

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION No. 2451462
BY ALTERNATIVE FINANCE GROUP LIMITED
IN CLASSES 36 AND 37**

**AND IN THE MATTER OF OPPOSITION No. 95425 THERETO
BY NATIONAL WESTMINSTER BANK PLC**

**AND IN THE MATTER OF AN APPEAL
TO THE APPOINTED PERSON
BY THE OPPONENT
AGAINST A DECISION OF MR. MARK BRYANT
DATED 7 MAY 2009**

DECISION

Introduction

1. On 2 April 2007, Alternative Finance Group Ltd (“AFG”) applied to register the following sign for use as a trade mark in Classes 36 and 37:



The device element of the AFG mark is represented in three shades of blue ranging from dark on the left, through mid on the top, to light on the right. The words “Alternative Finance Group” are in the darkest shade of blue with the phrase ‘Putting faith into finance’ having a ghosted appearance.

2. The services applied for were:

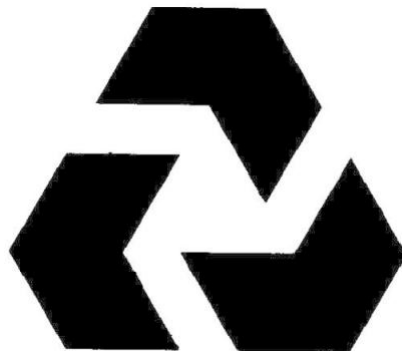
Class 36

Investment and savings, mortgages and home finance, commercial and corporate finance, insurance and security, banking and finance, insurance; financial affairs; real estate affairs. This also includes building society services; banking (including home banking); stockbroking; financial services provided on the Internet; providing tokens of value in relation to bonus and loyalty schemes; providing financial information

Class 37

Advisory services relating to development of property, advisory services relating to property development, commercial retail property development services, development (property-), development of property, property development, services of property development.

3. The Application was published on 18 May 2007. On 16 August 2007, National Westminster Bank Plc (“NatWest”) filed Notice of opposition to the Application. The grounds of opposition were under section 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994.
4. The opposition under section 5(2)(b) and 5(3) was based on eight earlier trade marks within the meaning of section 6 of the Act belonging to NatWest. The Hearing Officer focused his determinations in particular on Community Trade Mark Registration number 4318978¹. CTM 4318978 was not subject to the proof of use requirements and in his view represented NatWest’s best case.
5. CTM 4318978 is for NatWest’s “three arrow heads” logo:



¹ The Hearing Officer also mentioned NatWest’s UK Trade Mark Registration number 1278206, which he mistakenly assumed was not subject to the proof of use requirements. UK 1278206 was the result of a merger with UK 1278205 and bore the registration date of the latest of the two registrations namely 19 February 1988. Since (a) the Hearing Officer based his analysis particularly on CTM 4318978 (b) the mark in CTM 4318978 is identical to the second mark of the series in UK 1278206 (c) the services in UK 1278206 and CTM 4318978 overlap and (d) the grounds of appeal placed no separate reliance on UK 1278206, I informed the parties (with no dissent) that I would ignore UK 1278206 for the purposes of the appeal.

6. The full list of goods and services for CTM 4318978 was annexed to the Hearing Officer's decision (BL O/120/09). For the purposes of this appeal, I need only refer to the following:

Class 35

Accounting services; book-keeping; share registration services; payroll preparations; business appraisals, enquiries, investigations, research and business management advice; business management consulting; advertising and promotion services and information services relating thereto; business and commercial information services, all provided on-line from a computer database, computer network, global computer network or the Internet; compilation of advertisements for use as web pages on the Internet; business management services; business advisory services; compilation of directories for publishing on global computer networks or the Internet; compilation of advertisements for use on or as web pages or web sites on global computer networks or the Internet; provision of space on web sites for advertising goods and services; business administration services for the processing of sales made on the Internet; business planning; market analysis and research; data collection, storage and processing; personnel (payroll) services; advisory, consultancy and information services relating to all of the aforesaid services

