

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

ON APPEAL FROM THE TRADE MARKS REGISTRY (Mr Allan James) O/589/19

IN THE MATTER OF THE TRADE MARKS ACT 1994
IN THE MATTER OF Trade Mark Applications Nos. 3158947, 3158948, 3164282 and
3164283 by Jaguar Land Rover Limited
AND IN THE MATTER OF Opposition Nos. 409983, 409984, 409980 and 409981 thereto
by Ineos Industries Holdings Limited

Rolls Building
New Fetter Lane
London

Neutral Citation Number: [2020] EWHC 2130 (Ch)
Date: 03 August 2020

Before:

HER HONOUR JUDGE MELISSA CLARKE

B E T W E E N :

Claim No: CH-2019-000300

JAGUAR LAND ROVER LIMITED

Appellant

- and -

INEOS INDUSTRIES HOLDINGS LIMITED

Respondent

Miss Lindsay Lane QC (instructed by Mills & Reeve LLP) for the Appellant
Mr Michael Bloch QC (instructed by Potter Clarkson LLP) for the Respondent

Hearing date: 4 March 2020

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Her Honour Judge Melissa Clarke:

Introduction

1. This is an appeal from the decision of the UK Intellectual Property Office dated 3 October 2019 (Ref: O/589/19) (“**the Decision**”) to refuse UK trade mark applications 3164282, 3164283, 3158947 and 3158948 (“**the Applications**”) in the name of the Appellant (“**JLR**”) and allow oppositions by the Respondent (“**Ineos**”).
2. The Applications were to register as trade marks the shapes of the Land Rover Defender 90 and Land Rover Defender 110 motor vehicles, in each case with and without rear-mounted spare wheels (“**the Marks**”), in Classes 9, 12, 14, 28 and 37. JLR filed Applications 3158947/8 for the shapes of the Defender 90 and 110 with spare wheels on 11 April 2016 and Applications 3164282/3 for the shapes of Defender 90 and 110 without spare wheels on 12 May 2016. Ineos opposed the Applications under sections 1(1), 3(1)(a) – (d), 3(2)(a) – (c), 3(3)(a) and 3(6) of the Trade Marks Act 1994 (“**the Act**”) (“**the Oppositions**”).
3. I have heard from Ms Lindsay Lane QC for JLR and Mr Michael Bloch QC for Ineos. I thank them for their assistance.

The Decision

4. The Decision was that of Mr Allan James (“**the Hearing Officer**”). He found:
 - i) At paragraph 62 of the Decision, that, for the purposes of section 3(1)(b) of the Act, the Marks lacked inherent distinctiveness in relation to any goods and services apart from those goods unrelated to motor vehicles that he identifies at paragraph 172 of the Decision;
 - ii) At paragraph 125 of the Decision, that, for the purposes of the proviso to section 3(1) of the Act, the Marks had not been shown to possess acquired distinctiveness in relation to motor vehicles or any other goods or services;

- iii) At paragraph 169 of the Decision, that, for the purposes of section 3(6) of the Act, the Applications were made in bad faith in relation to vehicles other than “*4 x 4 land vehicles*”.
- 5. At paragraph 153 of the Decision, the Hearing Officer declined to determine whether or not the shape of the Marks added substantial value to the goods for the purposes of section 3(2)(c) of the Act as, given his finding that the Marks did not have inherent or acquired distinctiveness, it was not necessary for him to do so.
- 6. Accordingly, he refused the Applications in respect of all goods and services, save for some goods in Classes 9, 14, and 28. By the Decision he also refused the applications for marks comprising the shapes of the Series 1 and Series 2 Defender motor vehicles, but JLR does not appeal that part of the Decision.

Grounds of Appeal

- 7. JLR filed an Appellant’s Notice on 31 October 2019. The grounds of appeal are that:
 - i) the Hearing Officer did not apply the test of whether the Marks “*depart significantly from the norms and customs of the sector*” correctly. Had he done so, he would have found that the Marks were inherently distinctive; and
 - ii) the Hearing Officer correctly cited the test for acquired distinctiveness from *Windsurfing Chiemsee C-108 & C-109/97* but did not apply it properly or completely. Had he done so, he would have concluded that the Marks had acquired distinctiveness.
- 8. Ineos filed a Respondent’s Notice opposing the appeal, and requesting that the Decision be upheld on the following additional ground (“**Additional Ground**”): Although the Hearing Officer made no decision as to whether the Applications should be refused on the basis of section 3(2)(c) of the Act,

Ineos contends that the shape of the Applications gives substantial value to the goods and so registration should also be refused on that ground.

9. In addition Ineos sought to appeal the Decision to allow registration of the remaining goods in classes 9, 14 and 28 designated at paragraph 172 of the Decision, on the grounds that the Hearing Officer's findings of bad faith in respect of the Applications for '*vehicles which travelled by air and/or water*' should have caused him to refuse the Applications in their entirety. Ineos has withdrawn this cross-appeal in light of the CJEU's recent decision in *Sky v Skykick* (C-371/18).

Standard of Review

10. It is common ground that this appeal is conducted as a review of the Decision at first instance, see *REEF* [\[2003\] RPC 5](#).
11. Mr Justice Newey at [18] of *The Royal Mint Ltd v The Commonwealth Mint and Philatelic Bureau Ltd* [2017] EWHC 417 adopted the principles for such appeals as set out by Mr Daniel Alexander QC sitting as an Appointed Person in *Talk for Writing Trade Mark* (O/017/17, 19 January 2017), and confirmed that the same principles apply for appeals to the High Court as to an Appointed Person. I will not repeat them here, but I bear those principles closely in mind.

Ground 1 - Inherent Distinctiveness

12. This is addressed at paragraphs 22 to 74 of the Decision. Both parties relied on expert evidence in connection with this issue, and the permission granted was that such evidence was to address features of shapes, their technical functions and details of how such shapes differ from the norm. JLR relied on expert evidence of Mr J Mays, and Ineos relied on expert evidence of Mr Stephen Harper.
13. In his report, Mr Mays identified, *inter alia*, features which in his opinion are usual in the SUV/4x4 sector but which the Defender lacks, and a number of

additional features of the Defender which in his opinion are not usual in the SUV/4x4 sector.

