



Neutral Citation Number: [2025] EWHC 1629 (Ch)

Case No: CH-2024-000288

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)
ON APPEAL FROM THE UKIPO, TRADE MARKS REGISTRY

Rolls Building
Fetter Lane
London, EC4A 1NL

1 July 2025

Before :

MICHAEL TAPPIN KC
(sitting as a Deputy Judge of the High Court)

Between :

SHENZHEN SKE TECHNOLOGY CO LTD

Appellant

- and -

BARGAIN BUSTING LIMITED

Respondent

Benet Brandreth KC and Laura Adde (instructed by Stobbs (IP) Ltd) for the Appellant
Michael Edenborough KC and Sam Carter (instructed by Brandsmiths) for the Respondent

Hearing date: 24 June 2025

Approved Judgment

I direct that no official shorthand note shall be taken of this judgment and that copies of the version as handed down may be treated as authentic.

This judgment was handed down at 10.30 am on 1 July 2025 by circulation to the parties' representatives by email and release to The National Archives

The Deputy Judge:

1. This is an appeal by the Appellant (“SKE”) against decision O/1063/24 dated 8 November 2024 (the “Decision”) of Ms Judi Pike, a hearing officer acting on behalf of the Registrar of Trade Marks (the “Hearing Officer”).
2. In her Decision, the Hearing Officer rejected SKE’s opposition to trade mark application no. 3786148 (the “Application”) which had been filed on 10 May 2022 by Tashmeen Kaur and was assigned to the Respondent (“BB”) after the hearing before the Hearing Officer on 13 March 2024 but before her Decision. The agreed consequence of the rejection of SKE’s opposition to the Application was that oppositions based on the Application to seven trade mark applications by SKE succeeded.
3. The Application was for the mark CRYSTAL BAR for goods in class 34 including electronic cigarettes and vape bars. The ground of opposition pursued before the Hearing Officer was under s.5(4)(a) Trade Marks Act 1994 (the “Act”). SKE contended that, prior to 10 May 2022, it had acquired goodwill associated with the mark CRYSTAL BAR in relation to electronic cigarettes and vaping products, such that the use of CRYSTAL BAR by the applicant for the mark would amount to a misrepresentation causing damage to that goodwill.

The evidence

4. The evidence in support of SKE’s opposition was a witness statement of Jinghan Zhang dated 29 June 2023. After introducing herself as having been the sales director of SKE since 2021, in paragraph 2 she explains that SKE has been established since 2013 and then proceeds to provide some information about SKE’s current business and operations. Paragraph 3 of Ms Zhang’s statement is as follows:

“In 2021 my Company began to develop a new range of products to be sold under the trade mark CRYSTAL BAR. The CRYSTAL BAR products are a range of disposable vaping products, designed and manufactured by my Company in our factory in Shenzhen. As part of the development process my Company began a “soft launch” of the CRYSTAL BAR products in the United Kingdom in December 2021. This “soft launch” involved the initial marketing of the product to selected retailers and reviewers to gauge the acceptability of the product to the UK market and was the first use of the trade mark in the United Kingdom as it was the start of trying to develop the market for the products sold under the CRYSTAL BAR brand. Now shown to me marked Exhibit 1 is a selection of material relating to the World Vape Show held in London on 10th – 11th December 2021. In addition, my Company attended the Vaper Expo UK Exhibition held at the NEC in Birmingham between the 7 – 9th October 2022. Now shown to me marked Exhibit 2 is material relating to that event which shows extensive use of CRYSTAL BAR by my Company. My Company was awarded “Best Disposable of the show” at the Vaper Expo UK in both October 2022 and May 2023.”