Class 36

Financial services; banking services; monetary transfer; payment services; automated banking services; home banking; internet banking; savings services; bill payment services; payment and credit services; credit card, debit card, charge card, cash card and bank card services; cash management; safe deposit services; bankers' clearing services; account debiting services; personnel (payroll) services; escrow services; cheque encashment services; credit brokerage; automatic cash dispensing services, automatic teller machine services; insurance services; financing of loans; loans (financial) against security; financial investment services; capital investment services; trustee services; financial management services; brokers and agents (for bonds and other securities); financial consultation services; investment advice; financial guarantees (surety services); financial analysis and providing reports; financial information services; financial research services; financing services (securing funds for others); financial advisory services; services for the provision and purchase of financial and/or credit information; administration of financial affairs; computerised financial services; advice and enquiries regarding credit; financial services for the provision of credit; acceptance of deposits; discount of bills (notes); domestic remittance, liability guarantee, acceptance of bills, lending securities, acquisition and transfer of monetary claims; trustee services; trusteeship of money; futures contracts; securities, monetary claims, personal property, land, land fixture surface rights and land leasing rights; money exchange, foreign exchange transactions, currency exchange services, travellers cheque services; letter of credit-related business, securities trading, index fixtures, securities options, overseas market securities futures, underwriting securities, selling securities, handling subscriptions and offerings of securities, providing stock market information, life insurance brokerage, life insurance underwriting, agencies for non-life insurance, claim adjustment for non-life insurance, non-life insurance underwriting, insurance actuarial services; mortgage services; information relating to financial, banking, insurance, economical and investment services provided on-line (not downloadable); advisory, consultancy and information services relating to all of the aforesaid services.

7. Under section 5(4)(a) of the Act, NatWest relied on unregistered rights in its “three arrow heads” logo, which it claimed to have used in the UK in relation to a broad range of goods and services including financial services and financial services relating to property since 1 January 1970.
8. AFG took issue with the grounds of opposition in a Notice of defence and counterstatement dated 19 November 2007 including putting NatWest to proof of use across its earlier registrations and challenging NatWest’s passing off claim.
9. NatWest filed evidence and written submissions but since neither party requested a hearing, the Hearing Officer decided the case on the papers before him.

The Hearing Officer’s decision

10. In summary, the Hearing Officer’s findings were as follows:

Section 5(2)(b)

- (a) The respective services in Class 36 were identical.
- (b) AFG’s services in Class 37 were not complementary to any of NatWest’s services in Class 36. Therefore in respect of non-identical services, the level of similarity was low.
- (c) The average consumer for financial services (NatWest’s strongest case) included the general public and commercial undertakings whose purchasing acts would be reasonably well considered.
- (d) At a general level there was overlap with the average consumer of AFG’s property development services in Class 37, which might also be accessed by individuals or commercial undertakings. However, in essence the respective relevant consumers were different. Again, the purchasing act would be well considered.
- (e) The respective trade marks shared a reasonably high level of visual similarity. There was no aural similarity. Conceptually, the marks were neither similar nor dissimilar. On balance, the marks were moderately similar.
- (f) NatWest’s mark was possessed of a high degree of inherent distinctiveness, which had been enhanced through use in relation to banking, loans, credit card services, tax free savings products, mortgages, life assurance and spread betting and CFD account services.
- (g) There was a likelihood of confusion in relation to the identical services in Class 36 but not with AFG’s services in Class 37.

Section 5(4)(a)

NatWest’s case under section 5(4)(a) was no better than under section 5(2)(b).

Section 5(3)

- (a) NatWest’s “three arrow heads” logo enjoyed a reputation in respect of banking, loans, credit card services, tax free savings products, mortgages, life assurance and spread betting and CFD account services.
- (b) AFG’s trade mark would not bring NatWest’s trade mark to mind when used in relation to property development and associated services as listed in AFG’s Class 37. Assessed globally, the necessary link was not made out.
- (c) Unfair advantage/detriment did not therefore arise for consideration.

