

O/137/21

Trade Mark Act 1994

IN THE MATTER OF UK TRADE MARK REGISTRATION NO. 3438411
IN THE NAME OF LKQ CZ S.R.O FOR THE TRADE MARK




IN CLASSES 11, 12, 35 AND 37

AND

THE APPLICATION FOR INVALIDATION THEREOF UNDER NO. 503062
BY EASYGROUP LTD

Background and pleadings

1. LKQ CZ s.r.o (the proprietor) was assigned the UK trade mark registration no. 3438411 for the trade mark  effective from 1 November 2020. The change was recorded on the register at the UK Intellectual Property Office on 4 January 2021. The trade mark was initially filed on 22 October 2019 and registered on 24 January 2020 in the name of Auto Kelly a.s. On 21 May 2020, the goods and services as registered were limited as follows:

Class 11: Lighting apparatus for electric bicycles.


Class 12: Electric bicycles, parts, components, accessories and spare parts thereof included in this class.

Class 35: Intermediary services in the field of business, import-export, wholesale trade and specialized retail trade relating to electric bicycles, parts, components, accessories and spare parts.

Class 37: Electric bicycle repair, including guarantee repairs.

2. easyGroup Ltd (the cancellation applicant) applied to invalidate the registration on the 10 March 2020. The application for invalidation was filed in respect of all of the goods and services as registered, and the cancellation applicant maintained the invalidation against all of the goods and services following the limitation to these as referenced above.
3. The application for invalidation was filed under Section 47 and based on section 5(2)(b) and section 5(3) of the Trade Marks Act 1994 (the Act). Under

section 5(2)(b), the cancellation applicant relies on the six earlier registrations¹ as set out in the table below:

Registration no./territory	Trade Mark	Registration date	Goods/services relied upon
15841554/EU		06/03/17	<p>Class 12: Vehicles; vehicle parts and fittings; apparatus for locomotion by land, air or water.</p> <p>Class 37: Building construction; motor vehicle repair; computer installation services; electrical installation services; maintenance and repair of computer hardware; painting and decorating; cleaning services; vehicle maintenance and repair services; arranging for the maintenance of motor land vehicles; maintenance and repair of land vehicles; maintenance and repair of vehicles; provision of information relating to the maintenance of vehicles; refurbishment of vehicles; repair of accident damage to vehicles; repair of land vehicles; repair of vehicles; repair services relating to vehicles; service stations for the maintenance of vehicles; service stations for the repair of vehicles; servicing of vehicles; washing of vehicles.</p> <p>Class 39: Transport; packaging and storage of goods; travel arrangement; travel information; provision of car parking facilities; transportation of goods, passengers and travelers by air, land, sea and rail; airline and shipping services; airport check-in services; arranging of transportation of goods, passengers and travelers by land and sea; airline services; baggage handling services; cargo handling and freight services; arranging, operating and providing facilities for cruises, tours, excursions and vacations; chartering of aircraft; rental and hire of aircraft, vehicles and boats; chauffeur services; taxi services; bus services; coach transport services; rail services; airport transfer services; airport parking services; aircraft parking services; escorting of travelers; travel agency services; tourist office services; advisory and information services relating to the aforesaid services; information services relating to transportation services, travel information and travel</p>

¹ Although the UK has left the EU and the transition period has now expired, EUTMs, and International Marks which have designated the EU for protection, are still relevant in these proceedings given the impact of the transitional provisions of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 – please see Tribunal Practice Notice 2/2020 for further information.

			booking services provided on-line from a computer database or the Internet.
16140782/EU	easyValue	26/10/2017	Class 35: Advertising; business management; business administration; office functions; publicity, promotional services, import-export agency services, business information services, organising exhibitions for commercial or advertising purposes; Class 37: Aircraft fuelling services. Class 39: arranging of transportation of goods, passengers and travellers by land; rental and hire of vehicles, boats and aircraft
14920391/EU	EASYGROUP	26/05/2016	Class 35: Advertising; business management; business administration; provision of business information; retail services connected with the sale of cosmetics, non-medicated toilet preparations, perfumes, fragrances, colognes and scents, soaps and cleaning preparations; retail services connected with the sale of luggage, suitcases, travelling sets, sports bags, bike bags, backpacks, games, playing cards; retail services connected with the sale of gymnastic and sporting articles; retail services connected with the sale of scooters; marketing and publicity services; dissemination of advertising, marketing and publicity materials.
10735561/EU	EASYBUS	20/12/2012	Class 39: Transport; bus services; coach transport services; airport transfer services; advisory and information services relating to the aforesaid services;
10735553/EU	EASYCAR	20/12/2012	Class 39: Transport; rental and hire of vehicles; advisory and information services relating to the aforesaid services;
16079675/EU	EASYLAND	14/07/2017	Class 35: Advertising, marketing and publicity services; dissemination of advertising, marketing and publicity materials; business organisation, business administration and business management services, business information services, auctioneering services, office functions, promotional services; import-export agency services, business and management consultancy, assistance and advice; purchasing and demonstration of