5. Exhibit 1 consists of a single page, which is an invitation from SKE to visit its booth at the December 2021 World Vape Show. That invitation does not include the words CRYSTAL BAR (or either of them).
6. Paragraph 4 of Ms Zhang's statement recounts that SKE applied for approval for its CRYSTAL BAR products from the Medicines and Healthcare Products Regulatory Agency ("MHRA") and that they were approved for sale in the UK in May 2022. Exhibit 3 is an extract from the MHRA website which shows that the approval was published on 9 May 2022 and records the names of the products as being variants on the word CRYSTAL (but not including CRYSTAL BAR).
7. In paragraph 5 Ms Zhang refers to Exhibit 4 as being (i) a non-exclusive distribution agreement dated 14 February 2022 with Shemax Ltd ("Shemax") relating to the supply of CRYSTAL BAR products, and (ii) sales documents dated 28 March 2022 giving details of the supply of CRYSTAL BAR products to Shemax in the UK. Ms Zhang says that this material "clearly shows that my Company had been marketing its products under CRYSTAL BAR prior to 14 February 2022 as it had been seeking out and engaging with UK distributors".
8. The distribution agreement shows that it was agreed that Shemax's average order of CRYSTAL BAR products was to be 100,000 units per month. The sales document dated 28 March 2022 relates to an order for 30,000 units, and Mr Brandreth KC for SKE did not suggest that the sales documents showed further orders on other dates. Mr Edenborough KC for BB drew attention to what he said were inconsistencies between, and unexplained aspects of, the documents exhibited and suggested that it was not clear that the 28 March 2022 document related to CRYSTAL BAR products. If anything was to be made of that point, Ms Zhang's evidence would have had to be challenged, which it was not.
9. In paragraph 6 Ms Zhang refers to two exhibits which she says show promotional and advertising activities by SKE using the mark CRYSTAL BAR. She says that in 2022 SKE's marketing spend in the UK was £299,000. As the Hearing Officer observed, the exhibits relate to activities after 10 May 2022 and Ms Zhang does not explain what the marketing spend was before that date.
10. Paragraph 7 of Ms Zhang's statement concerns the appearance of the CRYSTAL BAR products. In paragraph 8, Ms Zhang says:

"As a direct result of my Company's marketing efforts the sales of our CRYSTAL BAR product have grown substantially. In the period 22 February 2022 to 22 November 2022 40,333,400 units of my Company's CRYSTAL BAR products were sold in the UK and between January 2023 and May 2023 a further 52,264,415 units of CRYSTAL BAR products were sold in the United Kingdom."
11. As the Hearing Officer noted, Ms Zhang does not break down the sales in 2022 into ones before and after 10 May 2022. Finally, Ms Zhang reiterates that SKE actively promotes its products relying heavily on the use of the mark CRYSTAL BAR, and again refers to the appearance of the products.

12. I should add that, in its skeleton argument on this appeal, SKE said that it also relied on a witness statement by Wancheng He which had been served in other proceedings between the parties in the High Court. In response, in its skeleton argument BB sought to rely on aspects of Mr He's statement which it suggested were inconsistent with Ms Zhang's statement. Mr He's statement was dated 21 January 2025 and therefore had not been before the Hearing Officer. There was no application by either party for leave to adduce it as evidence on this appeal. When I questioned the role it played on this appeal, both Mr Brandreth and Mr Edenborough said that they were not seeking to rely on Mr He's statement. I therefore need say no more about it, and I have not taken it into account.

The Decision

13. In her Decision, after introducing the issues and dealing with certain procedural matters, the Hearing Officer addressed the relevant law in uncontroversial terms. She then considered the evidence of Ms Zhang, making certain observations on it which I have recorded above, and dealing with certain procedural issues arising from the state of the exhibits. She then turned to consider the evidence which had been filed by the applicant which, for reasons which she explained, played no part in her assessment. She stated that she would treat SKE's evidence as unchallenged while assessing whether it was sufficient to establish goodwill at the relevant date, and recorded that the question for her was whether SKE had protectable goodwill at the relevant date (i.e. 10 May 2022).
14. The Hearing Officer then referred to three cases providing guidance as to the assessment of evidence in oppositions based on s.5(4)(a) of the Act. First, in *REEF TM* [2002] RPC 19, Pumfrey J said:

“27. There is one major problem in assessing a passing of claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a *prima facie* case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 RPC 97 as qualified by *BALI Trade Mark* [1969] RPC 472). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the *prima facie* case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

15. Secondly, in *Minimax v Chubb* [2008] EWHC 1960 (Pat) at [8] Floyd J commented on those observations, saying:

“Those observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least *prima facie*, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

