

O/123/21

TRADE MARKS ACT 1994

**IN THE MATTER OF INTERNATIONAL TRADE MARK REGISTRATION NO.
1473000 IN THE NAME OF TUI AG FOR THE TRADE MARK**




IN CLASSES 39, 41 & 43

AND



**THE APPLICATION FOR INVALIDATION THEREOF UNDER NO. 502914
BY PARK HOTEL MANAGEMENT PTE LTD**

Background and pleadings

1. TUI AG (“the holder”) is the holder of the International Trade Mark no.

1473000 designating the UK for the mark  . The trade mark was registered in the UK on 31 October 2019 and holds a priority date of 21 November 2018 in respect of the services identified and set out fully at paragraph 24 of this decision.

2. On 19 November 2019 Park Hotel Management Pte Ltd (“the cancellation applicant”) applied to invalidate the trade mark registration under the provisions of Section 47(2)(a) and Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The invalidation is based on its earlier UK Trade Mark no.

3206909 for the mark  /  (series of two). The earlier mark was registered in the UK on 15 September 2017. The cancellation applicant relies on all services as registered, all of which are set out at paragraph 25 of this decision.

3. The cancellation applicant argues that the respective services are identical or similar and that the marks are similar, and that as such there exists a likelihood of confusion.
4. The holder filed a counterstatement stating that with consideration to all factors of the case, particularly the differences between the dominant figurative elements of the marks, there is no likelihood of confusion between the same. The holder also submits it is the owner of many earlier marks including the word “destination” around the world, and that no party may claim exclusive rights the word “destination”. The holder submits that the earlier mark holds only a low level of distinctiveness.
5. Neither party filed evidence in these proceedings and neither party requested a hearing. Both parties filed written submissions in lieu of a hearing, which will

not be summarised but will be referred to as and where appropriate during this decision. This decision is taken following a careful perusal of the papers.

6. The holder is represented in these proceedings by Dr. Karsten Fischer, and the cancellation applicant is represented by Baker McKenzie LLP.

Preliminary issues

7. There are two elements of the holder's submissions that I feel require addressing before proceeding. The first of these has been highlighted within the cancellation applicant's written submissions, namely the holder's claim that it owns earlier rights including the word DESTINATION. I note several trade marks have been listed in the holder's final written submissions, and it is claimed that the existence of such and the use of the same in the UK and EU demonstrates there will be no conflict between the marks subject to these proceedings. For clarity, I note there are no consolidated matters introducing these rights into the current proceedings, and no evidence of the referenced use of these marks in the UK or EU has been filed by the holder. The existence of these registrations is therefore irrelevant to the current proceedings.
8. I also note that the earlier marks for which use has been claimed differ from the challenged mark in this instance, although for the reasons above, this does not require my additional consideration. Further, and for the avoidance of doubt, I note here that I do not find that the existence of alternative earlier registrations alone persuasive in respect of the holder's argument, as any "collision" will clearly be unlikely if there has been no use, or limited use of the marks in the relevant market. For these reasons, I will not consider the claimed earlier use or earlier rights further within this decision.
9. The second matter that I will address at this stage is the holder's statement that no one may claim exclusive rights to the word "Destination". The holder submits in its counterstatement:

“The word “Destination” can be found in common standard English dictionaries and needs to be kept freely available. No one can claim exclusive rights to the isolated word “Destination”.

10. These comments are repeated by the holder within its written submissions.

Whilst I acknowledge the holder may have intended that these statements be taken as part of a broader argument regarding the claimed descriptiveness or low level of distinctiveness of this element in respect of the services filed, I note this was included as a standalone point within its counterstatement. It is therefore also possible the holder wishes for these comments to be taken simply as they read above. As I find that the statements are based on reasoning that appears to be misplaced, I feel I should address these comments at this stage. I agree that “Destination” is a word that may be found within the English dictionary. However, it is not a requirement for a trade mark to be an invented word, and indeed there will be vast number of words included within the English dictionary that are also registered as trade marks within the UK. Whether a word must be kept “freely available” will be entirely dependent on the circumstances.

11. Within these proceedings I am required to consider the distinctiveness of the marks with reference to the services. I must consider the level of distinctiveness held by the earlier mark with reference to elements common to both marks, and I must weigh these factors into my decision regarding a likelihood of confusion. However, the particular claim from the holder that the word ‘Destination’ itself must remain “freely available” is not one I must consider within the current matter, and so whilst the distinctiveness of ‘Destination’ will play a role in this decision, no further comment will be made on this point.

DECISION

Section 47

12. Section 47 of the Act states as follows:

“47. –

(1) [...]

(2) The registration of a trade mark may be declared invalid on the ground -

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5 (4) is satisfied

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

...

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met

Section 5(2)(b)

13. Section 5(2)(b) of the Act is 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”.

Section 5A

14. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

Proof of use

15. The registration upon which the invalidation has been based was registered in the UK on 15 September 2017, and the application for invalidation of the later mark was filed on 19 November 2019. As the earlier registration was under five years old on the date on which the application for invalidation of the later mark was filed, proof of use is not required under Section 47(2A) of the Act.

The Principles

16. Although the UK has left the EU, section 6(3)(a) of the European (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.
17. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“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.

The principles

- (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 might believe that the respective goods or services come from the

same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

Similarity of goods and services – Nice Classification

18. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

19. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 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”.

20. In addition, it was established by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, that the following additional criteria is also relevant for an assessment of similarity of goods and services:

- (a) The respective users of the respective goods or services;
- (b) The respective trade channels through which the goods or services reach the market;
- (c) 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;

21. In *Gérard Meric v Office for Harmonisation in the Internal Market (“OHIM”)*, Case T- 133/05, the General Court 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 trade mark application (Case T-388/00 *Institut fur 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”.

22. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM* Case T-325/06, the General Court (“GC”) stated that goods were “complementary” in instances where:

“...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”.

23. The case law provides further guidance on how the wording of goods and services as registered and filed should be interpreted within the comparison. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... 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 Attorneys (Trademarks) (IP TRANSLATOR)* [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.”

24. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term 'computer software'. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

“...the applicable principles of interpretation are as follows:

- (1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.
- (2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.
- (3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.
- (4) A term which cannot be interpreted is to be disregarded.”

25. With these factors in mind, the goods and services for comparison are below:

Cancellation Applicant’s services	Holder’s services
<p><i>Class 35: Business management; project business management and administration; marketing and promotion services; business acquisitions; business advisory services; business project management; business secretarial services; business appraisals; business management and business administration of real estate, residential, industrial and commercial properties, offices, business centers, departmental stores, shopping centers, retail and wholesale outlets, temporary accommodations, hotels, motels, resorts, service apartments, buildings,</i></p>	

houses, condominiums, apartments, flats, warehouses, factories and developments; advertising services; demonstration of goods for promotional or advertising purposes; distribution of promotional souvenirs; event management services (organization of exhibitions or trade fairs for commercial or advertising purposes); arranging and conducting exhibitions for advertising, commercial or trade purposes; arranging and conducting trade shows; organization of exhibition for commercial or advertising purposes; providing office facilities for business meetings; commercial information services; business advisory and business consultancy services relating to franchising; outdoor publicity services; public relations; rental of advertising space; business research; sales promotion for others; organisation, operation and supervision of customer loyalty schemes; sales promotion through customer loyalty programmes (for others); dissemination of advertising matter; rental of billboards; shop window dressing; advertising; advisory, information and consultancy services relating to all the aforesaid services; all of the above services also provided on-line from a computer database or the Internet.

Class 39: Transport; packaging and storage of goods; transport of persons and goods, in particular by road, rail, sea and air; river transport; portage; transport of money and valuables; transportation logistics; organization, booking and arrangement of travels, excursions and cruises; arrangement of transport services; rental of diving suits; organization, booking and arrangement of excursions, day trips and sightseeing tours; travel consultancy and escorting of travellers; rental, booking and providing of aircraft; rental, booking and providing of ships, in particular rowing and motor boats, sailing vessels and canoes; rental, booking and providing of motor vehicles, bicycles and horses; parcel delivery; organization of trips, holidays and sightseeing tours; travel agency services, in particular consultancy and booking services for travel, providing information about travel, arrangement of transport services and travel; travel reservation; transport reservation; providing information about travel, via the Internet, in particular about reservation and booking in the tourism and business travel sector (online travel agencies); delivery, dispatching and distribution of newspapers and magazines; consultation provided by

	<p><i>telephone call centres and hotlines regarding travels, including business travel and in the field of transport logistics, transport and storage; tracking of passenger or freight vehicles using computers or global-positioning systems (GPS); traffic information.</i></p>
	<p><i>Class 41: Basic and advanced training as well as education information; instructional services, in particular correspondence courses and language training; entertainment; film production, other than advertising films; DVD and CD-ROM film production; production of radio and television programs; rental of films and videos; presentation of films and videos; entertainer services; musical performances; circus performances; public entertainment; theatrical performances; arranging and conducting of concerts; ticket agency services [entertainment]; organization and providing of an after school children's entertainment centre featuring educational entertainment; holiday camp services (entertainment); physical education services; language training; training and fitness club services; providing nursery schools, cinema theaters, discotheque services, providing museum facilities [presentation, exhibitions], amusement</i></p>

arcades, amusement park services; sport camp services; providing golf courses, tennis courts, riding facilities and sports facilities; rental of skin diving equipment; organization of sports competitions; organization of cultural and sporting events; arranging of cultural and sporting events; reservation services for sporting, scientific and cultural events; game services provided on-line [from a computer network]; rental of recorded data carriers (films, music, games), projector apparatus and accessories thereof; rental of newspapers and magazines; writing of texts, other than publicity texts; publication of printed matter, also in the form of electronic media including CD-ROMs, other than publicity texts, in particular books, magazines and newspapers; publication of printed matter in electronic form, except for publicity purposes, in particular magazines and newspapers, including in the Internet; publication of texts, except publicity texts, in particular of books, magazines and newspapers, including in the Internet; organization of exhibitions for cultural and teaching purposes; entertainment and educational services provided by recreation and amusement parks; services of an interpreter; services of a

	<p><i>translator; photography; radio entertainment; television entertainment; consultation provided by telephone call centres and hotlines in the field of education, training and further training, and entertainment; consultation provided by telephone call centres and hotlines in the field of reservation services for sporting, scientific and cultural events; information about entertainment events, in particular provided via online networks and the Internet; modelling for artists.</i></p>
<p><i>Class 43: Provision of temporary accommodation; rental of temporary accommodation; temporary accommodation reservation services; hotel services; restaurant, bar and catering services; cafe, cafeteria, coffee shop, hotel lounge services; preparation of food and drink, self-service and/or fast food restaurant services; club services for the provision of food and drink; wine club services; cocktail lounge services, snack bar services; banqueting services; luncheon club catering services; hotel and motel services; information services relating to hotel services; advisory and consultancy services relating to provision of temporary accommodation; advisory and consultancy services</i></p>	<p><i>Class 43: Providing temporary accommodation; providing of food and drinks for guests; accommodation bureau services; providing and rental of holiday homes, holiday flats and apartments; providing room reservation and hotel reservation services; providing hotel and motel services; catering; boarding house services; rental of meeting rooms; bar services; restaurant services; providing food and drinks in Internet cafés; consultation provided by telephone call centres and hotlines in the field of accommodation services, providing and rental of holiday homes, room reservation services and hotel reservation as well as accommodation and catering for guests.</i></p>