14. The former includes stamped body panels, contoured glazing, contoured, aerodynamic and integrated lighting, and an integrated bonnet (the Defender having a clamshell bonnet). The unusual additional features of the Defender he identified are alpine windows in the roof panels and an offset spare wheel. Mr Mays concluded that:

“Although not every difference taken in isolation may be significant, it is my view that, taken as a cumulative whole, the resulting difference in the overall shape of the vehicle from the norms and customs of the SUV sector is clear and significant. It is that shape which makes the Land Rover Defender so distinctive and acts as a visual receipt to the customer that it is a Land Rover Defender. It is unique”.

15. Mr Harper analysed the similarities and differences between the Defender and other vehicles in the sector and opined, with examples, that there are few unique features in the relevant sector, and there are many vehicles on the road today which bear significant visual similarity to the Defender in all its variants.
16. The Hearing Officer based his approach to the assessment of the inherent distinctiveness of the Marks in respect of goods and services for use on, or with, passenger cars, following the approach adopted by Floyd LJ in *London Taxi Corporation Limited v Frazer-Nash Research Limited and Anor* [2017] EWCA 1729 (Civ).
17. The Hearing Officer set out key passages from *London Taxi* in his decision. He correctly noted at paragraph 35 of the Decision that it was common ground between the parties that the relevant sector so far as vehicles is concerned is passenger vehicles (not the 4x4/SUV sector referred to by Mr Mays). The Hearing Officer summarised the report of Mr Mays at paragraphs 38 and 39 of the Decision and the report of Mr Harper at paragraphs 41 to 45 of the Decision. In paragraph 47 of the Decision he noted a disagreement between the parties about the appropriate level of generality at which to assess the norms and customs of the sector, and

considered the discussion of Floyd LJ at paragraphs 43 to 48 of *London Taxi* on this issue, before directing himself as to the appropriate approach to the assessment he had to carry out as follows:

“[49] I accept that it would be inappropriate to assess the elements of the shapes at issue at a lower level of detail than would realistically be undertaken by an average consumer of the goods. This means that it is necessary to exercise a degree of caution when deciding how much weight to attach to the evidence of design experts, such as Mr Mays, who say that there are important design differences between the shapes at issue and those of other similar vehicles on the market.

[50] Further, although I accept that it is necessary to consider what are the norms and customs of the sector, reducing this process to a comparison between written descriptions of common features and written descriptions of the features that make up the contested marks runs two risks. Firstly, reducing a shape mark to written descriptions of its various features may not capture the way that those features are arranged or configured. Configuration could, by itself, make the shape as a whole depart significantly from the norms and customs of the sector. Secondly, focussing exclusively on the individual features of a shape mark may give those elements of the marks more or less importance than they deserve in terms of their contribution to the overall shapes of the product.

[51] It is important to keep in mind that what ultimately matters is whether the shapes as wholes depart significantly from the norms and customs of the sector. Therefore, although it is relevant, it is not necessarily fatal that some (perhaps even, all) of the features of a shape are not unique to the mark at issue or unusual in the sector concerned. Equally, the presence of one or more features which are unique to the shapes at issue, or at least unusual in the sector concerned, does not automatically mean that the shapes as wholes depart significantly from the norms and customs of the sector. This may be a factor when, considered by itself, the unique or unusual feature(s) in question makes only a small contribution to the overall impression created by the shapes.”

18. JLR makes no criticism of the manner in which the Hearing Officer directed himself as to the law in relation to inherent distinctiveness, and in particular does not challenge the Hearing Officer's view that he must assess inherent distinctiveness from the perspective of the average consumer, which is a legal construct (see, for example, Lewison LJ in *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501; [2013] FSR 21 at paragraphs 44 and 73; Arnold J (as he then was) in *Jack Wills Ltd v House of Fraser (Stores) Ltd* [2014] EWHC 110 (Ch); [2014] FSR 39 at paragraph 63). Nor does it suggest there is any key passage of the judgment in *London Taxi* of which the Hearing Officer failed to remind himself.
19. The Hearing Officer found at paragraphs 58 to 60 of the Decision:

“[58] I have noted Mr Mays' evidence. Some of the design differences he points out, such as surface irregularities on the body of the Defender vehicles from the use of spot-welded flat body panels, are not visible in (and therefore not part of) the marks applied for. More generally, Mr Mays is a design expert. Differences in design that appear important to him may be unimportant, or may not even register, on average consumers of passenger cars. I am therefore doubtful whether many of the other design differences he considers important would be regarded as significant departures from the norms and customs of the sector by average consumers of passenger cars.

[59] JLR also relies on published comments by journalists and others to the effect that the shape of the Defender models is distinctive. However, these observations depend, at least in part, on the writers' familiarity with the shape(s) because of their long use in trade. In my view, this part of JLR's evidence is more relevant to the case that the shapes have acquired distinctive character through use. I will therefore return to this evidence in more detail when I come to deal with this part of JLR's case.

[60] Considering the matter at the relevant dates, I find that the shapes and appearance of the Defender did not depart significantly from the norms and customs of the passenger car sector. That is the case whether or not the shapes include a rear mounted rear wheel... I accept that the shapes applied for look very different to those of some other types of vehicles, such as hatchbacks and sports cars, but the test is not whether the shape of a 4x4 vehicle departs significantly from the shape of a hatchback or a sports car: it must depart significantly from shapes

used in any sector of the passenger car market, including the 4x4 sector. It is true that the use of ‘arrow shot’ rear windows and alpine side windows was unusual, if not unique, in the passenger car sector at the relevant dates. However, I find that these are minor variations from the norms and customs of the passenger car sector. I also note that these features are not part of the ‘701 or ‘751 marks, i.e. the Series 1 and 2 Land Rovers. All the other features of the shapes at issue, including the primary features relied on by JLR, are either within the norms and customs of the passenger car sector, or minor variations thereon. Further, although there is a significant design element in the way that the external elements of the vehicles are configured, there is nothing about the configuration which makes the resulting shapes depart significantly from the norms and customs of the sector.”