16. Thirdly, in *Advanced Perimeter Systems v Multisys Computers* [2012] RPC 14, Daniel Alexander QC (sitting as the Appointed Person) referred to a decision of Richard Arnold QC (sitting as the Appointed Person) in *Pan World Brands v Tripp* [2008] RPC 2:

“18. In *Pan World*, the Appointed Person said that, although documentary records of use were not required, mere assertion of use of a mark by a witness did not constitute evidence sufficient to defeat an application for revocation for non-use (see [31]). He did not regard a tribunal evaluating the evidence as bound to accept everything said by a witness without analysing what it amounts to. He pointed out at [37] that Hearing Officers were entitled to assess evidence critically and referred to the observations of Wilberforce J in *NODOZ Trade Mark* [1962] RPC 1 at 7:

“...in a case where one single act is relied on it does seem to me that that single act ought to be established by, if not conclusive proof, at any rate overwhelmingly convincing proof. It seems to me that the fewer the acts relied on the more solidly ought they to be established.”

19. *Pan World* and *NODOZ* were applications for revocation for non-use. The approach to use is not the same as in a s.5(4)(a) case. As Floyd J said in *Minimax*, it is possible for a party to have made no real use of a mark for a period of five years but to retain goodwill sufficient to support a passing off action. Conversely, use sufficient to prevent revocation for non-use may be insufficient to found a case of passing off.

20. However, the approach to evaluation of evidence of use is similar: the less extensive the evidence of use relied on, the more solid it must be. The Registrar is not obliged to accept - and in some circumstances may be obliged to reject - a conclusory assertion by a witness that it has a given goodwill at the relevant date or that the use by a third party of a similar mark would amount to misrepresentation, when the material relied upon in support does not bear that out.”

17. The Hearing Officer then turned to assess the evidence. She noted that much of SKE's evidence related to events after the relevant date, and that SKE had accepted that no sales to end users had been made by that date and that the sale of 30,000 units was to a single distributor.
18. She recorded the emphasis placed by Mr Brandreth on the “soft launch” of CRYSTAL BAR products at the World Vape Show in December 2021. She said

that the evidence relating to that event was extremely thin. She set out paragraph 3 of Ms Zhang's statement in full and then said:

"There are no details about how many people attended the expo, how many people visited the booth, or how the products were advertised. The document at Exhibit 1 does not show the sign relied upon: it is to publicise [SKE]'s presence at the expo."

19. The Hearing Officer then recorded a submission by Mr Brandreth (which was not maintained on this appeal) that in December 2021 SKE "already had an established business and an established goodwill so that its CRYSTAL BAR sign was not starting from a position of zero goodwill". She noted that the December 2021 expo was a "soft launch": a publicity event. She said that it was not clear whether an advertising campaign featuring a mark could create a protectable goodwill without any actual sales to UK customers, citing Lord Neuberger in *Starbucks v BSKyB* [2015] UKSC 31 at [66]. She then cited *Bernadin v Pavilion Properties* [1967] RPC 581 for the proposition that advertising under a mark was not sufficient to create an actionable goodwill when there was no imminent prospect of trade commencing – a point which she said was in SKE's favour as it was preparing to trade in the very near future. She said that pre-launch publicity appeared to have been accepted to create an actionable goodwill in *Allen v Brown Watson* [1965] RPC 191 and *BBC v Talbot* [1981] FSR 228 but in those cases the claimants had long established businesses and goodwill in the UK and the real issue was whether their new marks had become distinctive of those businesses to their UK customers through advertising alone. She said that until the law is clarified it is doubtful whether a business with no sales to UK customers can establish a passing off right based solely on advertising. The Hearing Officer then recorded asking Mr Brandreth to point her to evidence showing that SKE had an established business in the UK before December 2021, and being referred to paragraphs 2 and 3 of Ms Zhang's statement. After referring back to paragraph 3 and setting out paragraph 2 in full she said:

"None of this comes close to showing me that Party A had an established trade with customers and goodwill in the UK in December 2021. Much more solid evidence is required. There is nothing elsewhere in Party A's evidence to shed light upon UK trade prior to December 2021."