11. Applying those findings, the Hearing Officer rejected the Application in Class 36 but (subject to appeal) allowed it to proceed to registration in Class 37. Since both parties had achieved a measure of success, he made no order for costs.

NatWest's appeal

12. On 4 June 2009, NatWest filed Notice of appeal to the Appointed Person under section 76 of the Act against the Hearing Officer's decision in connection with Class 37.

13. The grounds of appeal were essentially that the Hearing Officer:

Section 5(2)(b)

- (a) Misinterpreted the scope of the Application in Class 37 including the term "property development".
- (b) Wrongly decided that the respective services were not complementary.
- (c) Inconsistently considered the average consumer.
- (d) Incorrectly compared the marks.

Section 5(4)(a)

- (e) Failed to determine the ground for opposition under section 5(4)(a) correctly or at all.

Section 5(3)

- (f) Applied an incorrect appreciation of the average consumer and the closeness of the respective services in determining that the requisite link was not made out.

14. At the hearing of the appeal, NatWest were represented by Mr. Giles Fernando of Counsel instructed by Pinsent Masons LLP. AFG did not appear, was not represented and made no written submissions. Mr. Fernando said in opening that his client did not intend to pursue its appeal under section 5(4)(a) as it added nothing further to the grounds under section 5(2)(b).

Standard of review

15. The Hearing Officer's decision under section 5(2)(b) and 5(3) involved multi-factorial assessments of the kind to which the approach set out in *REEF Trade Mark* [2003] RPC 101 at 109 – 110, Robert Walker L.J., applies:

"In such circumstances an appellate court should in my view 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."

A decision does not contain an error of principle merely because it could have been better expressed.

16. I intend to take the arguments on appeal in the order they were presented at the hearing.

Comparison of marks

17. Mr. Fernando made two criticisms of the Hearing Officer's assessment of the similarity in the marks. First, the Hearing Officer wrongly took into account the lack of aural and conceptual similarities (or dissimilarities), which tempered his estimation of the high visual similarity between the marks. Second, the Hearing Officer ignored NatWest's reputation in the "three arrow heads" logo for finance particularly in his conceptual consideration of the marks. In my judgment, neither of those criticisms is justified.

18. The relevant part of the decision reads:

"32) From the visual perspective, NatWest argue that the device element of AFG's trade mark is dominant and as a fall back, that if it is not considered to be the dominant element then it still performs an independent distinctive role. In comparing the two device elements, it further contends that both form an irregular hexagon shape comprising of interlocking arrow devices arranged around a central triangle. I concur with the view that the device element constitutes the dominant element of AFG's trade mark, but I am mindful of the comments of the ECJ in *Medion* that I must not merely take this component and compare it with NatWest's trade mark. However, from a visual perspective, at least, this device element in AFG's trade mark is more than three times larger than the word elements which appear below the device. The device element, as NatWest contends, does share a number of similarities with the earlier trade mark. Both are constructed from three arrowhead devices pointing outwards from the centre to form a shape that resembles a hexagon. They differ in that the device element of AFG's trade mark consists of "chevron" like arrow heads that interlock more closely than the solid block arrow heads of NatWest's device and the "arrows" in AFG's device point in different directions to those in NatWest's device. However, I doubt whether this final difference would be noticed by the relevant consumer unless they were presented with the opportunity to consider both trade marks side by side.

33) Of course, AFG's trade mark also contains the words "Alternative Finance Group" and "Putting faith into finance". NatWest, in its statement of grounds, expressed the view that the words "Alternative Finance Group" are not particularly distinctive and the words "Putting faith into finance" is descriptive of any services "relating to Islamic finance services". It concludes that because of this, the device element forms the distinctive element. Certainly, these word elements are not of the highest level of distinctiveness, but it is not possible to conclude that they are negligible within the meaning attributed in *LIMONCELLO*. As such, I do not accept NatWest's inference that the comparison of the respective trade marks should be made on the comparison of its trade mark with the device element in AFG's trade mark.

34) Nevertheless, taking all these factors into account and viewing the respective trade marks as a whole, I find that they share a reasonably high level of visual similarity.

