

O-355-17

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3162376 BY
AEG GROUP LTD**

TO REGISTER THE TRADE MARK:



FOR SERVICES IN CLASSES 36 and 37

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 407262 BY
ANSCHUTZ ENTERTAINMENT GROUP
DEVELOPMENT GmbH**

Background

1) On 1 May 2016 AEG Group Ltd (“the Applicant”) applied to register the following trade mark:



The application was published for opposition purposes on 3 June 2016. Registration is sought for the following services:

Class 36: *Finance services.*

Class 37: *Property development services [construction].*

2) The application is opposed by Anschutz Entertainment Group Development GmbH (“the Opponent”). The opposition, which is directed against all the services in the application, is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), for the purposes of which the Opponent relies upon the earlier EU trade mark registration no. 6881973 for the following mark (“the earlier mark”) in respect of the following goods:

AEG

Class 35: *Searching for sponsorship to promote sporting and entertainment events, for others; promoting the goods and services of others by arranging for sponsors (searching for sponsorship) to affiliate their goods and services with sports teams, entertainers or sports and entertainment facilities; arranging of advertising services; commercial administration of sports and entertainment facilities or arenas; business management services; business administration; office functions; real estate development, namely administration of facilities for sporting and entertainment events.*

Class 37: *Real estate development, namely construction of facilities for sporting and entertainment events.*

3) The Opponent claims that because of similarity between the respective marks and identity or similarity between the respective services there exists a likelihood of confusion. The earlier mark was applied for on 23 April 2008. It thus constitutes an earlier mark in accordance with section 6 of the Act. Since its registration procedure was completed more than five years before the publication of the Applicant's mark, the Applicant was entitled to request proof of use. In the TM8 form originally submitted the Applicant requested proof of use in respect of "*Finance service- [sic] Mortgages, finance loans*". In a letter of 11 October 2016 the Opponent's representatives pointed out that the earlier mark does not cover these services. In a letter of 21 October 2016 sent by the Registry to the Opponent, and copied to the Applicant, the Registry noted that this was so.

4) The Registry observed further that, upon a review of the case, it had become apparent that there were other issues to be addressed before these proceedings could continue. The parties were informed that, upon examination of the proceedings, including the proof of use issue raised in the Opponent's letter, it had been noted that a page of the Opponent's notice of opposition had not been filed. That particular page included questions 1, 2, 3 and 3a to support the Opponent's claim of opposition under Section 5(2)(b). Question 2 specifically asks the opponent whether it is providing a statement of use which, in turn, has a direct effect on any request for proof of use made by the applicant. The Opponent was allowed 14 days for the missing page of the notice of opposition to be filed at the Registry. On receipt of the missing page, the notice of opposition was then re-examined and served on the Applicant, which was then given a fresh deadline to file a Form TM8 and counterstatement.

5) In its second (amended) TM8 the Applicant requested proof of use in respect of "*Finance service- [sic] Mortgages, insurances, Building and construction which are not sport related, class 37 and class 36*". In a letter of 11 January 2017 to the Applicant the Registry drew the Applicant's attention to the fact that neither "*Finance*

service- Mortgages, insurances” nor *“Building and construction which are not sport related”* are contained in the specification of the earlier mark. It also pointed out that there is no Class 36 in the specification of the earlier mark. If the Applicant wished to request the Opponent to provide proof of use, therefore, the Applicant was asked to confirm the services for which it required such proof, ensuring that those services are actually contained in the specification of the earlier mark.

6) In the final (amended) TM8 filed the Applicant did not require the Opponent to provide proof of use of the marks relied on by it. In response to the tick box question on the notice of defence, the Applicant specifically states that proof of use is not required, with the result that the Opponent was not required to file evidence to support its statement of use, and may rely on the mark, as it is registered, for the whole breadth of those terms of the specifications of the earlier mark which is relied on in this opposition.