JLR’s submissions

20. JLR submits that there were three flaws in the way the Hearing Officer approached the matter of inherent distinctiveness.
21. First, JLR submits that although Mr Mays was not cross-examined on his evidence, the Hearing Officer did not accept it, and he did not provide reasons for rejecting it, save in respect of the spot-welding point dealt with at paragraph 58 of the Decision.
22. Secondly, JLR submits that the Hearing Officer was wrong to find at paragraph 60 of the Decision that the arrow shot and alpine windows were minor variations from the norm. Miss Lane QC for JLR submits that they are noticeable features, or prominent aspects, of the vehicle which the Hearing Officer himself concluded at paragraph 60 of his Decision were “*unusual if not unique*”. She took the court through the features rejected in *London Taxi* and argues that those were mere variants of standard design features, whereas the Defender’s arrow shot and alpine windows are features of a completely different kind. Accordingly, she submits, he should have found they were distinctive.
23. Thirdly, JLR submits that although the Hearing Officer considered the statements of those relating to the motor industry when considering inherent distinctiveness, he did not take them into account saying “*these observations depend, at least in part, on the writers’ familiarity with the shapes(s)*”

because of their long use in trade” (paragraph 59 of the Decision), and he was wrong not to do so. Miss Lane argues for JLR that it is plain those statements are partly dependent on the shape *per se* and that makes them relevant to the question of inherent distinctiveness.

Discussion and determination

24. In relation to JLR’s first submission, I remind myself, per the principles set out in *Talk for Writing* and approved in *The Royal Mint*, that the Court should not substitute its own assessment for that of the Hearing Officer unless it is satisfied that he has made a material error in law or his findings are wrong so as to oblige the Court to substitute its own view, notwithstanding the experience of the Hearing Officer and the nature of the exercise carried out by him. Situations where a hearing officer’s decision will be treated as wrong encompass those in which a decision is (a) unsupportable, (b) simply wrong, and (c) where the view expressed by the hearing officer is one about which the Court is doubtful but, on balance, concludes was wrong.
25. I accept Ineos’ submission that the Hearing Officer considered the competing evidence adduced by each side to reach his decision that the shape as a whole did not depart significantly from the norms and customs of the sector concerned. Mr Mays’ evidence was challenged by JLR in detailed submissions and reply evidence and the Hearing Officer was not bound to accept his opinion. He was required to consider all of the evidence, including that of the design experts, in approaching the question of whether the shapes **as wholes** depart significantly from the norms and customs of the sector, and it is clear from the Decision that he did so. I accept Mr Bloch’s submission for Ineos that Mr Harper and Mr Mays are experts on the design of passenger vehicles, not experts on what the average consumer (who is a legal construct) will perceive as a departure from the norms and customs of the passenger car sector. That is a matter for the Hearing Officer to determine, who is an expert himself, sitting in a specialist tribunal. As Baroness Hale of Richmond warned in the context of specialist tribunals in

AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49, [2008] 1 AC 678 at paragraph 30:

“... This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16... 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 or expressed themselves differently”.

26. This was approved by Sir John Dyson SCJ giving the judgment of the Supreme Court in *MA (Somalia) v Secretary of State for the Home Department* [2017] UKSC 49, [2011] 2 All ER 65 at paragraph 43; and was relied upon by Arnold J (as he then was) in, *inter alia*, *Shanks v Unilever PLC & Ors* [2014] EWHC 1947 (Pat) with reference to the specialist tribunal of the Comptroller-General of Patents, which was upheld by the Court of Appeal.
27. Per *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, the judicial duty to give reasons requires a judge to explain to the parties, and any appellate court, the basis on which he or she has reached his decisions, and it seems to me that there is no good reason for holding the Hearing Officer to any more or less onerous standard. In reaching his Decision on this point, the Hearing Officer expressed the view that differences in design that appear important to such specialists may be unimportant, or may not even register, with average consumers of passenger cars. It seems to me that this must be correct, and I accept Ineos' submission that this provides adequate explanation of his reason for not accepting Mr Mays' opinion.

28. In relation to JLR's third submission, I consider that this reasoning applies equally to the Hearing Officer's treatment of evidence from motoring journalists. Those included statements about the Defender by Quentin Willson in *The Mirror* - "*the most recognised automotive silhouette on the planet*"; Graham Hope in *Auto Express* - "*The original Mini apart, there's arguably no other British car that is as instantly recognisable...*"; and Ben Fogle in *The Telegraph* - "*It is said that for more than half the world's population, the first car they remember having seen is a Land Rover Defender, so recognisable is it, from every angle (bonnet, tailgate, even the gear stick is distinctive)*". These statements appear to be driven by a deep knowledge and, in some cases, a professed love and long association with Defenders (Mr Willson's article in *The Mirror* states "*I've owned eight Defenders and enjoyed each with a love that passes understanding*"; Mr Fogle, after setting out a long list of flaws and inconveniences of the Defender, discloses that "*My first car was a Land Rover Defender... I loved that car. I still do. I get a shudder of excitement and happiness whenever I sit in one like an excited schoolboy... I have owned three and I have mourned the departure of each one with great regret*"). Some of them are obviously hyperbolic. In those circumstances, I cannot find that the Hearing Officer was wrong to find that "*these observations depend, at least in part, on the writers' familiarity with the shapes(s) because of their long use in trade*" nor to decline to place significant weight on the distinctiveness of the shape to such motoring specialists/ long-term owners/ Defender aficionados when considering distinctiveness through the eyes of the average consumer of passenger cars.
29. Turning to JLR's second submission, in my judgment the Hearing Officer has carried out a careful and detailed assessment of the expert evidence and other evidence in respect of the variants relied on by JLR. I accept Ineos' submission that the Hearing Officer's conclusion that the shape of the Defender did not depart significantly from the norms and customs of the passenger car sector is entirely consistent with the characterisation of the norms and customs of the car sector which Floyd LJ makes at paragraph 47 of *London Taxi*, and the manner in which Floyd LJ uses that characterisation

at paragraph 48 of *London Taxi* to find that the features at issue in that case are “no more than a variant on the standard design features of a car”. Nor does his explanation of how he reaches that decision disclose any error of principle, in my judgment. He was entitled to find that the arrow shot rear windows and alpine side windows amounted to minor variations and this cannot be said to be wrong, particularly given the level of generality required for his assessment of inherent distinctiveness. The Hearing Officer’s conclusion was reached after hearing detailed submissions from each side and also reading reply evidence from each side and after undertaking the sort of multifactorial assessment or evaluation with which the 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 (per *Talk for Writing/The Royal Mint*). I have found no error of principle and I do not interfere with it. This Ground 1 fails.