35) Aurally, the respective trade marks share no similarity as the NatWest trade mark contains no word element and as such will have no aural identity. From a conceptual view point, the NatWest trade mark does not conjure up any conceptual identity as it contains no words and the device element is abstract in nature. On the other hand, AFG's mark is imbued, by virtue of its word elements, with the conceptual identity of a group of companies or individuals providing financial services that are alternative in nature. As such, the respective trade marks are neither conceptually similar nor dissimilar.

36) In conclusion, there is no aural similarity between the respective trade marks and conceptually, they are neither similar or dissimilar, but they share a reasonable high level of visual similarity. On balance, these factors combine to result in a moderate level of similarity between the respective trade marks.”

19. Contrary to the position advanced by NatWest, the Hearing Officer did not find that there was a high level of visual similarity in the marks. After noting a number of differences in the respective devices, he also took into account – in my view, correctly – that visually AFG's mark contained word elements that were not merely negligible and would figure in the public's visual appreciation of AFG's mark. He therefore concluded that there was a *reasonably* high level of visual similarity in the marks. Having then found there was nothing aurally or conceptually to factor into the balance, his assessment was that there existed a moderate level of similarity between the respective trade marks. Whilst that determination might have been better expressed², I do not accept the suggestion that the Hearing Officer somehow translated lack of aural and conceptual similarities into dissimilarities and subtracted those from his findings in relation to visual similarity. In my view, what he was trying to convey was that the aural and conceptual aspects of the comparison were neutral.
20. Regarding the contention that the Hearing Officer should have taken into account NatWest's reputation in the “three arrow heads” logo for financial services, it is well established that the conditions of section 5(2)(b) are cumulative (Case C-106/03 P, *Vedial SA v. OHIM* [2004] ECR I-9573, para. 51). The reputation of an earlier mark is relevant to the determination of likelihood of confusion but not the assessment of similarity in the marks. Otherwise would be double counting and to attribute undue importance to the reputation of a mark (Case C-235/05 P, *L'Oréal SA v. OHIM* [2006] ECR I-57, paras. 42, 43 and 45).

Comparison of services

21. Generally on the similarity of services, the Hearing Officer instructed himself with reference to Case C-39/97, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.* [1998] ECR I-5507, paragraph 23 and Case T-164/03, *Ampafrance SA v. OHIM* [2005] ECR II-1401, paragraph 53. As I have already indicated, the Hearing Officer found that identical services were concerned in Class 36.

² In particular, it is unfortunate that the Hearing Officer used “reasonable” instead of “reasonably” at para. 36. I suspect that was a typographical error.

22. Turning to NatWest’s contention that its “land, land fixture surface rights and land leasing rights” and “mortgage services” in Class 36 were complementary to AFG’s services in Class 37, the Hearing Officer noted the guidance of Jacob J. in *Avnet Inc. v. Isoact Ltd* [1998] FSR 16 at 19:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

23. The Hearing Officer also interpreted the respective services in question in the context of the Classes in which they were claimed. In *Altecnic Ltd’s Trade Mark Application* [2002] RPC 639, the Court of Appeal confirmed that the Class number forms part of a specification and is relevant to interpreting its scope (Mummery L.J. at paras. 41 – 42).
24. There was no suggestion that the Hearing Officer got the law wrong. I pause to consider the Class Headings and Explanatory Notes for Classes 36 and 37:

“CLASS 36

Insurance; financial affairs; monetary affairs; real estate affairs

Explanatory Note

Class 36 includes mainly services rendered in financial and monetary affairs and services rendered in relation to insurance contracts of all kinds.

This Class includes, in particular:

- services relating to financial or monetary affairs comprise the following:
 - (a) services of all the banking establishments, or institutions connected with them such as exchange brokers or clearing services;
 - (b) services of credit institutions other than banks such as co-operative credit associations, individual financial companies, lenders, etc.;
 - (c) services of "investment trusts," of holding companies;
 - (d) services of brokers dealing in shares and property;
 - (e) services connected with monetary affairs vouched for by trustees;
 - (f) services rendered in connection with the issue of travellers' cheques and letters of credit;
- services of realty administrators of buildings, i.e., services of letting or valuation, or financing;
- services dealing with insurance such as services rendered by agents or brokers engaged in insurance, services rendered to insured, and insurance underwriting services.