7) In its counterstatement the Applicant denies the grounds of opposition, observing that the design of the marks is completely different. It disputes that the services of its specification in classes 36 and 37 are similar to the Opponent’s in classes 35 and 37, observing that *“36 is based on finance which I cannot see within your classes”*. It further observes that AEG GROUP is the Applicant’s company name, whereas the AEG of the earlier mark is not the Opponent’s company name, but stands for Anschutz Entertainment Group Development, GmbH. It denies that there exists a likelihood of confusion between the competing marks so as to satisfy the requirements of section 5(2)(b) of the Act.

8) I observe that in the TM8 forms filed by the Applicant the name given in the box marked “Name of applicant/registered owner” is Adrian Foster, rather than AEG Group Ltd, which is the registered owner of the opposed mark. I note, however, that in the counterstatement in the first TM8 filed Mr Foster writes “firstly, my company name is AEG GROUP Ltd”, and that, in responding in its written submissions to points raised in the counterstatement, the Opponent refers to “The Applicant’s counterstatement”, and requests costs against the Applicant. The proceedings have therefore gone forward on the basis that Mr Foster is entitled to represent AEG Group Ltd in these proceedings.

9) Only the Opponent filed written submissions during the evidence rounds. Neither side filed evidence. Neither side requested a hearing. I therefore give this decision after a careful review of all the papers in this case.

Section 5(2)(b)

10) Section 5(2)(b) of the Act reads as follows:

“5(2) A trade mark shall not be registered if because – [...]

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

11) The following principles are gleaned from the decisions of the Court of Justice of the European Union (“the CJEU”) in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P (“*Bimbo*”):

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of services

12) In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

In *Boston Scientific Ltd v OHIM* (“*Boston*”), Case T-325/06, the General Court said:

“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...”.

13) The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services
- c) The respective trade channels through which the goods or services reach the market
- d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

14) In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05 (“*Meric*”), the General Court (“the GC”) stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM — Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42)”.

15) When it comes to understanding what terms used in specifications mean and cover, the guidance in the case-law is to the effect that “in construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of the trade”¹. I must also bear in mind that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning². I also note the judgment of Mr Justice Floyd in *YouView TV Limited v Total Limited* where he stated:

“..... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent*

¹*British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281

²*Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

Attorneys (Trademarks) (IPTRANSLATOR) [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of "dessert sauce" did not include jam, or because the ordinary and natural description of jam was not "a dessert sauce". Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

16) In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. stated that:

"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."

17) The respective services of the parties are as follows:

The Applicant's services	The Opponent's services
<p>Class 36: <i>Finance services.</i></p> <p>Class 37: <i>Property development services [construction].</i></p>	<p>Class 35: <i>Searching for sponsorship to promote sporting and entertainment events, for others; promoting the goods and services of others by arranging for sponsors (searching for sponsorship) to affiliate their goods and services with sports teams, entertainers or sports and entertainment facilities; arranging of advertising services; commercial administration of sports and entertainment facilities or arenas; business management services; business administration; office functions; real estate development, namely administration of facilities for sporting and entertainment events.</i></p>

	<p>Class 37: <i>Real estate development, namely construction of facilities for sporting and entertainment events</i></p>
--	--

18) Neither side filed evidence, so I have no evidence addressed to the issue of similarity of services. I will make the comparison with reference to the Applicant’s services.

The Applicant’s *finance services* in Class 36

19) The Applicant’s *finance services* would involve the provision or brokering of finance and related advice, including, for example, the provision and brokering of loans, credit, mortgages, etc. to private consumers, businesses and other organisations. At paragraph 10 of its written submissions of 15 March 2017 the Opponent contends:

“With respect to the Opponent’s services, “*searching for sponsorship...*” is in practice the same as searching for finance. The Opponent is seeking to raise money through sponsorship, and this is therefore highly similar to a finance service in terms of its activity and the consumers involved. When the Opponent offers services “*arranging for sponsors (searching for sponsorship) to affiliate their goods and services with sports teams, entertainers or sports and entertainment facilities*”, the latter will receive funds in exchange. The Opponent is thus involved in brokering financial arrangements. This too is closely similar, if not the same, as a finance service.”

