(2) of the Trade Marks Act 1994

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

Date: 23 October 2026

Before:

MR JUSTICE RICHARDS

Between:

FIFTH AVENUE ENTERTAINMENT LLC
Appellant

-and-

COMMODORE ENTERTAINMENT CORPORATION
Respondent

Joseph Chiffers (instructed by **JSC Chambers**) for the **Appellant**
Sam Carter (instructed by **Tomkins & Co**) for the **Respondent**

Hearing date: 07/10/2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 October 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Richards :

1. The appellant company appeals against decision number O/0257/25 (the **Decision**) of Hearing Officer Allan James (the **Hearing Officer**). By the Decision, the Hearing Officer upheld the respondent company's objection to the appellant's UK trade mark application no. 3675709 (the **Application**) for the words "THE COMMODORES".
2. The Decision refers to the appellant company as the "**applicant**" and the respondent company as the "**opponent**". So that this judgment can easily be read together with the Decision, I will use the same designations. References in this judgment to numbers in square brackets are to paragraphs of the Decision unless the context requires otherwise.

THE DECISION AND THE GROUNDS OF APPEAL AGAINST IT

The Application and the grounds of opposition that were before the Hearing Officer

3. The applicant is currently the proprietor of an EU trade mark for the words "THE COMMODORES" (the **EU Mark**) with priority date 17 October 2014. The opponent successfully opposed registration of the EU Mark at Board of Appeal level. However, the General Court remitted the matter to the Board of Appeal for further consideration. Following Brexit, the Board of Appeal declined to reconsider the matter any further on the basis that the opponent's opposition was based on its assertion of goodwill in the EU Mark in the UK alone. Accordingly, the Board of Appeal considered that EU authorities had no right to refuse registration of the EU Mark and the applicant retains ownership of it.
4. The opponent's objection to the Application before the Hearing Officer was advanced on two grounds:
 - i) The opponent had goodwill in the word "COMMODORES" as at the relevant priority date. Section 5(4)(a) of the Trade Marks Act 1994 (the **Act**) applied so as to establish a relative ground for refusal of the Application.
 - ii) Additionally or alternatively, the Application had been made in bad faith and so the absolute ground for refusal of registration set out in s3(6) of the Act was established.
5. Given the presence of the EU Mark, it was common ground that the opposition under s5(4)(a) of the Act fell to be tested on 17 October 2014, which was the date the application for the EU Mark was filed. The parties also agreed that the opposition based on the applicant's asserted bad faith fell to be tested as at 30 July 2021, which was the date of the Application. (In one place, the Decision refers to the application being made on 17 July 2021, but the parties agree that nothing turns on that slip.)

Uncontroversial background

6. The Hearing Officer's findings of fact need to be understood in the context of the background described in this section, which is not controversial.
7. COMMODORES (often referred to as THE COMMODORES) are an established band and musical and performing group (the **Band**). The Band was formed in 1968. By the 1970s, its membership included Lionel Richie, Thomas McClary (who controls the

applicant company), William King, Milan Williams, Ronald LaPread and Walter Orange. The Band had a number of hits in the UK and elsewhere through the 1970s and 1980s including *Easy* (1977), *Three Times a Lady* (1978), *Sail On* (1979) and *Nightshift* (1985) which won a Grammy in 1986.

8. In 1971, the Band obtained a recording contract with Motown Records (the **1971 Recording Agreement**). In 1978, the then members of the Band entered into a general partnership agreement under the laws of Alabama (the **1978 Agreement**). The 1978 Agreement was expressed to be effective from 13 December 1977. The 1978 Agreement contained provisions regarding the members' entitlement to use the group name. It precluded any member from using it on their own account. It provided that if one or more members left the partnership, the partnership would continue and would continue to have the right to use the group name.
9. Lionel Richie left the Band in 1982. By 1984, some other members had joined, some had left and some had died. On 2 March 1984, the remaining members of the Band entered into a new "Amendment in Toto" (the **1984 Agreement**) of the 1978 Agreement. I will refer to the partnership as created by the 1978 Agreement and as amended by the 1984 Agreement as the "**Partnership**", unless it is necessary to distinguish between its terms under the 1978 Agreement and 1984 Agreement respectively.
10. The overall effect of the 1984 Agreement is disputed. Among other provisions, the 1984 Agreement stated that the business of the Partnership had changed: it would no longer engage in the entertainment business as a group of artists, but would instead own, maintain and lease vehicles and equipment to the opponent. The opponent had been incorporated under the laws of the state of New York in 1974 and was reconstituted as a Nevada corporation in 1978.
11. In 1984, Thomas McClary left the Band. The parties are not agreed on whether he was wrongly removed from the Band or not. Nor are they agreed on the effect his departure from the Band had on his status as a partner in the Partnership.
12. The Band continued performing and recording music after the departure of both Lionel Richie and Thomas McClary. William King continues to be a member of the Band to this day.
13. In 2001, the opponent obtained various US trade mark registrations (the **US Trade Marks**) for the words "COMMODORES" or "THE COMMODORES". Those remained in force until around January 2024.
14. THE COMMODORES (in a line-up not featuring Thomas McClary) toured Europe, including the UK, in 1992 and 2005. They also toured the UK in 2009. They played some sort of concert at the O2 arena on 29 June 2012, although the Hearing Officer described the details of this concert as "sketchy" ([57]).
15. The Partnership came to an end by effluxion of time in accordance with its terms on 2 March 2014. From around 2014, the applicant and Thomas McClary conducted a musical business using the name "THE COMMODORES featuring Thomas McClary" or similar formulations including on a tour of Europe (that included the UK) in 2014. The opponent objected to this usage of what it saw as its goodwill. It obtained an interim injunction in the US on 9 October 2014 that restrained the applicant from using the name "THE

COMMODORES”. By order of 30 December 2014, it was clarified that this injunction restrained both Thomas McClary and the applicant from infringing the US Trade Marks both within and outside the US ([71(8)], [71(9)] and [72]).

16. On 17 October 2014, the applicant applied for the EU Mark.
17. The interim injunction in the US was made permanent by order of 24 August 2016 ([71(10)] and [72]) (the **US Injunction**). Litigation in the US continued concerning the question whether the US Injunction could have extra-territorial effect by restraining acts that occurred wholly outside the US. While this litigation was proceeding, the US Supreme Court gave judgment in the separate case of *Abitron v Hetronic* holding that US federal trade mark statutes did not cover acts that occurred wholly outside the US. In May 2024, the US Injunction was modified accordingly. However, it continued to restrain acts performed in the US that related to performances abroad such as organising, promoting or negotiating terms for such performances ([72]).