CLASS 37

Building construction; repair; installation services

Explanatory Note

Class 37 includes mainly services rendered by contractors or subcontractors in the construction or making of permanent buildings, as well as services rendered by persons or organisations engaged in the restoration of objects to

their original condition or in their preservation without altering their physical or chemical properties.

This Class includes, in particular:

- services relating to the construction of buildings, roads, bridges, dams or transmission lines and services of undertakings specialising in the field of construction such as those of painters, plumbers, heating installers or roofers;
- services auxiliary to construction services like inspections of construction plans;
- services of shipbuilding;
- services consisting of hiring of tools or building materials;
- repair services, i.e., services which undertake to put any object into good condition after wear, damage, deterioration or partial destruction (restoration of an existing building or another object that has become imperfect and is to be restored to its original condition);
- various repair services such as those in the fields of electricity, furniture, instruments, tools, etc.;
- services of maintenance for preserving an object in its original condition without changing any of its properties (for the difference between this Class and Class 40 see the Explanatory Note of Class 40);

This Class does not include, in particular:

- services consisting of storage of goods such as clothes or vehicles (Cl. 39);
- services connected with dyeing of cloth or clothes (Cl. 40).

25. The Hearing Officer's deliberations insofar as relevant were as follows:

“23) With this guidance [*Avnet*] in mind, I will take a look at what these terms are likely to mean within the context of Class 36. From a reading of the Class heading, they must be in the form of “insurance, financial or real estate agency services” that relate to “land, land fixture surface rights and land leasing rights” and therefore are somewhat different to the property development type services claimed by AFG. NatWest's services will provide the customer with access to financial support, insurance or knowledge of land that is for sale or lease and deal with the administration of the sale or lease of the same. These services are distinctly different from those who undertake property development in the form of building construction and repair as covered by AFG's Class 37 specification. Further, the type of undertaking that provides these respective services is normally different. On the one hand, you have banks, building societies, estate agents and insurance companies. On the other, you have construction and building companies. As such, I find that these respective services are not in competition with each other. Similarly, and for the same reasons, I also find that NatWest's “mortgage services” are not in competition any of AFG's Class 37 services. However, I also need to consider if they are complementary to each other.

24) According to the case-law of the CFI in relation to the analogous provision of the Community Trade Mark Regulation 40/94, goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for the production of those goods

lies with the same undertaking: *Sergio Rossi SpA v OHIM – Sissi Rossi*, Case T-169/03. On this basis the CFI has held that wine and wine glasses are not complementary, but that there is a slight similarity between some types of bags in Class 18 and shoes and clothing in Class 25: *El Corte Ingles S.A. v OHIM*, Case T-443/05.

25) I have already identified that the type of undertaking providing the respective services are different. It follows that the customer will not expect the respective services to be provided by the same undertaking. Further, the mortgaging or leasing of land is not indispensable for property development. In some cases, they may both be required by a customer but this is not to say that the either is indispensable or even important for the other. I therefore find that the respective services are not complementary.

26) I conclude that, on balance, in respect to the non-identical services, the level of similarity is low.”

26. AFG’s main complaint insofar as I understood it, is that the Hearing Officer wrongly held that NatWest’s services in Class 36 and AFG’s services in Class 37 were not complementary. Mr. Fernando sought to persuade me that the Hearing Officer had assumed AFG’s Class 37 services were limited to small-scale building/construction projects. In turn, that led the Hearing Officer incorrectly to find that financing was not indispensable – and so not complementary – to property development. Mr. Fernando particularly drew attention to AFG’s “commercial retail property development services” in Class 37.
27. I agree with Mr. Fernando that many property developments will be financed. However, that is not to say that the public will believe that the property development and the financing are provided by the same or related undertakings.
28. The Hearing Officer noted that the General Court of the Court of Justice of the European Union had on several occasions considered the complementarity of goods and services. In Case T-325/06, *Boston Scientific Ltd v. OHIM* [2008] ECR II-0174, the General Court stated (para. 82):

“82. It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 P *Rossi v OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR I-0000, paragraph 48).”