20) While I agree that seeking finance and seeking sponsorship both involve obtaining sources of funding for a business or organisation, I am not persuaded that this can in itself necessarily give rise to a significant degree of similarity between the respective services. The purpose of any business is to make money by selling its goods and services, or exploiting its assets. In the case of some businesses – such as sporting or entertainment concerns – one of those assets will consist in the fact that other businesses may wish to associate themselves with those concerns for marketing and advertising purposes. Accordingly, seeking sponsorship is, by nature,

akin to a marketing or advertising service, which naturally have to be paid for by the party receiving the benefit of the marketing or advertising.

21) In addition to funds raised in the course of an organisation's core business or activity – through sale of its goods and services or exploitation of its assets – it may from time to time require, for example, working capital or bridging finance in the form of share issues, loans and credit of various kinds. Though they may share the ultimate purpose of raising money, the brokering of loans or the management of share issues, for example, on one hand, and arranging sports, entertainment or cultural sponsorship deals on the other, are activities which are different in nature, and involve quite different sets of professional skills: various kinds of professional financial expertise and contacts in the former case, and in the latter case know-how, proficiency and contacts in fields associated with marketing and advertising. Consumers expect to find these two different kinds of services provided by different types of undertakings. Users of the respective services may overlap, but the services are widely used, so that this represents too great a level of generality to give rise to significant similarity; the mere fact that different services are supplied to the same users does not in itself indicate similarity.

22) An organisation will normally prefer to raise money by exploiting its own assets in the course of its normal activities – by concluding a deal with a sponsor, for example – rather than paying for finance services, which it will obtain as necessary. Although finance services on one hand and the searching for, and arranging of, sponsorship on the other both involve the raising of funding, therefore, I do not consider them to be substantially in competition; nor are they complementary 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 services lies with the same undertaking.

23) Taking the above considerations into account, I find that there is not more than a low degree of similarity, at best, between the Applicant's *finance services* and the Opponent's *searching for sponsorship to promote sporting and entertainment events, for others* and *promoting the goods and services of others by arranging for sponsors*

(searching for sponsorship) to affiliate their goods and services with sports teams, entertainers or sports and entertainment facilities.

24) The Applicant's *finance services* and the Opponent's *arranging of advertising services* clearly have a different nature and purpose, and are not in competition or complementary in the sense explained in *Boston*. They are not similar.

25) The Opponent submits:

“11. “Commercial administration “, “business management services” and “business administration” are all services which will entail finance services. Finance services are essential to the commercial operation, management and administration of businesses. This is because businesses:

- i. largely exist to create financial benefits for shareholders;
- ii. rely on finance to fund new projects;
- iii. regularly provide finance to service partners; and
- iv. necessarily have either an in-house or outsourced financial function.

12. Indeed, one of the “office functions” (as in the Opponent's services) would be the finance function.

13. Moreover, the abovementioned services of each party will be consumed by the same personnel in the customer organisation, namely the managing director, finance director or commercial director.

14. The Opponent's Class 35 services are therefore both highly similar in nature to the Applicant's services in Class 36 and service the same classes of consumers.”

26) The purpose and nature of *commercial administration of sports and entertainment facilities or arenas* is to complete the administrative tasks necessary for the day-to-day operation of such venues. The purpose and nature of *business management services* and *business administration* is to assist in the running of the business, including matters of strategy and organisation. There is potential for such administrative or management services to involve decisions about, or the obtaining

of, finance for the venue or business being administered or managed. There is nothing implicit in this, however, that either of them includes a function involving the provision of a finance service; their nature and purpose is the running of a venue or business – which may involve *obtaining*, as required, the money necessary for its running, together with the taking of any related professional advice that may be required. The nature and purpose of a finance service consist in the *provision* and brokering of finance and advice relating to such provision. Thus, the nature and purpose of finance services differ from those of commercial administration or business management. The methods of use also differ.