The Hearing Officer’s factual and evaluative findings

18. In this section, I outline the central factual and evaluative findings that the Hearing Officer made insofar as relevant to the present appeal. Some of these findings are challenged and I will consider the detail of those challenges later.
19. Although the 1978 Agreement and the 1984 Agreement were governed by Alabama law, no party sought to rely on evidence as to the effect of Alabama law before the Hearing Officer.
20. At [26], the Hearing Officer concluded that the 1978 Agreement did not give Thomas McClary (or indeed any other member of the Band) the right to use the name “COMMODORES” on his own account during the term of the Partnership. Moreover, if any partner left the Partnership, the goodwill, including that in the name “COMMODORES”, remained with the Partnership. A departing partner had no right to use that name pursuant to the terms of the 1978 Agreement.
21. The Hearing Officer resolved what he considered to be difficulties with the interpretation of the 1984 Agreement. As noted, in paragraph 9, it was clear that it effected a change in the business of the Partnership which would no longer engage in the entertainment business itself, but rather would provide some services to the opponent. However, less clear was what, if anything, happened to the goodwill of the Partnership and in particular ownership of goodwill in the name “COMMODORES”.
22. Recital C to the 1984 Agreement read, so far as material, as follows:

The principal business activity of the Partnership no longer is to engage in the entertainment business as the Group but is to own, maintain and lease certain motor vehicles and musical and studio equipment to Commodores Entertainment Corporation [i.e. the opponent], a Nevada corporation, (the “Corporation”), which now conducts the business of the Group, and to hold all rights in and to the Group name “THE COMMODORES,” and all goodwill inherent therein (collectively referred to as the “Group Name”).

Approved Judgment

23. However, in the operative part of the Agreement, Clause 2 made no mention of the Partnership continuing to own rights in the Group Name.
24. The Hearing Officer considered this to be an inconsistency between the recital and the operative part of the 1984 Agreement. He concluded as follows:
 - i) At some point prior to the date of the 1984 Agreement, the operation of the group's musical business was transferred to the opponent ([50]).
 - ii) However, the Hearing Officer was not prepared to conclude that "pre-existing goodwill" (by which he meant goodwill created before March 1984) was assigned to the opponent ([50]).
 - iii) The operative part of the 1984 Agreement should be given precedence to a recital ([29]).
 - iv) Recital C and the 1984 Agreement as a whole might have provided for the Partnership to continue to own "goodwill generated under the name Commodores prior to 1984". However, the Hearing Officer rejected the applicant's argument that the Partnership continued to hold goodwill associated with the Band's activities that arose after 1984. The 1984 Agreement made no provision for the ownership of such goodwill because it did not need to: the opponent would be carrying on the entertainment business after 1984. Later, the Hearing Officer found that goodwill associated with that business after 1984 accrued to the opponent being the person responsible for the quality of the goods and services that it was marketing in that business. ([29], [33] and [54] to [58]).
25. At [30] and [31], the Hearing Officer considered provisions of the 1984 Agreement dealing with, among other matters, partners leaving the Partnership. His overall conclusion having considered those provisions was that a partner leaving the Partnership would obtain no ownership interest in the Partnership's goodwill. That goodwill would continue to be owned by the Partnership which would continue as a Partnership between the continuing members. That conclusion is not challenged. However, in oral submissions in this appeal, Mr Chiffers on behalf of the applicant suggested that Alabama law might provide, on dissolution of the Partnership (as distinct from a partner's departure prior to dissolution), for the partners at the time of dissolution to take a transfer of all assets of the Partnership including any goodwill that it owned
26. The Hearing Officer found that that Thomas McClary sent a letter dated 6 August 1984 confirming his withdrawal from the Band with effect from 31 May 1984 (the **1984 Letter**). Thomas McClary had argued that the letter was a forgery. He annexed to his witness statement that was before the Hearing Officer a report from a Mr Richard Orsini who expressed the opinion that the signature on the 1984 Letter varied significantly from other examples of Thomas McClary's signature. Mr Orsini did not give evidence. There was no cross examination of the opponent's witnesses to put the case that the 1984 Letter was forged. Having considered other evidence, the Hearing Officer concluded at [40] that the 1984 Letter was genuine.
27. The Hearing Officer also found that, whether or not the 1984 Letter was genuine, Thomas McClary ceased to be a member of the Band and the Partnership after 1984 because he was pursuing a solo career. The Hearing Officer noted that he appeared with the Band on

a few occasions after 1983 or 1984. However, when he did so, he was not a full member of the Band but rather received payment for his ad hoc services.

28. Putting all of those findings together, the Hearing Officer concluded at [43]:

- i) It was not possible for someone to leave the Band but remain a member of the Partnership. Accordingly, when Thomas McClary left the Band in 1984 he necessarily left the Partnership. On leaving the Partnership, he had no ownership interest in goodwill in, under, or by use of the name “COMMODORES”.
- ii) Even if it was possible for Thomas McClary to leave the Band but remain a member of the Partnership, at most the Partnership retained an interest in goodwill in, under or by use of the name “COMMODORES” prior to 1984. The Partnership was dissolved on 2 March 2014 (although the Hearing Officer said 6 March), before the relevant date at which the challenge under s5(4)(a) of the Act fell to be tested. Clause 10.5 of the 1984 Agreement provided expressly that no partner could use the name “COMMODORES” after dissolution without the written consent of all other partners.

29. From these findings, the Hearing Officer concluded at Thomas McClary had no entitlement to any such goodwill in the name “COMMODORES” as at 17 October 2014 (the relevant date for the challenge under s5(4)(a)) and nor did he have any such entitlement in 2021, the relevant date for the s3(6) challenge. It followed that there was no interest in that goodwill that Thomas McClary could transmit to the applicant with the result that the applicant had no such interest at the relevant dates in 2014 or 2021 either.