20. The Hearing Officer then addressed the purchase order from Shemax dated 28 March 2022, saying that "for goods which cost so little and are disposable, 30,000 is not a large amount". She said that she also bore in mind that the evidence showed that the goods took the form of a crystalline bar, meaning that CRYSTAL BAR was not a very distinctive sign. She then referred to *Smart Planet v Sharma* (O/304/20) in which Tom Mitcheson QC (sitting as the Appointed Person) said, after a review of the judgments of the Supreme Court in *Starbucks* and of the House of Lords in the *Jif Lemon* and *Advocaat* cases:

"... a successful claimant in a passing off claim needs to demonstrate more than nominal goodwill. It needs to demonstrate significant or substantial goodwill and at the very least sufficient goodwill to be able to conclude that there would be substantial damage on the basis of the misrepresentation relied upon."

21. The Hearing Officer recorded that, in *Smart Planet*, Mr Mitcheson drew attention to the tiny proportion of the market represented by the sales invoices produced and the absence of any evidence from the applicant's customers or any other company as to goodwill associated with the mark in concluding that the evidence fell well short of what would have been necessary to establish sufficient goodwill to maintain a claim of passing off, a conclusion which he said was fortified by the descriptiveness of the mark in issue which meant that it would take longer to establish sufficient goodwill to make it distinctive of the applicant's goods.
22. The Hearing Officer concluded her judgment as follows:

"51. The sale of 30,000 units at \$2 each to Shemax Limited is the high point of [SKE]'s evidence. There is very little in the evidence which takes place prior to 10 May 2022. As already mentioned, there is next to no evidence regarding the December 2021 expo and nothing about [SKE] trading in the UK prior to that date. The MHRA approval did not happen until the day prior to the relevant date. Mr Brandreth submitted that I should infer that there were sales to consumers immediately that they were permitted, given the pre-sale promotion of the brand (at the December 2021 expo) and the established nature of [SKE]'s goodwill. He submitted that the rapid sales achieved after the relevant date were the result of [SKE]'s substantial goodwill pre-relevant date. In Mr Brandreth's submission, the substantial size of [SKE]'s business enabled it to make the non-exclusive agreement with Shemax Limited for a pricing system that anticipated sales of several millions of items.

52. This comes back to the lack of evidence pertaining to [SKE]'s trade in the UK prior to at least the December 2021 expo, just 5 months prior to the relevant date. The evidence about that event is very thin. There would need to be far more solid and supportive evidence to bolster the relatively small number of sales, the low distinctiveness of the sign, the paucity of evidence about use of the sign prior to the relevant date, and the very short period of time involved between the 'soft launch' and the relevant date. It was submitted on behalf of [SKE] that it is its distributors that are responsible for marketing, not [SKE], and it is they that are likely to hold more evidential material. The bottom line is that the burden is on [SKE] to prove its case and it is [SKE]'s responsibility to determine how best to obtain and file what is needed to prove its case.

53. The UK trade mark system is based on first to file. If a party wishes to show that it has antecedent rights, it must prove that it had goodwill in the UK in relation to the sign at the filing date of the applied for mark. It is not enough for a party to show that its trade in the UK took off soon after that date, however rapidly. [SKE] has not shown that it had a protectable goodwill in the UK at the relevant date. Without that, its opposition fails."

This appeal

23. SKE appeals under s.76(1) of the Act, and advances three grounds of appeal. The first is that the Hearing Officer erred in law in failing to consider goodwill among trade customers of SKE. The second is that the Hearing Officer's assessment of

goodwill was rationally unsupportable. The third is that the Hearing Officer erred in law in failing to consider goodwill generated by pre-launch advertising.

24. There was no dispute between the parties as to the principles to be applied on an appeal under s.76(1) of the Act. They were set out by Joanna Smith J in *Axogen v Aviv Scientific* [2022] EWHC 95 (Ch) at [24] (case citations omitted):

- (i) The appeal is by way of a review, not a rehearing.
- (ii) The appeal court will allow an appeal where the decision of the lower court was “wrong” (see CPR 52.11). Neither surprise at a Hearing Officer’s conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference.
- (iii) The decision of the lower court will be “wrong” if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge’s conclusion was “outside the bounds within which reasonable disagreement is possible”.
- (iv) The approach required by the appeal court depends on a number of variable including the nature of the evaluation in question. There is a “spectrum of appropriate respect for the Registrar’s determination depending on the nature of the decision”, with decisions of primary fact at one end of the spectrum and multi-factorial decisions...being further along the spectrum.
- (v) In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions.
- (vi) An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. The evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge’s conclusion is outside the bounds within which reasonable disagreement is possible.
- (vii) Another variable to be taken into account will be “the standing and experience of the fact-finding judge or tribunal”. Expert tribunals are charged with applying the law in the specialised fields and their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts.