<p><i>relating to hotel services; arranging, letting and rental of holiday accommodation; accommodation reservation services [holiday apartments] and accommodation reservations; room hire; provision of conference facilities; child-care services, professional consultancy relating to hotel operation; provision of information, advisory and consultancy services relating to these services; all of the above services also provided on-line from a computer database or the Internet.</i></p>	
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26. The cancellation applicant filed brief submissions on the services comparison, submitting that the respective class 43 services are identical, and identifying where this identity may be found. With regards to the services in classes 39 and 41, it submitted that these are all highly similar to its services. On this point, the cancellation applicant submits:

“They are all entertainment and travel related, and are directly complementary to one another. They are services which have the same purpose, in particular to give the consumer enjoyment and relaxation, and are very likely to be sold by the same entity as part of an overall package of services”.

27. I agree with the cancellation applicant that some of the contested services in class 43, for example *providing temporary accommodation*, are evidently identical to the services on which the invalidity is based, such as the *provision of temporary accommodation*. I will assume that all services that I find relating directly to travel, transport and accommodation in the holder’s specification are identical in class 43, or in the case of class 39 & 41, at least highly similar to those services protected by the cancellation applicant, as is submitted. If

the opposition fails in respect of these services on this basis, it follows that the opposition will also fail if a lower level of similarity were to be found. I will only return to conduct a full analysis on these services should it become necessary to do so. I have set out the services for which identity or a high level of similarity as submitted will be assumed below:

Class 39: *Transport; transport of persons and goods, in particular by road, rail, sea and air; river transport; portage; transport of money and valuables; transportation logistics; organization, booking and arrangement of travels, excursions and cruises; arrangement of transport services; organization, booking and arrangement of excursions, day trips and sightseeing tours; travel consultancy and escorting of travellers; rental, booking and providing of aircraft; rental, booking and providing of ships, in particular rowing and motor boats, sailing vessels and canoes; rental, booking and providing of motor vehicles, bicycles and horses; parcel delivery; organization of trips, holidays and sightseeing tours; travel agency services, in particular consultancy and booking services for travel, providing information about travel, arrangement of transport services and travel; travel reservation; transport reservation; providing information about travel, via the Internet, in particular about reservation and booking in the tourism and business travel sector (online travel agencies); consultation provided by telephone call centres and hotlines regarding travels, including business travel and in the field of transport logistics, transport and storage; tracking of passenger or freight vehicles using computers or global-positioning systems (GPS);*

Class 41: *holiday camp services (entertainment); sport camp services;*

Class 43: *Providing temporary accommodation; accommodation bureau services; providing and rental of holiday homes, holiday flats and apartments; providing room reservation and hotel reservation services; providing hotel and motel services; boarding house services; consultation provided by telephone call centres and hotlines in the field of accommodation services, providing and rental of holiday homes, room*

reservation services and hotel reservation as well as accommodation and catering for guests.

28. Where identity or a high similarity has not been assumed, I will conduct a services comparison below.

providing of food and drinks for guests; catering; bar services; restaurant services; providing food and drinks in Internet cafés;

29. I find the above services to be identical to the cancellation applicant's services, namely *restaurant, bar and catering services; cafe, cafeteria, coffee shop, hotel lounge services; preparation of food and drink, self-service and/or fast food restaurant services; club services for the provision of food and drink;* either self-evidently, or within the meaning of *Meric*.

rental of meeting rooms;

30. I find the above services are included within the cancellation applicant's services, namely *room hire*. For this reason, I find them to be identical within the meaning of *Meric*.

providing nursery schools

31. I note the cancellation applicant has claimed that all services in the holder's class 41 specification are highly similar to its own services. The cancellation applicant has registered protection for *child-care services* in class 43. Whilst I note that generally schooling services would be for the purpose of providing education, whereas child-care services relate to the provision of general care to children either prior to attending school or outside of school hours, I find nursery school services to be somewhat of an anomaly. Whilst there may be an educational element to the provision of nursery schools, it is my view that this term is commonly used in respect of private and optional facilities offering care to groups of very young children, for the purpose of safely supervising and occupying them. I find the nature and intended purpose of child-care

services to be at least highly similar to the provision of nursery schools. I find these services may also be in competition in respect of nursery school aged children, and that the trade channels may coincide with these services being offered by the same entities. I find the holder's services *providing nursery schools* to be highly similar to the cancellation applicant's *child-care services*.

organization and providing of an after school children's entertainment centre featuring educational entertainment;

32. I note again the cancellation applicant's child-care services registered in class 43, and the cancellation applicant's submission that these are highly similar to the holder's class 41 services, which include the above. I find the intended purpose of the above services differs slightly to child-care services, in that one is to provide entertainment and education to children, and the other to supervise and care for children, but that these may both broadly be for the purpose of keeping children occupied outside of schooling hours. It is my view that the holder's services above may incorporate a degree of child-care, although I recognise that these services may instead be engaged with under the supervision of a parent or guardian, and that this is not essential to the same. I do not find the services to be complementary. However, as I find it is often the case that child-care will be offered in addition to the holder's services above, and that a form of entertainment will be offered along with child-care, I find it likely that the same entities may offer both of these services, resulting in shared trade channels. Whilst the intended user of the services will be shared, these will be broadly aimed at the general public, namely parents and guardians of children, and so this is not a significant factor. I find that there may be a level of competition between the services, with parents or guardians seeking ways for children to be occupied after school. Overall, I find the above services to be similar to the cancellation applicant's childcare services to a medium degree.