30. Having concluded that the applicant had no interest in goodwill associated with the name “COMMODORES”, the Hearing Officer considered at [47] to [58] who did own that goodwill. He concluded as follows:

- i) Goodwill generated by the Partnership prior to its change in purpose in March 1984 continued to be owned by the Partnership ([50] to [53]) although the Hearing Officer recognised the possibility that it may have been assigned to the opponent ([58]). However, following dissolution of the Partnership on 2 March 2014, that goodwill did not pass to the partners as noted in paragraph 28.ii).
- ii) After March 1984, it was the opponent who conducted the musical business of the Band. Between 1984 and 2014, the opponent was responsible for the quality of the relevant goods and services. It owned more than trivial goodwill in the name “COMMODORES” as at 17 October 2014.
- iii) The Hearing Officer acknowledged that the situation was complicated after 2014. The Hearing Officer found that the applicant took steps a few months prior to 17 October 2014 to arrange performances in the UK under the name “THE COMMODORES featuring Thomas McClary” but saw no evidence that such performances had actually taken place before 17 October 2014. After 17 October 2014, the Hearing Officer noted that both the applicant and the opponent were conducting a musical business involving the use of the name “THE COMMODORES”. He acknowledged that multiple parties could own protectable interests in the same business name. However, the Hearing Officer found that the applicant’s use of the name did not operate to deprive the opponent of goodwill

([58]). Accordingly, the opponent continued to hold goodwill associated with the name “COMMODORES” in 2021 as well.

31. At [59], the Hearing Officer provided a summary of the essential ingredients of the tort of passing off. He concluded that all of these ingredients were present:
- i) The opponent owned a more than trivial goodwill in the use of COMMODORES name in the UK for reasons already summarised ([61] to [63]).
 - ii) The name “COMMODORES” was distinctive of the opponent in the UK on 17 October 2014. Use of the marks applied for would have amounted to a misrepresentation to the effect that the user of those marks was the opponent or economically connected to the opponent ([64] to [65]).
 - iii) Use of the marks applied for in the UK by the applicant would damage the opponent’s goodwill. Accordingly, such use would amount to passing off and the objection brought under s5(4)(a) of the Act succeeded.
32. The Hearing Officer directed himself on the applicable test for “bad faith” at [70]. At [73], the Hearing Officer noted that, to succeed with its s3(6) objection, the opponent did not need to establish that it owned any rights in the name “COMMODORES”. The s3(6) objection could be established if the Application was made to undermine the interests of any third party (whether that be the opponent or anyone else such as the Partnership). There is no challenge to those self-directions.
33. At [74], the Hearing Officer pointed to three matters that established a rebuttable presumption that the applicant made the Application with the subjective intention of undermining the interests of the opponent/Partnership in a manner inconsistent with honest practices namely:
- (1) Mr McClary left the Commodores in 1984 and had not traded under that name (anywhere) between 1984 and 2014;
 - (2) He knew the group had continued to perform under that name;
 - (3) The applicant and Mr McClary were the subject of an injunction from the US courts preventing them from infringing the US Trade Marks anywhere in the world.
34. At [75] to [86], the Hearing Officer considered Thomas McClary’s evidence, concluding that it did not rebut the presumption and so the opponent’s objection under s3(6) of the Act succeeded.

The grounds of appeal

35. The applicant does not require permission to appeal against the Decision. It advances the following grounds of appeal:
- Ground 1:** The Hearing Officer erred in law by assuming, without evidence, that Alabama law governing the 1978 Agreement and the 1984 Agreement mirrored English

partnership-at-will principles, wrongly concluding that Thomas McClary, lost all goodwill rights upon departure in 1984.

Ground 2: The Hearing Officer erred in law and procedure and/or made a decision that was factually perverse and/or outside the range of reasonable decisions that could have been made, by giving insufficient weight to forensic evidence suggesting the 1984 Letter was fraudulent and by overlooking its defective execution.

Ground 3: The Hearing Officer erred in law by misapplying the test for bad faith under section 3(6), wrongly finding the Appellant's application was made with dishonest intent.

Ground 4: The Hearing Officer made a finding of fact on bad faith that cannot reasonably be explained.

Ground 5: The Hearing Officer made a finding of fact on passing off that cannot reasonably be explained and/or made an error of law, as he conflated the Respondent acting as if they had acquired the goodwill with lawful ownership and/or failed to ask whether the goodwill could have been acquired without unlawful trading by the Respondent.

36. Pervading those grounds of appeal are three separate, but related issues:

- i) Whether Thomas McClary did (in his personal capacity) own any goodwill associated with the name "COMMODORES" at any point after he left the Band in 1984 and particularly as at 17 October 2014 and 30 July 2021.
- ii) Whether the opponent owned any goodwill associated with the name "COMMODORES" at any point after 1984, and particularly as at 17 October 2014.
- iii) Whether "bad faith" was present looking at matters on 30 July 2021.

37. In his skeleton argument and in answer to questions from me during the hearing, Mr Chiffers confirmed the following aspects of the applicant's case:

- i) The applicant does not argue for the purposes of this appeal that, at any point between 1984 and 2 March 2014 when the Partnership was dissolved, Thomas McClary had any personal right to use the name "COMMODORES".
- ii) His case on the objection under s5(4)(a) of the Act is not that he (or the applicant) did own goodwill associated with the name "COMMODORES", but rather that the opponent did not at the crucial date of 17 October 2014.
- iii) The applicant accepts that Thomas McClary left the Band in 1984. It is not accepted that that departure was regular: it is likely that he was wrongfully removed.
- iv) The applicant does not accept that Thomas McClary's departure from the Band in 1984 meant that he ceased to be a partner in the Partnership. He could, therefore, have remained a partner in the Partnership until its dissolution on 2 March 2014.

Approved Judgment

- v) Even though the opponent had, in 1984, started to carry on the musical business formerly carried on by the Partnership, the opponent did not own any goodwill in the name “COMMODORES”. That was because the 1984 Agreement, including Recital C, meant that goodwill in that name continued to be owned by the Partnership.
- vi) The Hearing Officer wrongly assumed that, by analogy with English law, Recital C had no operative effect. In fact, Alabama law may have accorded the Recital operative effect.
- vii) The Hearing Officer overlooked, or failed properly to address, other provisions of the 1984 Agreement that proceed on the basis that the Partnership continued to hold, and could regulate dealings in, the “Group Name” as defined.
- viii) The Hearing Officer failed properly to consider the relationship between the Partnership and the opponent in 1984 and onwards. If he had considered that relationship properly, he would have concluded that the opponent never acquired any goodwill in the name “COMMODORES”.
- ix) The applicant does not positively assert that, in 1984, the Partnership licensed the name “COMMODORES” to the opponent as there is no document that establishes the existence of such a licence.
- x) When the Partnership was dissolved, Alabama law could have provided that Thomas McClary (together with all other partners) became entitled to all assets of the Partnership. One asset that the Partnership held when it dissolved was goodwill in the name “COMMODORES” because of the analysis in paragraph v) above. On 2 March 2014, Thomas McClary may have acquired a pro rata share of that goodwill. That possibility was relevant to the question of the applicant’s good faith and the Hearing Officer should not have overlooked it.
- xi) The applicant does not seek permission to rely on any new evidence, including evidence as to Alabama law.