The wine/glasses example provided by the Hearing Officer was confirmed by the Court of Justice in Case C-398/07 P, *Waterford Wedgwood plc v. Assembled Investments (Proprietary) Ltd and OHIM*, 7 May 2009.

29. NatWest sought through argument for the first time on appeal to introduce evidence regarding property holdings by financial institutions. Such evidence was not before the Hearing Officer, there was no application to admit fresh evidence on appeal and it was agreed that I should ignore it.
30. Mr. Fernando also said that the public were used to seeing the “three arrow heads” logo attached to property/shop developments particularly on London hoardings. However, NatWest had put in no evidence to support that contention. NatWest’s evidence was largely focussed on its domestic banking business. There was just one general reference to NatWest being a commercial bank in Brand-finance’s, *Global 500 Financial Brands Index*, January 2008 where it was ranked as number 20 (exhibit NE6 to the witness statement of Neil English dated 17 June 2008).
31. In the absence of any such evidence, I believe the Hearing Officer was perfectly entitled to determine that the Class 36 and 37 services were not complementary. Further, I am not persuaded that Hearing Officer had only in mind small-scale construction projects.
32. NatWest also argued that the Hearing Officer forgot the “advisory services” elements of the respective specifications, which NatWest contended were overlapping, i.e., NatWest’s Class 36 services included financial advisory services relating to property development which were equally covered by “advisory services relating to property development” in AFG’s Class 37 services. However, that argument conveniently ignores the classification of the latter services in Class 37. Advisory services in Class 37 are those relating to building construction; repair; and installation.
33. In his skeleton argument Mr. Fernando raised the issue of NatWest’s Class 35 services in particular:
- “Business appraisals, enquiries, investigations, research and business management advice; business management consulting; ... business management services, business advisory services”
34. The Class Heading and Explanatory Notes for Class 35 read as follows:
- “CLASS 35
Advertising; business management; business administration; office functions
- Explanatory Note*
Class 35 includes mainly services rendered by persons or organizations principally with the object of:
- (1) help in the working or management of a commercial undertaking, or
(2) help in the management of the business affairs or commercial functions of an industrial or commercial enterprise,
- as well as services rendered by advertising establishments primarily undertaking communications to the public, declarations or announcements by all means of diffusion and concerning all kinds of goods or services.

This Class includes, in particular:

- the bringing together, for the benefit of others, of a variety of goods (excluding the transport thereof), enabling customers to conveniently view and purchase those goods;
- services consisting of the registration, transcription, composition, compilation or systematization of written communications and registrations, and also the exploitation or compilation of mathematical or statistical data;
- services of advertising agencies and services such as the distribution of prospectuses, directly or through the post, or the distribution of samples. This Class may refer to advertising in connection with other services, such as those concerning bank loans or advertising by radio.

This Class does not include, in particular:

- activity of an enterprise the primary function of which is the sale of goods, i.e., of a so-called commercial enterprise;
- services such as evaluations and reports of engineers which do not directly refer to the working or management of affairs in a commercial or industrial enterprise (consult the Alphabetical List of Services);
- professional consultations and the drawing up of plans not connected with the conduct of business (Cl. 42).

35. The Hearing Officer did not mention NatWest's Class 35 services in his consideration of AFG's Class 37 services, possibly because the point was not argued before him³. Nevertheless, in my judgment any such omission was immaterial. NatWest's services in Class 35 are not complementary in any relevant sense to AFG's services in Class 37 nor are they similar.

Average consumer

36. One of the grounds of appeal was that the Hearing Officer inconsistently defined the average consumer although this was not pursued by Mr. Fernando at the hearing.