			<p>goods for others; advisory and arrangement services relating to all the aforesaid;</p> <p>Class 37: Aircraft fuelling services.</p> <p>Class 39: Arranging of transportation of goods, passengers and travellers by land and sea; rental and hire of aircraft, vehicles and boats.</p>
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4. Under section 5(2)(b), the cancellation applicant argues that the proprietor’s goods and services in classes 12, 35 and 37 are identical to its own goods and services in these classes, and that the proprietor’s class 11 goods are similar to its goods in class 12. The cancellation applicant argues that the marks are similar, and that the likelihood of confusion is increased in accordance with the “Canon Interdependence Principle” due to the identity of the goods and services. The cancellation applicant claims that the earlier marks EASYGROUP, EASYBUS and EASYCAR all benefit from an “elevated distinctive character” due to the use made of them.

5. In respect of section 5(3) of the Act, the cancellation applicant relies upon its earlier EU trade mark registration as set out below:

Registration no./territory	Trade Mark	Registration date	Goods/services relied upon
10584001/EU	EASYJET	09/01/2015	Class 39: Transport; packaging and storage of goods; travel arrangement; travel information; transportation of goods, passengers and travelers by air; airline and shipping services; airport check-in services; airline services; baggage handling services; cargo handling and freight services; arranging, operating and providing facilities for cruises, tours, excursions and vacations; chartering of aircraft; airport transfer services; airport parking services; aircraft parking services; travel agency services; tourist office services; advisory and information services relating to the aforesaid services; information services relating to transportation services, travel information and travel

			booking services provided on-line from a computer database or the Internet.
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6. The cancellation applicant claims to have a reputation for the above registration in respect of the services relied upon. It claims that due to the use of 'easy' and the formulation of the later mark, the later mark looks like an extension of the cancellation applicant's brands, which will cause the consumer to establish a link between the later mark and the cancellation applicant's earlier registrations. The cancellation applicant argues that by using the later mark the proprietor will "free-ride" on its reputation without needing to invest time or marketing expense, leading to an unfair advantage. Further, the cancellation applicant submits that use of the later registration in relation to inferior services could diminish its reputation. The cancellation applicant also claims that the "formulation of easy followed by an allusive term is redolent of the [cancellation] Applicant" and that the unauthorised use of the later mark will dilute the distinctive character of its "easy family of brands", making it more difficult for consumers to distinguish its services from those of others due to "death by a thousand cuts".

7. The proprietor filed a counterstatement denying the claims made, and requesting proof of use in respect of the cancellation applicant's EU trade mark no. 10584001 only, and proof of reputation in respect of the same registration. Later on, within its submissions, the proprietor accepted that the cancellation applicant holds a reputation in respect of "airline services" in class 39, but maintained that this reputation does not extend beyond these services.

8. Only the cancellation applicant filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary. Both parties also filed written submissions during the proceedings, which will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.

9. Both parties are represented in these proceedings. The cancellation applicant is represented by Kilburn & Strode LLP and the proprietor is represented by Marks & Clerk LLP.

10. 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 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.

Evidence

11. The evidence for the cancellation applicant includes a witness statement in the name of Ryan Edward Pixton. Mr Pixton is identified in the statement as a Trade Mark Attorney for Kilburn & Strode, the representative for the cancellation applicant. The witness statement is provided primarily for the purpose of introducing four exhibits into proceedings, namely exhibits REP1 to REP4.

Exhibit REP1

12. Exhibit REP1 is a witness statement in the name of Sir Stelios Haji-loannou dated 4 August 2017. The witness statement identifies Sir Haji-loannou as founder and director of the cancellation applicant. The statement itself is 49 pages long and provides detail regarding the history of the cancellation applicant, as well as Sir Haji-loannou's role in the development of the company. The witness statement is dated 4 August 2017, predating the beginning of these proceedings by some time. The statement was clearly not prepared specifically with the current matter in mind. As a result, much of the content of the statement is largely irrelevant to these proceedings. I have nonetheless considered the full content of the statement, but I will summarise only what I deem necessary below, with reference particularly to the marks relied upon in these proceedings.