Ground 2 - Acquired Distinctiveness

30. This is addressed at paragraphs 78 to 130 of the Decision. The Hearing Officer based his approach to the assessment of acquired distinctiveness of the Marks in respect of goods and services for use on, or with, passenger cars, on the approach set out by the CJEU in *Windsurfing Chiemsee* and by Kitchin LJ (as he then was) in *Société de Produits Nestlé v Cadbury UK Ltd* [2017] EWCA Civ 358. He set out key passages from both cases, including, at paragraph 78 of the Decision, paragraphs 51 to 53 of *Windsurfing*:

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

52. If, on the basis of those factors, the competent authority finds that the relevant class of persons, or at least a significant proportion thereof, identify goods as originating from a particular undertaking because of the trade mark, it must hold that the requirement for registering the mark laid

down in Article 3(3) of the Directive is satisfied. However, the circumstances in which that requirement may be regarded as satisfied cannot be shown to exist solely by reference to general abstract data such as predetermined percentages

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

31. At paragraph 105 of the Decision the Hearing Officer directed himself that *"the key question is whether JLR has shown that a significant proportion of relevant average consumers would perceive the shapes applied for, without further indication, as distinguishing goods which have been placed on the market by JLR, or with its consent, from those of other undertakings"*.
32. JLR makes no criticisms of the manner in which the Hearing Officer directed himself as to the law in relation to acquired distinctiveness, nor, save in one respect which I address in paragraphs 35 and 42 below, does it suggest there is any key passage of the judgments in *Windsurfing Chiemsee* or *Nestlé* of which he failed to remind himself.

JLR's submissions

33. JLR submits that the Decision of the Hearing Officer in relation to acquired distinctiveness was flawed in three ways:
 - i) The manner in which he approached the assessment of the distinctive character of the Marks, by failing to carry out an overall assessment;
 - ii) His treatment of the survey evidence; and
 - iii) The manner in which he approached the evidence of Defenders modified and sold by third party modifiers ("**Modifiers**").
34. I find it convenient to deal with the first two points together, followed by the third.

Survey and Overall assessment

35. JLR objects to the manner in which the Hearing Officer first considered the factors set out at paragraph 51 in *Windsurfing* (the market share held by the mark; how intensive, geographically widespread and longstanding use of the mark has been; the amount invested by the undertaking in promoting; and evidence from motoring journalists) before only later, and separately, considering the survey evidence. JLR argues that the Hearing Officer was wrong to do so because, it submits, the effect of considering the evidence in two stages in this way was that, rather than allowing the survey evidence to reinforce the other evidence, the Hearing Officer effectively posed a separate and higher hurdle to be surmounted, in which the survey evidence had to be sufficient on its own to show distinctiveness. However, *Windsurfing* requires, at paragraph 49 of the CJEU's judgment, the Hearing Officer to "*make an overall assessment of the evidence*" and JLR submits that the Hearing Officer failed both to cite this requirement, and to carry it out.
36. In addition, JLR submits that the two-stage approach shows that the Hearing Officer had already pre-judged the question of distinctiveness at paragraph 98 of the Decision, without taking into account all of the relevant *Windsurfing* factors, and only then approached the survey evidence with that prejudice in mind. JLR submits that this can be seen in the way that:
- i) the Hearing Officer substituted his own views of the survey evidence for those of JLR's expert, Mr Philip Malivoire. That evidence was unchallenged either by any expert of Ineos or by cross-examination on behalf of Ineos and in those circumstances JLR submits that it was not appropriate for the Hearing Officer to substitute his own analysis for that of Mr Malivoire; and
 - ii) the Hearing Officer carried out his own, flawed analysis of the responses provided by the first 100 of the almost 500 respondents to the survey. The Hearing Officer should not have embarked on such an exercise at all because there was unchallenged expert evidence which provided the necessary analysis which he should not have gone behind.

37. Moreover, JLR submits, the fact and manner in which the Hearing Officer did so indicates that by this stage in the Decision he had already made a decision based on his incomplete analysis of the first three *Windsurfing* factors only.
38. In her skeleton, Miss Lane also took issue with the Hearing Officer's finding at paragraph 122 of the Decision that the survey showed "*a significant, but not overwhelming degree of recognition of the shape of the Land Rover*" (JLR's emphasis), and submitted that there is no requirement in the authorities that survey evidence should show an overwhelming degree of recognition in order for a mark to have acquired distinctiveness. I do not understand this to be disputed. Indeed, as she points out, CJEU authority makes clear that it is not necessary for an opinion poll to show a particular percentage of recognition to show that a mark has acquired a distinctive character through use (see C-217/13 and 218/13 *Oberbank AG v Deutscher Sparkassen* [2014] ETMR 56 at [48]-[49]). Miss Lane did not press this point orally and in fact in her reply to Mr Bloch's submissions she stated that JLR accepts the Hearing Officer's finding that the survey shows a "*significant, but not overwhelming*" degree of recognition. Instead, she submits for JLR that the degree of recognition is important, and the 20-40% range that the Hearing Officer arrived at is unexplained. For that reason, she asks me to prefer Mr Malivoire's quantification at 50%.
39. Finally, JLR submits that the Hearing Officer failed properly to take account of factor (v) in *Windsurfing*, namely the evidence of statements made by those relating to the trade, although he suggested at paragraph 124 of the Decision that he had done so. In fact, it says, he rejected the views of motoring journalists (at paragraph 99 of the Decision) and said he gave more weight to the statements of Ineos' Chairman, but ultimately failed to take even those into account (paragraph 100 of the Decision).

Discussion and determination - Separate consideration of survey evidence

40. *Windsurfing* provides the following guidance in relation to opinion polls, which it is common ground covers survey evidence of the type in evidence in

this case, at paragraph 54: “...where the competent authority has particular difficulty in assessing the distinctive character of a mark... **Community law does not preclude it from having recourse, under the conditions laid down by its own national law, to an opinion poll as guidance for its judgment**” (my emphases). I accept Ineos’ submission that it would have been perfectly possible for the Hearing Officer to assess the evidence excluding the survey, and reach a conclusion that it was satisfied that the Mark was distinctive, such that he did not need to go on to consider the survey evidence at all. That being the case, it seems to me to be perfectly permissible, and as Mr Bloch submits, in accordance with the teaching in *Windsurfing*, for the Hearing Officer to reach a provisional conclusion on distinctive character without taking into account the survey evidence and, if not at that point satisfied of the distinctive character of the Mark, go on to consider the survey evidence to see whether, on an overall assessment of all of the evidence, he was now satisfied that the Mark was distinctive.