The arguments that are properly before this court

- 38. The opponent complains that the applicant’s case has shifted since the hearing before the Hearing Officer. I agree. Central to the applicant’s case before the Hearing Officer was the proposition that Thomas McClary did, both under the 1978 Agreement and the 1984 Agreement, own goodwill in the name “COMMODORES” because, he was a partner in the Partnership and the Partnership had no separate legal personality. That can be seen in paragraphs 10(4), 10(7), 10(12) and page 14 of the applicant’s Response before the Hearing Officer. The acceptance in paragraphs 37.i) and the focus summarised in paragraph 37.ii) are significant changes in the applicant’s position on the issue under s5(4)(a) of the Act as compared with the case before the Hearing Officer.
- 39. As cases pass through the appellate system it is not unusual for a case to be refined and focused. It would, however, be objectionable for the opponent to run a case on appeal that either (i) falls outside the Grounds of Appeal or (ii) was not raised before the Hearing Officer. The need to confine a case to pleaded Grounds of Appeal is obvious: the opponent is entitled to know what case it has to meet at the hearing of this appeal. The

proscription on running new points for the first time on appeal has its roots in the proposition that a first instance tribunal should, generally, be the final arbiter of factual matters. That is why more leniency is shown if pure points of law are raised for the first time on appeal as the following extract from the judgment of Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 demonstrates:

15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.

16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).

18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24 at [29]).

Factual points that were not before the Hearing Officer

40. I can only discern the applicant's case before the Hearing Officer from the written Response that it submitted in the UKIPO proceedings. It is fair to say that that document is unclear. Paragraph 10(10) of that document asserts that:

The Opponent has not proved or provided any evidence to show how it obtained rights to the Group Name from the Partnership that enable it to accrue any or further goodwill. Any goodwill the Opponent has is as a result of William King and the Applicant's Mr McClary's joint work.

41. That raises an argument that the opponent never acquired any goodwill in the name "COMMODORES", although it is couched in terms that the opponent has not proved its case. However, it does not explain that the asserted reason why the opponent obtained no goodwill is that a proper construction of the 1984 Agreement, including Recital C, showed that goodwill that the opponent would otherwise have accrued while operating a musical business under the name "COMMODORES" should belong to the Partnership.
42. Paragraph 12 of the Response then goes on to assert that the problem for the opponent is that even if it can establish that it did acquire goodwill in the name "COMMODORES" from 1984 onwards, Thomas McClary was joint owner of that goodwill.

Approved Judgment

43. By page 14 of the Response, the position has moved on and become an assertion that Thomas McClary had “concurrent ownership” of the unregistered goodwill and associated trademark.
44. The Response could certainly have been clearer. However, on balance I conclude that it did put before the Hearing Officer a case to the effect that a proper construction of the 1984 Agreement caused goodwill in the name “COMMODORES” to remain with the Partnership. After all, the Hearing Officer considered that issue at [27] to [32]. The applicant explicitly argued before the Hearing Officer that Thomas McClary remained a partner in the Partnership until its dissolution on 2 March 2014.
45. However, the applicant did not put before the Hearing Officer any factual proposition that considerations of the relationship between the Partnership and the opponent meant that the Partnership continued to own goodwill in the name “COMMODORES” that was generated after 1984. If such a case had been put, the hearing would have been conducted differently as regards the evidence as the Hearing Officer would have had to make findings as to what that “relationship” was. In his oral submissions, Mr Chiffers was coy about salient features of the relationship saying it was for the opponent to address that issue as it bore the burden on the s5(4)(a) issue. I do not accept that. The applicant did not make any assertions about salient features of the relationship before the Hearing Officer. It should not now, on appeal, be entitled to hint that there are unspecified features of that relationship that somehow meant that the opponent’s case on s5(4)(a) should fail.
46. Nor did the applicant put before the Hearing Officer a case to the effect that Alabama law meant that Recital C had operative effect, or that assets of the Partnership passed to partners on dissolution. It could scarcely have done so because it produced no evidence on the effect of Alabama law. The applicant showed me a number of authorities concerning the circumstances in which an English court or tribunal is entitled to assume that foreign law is the same as English law. In my judgment, that citation of authority misses the point. The applicant evidently now wishes to assert, on appeal, that Alabama law does or may have a particular effect (see paragraphs 37.vi) and 37.x) above). It wishes to assert that the Hearing Officer erred in overlooking that effect. However, it had not given the Hearing Officer expert evidence on what the asserted effect was and is not even seeking permission to adduce that evidence now. It is difficult to understand what the Hearing Officer (or this court) are supposed to do in the absence of such evidence.
47. It is, of course, true that the opponent bore the burden on both the s5(4)(a) issue and the s3(6) issue. However, I do not accept that this meant that the opponent should somehow have worked out, without being told, that the applicant considered Recital C might have operative effect or that Alabama law gave Thomas McClary a share in the Partnership’s goodwill after dissolution. Nor do I accept that, even if it had divined these points, the opponent was required to produce expert evidence on Alabama law to meet them. If the applicant wished to make assertions about the effect of Alabama law, it should have made those assertions before the Hearing Officer and backed them up with evidence. It is too late to do so now for the first time on appeal applying the principle in *Singh v Dass*.

Aspects of the argument that fall outside the Grounds of Appeal

48. Ground 1, as set out in paragraph 35 above, is an assertion that the Hearing Officer wrongly applied English law partnership-at-will principles when construing the 1978 Agreement and 1984 Agreement.