EASYJET

13. Sir Haji-loannou confirms that ‘easyJet’ was the first mark in the “EASY family of brands”, and that it was first registered in the UK on 5 April 1995.² The ‘easyJet’ airline was launched in 1995,³ with the first routes between Luton and Edinburgh/Glasgow taking place in November 1995. In 1996, the company introduced international flights.⁴ In 1999, “the airline” became the subject matter of an ITV reality show named “Airline”, which Sir Haji-loannou confirms received 7.5 million viewers per episode in its first series.⁵ This ran for nine series spanning into 2006.⁶ The business expanded its fleet and routes in late 2000 after being floated on the stock market.⁷ The number of passengers travelling with easyJet increased year on year from 30,000 in 1995 to over 21,000,000 between 1 February 2003 – 31 January 2004, topping 50,000,000 every year since 2010 up until the latest figures provided of over 74,000,000 in 2017.⁸ Visitors to the website easyJet.com are provided by Sir Haji-loannou in the table below:⁹

Year	Users	Page views
2011	122,774,951	1,290,544,781
2012	181,066,443	1,384,003,741
2013	182,844,400	1,622,460,308
2014	204,695,807	1,832,692,963
2015	208,363,085	1,625,290,017
2016	168,943,682	1,435,611,431
2017 ¹	86,917,538	919,258,176

¹ Up to the end of July

² Haji-loannou, paragraph 8

³ Haji-loannou, paragraph 46

⁴ Haji-loannou, paragraph 46

⁵ Haji-loannou, paragraph 15

⁶ Haji-loannou, paragraph 58

⁷ Haji-loannou, paragraph 47

⁸ Haji-loannou, paragraph 48

⁹ Haji-loannou, paragraph 51

14. These visitors included 3,797,300,717 page views from the UK and 536,756,400 page views from Germany between 2011 – 2016.¹⁰ By 2014, the airline operated 675 routes, of which all but 50 were split between EU territories including the UK, Italy, Portugal, Spain and Germany.¹¹ Since the “early years”, easyJet has provided holiday and accommodation services which it advertised in its in-flight magazine,¹² and by 2000 easyJet was listed as a “Superbrand” as judged by the independent Business Superbrands Council.¹³

EASYGROUP

15. easyGroup (UK) Limited was formed in 1998 for the purpose of formalising a strategy to create an ‘easy’ family of brands.¹⁴ A further company, easyGroup IP Licensing Limited was incorporated on 25 August 2000 to hold and license easyGroup’s intellectual property, and it changed its name to easyGroup Limited on 22 May 2014.¹⁵ By August 2000, ‘easyGroup’ featured within a list of ‘easy’ marks being promoted on the cancellation applicant’s website easy.com.¹⁶ EASYGROUP was engaged by other ‘easy’ companies between 2000-2001 to support them in ways including media relations and brand management.¹⁷

EASYCAR

16. easyRentacar (UK) Limited was established as a separate company, having changed its name to the aforementioned on 17 September 1999.¹⁸ It began trading at a site near London Bridge on 20 April 2000, although planning began prior to both these dates.¹⁹ Sites in Barcelona and Glasgow opened

¹⁰ Haji-loannou, paragraph 52

¹¹ Haji-loannou, paragraph 57

¹² Haji-loannou, paragraph 53

¹³ Haji-loannou, paragraph 56

¹⁴ Haji-loannou, paragraphs 30-31

¹⁵ Haji-loannou, paragraph 30

¹⁶ Haji-loannou, paragraph 90

¹⁷ Haji-loannou, paragraph 40

¹⁸ Haji-loannou, paragraph 82

¹⁹ Haji-loannou, paragraph 82

shortly after the London site, also in April 2000.²⁰ The business allowed customers to rent a car under the easyRentacar name over the phone or via the internet, and using both easyCar.com and easyRentacar.com.²¹ At some point the mark used for these services changed to easyCar.²² On 13 March 2000 £244,869 was spent on advertising for easyRentacar in 8 national newspapers.²³ Turnover/revenue under easyRentacar / easyCar was as below²⁴ (it is not specified which mark generated which portion of this):