rental of projector apparatus and accessories thereof

33. The cancellation applicant has claimed the services covered by the holder in class 41 are highly similar to its services. I note that the *provision of conference facilities* in the cancellation applicant's services in class 43 and the *rental of projector apparatus and accessories thereof* covered by the holder's class 41 services are likely to share trade channels, as it is my view these will frequently be offered by the same undertakings providing conference facilities. I also find the intended user will often be shared, namely businesses arranging conferences, speeches and events. However, the nature and intended purpose of the services differ. I find the above services similar to the cancellation applicant's services to a low degree.

reservation services for sporting, scientific and cultural events; ticket agency services [entertainment]; consultation provided by telephone call centres and hotlines in the field of reservation services for sporting, scientific and cultural events; consultation provided by telephone call centres and hotlines in the field of entertainment; information about entertainment events, in particular provided via online networks and the Internet;

34. The cancellation applicant has the services *temporary accommodation reservation services; accommodation reservation services [holiday apartments] and accommodation reservations; provision of information, advisory and consultancy services relating to these services* protected within its specification. These services are all of a similar nature to the applicant's services above, in the sense they are all reservation services or consultancy and information services within the broad field of hospitality, but the specific intended purposes of the services differ. On the one hand, the holder's services are for the purpose of reserving a place or seat at (or providing consultation and information regarding) an event, and the cancellation applicant's services are regarding reservation or consultation in respect of a place to stay. I note the services may share trade channels, as in my view it is likely that entities offering reservation or consultation services in respect for events and entertainment may also offer accommodation reservation and

consultation services, either separately or as part of a package, and vice versa. However, I do not find that the services are important or indispensable to one another and these may also be provided completely independently, and I do not find they will be in competition with one another. Overall, I find the holder's services above to be similar to those covered by the cancellation applicant to a medium degree.

organization of exhibitions for cultural and teaching purposes; organization of cultural and sporting events; arranging of cultural and sporting events; organization of sports competitions;

35. I note the cancellation applicant covers services in class 39, namely *event management services (organization of exhibitions or trade fairs for commercial or advertising purposes); arranging and conducting exhibitions for advertising, commercial or trade purposes; arranging and conducting trade shows; organization of exhibition for commercial or advertising purposes*. I note the nature, intended purpose and method of use of these services coincide to some extent, in that they are all organisation and event planning services, although the subject matter of those events varies. I note there is a possibility there will be an overlap in trade channels, however, in the absence of evidence on this point I find it more likely that each type of event requires a particular knowledge and skillset, and that event organisers will likely remain in their field of expertise rather than cross over from trade shows and advertising exhibitions to sporting and cultural events. I find there will be no competition or complementarity between the services. Overall, if there is any similarity between these services and those covered by the cancellation applicant, I find this to be at a low degree.

training and fitness club services; providing golf courses, tennis courts, riding facilities and sports facilities; physical education services;

36. The cancellation applicant covers *hotel services* within its specification. I consider that the nature and the intended purpose of hotel services differs to those above, with the holder's services provided for consumers to engage in

sport and fitness activities, and the cancellation applicant's being to provide a place for consumers to wash and rest. However, I find that there will be shared trade channels, with hotel services often offered by the same entities as those offering the services above, and consumers often expecting a range of facilities such as the above will be offered by alongside hotel services by the same provider. However, I do not find the services to be complementary or in competition with one another. Overall, I find a low level of similarity between the above services, and the *hotel services* covered by the cancellation applicant.

Class 41: entertainment; entertainer services; musical performances; circus performances; public entertainment; theatrical performances; arranging and conducting of concerts; cinema theaters, amusement arcades, amusement park services; presentation of films and videos; entertainment and educational services provided by recreation and amusement parks;

37. Whilst the cancellation applicant does not have entertainment services per se, I note they do have protection for services in the hospitality industry including *restaurant, bar and catering services, wine club services, hotel services, banqueting services and cocktail lounge services*. I have considered the cancellation applicant's argument that the intended purpose of all these services are the same on the basis that they are to offer the consumer "relaxation and entertainment". Whilst I note this may be true on some level, I also find this claim to be very broad.

38. However, considering the services in more detail, it is my view instead that the nature of the services above differs to the cancellation applicant's, as does the intended purpose. I find it true that the holder's services are intended broadly to provide entertainment on the one hand, but I find the services protected by the cancellation applicant are for providing food, drink or accommodation, or supervision of children. I note there is an overlap in terms of consumers, but only on a very basic level, namely that the services are aimed at the general public. It is my view that the services are not complementary as they are neither important nor indispensable from one

another. I also find it would be unusual for there to be competition between the services due to the differences in intended purpose, although I note the possibility of the consumer choosing to attend a cocktail lounge which also provides a musical performance, rather than a concert that serves alcohol, for example. I also note on this basis that in respect of all of the above services, there may be an overlap in trade channels, with bars offering live acts, and entertainment venues and cinemas offering bars and catering. I also note the above may include children's entertainers, and I have considered the possibility of the overlap in trade channels with the cancellation applicant's child-care services. With consideration of the occasional competition and the overlap in trade channels, I find the holder's entertainment services listed above to be similar to the cancellation applicant's services to a low degree.

discotheque services

39. Although I note there will still be differences in the intended purpose of the above services and the cancellation applicant's cocktail lounge and bar services, with the formers primary purpose being dancing, and the latter being drinking, I note these will be of a very similar nature, in the sense that they will both provide a venue, generally with a bar serving alcohol, music and facilities. I find these venues are more likely to be in competition than other entertainment services covered by the holder in class 41, with music, drinking and dancing often available to the consumer within both sets of services. I also find that the trade channels will also often coincide due to the similarities between the nature of the services. I find the above services similar to those protected by the cancellation applicant to a high degree.