27) What I have said in paragraph 26 about the nature and purpose of the Applicant's and Opponent's respective services indicates that they do not compete. Nor are they indispensable or important for the use of one another in such a way that the relevant consumers may think that responsibility for them lies with the same undertaking. The mere fact that the different services may be supplied to the same users does not in itself indicate that they are similar. Nor is there evidence that they share the same channels of trade. In the absence of such evidence, the natural and obvious conclusion is that they are provided by discrete operators.

28) My observations with regard to the Opponent's commercial and business administration and management services apply *a fortiori* to its *office functions*, which can be seen as the supplying to undertakings of general administrative support or back-office function services, such as handling of written and telephone communications, mailroom, reprographics, stationery procurement, filing, etc., and perhaps book-keeping. The Opponent's *real estate development, namely administration of facilities for sporting and entertainment events* brings nothing further to the comparison beyond its other services already discussed in paragraphs 25-27.

29) To summarise: I do not consider that there is any material similarity between the Applicant's *finance services* and the Opponent's *commercial administration of sports and entertainment facilities or arenas; business management services; business administration; office functions; real estate development, namely administration of facilities for sporting and entertainment events*.

30) The Opponent submits:

“15. Moreover, the provision of the Opponent’s Class 37 services will require funding, loans, and sources of credit. The Applicant’s Class 36 services are therefore complementary to the Opponent’s Class 37 services, and consumers would expect both kinds of service to be offered by one company. Indeed, this is proven by the fact that the Applicant offers both Class 36 and Class 37 services”.

31) I do not accept the Opponent’s contention that the fact that the Applicant offers both Class 36 and Class 37 services proves that consumers would expect both kinds of service to be offered by one company; it simply shows that the Applicant is interested in operating in both these areas. I note that the Opponent’s real estate development service in Class 37 is limited to the construction of facilities for sporting and entertainment events. While users may overlap, the Applicant’s *finance services* do not have the same nature, the same intended purpose or the same method of use as the Opponent’s *real estate development, namely construction of facilities for sporting and entertainment events*. Nor do I have any evidence that channels of trade coincide.

32) With regard to complementarity, while the provision of finance may play a significant role in facilitating the construction of facilities for sporting and entertainment events, it cannot be inferred from that fact alone that consumers would be led to believe that the same undertaking was responsible for both. To conclude otherwise would imply that any non-financial service which, on the basis of its scale or for other reasons, depends upon the provision of financing, is complementary to a finance service, even where the link lies merely in the need to obtain financing, and consumers would not otherwise assume that the same undertaking was responsible for those services³. I find no material similarity between *finance services* and *real estate development, namely construction of facilities for sporting and entertainment events*.

³ See, to that effect, T-323/14, *Bankia, SA v OHIM* at paragraph 37.

The Applicant's *property development services [construction]* in Class 37

33) The Applicant's *property development services [construction]* and the Opponent's *real estate development, namely construction of facilities for sporting and entertainment events* both involve construction undertaken for the purposes of property development. The Opponent's term falls squarely within the ambit of the term in the Applicant's specification. Accordingly, the services are identical under the guidance in *Meric*.

The average consumer and the purchasing process

34) The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

35) The Applicant's *finance services* would involve the provision of finance. This would include, for example, the provision of loans and credit to private consumers as well as the arrangement and delivery of funding to businesses and other organisations. Thus, the average consumer for these services can be either the general public or commercial undertakings. In either case, the selection and purchase of finance services will normally be well considered, with potential

customers taking note of charges, interest rates, price comparisons, accessibility of services etc. before entering into the purchasing act.