Year end	
September 2000	Turnover £3,344,000
September 2001	Revenue £17,987,000
September 2002	Revenue £28,306,000
September 2003	Revenue £32,498,000

easyValue

17. easyValue began operating in November 2000 as a price comparison service at www.easyValue.com.²⁵ The price comparison services were available in respect of a broad range of goods and services.²⁶ Examples of press coverage from ahead of the launch of the service in June 2001²⁷ include an article in the Times on 17 October 2000 and Marketing Week on 2 November 2000.²⁸ Monthly visits to the site increased to over 1 million within 6 months.²⁹ The site included a property search service.³⁰ Contracts were entered to compare and advertise other services on the site and third parties were engaged to purchase and sell advertising space on its behalf.³¹ Turnover

²⁰Haji-loannou, paragraph 82

²¹ Haji-loannou, paragraph 82

²² Haji-loannou, paragraph 82

²³ Haji-loannou, paragraph 85

²⁴ Haji-loannou, paragraph 84

²⁵ Haji-loannou, paragraph 104

²⁶ Haji-loannou, paragraph 104

²⁷ Haji-loannou, paragraph 106

²⁸ Haji-loannou, paragraph 105

²⁹ Haji-loannou, paragraph 106

³⁰ Haji-loannou, paragraph 107

³¹ Haji-loannou, paragraph 111

under easyValue was £17,070 until December 2000, and revenue for the following years was £76,983 in 2001, £22,880 in 2002, and £27,636 in 2003.³²



easyCoach

18. There is no mention made of the above mark within Exhibit REP1.

EASYLAND

19. easyLand was the name given to the renamed “Executive Terminal” used by easyJet at Luton Airport in 1998.³³ At the time the witness statement was written, there were three physical spaces (soon to be four) around the world named easyLand, comprising of retail spaces displaying the history of the “easy family” of brands.³⁴

EASYBUS

20. “easyBus” was set up as a low cost option for going between Luton airport to central London, aimed at customers who could not afford other forms of transport to and from the airport.³⁵

Exhibit REP2

21. Exhibit REP2 includes various press articles referencing easyJet, of which at least the vast majority appear to be aimed primarily at a UK audience. The articles include those displayed on ‘.co.uk’ domains, and those published on British newspaper sites including the Telegraph, the Independent and the Guardian. The articles are dated between 6 June 2014 and 16 May 2017, and cover topics from easyJet’s planned expansion,³⁶ its 5th year of record profits

³² Haji-loannou, paragraph 113

³³ Haji-loannou, paragraph 9

³⁴ Haji-loannou, paragraph 157

³⁵ Haji-loannou, paragraph 35

³⁶ REP2, page 116 (Financial Times, 24 Jan 2017)

in 2015,³⁷ and airline and marketing awards won.³⁸ The articles include reference to the sponsorship of Manchester pride in 2014³⁹ and easyJet's partnership with Unicef in 2016.⁴⁰ In addition to the press articles, this exhibit provides the easyJet year end results from 2013 and 2016, the key aspects of which are summarised in the table below:

Year	Passenger nos. (million)	Total revenue (million)
Year end 30 September 2016	73.1	4,669
Year end 30 September 2015	68.6	4,686
Year end 30 September 2014	64.8	4,527
Year end 30 September 2013	68	4,258

EXHIBIT REP3

22. As mentioned, the witness statement at exhibit REP3 is in the name of Christopher Griffin in his position as Chief Executive of the Museum of Brands. Mr Griffin explains he has “been involved in global brand consultancy since 1984”, and that he was a director of the Marketing Society for nearly 20 years, and goes on to detail other positions and roles he has held in the industry. Mr Griffin explains he is acknowledged as an expert in the field of branding, but he does not state how this acknowledgment came about, or by whom he is recognised as such. Mr Griffin provides his opinion on the fame of the ‘easy’ brand and states he would expect this to be widespread. He asserts

³⁷ REP2, page 93 (Guardian, 17 November 2015)

³⁸ REP2, Winner of the Marketing Society Awards (page 90, campaignlive.co.uk, 6 June 2014), World Travel Awards 2002 & 2009 – 2014 (page 79-80, worldtravelawards.com), Europe's Most Preferred Airline poll by eDreams.co.uk (page 86-87, travel.aol.co.uk, 8 October 2016 & page 89, carrentals.co.uk, 10 October 2016), Business travel awards (page 98-99, 5 August 2014, buyingbusinessstravel.com)

³⁹ REP2, page 102

⁴⁰ REP2, page 88 & page 108-112

that, “as an expert in the field”, he is particularly aware that the consumer will associate various brand values with the ‘easy’ marks, and that these values will be tarnished by third party use of ‘easy’ branded services.