40. As mentioned, the cancellation applicant has provided (limited) submissions as to why I should find holders services in class 39 & 41 highly similar to the services upon which this invalidation has been based. However, I do not find the broad statement that all the services are for "entertainment or relaxation" to be enough to find similarity between all of the services listed, even where this statement is true. In the absence of any further submissions or evidence to consider, it is my view that below services do not share a similar nature,

method of use, intended purpose or intended user, and that the services are not in competition or complementary, and that they are unlikely share trade channels. Alternatively, if there is an overlap in one of these factors, I find this to be at a general level, for example, based on the intended user being members of the general public or based on services being provided via the internet, and I find no similarity between the services on this basis. I acknowledge that there may be instances where some of the services below are offered by the same trade channels as the cancellation applicant's services, for example the rental of diving suits may also be offered by those providing accommodation, but I do not find that the consumer would assume this to be the norm in a way that will result in a finding of similarity between the services below and those of the cancellation applicant. The services for which I find no similarity on this basis are therefore as follows:

Class 39: *rental of diving suits; traffic information; packaging and storage of goods; delivery, dispatching and distribution of newspapers and magazines;*

Class 41: *Basic and advanced training as well as education information; instructional services, in particular correspondence courses and language training; film production, other than advertising films; production of radio and television programs; radio entertainment; television entertainment; rental of films and videos; providing museum facilities [presentation, exhibitions]; language training; rental of skin diving equipment; game services provided on-line [from a computer network]; rental of recorded data carriers (films, music, games), rental of newspapers and magazines; Photography; DVD and CD-ROM film production; writing of texts, other than publicity texts; publication of printed matter, also in the form of electronic media including CD-ROMs, other than publicity texts, in particular books, magazines and newspapers; publication of printed matter in electronic form, except for publicity purposes, in particular magazines and newspapers, including in the Internet; publication of texts, except publicity texts, in particular of books, magazines and newspapers, including in the Internet; services*

of an interpreter; services of a translator; consultation provided by telephone call centres and hotlines in the field of education, training and further training; modelling for artists.

Comparison of marks

41. 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. The same case also explains 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 Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, 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.”

42. It would be wrong, therefore, to artificially dissect the trade marks, 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.

43. The respective trade marks are shown below:

	
Earlier trade mark	Contested trade mark

44. The cancellation applicant submits that DESTINATION is the most dominant element in both marks. On the contrary, the holder submits that the word DESTINATION will not be viewed as dominant in the marks, and that all elements will contribute to the overall impression of the same.

45. I am inclined to agree in part with both parties. In my view, the word DESTINATION is the most dominant element in the two marks, being that it is the largest of the word elements in the same, and the element that will initially catch the eye of the consumer. I find in respect of the holder's mark that after the word DESTINATION, the attention of the consumer will be directed towards the eye catching device element, which consists of a set of multicoloured shapes (for which the colours have been claimed) resembling what appear to be countries or continents. I find little attention will be given to the smaller descriptive word 'services'. I find that wording 'worldwide' will gain the consumers attention after DESTINATION: in the earlier mark, with the use of the colon seemingly joining this to DESTINATION and making it natural for the consumer to read this element alongside DESTINATION. This will be followed by the map in the background which appears decorative.

46. However, I find the word 'destination' to hold only a very low level distinctiveness in respect of many services covered by the marks, particularly in respect of the travel, transport and accommodation related services, due to its meaning as somewhere to travel to or somewhere to stay. I also find it holds only a low level of distinctiveness in respect of the entertainment and other hospitality related services in particular, due to the somewhat laudatory

meaning that applies when describing something or somewhere as a “destination” (a place worth going, or *the* place to be). Where DESTINATION holds very little distinctiveness in respect of the holder’s mark, I therefore find the overlapping coloured shapes to be the most distinctive element, despite their resemblance to countries or continents. In respect of the earlier mark I find that the word DESTINATION is arguably very slightly more distinctive than the wording WORLDWIDE and the image of the map in respect of the travel, transport and accommodation services, but only due to the very low level of distinctiveness held by these elements, with the word “worldwide” simply indicating to the consumer that the “destinations” are worldwide. I agree with the holder that the overall impression of both marks resides in each of the marks as a whole.

Visual comparison

47. Clearly both marks coincide visually with the use of the dominant word DESTINATION. Although this is stylised differently in each mark, the font used is not particularly notable in either mark. However, the remaining visual elements of the marks share no similarity, including the additional wording, the device and background, and the layout and positioning. Overall, I find the marks visually similar to between a low to medium degree.

Aural comparison

48. Although I have found that the wording “worldwide” and “services” will not be disregarded entirely within the overall impression of the marks, I find that the word “services” will not always be verbalised by the consumer in the contested mark. I find it far less likely the consumer will fail to verbalise the wording “worldwide” in the earlier mark, particularly if the use of the colon is noticed by the consumer, as this makes this words appear to be part of a phrase that is intended to be read together, although I acknowledge the colon may not be taken into account by a portion of consumers. However, even where the colon is not considered by the consumer, I find it likely that WORLDWIDE will be

verbalised by the majority of the same, as it appears to identify the destination referred to.

49. As I find it likely that either the marks will be verbalised as “destination: worldwide” and “destination”, or on occasion as “destination: worldwide” and “destination services” I find the marks will be aurally similar to a medium degree. I note it is possible that they may be pronounced by a few as “destination” and “destination”, but it is my view this will only be by a small minority of consumers who have both ignored or failed to recognise the use of the colon in the earlier mark, and who have also chosen to ignore the word WORLDWIDE when verbalising the earlier mark.