49. Yet in his skeleton argument and oral submissions on behalf of the applicant, Mr Chiffers sought to position Ground 1 as a challenge to the Hearing Officer's construction of those agreements. Revealingly, those arguments on the proper construction of the two agreements included no assertion that the Hearing Officer's construction was infected by a wrongful application of principles applicable to English partnerships at will. The arguments on Ground 1 as advanced orally and in writing are almost all outside the scope of Ground 1. No application to amend the grounds of appeal was made and these arguments cannot therefore proceed under Ground 1.
50. The applicant seeks to run arguments on construction of the 1984 Agreement under Ground 5 as well. In essence, it seeks to argue that because the Hearing Officer misconstrued the 1984 Agreement, he failed to conclude that all goodwill in the name "COMMODORES", whether created before 1984 or afterwards, belonged to the Partnership until 2014 with the result that the opponent never acquired any goodwill. The applicant asserts that this was an error of law of the kind specified in Ground 5.
51. Any fair reading of Ground 5 suggests that it is a complaint about (i) clarity of reasoning, (ii) an undue focus on the opponent's actions and not the question of whether they were lawful owners of goodwill in the name "COMMODORES" and (iii) a failure to consider that the opponent might be trading unlawfully (it being unclear what this means). It is fair to say that this formulation necessarily involves an assertion that the opponent did not acquire any goodwill in the name "COMMODORES". However, it certainly does not say that the proper construction of the 1984 Agreement caused the Partnership to retain all goodwill, and still less does it specify what clauses of the 1984 Agreement were ignored or misconstrued.
52. Matters are not helped by the fact that the applicant submitted a 4-page skeleton argument in support of the appeal in April 2025 (the **Original Skeleton**), substituting that with a 22-page skeleton argument just a few days before the hearing (the **Replacement Skeleton**). When it submitted its own skeleton argument, the opponent would only have seen the applicant's Original Skeleton. The applicant's submissions on Ground 5 in the Original Skeleton did not mention construction of the 1984 Agreement at all and instead argued:

The hearing officer presumed that because the Respondent represented itself as owning the brand name Commodores, that it was the owner (see paragraphs 54-58); he failed to ask whether such representations were in breach of any co-ownership agreement.

53. As explained in this way, the focus of Ground 5 is on an assertion that both the opponent and someone else (perhaps the Partnership, perhaps Thomas McClary or the applicant) owned "the brand name Commodores" under a form of co-ownership agreement. There is no hint of an argument that only the Partnership owned that goodwill because of construction of the 1984 Agreement. In my judgment it would be procedurally unfair to require the opponent to meet arguments on construction of the 1984 Agreement under Ground 5 in circumstances where (i) they are not explained in any fair reading of Ground 5, (ii) were not explained in the Original Skeleton and (iii) were only fully developed in the Replacement Skeleton served a few days before the appeal. I will formally not permit those arguments to be advanced. However, since Mr Carter did make some response to

Approved Judgment

arguments on construction in his oral submissions, I will deal with the arguments in the light of those submissions.

Conclusion on the scope of the applicant's permissible case

54. Ground 1 can only proceed as a challenge to the assertion that the Hearing Officer wrongly applied English law partnership-at-will principles when construing the 1978 Agreement and 1984 Agreement.
55. Grounds 2 to 4 can proceed fully on the basis of the submissions in the Replacement Skeleton. The opponent takes no issue with any of the arguments made in support of these grounds.
56. The scope of the permissible appeal on Ground 5 is limited as follows:
 - i) The arguments on construction of the 1984 Agreement set out in paragraphs 37.v) and 37.vii) do not form part of the Grounds of Appeal and formally cannot be advanced on appeal, although I will express some conclusions on them in the light of Mr Carter's oral submissions.
 - ii) The argument set out in paragraphs 37.vi) and 37.viii) and 37.x) cannot proceed on appeal. These matters were not before the Hearing Officer and, if they had been, the hearing would have been conducted differently as regards the factual evidence.

THE GROUNDS CONSIDERED

57. I will address the applicant's arguments only insofar as they are properly before the court.

The approach I should take to this appeal

58. It is common ground that this is an appeal against the Hearing Officer's findings of fact, including findings as to the effect of agreements entered into under Alabama law. It is also common ground that the appeal is by way of review rather than re-hearing.
59. The opponent submits that I should follow the approach to appeals against findings of specialist tribunals set out at [24] of *Axogen v AVIV Scientific* [2022] EWHC 95 (Ch). The applicant does not disagree that this is the correct overall approach, but emphasised a few points with which the opponent does not dissent.
60. As *Axogen* makes clear, this court should give a good degree of respect to the Hearing Officer's findings of fact. I took it to be common ground, as the opponent emphasises, that there is a spectrum of "respect" with primary findings of fact (such as, for example, a finding as to whether a document is a forgery or not) being accorded more respect than, for example, an evaluative finding which depends on an assessment of numerous factors (such as whether the Application was tainted by bad faith).
61. Applying that distinction, I took the parties to agree that the central issue with Ground 2 is whether the Hearing Officer's conclusion, that the letter in question was not a forgery, was perverse, outside the range of reasonable conclusions, or reached having taken irrelevant considerations into account or ignoring relevant considerations. The appeal on Grounds 3 and 4 against the Hearing Officer's conclusion on bad faith would also succeed on that basis. However, the court would also be entitled to interfere with the

Approved Judgment

Hearing Officer's conclusion on bad faith if there was a failure in the reasoning process, such as a gap or a failure of logic.

62. I also note the clear possibility that all relevant evidence was not put before the Hearing Officer. I was shown the Judgment of the General Court of 6 December 2018 concerning litigation on the EU Mark. That judgment refers to a 1981 amendment to the 1978 Agreement. It suggests that this contained a clear agreement that the founding members of the Band assigned their rights in goodwill to the opponent. If that were the case, it is difficult to see how this appeal could succeed: the applicant's key argument that the opponent owned no goodwill in the name "COMMODORES" would fail and so would the challenge to the Hearing Officer's decision on s5(4)(a) of the Act. The appeal on s3(6) of the Act would then become academic as it could not alter the outcome.
63. Yet neither party put any 1981 amendment agreement in evidence before the Hearing Officer. Neither side seeks to adduce that evidence on appeal. It follows that there is the very real possibility that the Hearing Officer's factual conclusions are, through no fault of his, wrong in the light of an agreement signed in 1981. That only serves to emphasise that the Hearing Officer was asked to do the best he could with a possibly incomplete set of evidence. That makes it all the more difficult for this court to depart from his conclusions on appeal.