EXHIBIT REP4

23. Exhibit REP4 consists of print outs of pages from the Collins English Dictionary providing a variety of definitions of the word “vehicle”.

DECISION

Section 47

24. 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)

25. 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

26. 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.”

27. Proof of use has not been requested by the proprietor in respect of any of the earlier registration relied upon under this ground, and so it will not be considered at this stage.

The principles

28. 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

29. 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.”

30. 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 uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) 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;

(f) 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.

31. 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”.

32. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“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 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”.

33. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC that goods may be considered “complementary” 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”.

34. 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.”

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

Cancellation applicant’s goods/services	Proprietor’s goods and services
<p>Registration no. 15841554</p> <p>Class 12: <i>Vehicles; vehicle parts and fittings; apparatus for locomotion by land, air or water.</i></p> <p>Class 37: <i>Building construction; motor vehicle repair; computer installation services; electrical</i></p>	<p>Registration no. 3438411</p> <p>Class 11: <i>Lighting apparatus for electric bicycles.</i></p>


<p><i>installation services; maintenance and repair of computer hardware; painting and decorating; cleaning services; vehicle maintenance and repair services; arranging for the maintenance of motor land vehicles; maintenance and repair of land vehicles; maintenance and repair of vehicles; provision of information relating to the maintenance of vehicles; refurbishment of vehicles; repair of accident damage to vehicles; repair of land vehicles; repair of vehicles; repair services relating to vehicles; service stations for the maintenance of vehicles; service stations for the repair of vehicles; servicing of vehicles; washing of vehicles.</i></p> <p>Class 39: <i>Transport; packaging and storage of goods; travel arrangement; travel information; provision of car parking facilities; transportation of goods, passengers and travelers by air, land, sea and rail; airline and shipping services; airport check-in services; arranging of transportation of goods, passengers and travelers by land and sea; airline services; baggage handling services; cargo handling and freight services; arranging, operating and providing facilities for cruises, tours, excursions and vacations; chartering of aircraft; rental and hire of aircraft, vehicles and boats; chauffeur services; taxi services; bus services; coach transport services; rail services; airport transfer services; airport parking services; aircraft parking services; escorting of travelers; travel agency services; tourist office services; advisory and information services relating to the aforesaid services; information services relating to transportation services, travel information and travel booking services provided on-line from a computer database or the Internet.</i></p>	<p><i>Class 12: Electric bicycles, parts, components, accessories and spare parts thereof included in this class.</i></p> <p><i>Class 35: Intermediary services in the field of business, import-export, wholesale trade and specialized retail trade relating to electric bicycles, parts, components, accessories and spare parts.</i></p> <p><i>Class 37: Electric bicycle repair, including guarantee repairs.</i></p>
<p>Registration no. 16140782</p> <p>Class 35: <i>Advertising; business management; business administration; office functions; publicity,</i></p>	

<p><i>promotional services, import-export agency services, business information services, organising exhibitions for commercial or advertising purposes;</i></p> <p>Class 37: <i>Aircraft fuelling services.</i></p> <p>Class 39: <i>arranging of transportation of goods, passengers and travellers by land; rental and hire of vehicles, boats and aircraft</i></p>	
<p>Registration no. 14920391</p> <p>Class 35: <i>Advertising; business management; business administration; provision of business information; retail services connected with the sale of cosmetics, non-medicated toilet preparations, perfumes, fragrances, colognes and scents, soaps and cleaning preparations; retail services connected with the sale of luggage, suitcases, travelling sets, sports bags, bike bags, backpacks, games, playing cards; retail services connected with the sale of gymnastic and sporting articles; retail services connected with the sale of scooters; marketing and publicity services; dissemination of advertising, marketing and publicity materials.</i></p>	
<p>Registration no. 10735561</p> <p>Class 39: <i>Transport; bus services; coach transport services; airport transfer services; advisory and information services relating to the aforesaid services;</i></p>	
<p>Registration no. 10735553</p> <p>Class 39: <i>Transport; rental and hire of vehicles; advisory and information services relating to the aforesaid services;</i></p>	
<p>Registration no. 16079675</p> <p>Class 35: <i>Advertising, marketing and publicity services; dissemination of advertising, marketing and publicity materials; business organisation, business administration and business management services, business information services, auctioneering services, office functions, promotional</i></p>	

services; import-export agency services, business and management consultancy, assistance and advice; purchasing and demonstration of goods for others; advisory and arrangement services relating to all the aforesaid;	
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36. Within its submissions, the proprietor states:


“The Registration covers only electric bicycles and their parts and fittings. The only Registration relied on by the Applicant covering Class 12 is EUTM no. 015841554 'easyCoach'. The Applicant's registration covers 'vehicles' without restriction. Whilst the Registrant accepts that 'vehicles' in class 12 reasonably encompasses 'electric bicycles', the specific form of 'vehicle' for which the Applicant's Earlier Mark 'easyCoach' may be used is likely to be a coach, which is totally different from the electric bicycles covered by the Registration, as the nature and intended purpose of such goods and coaches are completely different.”

37. The registration for  as referenced by the proprietor above is not yet subject to proof of use requirements. It is well established that where an earlier registration is not subject to proof of use requirements, the comparison of the goods and services must be undertaken in respect of those as registered. For this reason, the proprietor's speculation regarding what the cancellation applicant's services are likely to look like in practice are irrelevant.

38. However, I do note the proprietor's comments include a concession that there is identity between vehicles and the proprietor's *electric bicycles* within the meaning of *Meric* as set out above. On this basis I must also find identity between *vehicle parts and fittings* covered by the cancellation applicant, and *parts, components, [...] and spare parts thereof included in this class* following the proprietor's *Electric bicycles* in class 12. I also note identity between the

proprietor's *electric bicycles* and the cancellation applicant's *apparatus for locomotion by land*. In summary, I find the proprietor's mentioned goods in class 12 to be identical to the cancellation applicant's class 12 goods covered

by the earlier registration for .

39. Also on the basis of the cancellation applicant's vehicles reasonably incorporating electric bicycles, I find also there will be identity between the cancellation applicant's class 37 services *vehicle maintenance and repair services*; and the proprietor's *Electric bicycle repair, including guarantee repairs* covered under the earlier mark  within the meaning of *Meric*.

40. The wording of the proprietor's services in class 35 read: *Class 35: Intermediary services in the field of business, import-export, wholesale trade and specialized retail trade relating to electric bicycles, parts, components, accessories and spare parts*. It is my view that the correct interpretation of this class is that *intermediary services and relating to electric bicycles, parts, components, accessories and spare parts* will apply to the whole of class 35.

41. The cancellation applicant covers the services *import-export agency services* in class 35 under both its marks *easyValue* and *EASYLAND*. I find these will incorporate and thus are identical to the proprietor's services *Intermediary services in the field of [...] import-export [...] relating to electric bicycles, parts, components, accessories and spare parts* within the meaning of *Meric*.

42. I note at this point it is also appropriate to consider the degree of similarity between the proprietor's *Intermediary services in the field of [...] import-export [...] relating to electric bicycles, parts, components, accessories and spare parts* and the cancellation applicant's *transport* and the defined transport services covered under the registration no. 10735561 for *EASYBUS*, as I will go on to find this mark to be the most similar of the earlier marks relied upon to the proprietor's mark. I note that these terms both relate to services where

the very broad intended purpose is for the easy movement of people or cargo from one place or territory to another, including either via land, sea, or air. Further, it is my view that the infrastructure required to operate import and export services themselves may to an extent mirror that required for land, ocean and air transport. However, I note here that the proprietor's services are intermediary services only, and so I do not find that this will cover the actual provision of the transport to import and export items, rather this will cover the arrangement of these services for others with third party providers. It may be that there is a level of complimentary between import and export services and transport services, in that transport services are essential or important to import and export services, but this is somewhat further removed in respect of the intermediary services found here, and I find this would be insufficiently pronounced for the consumer to assume that these intermediary services for import and export will be offered by the same entity as transport services. In addition, it is my view that the nature and specific intended purpose of these services differ. On the one hand, intermediary services relating to import and export will be concerned with liaising with third parties for the arrangement of import and export, possibly including assistance with the fulfillment of the requirements to meet regulations and laws for the movement of goods across borders on behalf of others. On the other hand, transport services will simply be for the purpose of moving people or cargo from one place to another. I find there will be no competition between the services. Overall, I find the services to be similar only to a low degree.