Conceptual comparison

50. Conceptually, both marks share the concept of a ‘destination’. The cancellation application submits this means “the place to which someone or something is going or being sent”. I agree, and I find the word destination may convey to the consumer the concept of the place at the end of a journey. Further, it is my experience that the word may be used to convey the concept of somewhere to go, spend time and stay, i.e. somewhere that has a buzz about it and reason to visit, rather than pass through. I find the word destination may be used in reference to a geographical location, such as a city or country, or an entertainment venue or building, such as a very popular nightclub, or the Eiffel tower for example.

51. The use of ‘worldwide’ following ‘destination:’, in the earlier mark gives the concept that the ‘destinations’ are located around the word, alluding to a concept of international travel. The device element in the later mark combined with the other elements also allude to this concept. The background element of the map in the earlier mark again reinforces concept of travel.

52. Overall, I find the marks conceptually similar to a high degree. I find the consumer may find both the more formal and the more colloquial concepts conveyed by both marks, but I find in respect of a vast number of the services

covered by the parties, the shared concept of a destination and of international travel is weak. The word “services” adds little to the concept of the contested mark, other than to indicate services will be offered (most likely relating to “destinations”).

Average consumer and the purchasing act

53. 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.

54. 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.”

55. Many of the services covered by the marks are aimed at the general public, including those such as accommodation, travel and transportation services. Where these services are aimed at the general public, they are likely to gain at least an average level of attention from the consumer, who will wish to consider aspects such as cost, convenience and quality when choosing the services making. In respect of the accommodation services, whilst sometimes

this may gain a particularly high level of attention, for example when spending a great deal of money on a luxury holiday, these may also simply include the reservation of a cheap hotel near to an airport for example, and I do not find the possibility that sometimes these services will be expensive to raise the normal level of attention paid to the services. I find the level of attention to be slightly above average in respect of the accommodation services, and to range from average to slightly above average in respect of travel, transport and entertainment. I find in respect of the broader hospitality services aimed at the general public, I find the level of attention will generally be average. However, not all of the services under the marks will be aimed at the general public, for example, I note services such as the organisation of commercial and trade events will be aimed at the professional public, and that there are also professionals to whom the booking of accommodation and transport services is part of all of their job itself. I find the professional public will often take additional care due to the increased responsibility of their position and the added pressure to choose the correct services, meaning that their level of attention will be at least above average in respect of the services.

56. I note there are also services outside of hospitality for which similarity has been found, including services relating to child-care and the provision of nursery schools. I consider that parents will likely pay an above average level of attention when it comes to engaging child-care services or choosing nursery schools, on the basis that they will be entrusting the provider with the care of their children.

57. The services offered by the parties will generally be engaged with following visual inspection, with consumers reviewing or purchasing the services online or in a retail establishment such as a travel or entertainment agencies, via brochures, or at the venues themselves. However, I find that there may also been word of mouth recommendations in relation to travel, accommodation and entertainment services. Recommendations may come from agents, or from friends or acquaintances. In respect of child-care services, verbal recommendations may also be commonly made by other parents and guardians. The aural considerations cannot therefore be discounted.

Distinctive character of the earlier trade mark

58. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“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).”

59. Registered trade marks possess varying degrees of inherent distinctive character, some being suggestive or allusive of a characteristic of the goods and services on offer, others being highly inherently distinctive, such as invented words. The degree of distinctiveness is an important factor as it may directly relate to whether there is a likelihood of confusion; the more distinctive the earlier mark the greater the likelihood of confusion. The distinctiveness of a mark can be enhanced by virtue of the use made of it. The cancellation

applicant has not filed any evidence and therefore, I am only able to consider the position based on inherent characteristics.

60. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

"38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it."

61. As mentioned, the common element in both marks is the word DESTINATION. In addition, there is a basic shared concept of travel, including international travel. As I have mentioned, it is my view that in respect of a large number of the cancellation applicant's services the word 'destination' is at least highly allusive. This applies particularly to services relating to travel, transport and accommodation. I therefore find the distinctiveness of this common element of the marks to be very low at best in respect of these services. I also find the shared concept to be weak in respect of these services. In respect of the general hospitality services, I find that the common element DESTINATION is slightly more distinctive, but I find that it remains low due to its somewhat laudatory nature, and the allusion that the services provided are a destination, namely a place with a buzz, a place to go and to stay a while. I find the map and use of worldwide do little to raise the distinctiveness of the earlier mark, again due to these elements being at best

allusive and at worst descriptive that the services are offered worldwide. Overall, I find the earlier mark holds a low level of distinctiveness in respect of the aforementioned services, which is a result of the combined elements in the mark.

62. However, I note it is not always the case that the use of 'destination' and the concept of travel is descriptive or allusive. In respect of services such as 'child-care services', I find the use of DESTINATION and a concept of travel would be more unusual and would be less likely to be viewed in a laudatory way, although I find it still to be use of a simple English word. In respect of these services, I find the elements of the earlier mark which are common to both mark hold an average degree of distinctive character, and also that the mark as a whole holds an average degree of distinctive character for the services.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

63. Prior to reaching a decision on this matter, I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 17 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, 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. I must consider the level of attention paid by the consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. I must consider that a likelihood of confusion may be increased where the earlier mark holds a high degree of distinctive character, either inherently, or due to the use made of the same, and that a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks. I must also consider that both the degree of attention paid by the consumer and how the goods or services are obtained will have a bearing on how likely the consumer is to be confused.