37. The Hearing Officer stated:

“27) As matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23) it is important that I assess who the average consumer is for the goods and services at issue. I will limit my analysis to identifying the average consumer with respect to NatWest's Class 36 services and all of AFG's services because NatWest's best case, in the main, is served by these services. The average consumer for financial services can be either the general public or commercial undertakings. There is no evidence regarding the nature of the purchasing act but, it is my experience that, this is normally reasonably well considered with potential customers taking note of charges, interest rates, price comparisons, accessibility of services etc before entering into the purchasing act. I do not believe that this would be appreciatively different for personal or commercial banking or other financial activities.

³ Class 35 was not argued in the grounds of appeal either.

28) In respect of the property development services that make up AFG's Class 37 specification of services, the average consumer may also be an individual or a commercial undertaking. As financial services are accessed by a large proportion of the population, it will follow that on this general level, there will be some overlap with the part of the population that also wishes to access property development services, but essentially the respective relevant consumers will be different. The purchasing act for such services will also be well considered, with considerations such as the quality and cost being important as well as availability and timeliness.

29) As both sets of services require a well considered purchasing act, it follows that the relevant consumers will have a greater ability to discern between trade marks and the undertakings providing the respective services when compared with, for example, the purchasing act involved in the trade of a common consumer item."

38. The grounds of appeal took issue with paragraph 28. I agree that the second sentence is unclear. The Hearing Officer may have meant that although the purchasers of the respective services might overlap at a general level their objectives would differ. In any event I believe the point is immaterial and one which Mr. Fernando properly chose not to argue.

Section 5(3)

39. This ground of appeal realistically depended on the outcome of the previous grounds for appeal. To recap on section 5(3), the Hearing Officer held in connection with AFG's Class 37 services that: (a) NatWest had established reputation in its "three arrow heads" logo; but (b) the requisite link had not been made out.
40. Regarding the existence of such a link, the Hearing Officer rightly took into account the factors listed in Case C-252/07, *Intel Corporation Inc. v. CPM United Kingdom Ltd* [2009] RPC 15 (para. 42, confirmed in Case C-487/07, *L'Oréal SA v. Bellure NV* [2010] RPC 1, para. 44). He said:

"56) The respective trade marks share a moderate level of similarity, but the respective services share a low level of similarity and the relevant public may, in some cases, overlap. But essentially, NatWest's relevant public are those who are seeking financial and similar services whereas AFG's relevant public are individuals or businesses wishing to undertake development of property. I do note however, that NatWest enjoys a strong reputation in respect of its banking and associated services and that its trade mark enjoys a high level of distinctive character by virtue of its inherent qualities and because it is enhanced through the use made of it. However, I found that there was no likelihood of confusion in respect of AFG's Class 37 services.

57) I am mindful that the link must be real and not theoretical in its effect (*Intel v. Sihra and Intel Corporation Inc v. CPM United Kingdom Ltd*). I am also mindful that the provision is not aimed at every sign whose use may stimulate the relevant public to recall a trade mark which enjoys a reputation

with them (*Premier Brands UK Limited v. Typhoon Europe Limited*). Taking all of the factual points, listed above, into account and also the guidance provided by the various authorities and in particular taking account of the distance between the respective services, the different consumers and the fact that AFG's trade mark is a composite mark incorporating words identifying the trade source that is not obviously the opponent, I find that AFG's trade mark would not bring NatWest's trade mark to mind when used in respect to property development and associated services as listed in AFG's Class 37. Having established that the necessary link does not exist, I do not need to go on to consider the issue of unfair advantage and detriment. Therefore, in respect to AFG's Class 37 services, I find that the opposition under Section 5(3) fails."

41. NatWest's challenge to that finding is based on its prior contentions that the Hearing Officer misjudged the similarities in the marks and the services. Since I have not accepted those contentions, the final ground of appeal similarly fails.

Conclusion

42. In the event, the appeal fails. AFG did not appear, was not represented and made no submission on appeal. I will therefore make no order for costs.

Professor Ruth Annand, 10 May 2010

Mr. Giles Fernando of Counsel instructed by Pinsent Masons LLP appeared for the Opponent/Appellant

The Applicant/Respondent did not appear and was not represented