41. In my judgment, that is the process that the Hearing Officer undertook. At paragraph 109 of the Decision he states that his findings at paragraph 97 (which JLR does not criticise) and the points which he makes at paragraphs 106 to 108, give him “*serious doubts*” as to whether the shapes of the Defender models had acquired a distinctive character as trade marks at the relevant dates, and goes on to state: “*With this in mind I turn to JLR’s survey evidence to examine whether it is sufficient to remove those doubts and establish that the Marks had indeed acquired distinctive character*”. He then goes on to consider the survey evidence, which I will deal with in more detail in the next section. At paragraph 124 of the Decision the Hearing Officer makes the following finding: “*I find that the survey does not remove the serious doubts I had after examining JLR’s case based on the scale, length and nature of its use and promotion of the shapes of the Defender models, statements made by those connected to the trade, and taking account of the presence on the market of vehicles marketed by third parties with very similar shapes. In my judgement, the evidence does not establish that the shapes at issue had acquired a distinctive character at the relevant date in relation to passenger cars*”.

42. I do not accept JLR's submission that the effect of approaching the evidence of distinctive character in this way was to pose "*a separate and higher hurdle to be surmounted, in which the survey evidence had to be sufficient on its own to show distinctiveness*" as JLR submits. In fact, if the Hearing Officer had been satisfied of distinctiveness without considering the survey evidence at all, he could have stopped there. As he was not, I am satisfied that he considered the survey evidence and then, as the previous quote from paragraph 124 shows, stood back and considered all of the evidence, including the survey evidence, to see whether on a global assessment, the evidence satisfied him that the shapes had acquired a distinctive character at the relevant dates. The survey evidence did not "*have to be sufficient on its own to show distinctiveness*" but may have been sufficient to persuade the Hearing Officer that, on balance on a global assessment, he could be satisfied of acquired distinctiveness. In fact, he found it was not. I can see no error of principle in this approach. The fact that he did not specifically cite the *Windsurfing* requirement to carry out a global assessment is not a point on which I criticise this very experienced Hearing Officer, since it appears to me that he was aware of the need to, and did, carry out a global assessment.
43. Moreover, I am entitled to assume, absent good reason to the contrary, that the Hearing Officer has taken all of the evidence into account in evaluating the evidence (per *Talk for Writing/The Royal Mint*). I can see no good reason to assume the contrary in this case.

Discussion and determination – Prejudging question of distinctiveness

44. Nor do I accept JLR's submission that the Hearing Officer was bound to accept, uncritically, the expert evidence of Mr Malivoire, and not entitled to make his own assessment of the survey evidence. I asked Miss Lane for any authority for that submission, and she could provide none. I note that before the Hearing Officer, Miss Lane did not argue this point. In fact, Mr Bloch directed my attention to the transcript of that hearing from which it can be seen that she made her own suggestions about how he should assess the survey evidence.

45. It should not be contentious to state that an expert is there to assist the tribunal (whether that be a Court or a hearing officer). Because of their expertise, experts are entitled to offer their opinion for the assistance of the tribunal, where a witness of fact would not. However, it is for the decision-maker to consider that opinion evidence in the same manner as any other evidence: to assess it; determine what weight, if any, to give it; and to reach his or her own conclusions on the relevant issues in light of all of the evidence relevant to those issues. To do otherwise would be an abrogation of his or her tribunal functions, in my judgment.
46. This can be seen in the Kit Kat case (*Nestlé*), which also related to an appeal from the decision of the same hearing officer, Mr Allan James, refusing an application to register a three-dimensional trade mark in the shape of the Kit Kat biscuit. The hearing officer made his own assessment of survey answers, which was upheld by Arnold J (as he then was) in his second judgment on the first appeal ([2016] EWHC 50 (Ch)) at paragraph 68, and also by Kitchin LJ, Vos LJ, and Floyd LJ in the Court of Appeal ([2017] EWCA Civ 358) in the following terms at paragraph 89 of the judgment of Kitchin LJ (as he then was):

“The hearing officer therefore rightly paid particular attention to the second survey. **He considered for himself the responses to it and, in light of the other evidence before him, came to a reasoned conclusion as to what it established.** The high point for Nestlé is his finding that at least half the people surveyed thought that the picture shown to them was a Kit Kat. But in giving their responses they might have had in mind a product coming from the same source as Kit Kat or a product of the Kit Kat type or a product which looked like a Kit Kat. **The hearing officer was therefore entitled and indeed bound to consider the results in light of all of the other evidence before him.** I am also satisfied he was entitled to conclude as he did that Nestlé had shown recognition and association of the shape with Kit Kat but had failed to prove that the shape (and hence the Trade Mark) had acquired a distinctive

character in light of the use which had been made of it”. (my emphases)

47. It can also be seen in the judgment of Chadwick LJ in *Bach Flower Remedies v Healing Herbs* [2000] RPC 513 at page 535:

“I agree with Morritt L.J. that, in seeking to apply the test, the court is unlikely to be assisted by repetitious evidence from individual consumers, put forward by each party as the embodiment of the average consumer. The task for the court is to inform itself, by evidence, of the matters of which a reasonably well informed and reasonably observant and circumspect consumer of the products would know; and then, **treating itself as competent to evaluate the effect which those matters would have on the mind of such a person with that knowledge**, ask the question: would he say that the words or word identify, for him, the goods as originating from a particular undertaking?” (my emphasis)

48. In my judgement, and for those reasons, the Hearing Officer was entitled to treat himself as competent to evaluate the survey evidence before him and cannot be criticised for not accepting, uncritically, Mr Malivoire’s opinions.
49. Turning then to the submission that the Hearing Officer removed the statistical basis of the survey and went behind it, by looking only at the first 100 responses to it. In my judgment this submission is misconceived. I note that at paragraph 118 of the Decision the Hearing Officer explicitly stated that he had read through the answers of the respondents of the survey (except in relation to respondents in Newcastle and Watford whom the parties agreed should be excluded from his consideration), which he said “*paint a broadly similar picture. I will therefore use the answers given by the first 100 respondents to exemplify my findings*”. Accordingly, by his own explanation his analysis was not limited to 100 survey responses but was based on a consideration of all of the admissible survey evidence. It was only for the purposes of explaining his findings in the Decision that he used some of the

first 100 responses as exemplars. I can detect no error of principle in this approach.