Ground 1

64. The short answer to Ground 1 is that the Hearing Officer did not apply English partnership-at-will principles when construing the 1978 Agreement or the 1984 Agreement. The Hearing Officer refers to the concept of an English partnership-at-will at [20]. In that paragraph he is considering the position before the 1978 Agreement. Ground 1 fails because it misunderstands the Decision.

Ground 2

65. In both his Replacement Skeleton and in his oral submissions, Mr Chiffers acknowledged that Ground 2 on its own does not take the applicant very far. Given the aspects of the applicant's case that I have summarised in paragraphs 37.i) and 37.ii), the applicant accepts that whether Thomas McClary remained a member of the Partnership until its dissolution on 2 March 2014 has nothing to say about the opponent's objection under s5(4)(a) of the Act.
66. In his oral submissions, Mr Chiffers confirmed that Ground 2 is concerned with the Hearing Officer's conclusions on bad faith. The applicant is seeking to argue in this appeal that, (i) if Thomas McClary never validly left the Partnership, even if he did leave the Band then (ii) he was still a member of the Partnership at the time of its dissolution so that (iii) Alabama law might have given him some proprietary interest in the goodwill in the name "COMMODORES" on dissolution which (iv) might be relevant to whether the applicant was acting in bad faith in seeking to register that as a trade mark. However, that analysis breaks down at point (iii) of the above analysis as the applicant is not entitled to raise points of Alabama law in this appeal (see paragraphs 46 and 47 above).
67. Indeed, there is a strong indication in Clause 10.5 of the 1984 Agreement that even if both (i) the Partnership continued to hold all goodwill in the name "COMMODORES" (whether that accrued before or after 1984 when the opponent started carrying on the

musical business) and (ii) Thomas McClary remained a member of the Partnership until its dissolution, Thomas McClary still obtained no personal rights in the name “COMMODORES” on dissolution. Clause 10.5 of the 1984 Agreement provides that:

Unless otherwise provided herein, upon dissolution and/or termination, The Partnership’s asset shall be divided in accordance with the Uniform Partnership Act of the State of Alabama, in force at the date as of which this Amendment is executed, provided, however, that no value shall be assigned to the Group Name and no partner shall use the Group Name after dissolution without the written consent of all the other Partners.

68. It is, therefore, very difficult to see any continued role for Ground 2 in this appeal since it can say nothing about either the opponent’s objection under s3(6) of the Act or its objection under 5(4)(a). I will, however, address it since I have heard argument on it.

69. Clause 14 of the 1984 Agreement provides, so far as material:

14. Withdrawal of Partner. Any partner who at any time desires to withdraw from the Partnership shall notify each of the remaining partners in writing of such desire not less than six (6) months prior to the date upon which he desires to withdraw. The Partnership shall not terminate upon the withdrawal of any one (1) or more of the partners...

70. The applicant’s first argument under Ground 2 is that the 1984 Letter was legally ineffective to constitute Thomas McClary’s resignation from the Partnership because (i) it was on the headed paper of a company called Thomas McClary Productions, Inc, (ii) it was dated 6 August 1984 and purported to give backdated notice of withdrawal rather than 6 months’ prospective notice and (iii) it was addressed to a Mr Lawrence J Blake at (perhaps) a firm of attorneys rather than to all members of the Partnership.

71. However, the Hearing Officer was quite entitled to conclude that a valid notice under Clause 14 was not the only way in which Thomas McClary could leave the Partnership. Clause 13 of the 1984 Agreement envisaged that a partner would leave the Partnership if his employment under a “Service Agreement” with the opponent was terminated. As I have noted, the Hearing Officer was provided with only a partial picture of the evidence. However, on the picture he was given, the Hearing Officer concluded that Thomas McClary started a solo career in 1984 and performed with the Band only on two occasions after 1984 under ad hoc arrangements entered into as a favour because the Band’s road manager perceived that Thomas McClary needed the money. There is nothing wrong with the Hearing Officer’s evaluative conclusion that Thomas McClary left the Partnership in 1984. It may be that Thomas McClary did not receive the full compensation to which he was entitled under the 1984 Agreement when he left, but the Hearing Officer was quite entitled to conclude that defects in the 1984 Letter did not prevent him leaving the Partnership in 1984.

72. There is no force in the applicant’s challenge to the Hearing Officer’s conclusion that the 1984 Letter was not a forgery. The Hearing Officer considered the asserted oddities in the 1984 Letter but concluded at [40] that the 1984 Letter was consistent with other

Approved Judgment

factors such as Thomas McClary's wish to pursue a solo career. That was an evaluative conclusion with which this court should not interfere.

73. When reaching that evaluative conclusion, it was for the Hearing Officer to decide what weight to give to Mr Orsini's expressed opinion on Thomas McClary's signature. Mr Orsini had not given an expert report and indeed neither side had permission to adduce opinion evidence before the Hearing Officer. While he had expressed an opinion, his expertise to express that opinion was not clear (as his CV, while expressed to be attached to his letter did not appear in the bundle). It was not clear whether he had the requisite independence. The Hearing Officer was entitled to give Mr Orsini's opinion little or no weight in those circumstances.
74. The applicant suggests that the Hearing Officer gave too much weight to the fact that Mr King, who had exhibited the 1984 Letter to his witness statement on behalf of the opponent was not cross-examined. It suggests that this point cuts both ways since while the assertion that the document was a forgery was not put to Mr King, it was not put to Thomas McClary either. I do not accept that. The Hearing Officer did not say, at [40], that a failure to cross-examine Mr King meant that the allegation of forgery was bound to fail. He was simply noting that the absence of cross-examination made his task difficult. Indeed it was a difficult task, and there is no basis for this court to interfere with the Hearing Officer's conclusion.
75. In any event, as noted, Ground 2 cannot alter the result since the Hearing Officer was entitled to conclude that Thomas McClary's departure to pursue a solo career meant that he left the Partnership one way or another.
76. The appeal on Ground 2 is dismissed.