- (viii) The appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed; “the duty to give reasons must not be turned into an intolerable burden”. The reasons need not be elaborate. There is no duty on a judge, in giving her reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what she says shows the basis on which she has acted. The issues the resolution of which were vital to the judge’s conclusions should be identified and the manner in which she resolved them explained.
 - (ix) In evaluating the evidence, the appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account.
25. In its judgment in *Iconix v Dream Pairs* [2025] UKSC 25 (handed down on the morning of the hearing before me) the Supreme Court (at [95]) reiterated what it had said in *Lifestyle Equities v Amazon* [2024] UKSC 8 at [49]-[50], namely that on a challenge to an evaluative decision of a first instance judge an appeal court should “not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge’s treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion”; it emphasised that it is not enough to show that the appellate court might have arrived at a different conclusion.

Ground 1

26. As I have said, ground 1 is that the Hearing Officer erred in law by failing to consider SKE’s goodwill amongst trade customers. BB accepted that as a matter of law goodwill could subsist amongst trade customers as well as amongst ultimate consumers of a product. SKE submitted that while the Hearing Officer referred to the evidence about its dealings with trade customers, and in particular with Shemax, she only did so to consider whether it supported the existence of goodwill amongst ultimate consumers.
27. I disagree. The Hearing Officer was fully aware of the emphasis placed by SKE on the “soft launch” at the World Vape Show in December 2021, which was a trade fair rather than an event aimed at ultimate consumers. She noted that there was no evidence about the number of people who attended that trade fair, the number of people who visited SKE’s booth, or how the products were advertised. There is nothing to suggest that she did not have in mind that SKE could have goodwill amongst trade customers, if the evidence supported that. Having noted that sales had been made to only one distributor, and not to ultimate consumers, she then went on to consider the order from Shemax for 30,000 units. I see nothing to suggest that she had in mind that its only relevance was to support the allegation of goodwill amongst ultimate consumers.
28. In paragraphs 51-53 of her Decision (quoted above) she is assessing matters in the round. While, if it had been impressed on her by SKE that it contended she should consider separately whether there was goodwill amongst trade customers and amongst ultimate consumers, it is possible that she would have expressed

herself differently, I can see nothing to suggest that she thought that the only relevance of the evidence as to dealings with trade customers was its support (if any) for a claim to goodwill amongst ultimate consumers. On the contrary, she is considering whether SKE had a protectable goodwill, taking into account all the evidence, including that relating to dealings with trade customers. Mr Brandreth submitted that because the Hearing Officer said, in paragraph 53, that it was “not enough for a party to show that its trade in the UK took off soon after [the relevant] date, however rapidly” she must have been leaving out of account SKE’s dealings with Shemax. In my judgment that sentence, if read fairly in the context of the Decision as a whole, is not to be understood as saying that SKE’s relevant trade in the UK took off from a baseline of zero rather than a low baseline.

29. In his oral submissions, Mr Brandreth addressed grounds 1 and 2 together (and so did Mr Edenborough in response). However, in my judgment it is necessary to keep the two grounds separate. In my judgment submissions about whether the evidence about SKE’s dealings with trade customers, and in particular Shemax, should have led the Hearing Officer to conclude that SKE had a protectable goodwill belong under ground 2. It is sufficient to dispose of ground 1 to say, as I have, that the Hearing Officer did not make the error of law which she is alleged to have made.