50. I turn next to JLR's submission that the Hearing Officer's own analysis of the survey evidence contained at paragraphs 118 to 123 of the Decision was flawed. I accept that if the Hearing Officer's Decision was based on a misunderstanding of the evidence, then this may be a reason for an appellate court to interfere with his conclusion on acquired distinctiveness (per principle (iv) in *Talk for Writing/The Royal Mint*). However, although JLR criticises the Hearing Officer for making errors in his analysis, Miss Lane was careful to clarify in oral submissions that JLR does not say that a single error or a few errors is or are sufficient for an appeal court to overturn the Decision. Rather she says that it is illustrative that the Hearing Officer is getting involved with analysis and coming up with figures which are not readily explicable and not consistent with the expert evidence in the case, and submits that the court can infer that the Hearing Officer was not prepared to take Mr Malivoire's 50% at face value because he had pre-judged the case even before turning to the survey evidence.
51. The Hearing Officer set out at paragraph 113 the headline points from Mr Malivoire's analysis of the survey results, namely that they indicated that 11% of those shown the pictures of the Land Rover Defender 90 mentioned (only) LAND ROVER before they had been asked any questions. After the first question ("*What can you tell me about what you are looking at?*") this rose to 44%. The second question was "*And what else, if anything, can you tell me about it?*". After the third question, posed only to those who mentioned a car brand ("*You mentioned [X]. Why was that?*"), 50% had mentioned only LAND ROVER, including mentions of DEFENDER and DISCOVERY, another Land Rover model. He also noted that 4% of respondents mentioned (only) JEEP before being asked any questions, and after all the questions 15% of respondents had mentioned JEEP.
52. The Hearing Officer then set out the findings of his own analysis, providing examples by way of the number assigned to each respondent in the survey spreadsheets. It is fair to say that the survey response spreadsheets are a little

confusing, because the first two columns set out firstly the spreadsheet line number, and secondly the respondent number, and they are not the same, being out by one. So, respondent 11 is on spreadsheet line 12, respondent 67 is on spreadsheet line 68, etc. I think this is the reason that some of the Hearing Officer's references are wrong, because in some cases he mistakenly provides the spreadsheet line and not the respondent number. However, once it is known that this is the problem, the correct reference can easily be found.

53. In paragraph 119 he provides some examples from the first 100 respondents who mentioned only LAND ROVER, but by their responses made clear that they did **not** think that the shape alone denoted only passenger cars marketed by JLR. For example, the respondent who said it *"looks like a Land Rover and if it's not a Land Rover it's a four wheel drive"*. Looking at the first 100 responses myself, I am satisfied that the Hearing Officer provided only some examples and not all of them, as there are other responses which fall in this category, including respondent 5 *"it's not a Land Rover but it does look like one as it has no badges on it"*.
54. In paragraph 120, he considered that about 40% of respondents mentioned LAND ROVER (or DEFENDER or DISCOVERY) in terms that do **not** clearly undermine the case for saying that they considered the shape of the Defender 90 model to function as a trade mark. He identified a sub-group of that as respondents who clearly **did** consider the shape shown to them to be a Land Rover and provided 20 examples from the first 100 respondents. Once again it seems to me that he did not produce a full list of relevant examples in the first 100 responses as I found several more which would fall into this category.
55. In paragraph 121 of the Decision the Hearing Officer identified that there were other responses in which more equivocal answers were given and provided some examples where respondents had said things like *"It looks a bit like a Land Rover or something similar"*. His conclusion taking the survey evidence as a whole was that:

“In my view, the survey shows that somewhere between 20 and 40% of respondents were confident that the pictures shown to them depicted a Land Rover Defender 90. The remaining respondents either did not name a maker, were not sure who made the car, thought that the car was a different one made by another maker, or were guessing. The survey therefore shows a significant, but not overwhelming, degree of recognition of the shape of the Land Rover Defender”.

56. I do not have the same difficulty as JLR in understanding where the Hearing Officer’s range of 20-40% comes from. It is set out in paragraphs 120 and 121. The Hearing Officer has carried out his own analysis and found that about 40% mentioned LAND ROVER (or DEFENDER or DISCOVERY) in terms that do **not** clearly undermine the case for saying that they considered the shape of the Defender 90 model to function as a trade mark, but says some of those answers are equivocal. So, 40% is the high-water mark of his range, because of the 50% identified by Mr Malivoire as mentioning only LAND ROVER, the Hearing Officer considers the remaining 10% of responses to clearly undermine the case for saying they consider the shape to function as a trade mark. Of that 40%, the Hearing Officer by his own analysis has found a sub-group of respondents who are clear that the photographs depict a Land Rover Defender, and he puts that at 20%. That forms the bottom of his range, because it is clear that he considers, at the very least, those respondents clearly recognise the shape of the Defender 90 model as being a Land Rover. As a method of assessing the survey evidence, I do not see any error in principle in it.
57. In terms of whether his assessment is quantitatively correct or not, I have looked at all the survey evidence and done my own rough analysis, really as a sanity-check more than anything else, since I am acutely aware that there is an element of subjectivity in the assessment of individual responses. Having done so, I would probably put those who are clear, or unequivocal about identification of the photographs as a Land Rover a little higher than does the Hearing Officer, perhaps even as high as 25%, although for the purposes of assessing the bottom of the range there is merit in adopting a strict approach,

which is what the Hearing Officer seems to have done. It seems to me that the bottom of his range is justifiable on the survey evidence. I cannot quibble with the top of the Hearing Officer's range as I came out at roughly the same place. Certainly, I would not reach Mr Malivoire's figure of 50%.

58. Of importance is the Hearing Officer's statement in paragraph 117, that by a respondent simply mentioning LAND ROVER and no other brand in response to the pictures of the Defender's shape it does not mean that respondents necessarily regarded the shape, by itself, as distinguishing the goods of JLR from those of other undertakings. He found there was force in the submission advanced before him by Mr Bloch for Ineos that the survey showed some degree of recognition of the shape and a level of association with JLR, but not recognition of the shapes as trade marks, i.e. as designating the goods of JLR and no other. The authorities make clear that he was correct to question whether the survey showed that a substantial proportion of relevant consumers had come to perceive the shape of the Defender as an indication of origin, rather than merely recognising it and associating it with JLR (see, for example, the discussion at [77]-[79] of the judgment of Kitchin LJ (as he then was) in *Nestlé*).