Ground 5

77. I take this Ground out of order so that I can deal with Grounds 3 and 4 (which purely challenge the finding of bad faith) last of all and together.
78. In his written skeleton argument, Mr Chiffers on behalf of the applicant engaged in a detailed critique of the Decision. However, given my conclusion on the scope of the permissible appeal I will not, without meaning any disrespect to Mr Chiffers or his closely reasoned analysis, work through all the arguments that are advanced. Rather, I will seek to explain why the Hearing Officer was entitled to conclude that as at 17 October 2014, the opponent owned sufficient goodwill in the name "COMMODORES" to mount a successful objection under s5(4)(a) of the Act.
79. The applicant does not challenge the Hearing Officer's conclusion at [43(2)] and [50] that, at some point prior to March 1984, (i) the opponent started to carry on the musical business of the Band and (ii) the Partnership ceased to carry on that business and instead carried on a business that involved leasing equipment and providing studio space.
80. Nor does the applicant challenge the Hearing Officer's conclusion at [56] to [59] that the opponent continued to carry on a musical business involving use of the name "COMMODORES" from March 1984 until 30 July 2021.

Approved Judgment

81. If the matter ended there, then the opponent would clearly have sufficient goodwill in the name “COMMODORES” to mount a successful objection to the Application. To succeed on Ground 5, therefore, the applicant needs to establish some reason why the opponent nevertheless had no goodwill in the name. Relevant reasons that have been advanced are as follows:
- i) The opponent had no goodwill in the name “COMMODORES” because the Partnership owned it instead either because of:
 - a) construction of the 1984 Agreement;
 - b) Recital C of the 1984 Agreement having operative effect under Alabama law; or
 - c) The “relationship” between the Partnership and the opponent.
 - ii) The opponent had no goodwill in the name “COMMODORES” because Thomas McClary or the applicant owned it instead.
82. None of the points made in paragraph 81.i) are properly before this court on appeal. However, since Mr Carter made some submissions on these points orally, I will say something about them.
83. It is simply not possible for me to say anything about whether Alabama law gave Recital C operative effect. However, there is something in the applicant’s points on construction of the 1984 Agreement. That agreement does appear to proceed on the assumption that the Partnership has some rights over the Group Name because, for example, Clauses 9 and 10.5 of that agreement purport to regulate use of that Group Name (i) by the Partnership if a partner leaves and (ii) by the partners after the Partnership is dissolved. The applicant is also correct to say that the definition of “Group Name” is wide and includes all goodwill in the name “COMMODORES”.
84. I can, therefore accept, that even putting Recital C to one side, there is something in the argument that in 1984 and subsequently, the Partnership owned some goodwill in the name “COMMODORES”. The Hearing Officer agreed. He declined the opponent’s invitation to infer that all goodwill was assigned to it in or around 1984 (see [50]). He concluded that the Partnership owned goodwill generated between 1977 and 1984, but that the opponent owned goodwill generated thereafter.
85. The applicant’s arguments proceed on the basis that it is axiomatic that if the Partnership owned some goodwill in the name “COMMODORES” that had accrued prior to 1984, it must necessarily own goodwill in the name that was generated by the efforts of the opponent in conducting the musical business after 1984. However, no basis for that assertion has been satisfactorily spelled out. Certainly no contract or other relationship was produced either to the Hearing Officer or this court to explain why that was the result.
86. Therefore, the applicant is left relying on assertions of what it asserts to be general principles. However, those general principles point against the applicant’s conclusion rather than in favour of it. Under English law, the name “COMMODORES” and goodwill inherent in it is different in character from, for example, a registered trade mark. Even if the Partnership did own some goodwill in the name “COMMODORES” in 1984, it does

not follow that it would be entitled as of right to restrain any use of that name by others. Rather, its protectable interest would, under English law, come under the tort of passing off. If someone else traded under the name “COMMODORES”, the tort of passing off could be established if that trading would involve a misrepresentation leading to damage to the Partnership’s goodwill.

87. It is difficult indeed to see how the Partnership could, following 1984, have succeeded in any action in the tort of passing off involving use of the name “COMMODORES” in connection with a musical business. The Partnership was not, after all, conducting any musical business under that name after 1984. I am reassured to note that Laddie J evidently had a similar analysis in mind at [25] of his judgment in *Saxon Trade Mark* [2003] EWHC 295 (Ch), [2003] FSR 39 where he said (with citations of authority omitted):

Absent special facts ... the rights and obligations which arise when a group of musicians, performing in a band as a partnership, split up can be explained as follows. It is convenient to start by considering the position when two, entirely unrelated bands perform under the same name. The first performs from, say, 1990 to 1995 and the second performs from 2000 onwards. Each will generate its own goodwill in the name under which it performs. If, at the time that the second band starts to perform, the reputation and goodwill of the first band still exists and has not evaporated with the passage of time... or been abandoned... it is likely to be able to sue in passing off to prevent the second group from performing under the same name ... On the other hand, if the goodwill has disappeared or been abandoned or if the first band acquiesces in the second band’s activities, the latter band will be able to continue to perform without interference. Furthermore, whatever the relationship between the first and second bands, the latter will acquire separate rights in the goodwill it generates which can be used against third parties ...

88. On the Hearing Officer’s findings, the Partnership had, at the very least, acquiesced in the opponent carrying on a musical business under the name “COMMODORES” from 1984 onwards. Applying English law principles, the opponent acquired separate rights in the goodwill it generated that it could assert against third parties. Perhaps the opponent would have faced some difficulties in asserting such rights against the Partnership. However, general principles provide scant support for the proposition that the opponent lacked standing to assert its rights against Thomas McClary or the applicant. The applicant seems to assume that, because Thomas McClary was a founder member of COMMODORES, the opponent is somehow incapable of asserting its rights against it. However, it has not explained why that is the case.
89. The applicant no longer appears to rely on the argument set out in paragraph 81.ii) (see paragraph 37.i) above). In any event, it is difficult to discern a basis on which Thomas McClary could have owned goodwill himself to the exclusion of the opponent. No evidence of Alabama law has been advanced to substantiate that outcome. At [22] to [31], the Hearing Officer expressly considered relevant provisions of the 1978 Agreement and the 1984 Agreement dealing with the entitlement of partners to goodwill. The Hearing Officer was quite entitled to conclude on the evidence before him that Thomas McClary

had not shown he was the owner of goodwill in the name “COMMODORES” to the exclusion of the opponent. Just as fundamentally, it has not been explained how such rights Thomas McClary says he had were ever transmitted to the applicant.