36) The average consumer for the Class 37 services of the Opponent, could consist, for example, of sports clubs, sporting associations, and public and private sector organisations wishing to provide venues for cultural and entertainment events. The average consumer for the Class 37 services of the Applicant would also include these, but would in addition cover the wider category of entities seeking the development of property in other fields too. These services will represent high value purchases for the consumer, and will be well considered, their purchase being likely in most cases to involve a process of meetings and correspondence.

37) The average consumer for the Class 35 services of the Opponent would consist of sports clubs, sporting associations and public and private sector organisations providing sports and entertainment events and facilities, seeking sponsorship or assistance with the administration of their facilities. Also covered by the Class 35 services would be businesses or other organisations wishing to advertise, or to seek assistance with the commercial and administration aspects of running their activities. The purchasing act for such services will be well considered, and would, for example, in most cases be likely to involve meetings and/or correspondence. The degree of care and attention given to the process of selection will reflect the cost, complexity and sophistication of the services being purchased.



Comparison of the marks

38) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. It is also explained in the same case that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

39) It would be wrong, therefore, to dissect the trade marks artificially, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

40) The marks to be compared are shown below:

The Applicant's mark	The earlier mark
 The Applicant's mark consists of the text "AEG Group" in white, sans-serif font, centered within a solid red rectangular background.	 The earlier mark consists of the letters "AEG" in a bold, black, sans-serif font, centered on a plain white background.

41) The word “Group” takes up a substantial part of the Applicant’s mark. However, consumers are used to seeing the word “group” as indicating that the preceding element – here AEG – designates a group of affiliated enterprises; “Group” here, while not negligible in the overall impression, will have the same kind of visual impact as, for example, the additions “Ltd” or “PLC”; it will be accorded less attention than the initial and distinctive element AEG, on which attention will focus, and which dominates the mark. The whole word element is presented in a perfectly ordinary typeface in white against a plain red background. The Opponent’s mark consists of the letters AEG, which constitute the mark’s sole element. I bear in mind that it may

be used in any colour⁴. Overall, there is a high degree of visual similarity between the marks.

42) I have explained how I consider that the consumer will perceive the word Group in the Applicant's mark. In the light of this, I consider that the word Group may well often not be articulated in oral use of the mark. This would result in oral identity, AEG being pronounced in both marks as an identical sequence of letters. Where the word Group is spoken in the Applicant's mark, this will provide an element of oral difference in oral use too, however, attention will focus on the initial distinctive AEG element, which accounts for three of the four spoken syllables of the Applicant's mark, so that there will in any event be a high degree of oral similarity between the marks.

43) I have no evidence to suggest that the relevant public will have been educated to see the letter sequence A, E and G in either of the competing marks as standing for any particular combination of words. That being so, the average consumer will see the AEG element in both marks simply as a sequence of letters having no particular meaning for him or her. It thus contributes no material conceptual similarity to the competing marks. The word Group in the Applicant's mark adds a concept missing in the opponent's mark but, as I have already observed, consumers are used to seeing the word "group" as indicating that the preceding element – here AEG – designates a group of affiliated enterprises, and will, for that reason, accord it relatively little attention. There is neither conceptual similarity nor any significant conceptual difference between the marks.

The distinctiveness of the earlier mark

44) The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark, on the basis either of inherent qualities or because of use made, the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU stated that:

⁴See Kitchen LJ at paragraph 5 in *Specsavers International Healthcare Ltd & Ors v ASDA Stores Ltd & Anor* [2014] EWCA Civ 1294.

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

45) I have no evidence of acquired distinctiveness to consider. I therefore have only the inherent distinctive character of the earlier mark to assess. I have already observed that I have no evidence to suggest that the relevant public will have been educated to see the letter sequence A, E and G in either of the competing marks as standing for any particular combination of words. That being so, the average consumer will see the AEG element in both marks simply as a sequence of letters having no descriptive or allusive significance for him or her. It has an average degree of distinctiveness.

Likelihood of Confusion

46) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment

of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused. It will be convenient to consider the Applicant's services in Class 37 first.