64. I consider at this point that there are two types of confusion that I may find. The first type of confusion is direct confusion. Direct occurs where the consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.¹
65. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.
66. I have found a portion of the holder's specification to be dissimilar to those services upon which the cancellation applicant relies. In order to find a likelihood of confusion exists under Section 5(2)(b), there must be at least some similarity between the services.² I therefore find no likelihood of confusion in respect of the following services:

Class 39: rental of diving suits; traffic information; packaging and storage of goods; delivery, dispatching and distribution of newspapers and magazines;

Class 41: Basic and advanced training as well as education information; instructional services, in particular correspondence courses and language training; film production, other than advertising films; production of radio and television programs; radio entertainment; television entertainment; rental of films and videos; providing museum facilities [presentation, exhibitions]; language training; rental of skin

¹ *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10,

² See *Waterford Wedgwood plc v OHIM* – C-398/07 P (CJEU)

diving equipment; game services provided on-line [from a computer network]; rental of recorded data carriers (films, music, games), rental of newspapers and magazines; Photography; DVD and CD-ROM film production; writing of texts, other than publicity texts; publication of printed matter, also in the form of electronic media including CD-ROMs, other than publicity texts, in particular books, magazines and newspapers; publication of printed matter in electronic form, except for publicity purposes, in particular magazines and newspapers, including in the Internet; publication of texts, except publicity texts, in particular of books, magazines and newspapers, including in the Internet; services of an interpreter; services of a translator; consultation provided by telephone call centres and hotlines in the field of education, training and further training; modelling for artists.

67. In addition to the above, I have assumed identity and high similarity in respect of the services relating to travel, transport and accommodation, as was submitted by the cancellation applicant. These services are set out within paragraph 27 of this decision. Further, I have found similarity ranging from low to high in respect of the remaining services covered by the holder.

68. I have found that the marks are visually similar to between a low to medium degree, and aurally similar to a medium degree. I have found the marks are conceptually similar to a high degree. I have found that the average consumer may consist both of the general public and the professional public, and will pay at least an average degree of attention, with the level increasing to above average depending on the services. I have found that in respect of the vast majority of services for which identity or a high similarity has been assumed or found, that the conflicting element DESTINATION will hold only at best a very low level of distinctive character in respect of the services, and the shared concept of travel is weak and allusive of the services. In respect of the services for which similarity has been found that do not, in my view, fall within the category of travel, transport or accommodation, I have found the earlier mark and in particular DESTINATION holds either a low or an average degree of distinctive character in relation to the services. No evidence has been filed

and so I did not find the distinctiveness of the mark had been enhanced through use. I found that the services are generally engaged with visually, either online or in brochures, but I also find that verbal recommendations may be made, meaning I cannot not disregard the aural comparison.

69. With consideration to the factors set out above, it is my view that the consumers will notice the considerable differences that exist in respect of the marks. Even with consideration of the interdependency principle, the identical goods, and the consumers imperfect recollection, I do not find it plausible that the consumer would mistake one mark for the other, particularly considering the low to medium level of visual similarity and the average degree of attention paid in respect of the services. I note I must consider the possibility of aural recommendations, but I do not find that a slightly higher level of aural similarity will result in a mistake of this nature. It is my view that there will be no likelihood of direct confusion between the marks.

70. In respect of the indirect confusion, I find this requires further consideration with reference to the varying services and degree of distinctiveness of the earlier mark. Firstly, I consider the position in respect of those goods for which I have assumed identity, all falling within the sector of travel, transport and accommodation. As mentioned above, I have found in respect of these services that the word DESTINATION holds a very low level of distinctiveness for the services. I also find that the shared concept of the marks, namely the concept of travel, is also weak and allusive of the services. I consider that the average consumer is reasonably observant and circumspect. Whilst I acknowledge that a low level of distinctive character in a mark does not preclude a likelihood of confusion,³ considering all factors above, I find it highly unlikely that the consumer will view the use of a word such as DESTINATION and a basic concept of travel as an indication that the undertakings providing the services relating to travel, transport and accommodation are related. I remind myself of *Duebros* above, and I find at best there will be a mere association between the marks in the mind of the

³ See CJEU decision *L'Oréal SA v OHIM*, Case C-235/05 P

consumer. I therefore find that, in respect of the services listed below, there will be no likelihood of indirect confusion:

Class 39: Transport; transport of persons and goods, in particular by road, rail, sea and air; river transport; portage; transport of money and valuables; transportation logistics; organization, booking and arrangement of travels, excursions and cruises; arrangement of transport services; organization, booking and arrangement of excursions, day trips and sightseeing tours; travel consultancy and escorting of travellers; rental, booking and providing of aircraft; rental, booking and providing of ships, in particular rowing and motor boats, sailing vessels and canoes; rental, booking and providing of motor vehicles, bicycles and horses; parcel delivery; organization of trips, holidays and sightseeing tours; travel agency services, in particular consultancy and booking services for travel, providing information about travel, arrangement of transport services and travel; travel reservation; transport reservation; providing information about travel, via the Internet, in particular about reservation and booking in the tourism and business travel sector (online travel agencies); consultation provided by telephone call centres and hotlines regarding travels, including business travel and in the field of transport logistics, transport and storage; tracking of passenger or freight vehicles using computers or global-positioning systems (GPS);

Class 41: holiday camp services (entertainment); sport camp services;

Class 43: Providing temporary accommodation; accommodation bureau services; providing and rental of holiday homes, holiday flats and apartments; providing room reservation and hotel reservation services; providing hotel and motel services; boarding house services; consultation provided by telephone call centres and hotlines in the field of accommodation services, providing and rental of holiday homes, room reservation services and hotel reservation as well as accommodation and catering for guests.