90. The appeal on Ground 5 is dismissed.

The applicant’s “alternative case”

91. In the Replacement Skeleton, Mr Chiffers advanced what he described as the applicant’s “alternative case”. That case proceeded on the basis that (i) the Partnership held the goodwill in the name “COMMODORES” whether that accrued before or after 1984 and (ii) when the Partnership expired by effluxion of time in 2014, that goodwill enured to the benefit of its partners. I do not need to address that case. Since Ground 5 has failed, the premise behind the alternative case is not made out as the Hearing Officer’s conclusion, that after 1984, goodwill in the name “COMMODORES” accrued to the opponent is not being disturbed. Moreover, as I have explained, if the applicant wished to assert that termination of the Partnership had any particular result, that result could only be produced by operation of Alabama law. However, the applicant has adduced no evidence on the effect of Alabama law.

Grounds 3 and 4

92. I will take these grounds together as Mr Chiffers did in his written and oral submissions. The applicant accepts that the Hearing Officer directed himself correctly on the law. Therefore, these grounds are a straightforward challenge to the Hearing Officer’s evaluative conclusions.
93. The applicant’s first argument is that the prima facie case of bad faith that the Hearing Officer found, which I have summarised in paragraph 33 was “built on a proposition that the Hearing Officer ... rejected”. It argues that, at [74], the Hearing Officer said that the applicant and Thomas McClary must have realised that the opponent and/or ex-partners in the Partnership “had at least as much right ... to use the mark in the UK”. Yet the applicant argues that this reasoning is contradictory since, at [82], the Hearing Officer observed that, if just one person of several with rights in a mark apply to register it, the application would not necessarily be in bad faith.
94. This represents a mis-reading of the Decision and a failure to read [82] as a whole. The Hearing Officer had not accepted that Thomas McClary (or the applicant for that matter) had any rights over the name “COMMODORES”. The Hearing Officer’s point at [74] was that, even taking the applicant’s case at its absolute highest, Thomas McClary must have realised that the Application sought to exclude the opponent (and his ex-partners) from using the name “COMMODORES” in the UK in circumstances where (i) they had at least as much rights as him in the name, (ii) the opponent had been trading under that name from 1984 to 2014 and Thomas McClary had not.
95. The Hearing Officer’s point at [82] was that sometimes there will be no bad faith if one of many persons with rights in a mark applies to register it. As the Hearing Officer said “it all depends on the applicant’s intentions”. An intention to prevent third parties from using the mark, for example, might involve no bad faith at all. The presence of a more benign intention, of the kind set out at [82], could certainly rebut a presumption of bad faith of the kind set out at [74]. However, there was no inconsistency between [74] and

[82]. The Hearing Officer was quite entitled to conclude at [74] that a prima facie case of bad faith was established.

96. The applicant argues next that the Hearing Officer “reversed the burden of proof”. That argument is based on [82] in which the Hearing Officer commented that, if Thomas McClary had a more benign intention of the kind summarised in that paragraph, he would have expected the applicant to “give clear evidence on that point”. Contrary to the applicant’s submissions, that involved no reversal of the burden of proof. Having permissibly concluded that a rebuttable presumption of bad faith had been established, the Hearing Officer considered whether the evidence that Thomas McClary had given was sufficient to rebut the presumption and concluded that it was not. That approach was consistent with the Hearing Officer’s unchallenged self-direction on the law which he derived from *SkyKick UK Limited and another v Sky Ltd and others* [2024] UKSC 36.
97. Relatedly, the applicant argues that the Hearing Officer should have accepted Thomas McClary’s explanation of his more benign intention. However, that is a straightforward challenge to an evaluative conclusion. The asserted benign intention was based on a combination of arguments such as Thomas McClary’s asserted ownership of rights in the name “COMMODORES”, his wish to be able to embark on a UK tour in 2014, his realisation that the trade mark “COMMODORES” was not registered in the UK and the EU and his reasonable belief that the US courts had exceeded their jurisdiction in making the US Injunction. The applicant also emphasised Thomas McClary’s asserted belief that he had genuine rights in the words “COMMODORES” and, having been unfairly treated on his departure from the Band genuinely thought that he was exercising his rights in good faith.
98. The Hearing Officer engaged with those arguments in detail but concluded that there was nevertheless bad faith because Thomas McClary and the applicant were seeking to shut out the opponent, who had used the name “COMMODORES” for over 30 years in the UK, from continuing to do so. The applicant’s arguments on appeal simply invite me to come to a different evaluative conclusion from that of the Hearing Officer. I will not do so. I consider the Hearing Officer’s conclusion on these issues was available to him. It was reached following a detailed consideration of the applicant’s contrary arguments. It is not vitiated by any gap of reasoning or logic. Applying the correct approach to an appeal of this kind, I see no basis to substitute a different conclusion from that of the Hearing Officer.
99. At [78], the Hearing Officer referred to the fact that the EU tour that Thomas McClary was contemplating in 2014 would have involved him being promoted as “THE COMMODORES featuring Thomas McClary” whereas he was seeking to register “COMMODORES” as a UK trade mark. The applicant argues that this was of no significance and demonstrates only that it was seeking to register the “distinctive and dominant” element of its goodwill as a trade mark. The significance or otherwise of this factor was, however, for the Hearing Officer to evaluate. He was quite entitled to conclude that the application to register “COMMODORES” was consistent with an intention to shut the opponent out from using that mark. The applicant was arguing for a more benign inference, but the Hearing Officer was entitled to take a different view.
100. Finally, the applicant argues that the Hearing Officer applied the “bad faith” test at the wrong date (in 2014) when he should have applied it at the date of the Application (on 30 July 2021). I do not accept that. The Hearing Officer directed himself correctly, at

Approved Judgment

[70], by reference to *SkyKick* that the relevant date is the date on which the application for registration is made. At [72], the Hearing Officer referred to the date of the Application as being 17 July 2021. That was a typographical error since the Application was made on 30 July 2021. However, the Hearing Officer was not directing himself that the determination had to be made as of a date in 2014.

101. The Hearing Officer certainly referred in his analysis to events that took place in 2014. However, he was entitled to conclude that these shed a light on the subjective intentions of Thomas McClary, and so of the applicant as of 30 July 2021.
102. For all of the above reasons, the appeal fails on Grounds 3 and 4.

DISPOSITION

103. The appeal is dismissed. I will invite the parties to agree the terms of an order giving effect to this judgment and dealing with consequential matters such as costs. If they cannot do so, then there will need to be a further consequential hearing that should, unless the court orders otherwise, take place within 28 days of hand-down of this judgment. Any such hearing can proportionately be heard over Microsoft Teams.