The Applicant's *property development services [construction]* in Class 37

47) I have found the earlier mark to be of average distinctiveness. I have found that there is a high degree of visual and oral similarity between the competing marks, and that there is neither conceptual similarity nor any significant conceptual difference between them. I have found the Applicant's *property development services [construction]* and the Opponent's *real estate development, namely construction of facilities for sporting and entertainment events* to be identical.

48) Bearing in mind my findings in respect of the average consumer and the purchasing process, the differences in the marks may well be noticed and recollected but, used in connection with identical services, they will not be perceived as indicating a difference in trade origin. In the light of the strongly dominant and distinctive word element AEG the graphic element of the Applicant's mark (normal typeface in white against a plain red background) will be seen as a simple variant (and the Opponent's mark may in any case be used in any colour). The word "Group" in the Applicant's mark will be seen simply as indicating affiliated enterprises. When encountering the competing marks used in connection with identical services, the average consumer will believe that the respective services are provided by the same or economically linked undertakings; there is a likelihood of indirect confusion. If the differences between the marks are not noticed, there will be direct confusion.

49) In the counterstatement on the TM8 form filed by the Applicant on 30 September 2016 the Applicant contends that its "focus is mainly residential, student accommodation construction", implicitly contrasting this with the Opponent's focus on construction of facilities for sporting and entertainment events. This raises the question of whether a sub-set, or sub-sets, of construction services undertaken for

the purposes of property development could be identified which were sufficiently far removed from the Opponent's construction of facilities for sporting and entertainment events as not to give rise to a likelihood of confusion. I have come to the conclusion that this is not a viable course in this case.

50) I bear in mind the nature of the average consumer I have identified, the considered nature of the purchasing process, and the degree of attention involved. Nevertheless, I consider that, given the high similarity of the marks, on encountering the Applicant's mark used in connection with, for example, construction for the purposes of residential development, it will be natural for the average consumer of the Opponent's Class 37 services to assume that those services are supplied by the same undertaking, or by economically linked undertakings. Indeed, the word "Group" in the Applicant's mark is consistent with the existence of affiliated companies respectively targeting different sectors of the market for the relevant services. Accordingly, I find there is a likelihood of indirect confusion between the Applicant's *property development services [construction]* and the Opponent's *real estate development, namely construction of facilities for sporting and entertainment events*. If the differences between the marks are not noticed, there will be direct confusion.

The Applicant's *finance services* in Class 36

51) I have found not more than a low degree of similarity, at best, between the Applicant's *finance services* in Class 36 and the Opponent's *searching for sponsorship to promote sporting and entertainment events, for others and promoting the goods and services of others by arranging for sponsors (searching for sponsorship) to affiliate their goods and services with sports teams, entertainers or sports and entertainment facilities* in Class 35. I find that for the average consumer I have identified, showing an appropriate degree of care and attention, the high degree of similarity between the competing marks will not be sufficient to outweigh the (at best) low degree of similarity between the respective services in this case. As a result, I consider that s/he will not regard the presence of the distinctive AEG in both marks as more than a coincidence when used in relation to these services. This also applies to the comparison with all the Opponent's other services in Class

35, since I have found none of them to have any material degree of similarity with the Applicant's *finance services*. Accordingly, there is no likelihood of confusion between the competing marks in respect of the Applicant's *finance services* in Class 36.

Result

52) The opposition fails in relation to the Applicant's *finance services* in Class 36, in respect of which the contested mark may proceed to registration.

The opposition succeeds in relation to the Applicant's *property development services [construction]* in Class 37, in respect of which the contested mark may not proceed to registration.

Costs

53) The Opponent has been successful in opposing the specification of the Applicant's mark in Class 37. On the other hand, the Applicant has been successful in defending its specification in Class 36. The result may be described as a score draw. Accordingly, neither side will be favoured with an award of costs.

Dated this 27th day of July 2017

**Martin Boyle
For the Registrar,
The Comptroller-General**