71. In respect of services relating to entertainment, I have found that the common element of the marks DESTINATION holds a low level of distinctive character. In respect of these goods, I have found the following services covered by the holder's mark to be similar to the cancellation applicant's services to a low degree:

Class 41: entertainment; entertainer services; musical performances; circus performances; public entertainment; theatrical performances; arranging and conducting of concerts; cinema theaters, amusement arcades, amusement park services; presentation of films and videos; entertainment and educational services provided by recreation and amusement parks; training and fitness club services; physical education services; providing golf courses, tennis courts, riding facilities and sports facilities organization of exhibitions for cultural and teaching purposes; organization of cultural and sporting events; arranging of cultural and sporting events; organization of sports competitions;

72. With consideration to the factors set out above, namely the low degree of similarity between the services, the lower than average level of distinctiveness of the common element of the marks, and the visual differences between the marks themselves, it is my view that the average consumer would not assume that there is an economic connection between the providers of the services under these marks. Whilst it is possible that the consumer will notice the conceptual similarities and the use of the common word DESTINATION, it is my view that if there is any recognition of this it will be put down to coincidence and not cause the consumer to be confused on this basis. I therefore do not find there will be a likelihood of indirect confusion in respect of the services above.

73. I found the following services filed by the holder to be identical to those protected by the cancellation applicant:

Class 43: rental of meeting rooms; providing of food and drinks for guests; catering; bar services; restaurant services; providing food and drinks in Internet cafés; rental of projector apparatus and accessories thereof

74. I consider that the identity of the services goes some way to balance out the differences in the marks themselves. However, I find the common element shared by the marks to be distinctive to a low degree. In respect of the *rental of meeting rooms*, the mark alludes to the provision of the destination (the room), one that is often traveled to, or that is available whilst travelling away from the usual office location. Generally, these services will be used by the professional consumer paying an above average level of attention.

75. In respect of services relating to the provision of food and drink the word 'destination' alludes to the fact that these services may be taken to a destination (in catering), and in respect of food and drink venues it alludes to them being a place to stop and stay a while, or somewhere with a buzz about them.

76. After some consideration of the factors above, including the identity of the services, it is my view that the visual differences between the marks and the low level of distinctiveness of the key common element will mean the consumer paying at least an average degree of attention will again put any similarity in the marks down to coincidence, and not be confused into thinking that a common undertaking is responsible for both marks. I therefore do not find a likelihood of indirect confusion between the marks in respect of these services.

77. I have found a high degree of similarity in respect of the holder's below services with those registered by the cancellation applicant:

Class 41: discotheque services

78. However, despite this, and with consideration of all the factors outlined, I find that the significant visual differences between the marks, and the low level of

distinctiveness of the key common element DESTINATION will lead the consumers to put the commonality between the marks down to coincidence, and will not assume that the services derive from the same economic undertaking. I therefore find no likelihood of indirect confusion in respect of the services above.

79. I have found a medium level of similarity in respect of the following services registered by the holder:

Class 41: reservation services for sporting, scientific and cultural events; ticket agency services [entertainment]; consultation provided by telephone call centres and hotlines in the field of reservation services for sporting, scientific and cultural events; consultation provided by telephone call centres and hotlines in the field of entertainment; organization and providing of an after school children's entertainment centre featuring educational entertainment; information about entertainment events, in particular provided via online networks and the Internet;

80. Where I have found the cancellation applicant's services to be similar to the holder's services above, I also found that the earlier mark and in particular the common element DESTINATION to hold a low level of distinctive character in respect of the services. In addition, I found the consumer will pay at least an average level of attention in respect of the same. It is my view that these factors, alongside the visual differences between the marks will mean that even if one mark is called to mind by the other, the consumer will put this down to coincidence, and will not be confused that the services are offered by economically connected undertakings. I do not find a likelihood of indirect confusion in respect of the services above.

81. I found the holder's services below to be similar to the cancellation applicant's *child-care services* to a high degree:

Class 41: providing nursery schools;

82. I found the common element of the marks, namely DESTINATION to be distinctive to an average degree in respect of the child-care services, and I find this to also be true in respect of the services above. In respect of these services, I find the concept of travel to add to the similarities between the marks in the mind of the consumer, as it is my view, and in the absence of further evidence on this point, that the concept of travel is not particularly weak in respect of the same. On the contrary, it is my view that the concept of travel is not usually one associated with child-care, as it is instead preferable that these services are located close by. Further, I find that in respect of these services, verbal recommendations from other parents and guardians will play a key part in the decision making process, although I find this is counteracted somewhat by the above average level of attention that I find will be paid in respect of these services, making it likely that further visual research will be done following a verbal recommendation. However, it is my view that the common element shared in respect of these marks, namely the dominant element 'DESTINATION', combined with the highly similar concept, and coupled with the medium level of aural similarity between the marks may well lead a significant portion of consumers to believe that these services do derive from the same economic undertaking, putting the visual differences in the marks down to a variation used by different branches of the child-care offering. I therefore find a likelihood of indirect confusion in respect of *providing nursery schools* as registered by the holder.

Final Remarks

83. The cancellation applicant has been unsuccessful in respect of all services other than the following:

Class 41: providing nursery schools;

84. The registration will remain registered for all services other than the above.

COSTS

85. The holder has achieved considerably more success than the cancellation applicant and is entitled to a contribution towards its costs, with a small reduction to account for the cancellation applicant's partial success. In the circumstances I award the holder the sum of £500 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering other sides statement and preparing defence	£250
Preparing and filing written submissions	£300
Reduction made for cancellation applicant's partial success	-£50
Total	£500

86. I therefore order Park Hotel Management Pte Ltd to pay TUI AG the sum of £500. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 26th February 2021

**Rosie Le Breton
For the Registrar**