59. For those reasons, I do not accept the submission that the Hearing Officer's approach shows that he had pre-judged the issue of distinctiveness and approached the survey evidence with prejudice. Rather it seems to me it shows the Hearing Officer carefully and fairly assessed the survey evidence in a way which discloses no error of principle, before returning to carry out the multifactorial global assessment he describes in paragraph 124 (which, for the reasons I have already given, I consider included consideration of evidence of statements made by those connected with the passenger vehicle trade). Indeed, he seems to have arrived at a conclusion he was not necessarily expecting, saying at paragraph 125 of the Decision that he came into the case "*...with an open mind as to whether the shapes at issue distinguished JLR's cars from those of other traders, but the weight of the evidence before me indicates that the shapes at issue have not, and will not, function as trade marks for passenger cars*".

Modifiers

60. JLR submits that the Hearing Officer misunderstood the import of evidence about modifiers such that he was wrong to conclude that the absence of evidence of confusion of the public supported his finding that the shapes were not distinctive to distinguish the trade source of the products. JLR does not challenge the factual findings at paragraph 97(i) to (vii) of the Decision, and accepts that the Hearing Officer correctly stated the law, including at paragraph 105 of the Decision that JLR's case cannot fail simply because it used the Marks with other trade marks:

“[105] So the key question is whether JLR has shown that a significant proportion of relevant average consumers would perceive the shapes applied for, without further indication, as distinguishing goods which have been placed on the market by JLR, or with its consent, from those of other undertakings. In answering that question, it is relevant to consider whether consumers would be likely to rely on the shapes at issue to make or confirm their transactional decision in the goods. However, it is not necessary to show that relevant consumers have relied on the shapes alone in the past. Therefore, JLR's case cannot fail simply because there is no evidence that consumers have relied on the shapes of the Defender models to make or confirm their transactional decisions in the goods in the past.”

61. He went on to say at paragraphs 106 and 107:

“[106] However, considering the position at the relevant dates in 2016, several things make me doubt whether a significant proportion of relevant average consumers would have both (a) recognised the shapes at issue as those of the LAND ROVER DEFENDER models and (b) perceived the shapes applied for, without further indication, as distinguishing passenger cars marketed under the control of JLR from marketed vehicles embodying the shapes at issue under the distinctive word marks LAND ROVER and DEFENDER. The natural inference is that these signs played the primary roles in distinguishing the trade source of JLR's goods. JLR's counsel, Miss Lane, submitted that, unlike many other goods, the public

use the shapes of passenger cars to distinguish the trade source of the products. I accept that consumers are drawn to cars they like the look of and will come to recognise the shapes of popular vehicles, or those of special interest to them. However, in my experience when it comes to making or confirming their transactional decisions about passenger cars, consumers generally use the names of the manufacturer and/or product/model names.

[107] Secondly, there is evidence that third parties have sold passenger cars based on the shapes of the Defender models in the UK under different trade names, i.e. the Santana PS10, as well as various companies marketing modified versions of the Defender under different names, such as Overfinch and Twisted. If the shapes of the Defender models were truly distinctive of products marketed under the control of JLR, one would expect third parties marketing passenger cars with very similar shapes to have caused some confusion. However, there is no evidence that consumers were confused into thinking that JLR was responsible for these vehicles, or that they were marketed with JLR's consent. For example, there is no evidence of anyone blaming JLR for a problem they experienced with a Santana or Overfinch vehicle. It is true that the evidence does not establish the size of the market in modified versions of Defender models, but as JLR itself filed evidence about the existence of this trade, it is reasonable to assume that it considered it to be on scale that was relevant. Further, as the marketing of modified versions of the Defender by Overfinch and other modifiers depended on the availability of Defender vehicles to modify, it is obvious that such use of the Defender shapes for these parties vehicles must have occurred when the Defender was still in production, i.e. prior to the relevant dates."

62. JLR submits that the reasoning in paragraph 107 is flawed, because the Hearing Officer completely misunderstood the point about modifiers which was set out in paragraphs 48 to 52 of the second witness statement of Miss Beaton and addressed in oral submissions. Miss Beaton's witness statement

stated, under the sub-heading “*Third party modifiers’ use of the Defender’s shape as an indicator of origin*”:

“48. Car owners sometimes choose to modify their vehicles. In this way, owners can personalise what otherwise would be a standard production vehicle. An industry has grown up around this demand for customization, and the industry has been in existence for many years. Modifications can take many forms including, for example, performance modifications to increase a vehicle's horsepower and visual modifications to change the way a vehicle looks.

49. The business of a number of the third party modifiers is based around, or includes, modification of the Defender. Examples of such companies are Twisted, Overfinch, Kahn/The Chelsea Truck Company and JE Motor Works. None of these third party modifiers is licenced, authorised or endorsed by JLR and JLR does not accept that unauthorised third parties should be allowed to carry out modifications to its vehicles in this way.

50. The modifiers frequently remove the original manufacturers’ badging from vehicles and replace it with their own. The clear intention is that customers will recognise the base vehicle (which has been modified) from its shape. Where the vehicle which has been modified is a Defender, I believe that this is obvious from its shape which in turn is why I believe customers want to buy it...

51. On its website, in advertising its exterior modification services, Overfinch emphasise the importance of retaining the shape of the Defender: “Retaining the iconic body shape but introducing distinctive characteristics and a sense of purpose that make it unmistakably Overfinch”.

52. As can be seen from the image attached at Exhibit AJB17.5, the original badging on the vehicle modified by JE Motor Works has been replaced with a JE double-wing badge. The website states: “At a glance, the badge is one of the few external details that distinguish the ultra-rare Zulu from other Land Rovers”. That statement implies that the other Defenders have something in common in their external appearance which identifies them as Land Rovers, and I believe that to be a reference to the Defender’s distinctive shape.”

63. Miss Lane for JLR submits that Ms Beaton’s evidence is that people buy modified Defenders because they know from the shape that they are Defenders from JLR, not because they are any old vehicle. They want a Defender with the added tweaks that the modifiers provide to it. The

modifiers buy a Defender, remove the badging, make modifications, and replace the badge with their own. Nonetheless it is obvious from the shape alone that it is a Defender, and that is why customers want to buy it. She submits that this is evidence that purchasers of modified vehicles have relied on shape alone for the purpose of making transactional decisions, and the Hearing Officer had completely misunderstood the position when saying *“there is no evidence that customers were confused into thinking that JLR were responsible for these vehicles, or that they were marketed with JLR’s consent”*.