Ground 2

30. Ground 2 is that the Hearing Officer’s conclusion that SKE had not demonstrated that it had goodwill protectable by the law of passing off was rationally unsupportable.
31. While a number of points were made in support of this submission in SKE’s skeleton argument, in his oral submissions Mr Brandreth emphasised two points.
32. First, he said that Ms Zhang’s evidence relating to SKE’s dealings with trade customers, including Shemax, should have led to the conclusion that SKE had a protectable goodwill amongst such customers by 10 May 2022. He referred to her evidence about the “soft launch” in paragraph 3 of her statement and to her evidence about the dealings with Shemax in paragraph 5 of her statement and Exhibit 4. He drew particular attention to the fact that Shemax had not only ordered 30,000 units, but agreed to order an average of 100,000 units a month.
33. Secondly, he submitted that it was possible to infer that there had been sales to ultimate consumers starting on 9 May 2022 (when the products were approved by the MHRA) and hence that there had been sales before the date of application (10 May 2022) and/or to infer from the fact that sales to ultimate consumers increased rapidly after MHRA approval that there must have been goodwill at the relevant date.
34. Overall, Mr Brandreth’s submission was, in effect, that the only rational conclusion from the evidence was that SKE had a protectable goodwill by 10 May 2022 and that the Hearing Officer’s decision was outside the bounds within which reasonable disagreement was possible.

35. I do not agree. First, Mr Brandreth did not suggest that the Hearing Officer had misdirected herself as to the approach to the evaluation of evidence when she referred to the extracts from the authorities set out in paragraphs 14-16 above. Further, he accepted that, to be protectable, goodwill has to be more than nominal or trivial, but instead be such that a misrepresentation would cause damage that was, as he put it, “real and substantial”; he did not suggest that the Hearing Officer had misdirected herself by referring to Mr Mitcheson’s summary in *Smart Planet* (see paragraph 20 above). Further, he referred me to *Sutherland v V2 Music* [2002] EWHC 14 at [22] for the proposition that the question of whether a goodwill is too small to merit protection is a matter of fact and degree. When the allegation is that a Hearing Officer has not misdirected herself in law but has made an error in her assessment of a matter of fact and degree, the warnings against interference by an appeal court which I have cited above must be borne firmly in mind.
36. In my judgment, the decision of the Hearing Officer was not rationally insupportable – far from it. She was fully entitled to regard Ms Zhang’s evidence of SKE’s contacts with trade customers during the “soft launch” as extremely thin. There was, as she said, nothing to indicate how many people had been exposed to the mark CRYSTAL BAR as a result of the “soft launch” or how that mark had been presented to them. Only Shemax was identified as having been exposed to the mark CRYSTAL BAR but, as the Hearing Officer observed, Shemax was a single distributor in the early stages of its dealings with SKE and the mark had low distinctiveness (a conclusion not challenged on appeal). It does not follow from the facts in evidence that Shemax (let alone any other trade customer) regarded CRYSTAL BAR as being distinctive of SKE’s products. There was no evidence from Shemax (or any other trade customer) to support such a contention, and no explanation for the absence of such evidence.
37. The Hearing Officer was also fully entitled to reject the inference that sales to ultimate consumers had been made on 9 May 2022. There was no material to support such an inference. Nor is there any basis for an inference of goodwill as at 10 May 2022 based on a rapid increase in sales to ultimate consumers after that date, not least because Ms Zhang’s evidence does not actually provide any breakdown of sales in the period between then and 22 November 2022.
38. Overall, the Hearing Officer was fully entitled to regard the evidence presented on behalf of SKE as being inadequate to show that it had protectable goodwill in the UK at 10 May 2022.

Ground 3

39. Ground 3 is that the Hearing Officer erred in law in failing to consider goodwill generated by pre-launch advertising. SKE’s submission was that pre-launch advertising alone, without actual customers in the UK, can give rise to protectable goodwill. That is an interesting question of law which will, at some point, need to be resolved by a higher court – see Lord Neuberger in *Starbucks* at [66]. However, the point does not arise in this case. That is for two reasons. First, there was no evidence of pre-launch advertising to ultimate consumers, so the question of whether pre-launch advertising could create goodwill amongst ultimate consumers is moot. Secondly, this is not a case where SKE had no trade customers

in the UK – it had a distribution agreement with Shemax, which had placed an order for 30,000 units. The Hearing Officer took into account the evidence about the pre-launch promotional activities at the World Vape Show (such as it was) as well as the evidence about the dealings with Shemax in rejecting SKE's claim to protectable goodwill.

40. For these reasons, each of SKE's grounds of appeal fails and its appeal must be dismissed.