Discussion and Determination

64. One difficulty I have with this submission, and with Ms Beaton’s evidence, is that the screenshots from websites of the modifiers annexed to her evidence, and available to the Hearing Officer, show that the modifiers do not expect their customers to identify the vehicles by shape alone. They refer to the manufacturer and/or product name. So, if a customer wishes to buy an Overfinch, and visits the Overfinch website to find out more, he must first choose whether he is interested in an Overfinch Defender, an Overfinch Discovery, or another Overfinch model. The badging on the modified vehicle may only be that of Overfinch, but Ms Beaton’s statement that customers will recognise the base vehicle only by the shape appears to be mere supposition when the modifiers themselves refer to them by the trade marks “Land Rover” and/or “Defender” “Discovery” etc. Ms Beaton herself identified such a reference to a JLR brand on the JE Motor Works website, at paragraph 52 of her witness statement. Accordingly, I do not criticise the Hearing Officer for not accepting Ms Beaton’s witness statement as evidence that consumers relied on the shape alone to identify a modified Defender as originating from JLR, in the context of a transactional decision, as Miss Lane submits I should. Of course, as the Hearing Officer correctly directed himself, it is not necessary to show that relevant consumers have relied on the shape alone in the past, but JLR seeks to rely on the evidence about modifiers to show that consumers have done so.

65. The fact that the modifiers make clear in their websites that the base vehicles to which they make modifications originate from JLR suggests to me that they consider this important. I consider that it was open to the Hearing Officer to draw an inference that they do so because it is of benefit to the modifiers in some way: and the most obvious inference to draw is that they are concerned that consumers will not otherwise perceive them as originating from JLR unless they are told. Perhaps they are concerned that, without the JLR badging, their customers may think, like some of the survey respondents did, that the underlying vehicle is a “kit car” or a “knock-off” that merely looks like a Defender. In fact, the Hearing Officer did not draw this inference.
66. As the authorities make clear, the ultimate question is whether the mark, used on its own, has acquired the ability to demonstrate that the goods designated by the mark originates from a particular undertaking: as Floyd LJ put it at paragraph 105 of his judgment in *Nestlé*, a significant proportion of the relevant class of consumers must be able to conclude that the goods in question “*are the goods of one undertaking and no other*”. This is what I must bear closely in mind when I consider the question of the evidence about modified vehicles, and how the Hearing Officer has dealt with it.
67. As Ms Beaton states, the value that modifiers bring to a Defender or other JLR vehicle is the value that the market attributes to a personalised and customised vehicle, whether those modifications are to the visual appearance or to the performance of the vehicle, or to other features such as comfort. It seems obvious that purchasers do not buy a modified vehicle simply because they want a Defender: if that was the case, they would buy from JLR without having to pay the premium for the modifications. They buy a modified vehicle because they want a ‘Defender, but better’ – better in the buyer’s eyes, at least. That being so, if they do not want a JLR vehicle, rather something that looks like it but which they consider is better, then the shape of the modified vehicle is not indicating that the goods in question are the goods of one undertaking and no other. It is not the shape in issue which is wholly or even mainly changing the economic behaviour of the buyer. The

goods may be based on the Defender, but a significant part of what they are buying, and arguably what drives the transaction (otherwise they would buy from JLR), are the modifications which originate from the modifier, not JLR. Accordingly, in my judgment, the shape in issue is not operating as a guarantee of origin to those who purchase it.

68. Miss Lane criticises the Hearing Officer's statement that "*there is no evidence that customers were confused into thinking that JLR were responsible for these vehicles, or that they were marketed with JLR's consent*". She submits that it is precisely because the Marks are truly distinctive that consumers know exactly what they are getting, a car produced by JLR although modified by a third party and bearing a third party mark. As I have already stated, the modified vehicles are promoted on the modifiers' websites by reference to manufacturer and product name, not only by shape. It also seems to me that that the absence of confusion in relation to modified vehicles is a relevant consideration in the analysis I have just undertaken. If there was such evidence, it would have supported JLR's case that buyers of modified vehicles were perceiving the shape as a guarantee of origin, believing the origin of the modified vehicles to be JLR or that they were placed on the market with JLR's consent. For those reasons I do not consider that the Hearing Officer was wrong to conclude that the absence of evidence of confusion of the public supported his finding that the Marks were not distinctive to distinguish the trade source of the products.
69. I accept Miss Lane's submission that the absence of evidence should not be determinative, particularly where, as in this case, there is no evidence that either party has made any serious attempt to find evidence of confusion (see, for example Arnold J (as he then was) in *Jack Wills Ltd v House of Fraser (Stores) Ltd* [2014] EWHC 110 (CH), [2014] FSR 39 at [99]-[102]), but I do not accept that the Hearing Officer did find the absence of evidence of confusion to be decisive. It is clear from paragraph 109 of the Decision that it is only one of the factors which he took into account.
70. To summarise, I accept Ineos' submissions that the Hearing Officer conducted a thorough assessment of "*JLR's case based on the scale, length*

and nature of its use and promotion of the shapes of the Defender models [and] statements made by those connected to the trade” at paragraph 124 of the Decision, and that it was open to him to find as he did that the case advanced by JLR in relation to these matters was insufficient to show that the Marks had acquired distinctiveness in the requisite trade mark sense i.e. that the mark should “*distinguish the goods and services of one undertaking from those of other undertakings*” (section 1(1) of the Act) so as to guarantee the trade mark as an indicator of origin.

71. Of course, I am not required to satisfy myself that the Hearing Officer was bound to make the finding which he made - another hearing officer may have come to a different finding. It is JLR which must show either that the Hearing Officer made a material error of principle in his assessment or that his finding was clearly wrong, and it has failed to do so in my judgment. Ground 2 must fail.

SHAPE WHICH GIVES SUBSTANTIAL VALUE TO THE GOODS

72. Given my findings upholding the Hearing Officer’s decision in respect of inherent and acquired distinctiveness, there is no purpose to my considering the submissions that I have heard on substantial value, as both Counsel accepted during the appeal hearing.

CONCLUSION

73. For the reasons given in this judgment, the Appeal is dismissed.