43. In respect of *Intermediary services in the field of [...] wholesale trade and specialized retail trade relating to electric bicycles, parts, components, accessories and spare parts* covered by the proprietor's mark, it is my view that these services will encompass the cancellation applicant's *purchasing and demonstration of goods for others* rendering them identical within the meaning of *Meric*. However, if I am wrong about the identity of these services, I find these services highly similar. I find the nature and intended purpose of the services will cross over on the basis that they are both 'middleman' services in the field of retail and wholesale, and that the intended purpose of the services will be to assist retailers and wholesalers with making efficient

and suitable sales and purchases. I find that the intended user of the services will often overlap, those being primarily retailers and wholesalers, although I note the possibility of general consumer engaging a buying service. If the services are not identical, they are unlikely to be in competition or to be complementary, but I find it likely they will share trade channels due to the similarity of the services.

44. I also note the cancellation applicant's submission that its services *retail services connected with the sale of bike bags* are identical to the proprietor's services. However, I find that if this is the case the identity extends only to *Intermediary services in the field of [...] specialized retail trade relating to electric bicycles accessories*, although I also find there would be also be high level of similarity in respect of the proprietor's *Intermediary services in the field of [...] wholesale trade [...] relating to electric bicycles accessories* due to the similar nature and purpose of the same.
45. In respect of the proprietor's *Intermediary services in the field of business [...] relating to electric bicycles, parts, components, accessories and spare parts*, I find these to be identical under *Meric* to *business organisation, business administration and business management services ... business and management consultancy, assistance and advice; advisory and arrangement services relating to all the aforesaid* (emphasis added) covered by the cancellation applicant, as I find arrangement of these services will be covered under intermediary services.
46. The proprietor's goods in class 11 comprise of *Lighting apparatus for electric bicycles*. The proprietor has also registered *electric bicycle, accessories thereof* as included in class 12. I find these will include goods such as bicycle bells, training wheels and seat covers. I find the cancellation applicant's closest goods both to the bicycle accessories in class 12 and the bicycle lighting in class 11 to be *Vehicles; vehicle parts and fittings; apparatus for locomotion by land*. It has been conceded by the proprietor that the cancellation applicant's 'vehicles' covers 'electric bicycles' (and thus its *vehicle parts and fittings* include electric bicycles parts and fittings). However,

I still find that these items are of a different in nature to the proprietor's lighting apparatus and accessories for use with electric bicycles. On the one hand, the parts and fittings are parts which connect to other parts to form a complete article. On the other hand, the accessories will generally be complete items which may be attached to or used with the complete article, but do not form an integral part of the same. I find that electric bicycles as covered under the broader term by the cancellation applicant are complementary to the proprietor's goods on the basis that electric bicycles are indispensable, or at least important to lights and accessories for the same, and that the consumer would expect these to often be offered by the same undertaking. Further, I find that the intended user and trade channels will be shared. The intended purpose of the goods is clearly different with one to be used as a mode of transport (or as an integral part of this), and the others for the purpose of either illuminating the way in the dark, or accessorising either to add to or alter the functionality, aesthetics or to help protect the bicycle. Overall, I find the goods to be similar to between a low to medium degree.

Comparison of marks

47. 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 CJEU 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.”

48. 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.

49. The respective trade marks are shown below:


Earlier trade marks	Contested trade mark
 <p data-bbox="427 916 577 952">easyValue</p> <p data-bbox="400 1025 604 1061">EASYGROUP</p> <p data-bbox="427 1135 577 1171">EASYBUS</p> <p data-bbox="427 1245 577 1281">EASYCAR</p> <p data-bbox="416 1355 588 1391">EASYLAND</p>	

50. Five of the earlier marks comprise solely of the word EASY, combined with a second 3-5 letter word, without any additional stylisation. All of these marks will be understood by the consumer as being the sum of two conjoined

English words. The consumer will understand the mark  as the sum of two English words contained within an orange box. In all of the marks, the word easy conveys to consumers that the goods or services under the mark are easy to use. In addition, the later part of the earlier marks often (but not always) describes the goods or services under the mark. Where the later

element is entirely descriptive, the first part of the mark 'easy' may play a slightly greater role in the marks, and where the later part of the mark is unrelated to the goods and services, the second word will play a slightly

The logo for 'easyCoach' features the word 'easy' in a white, lowercase, sans-serif font and 'Coach' in a white, uppercase, sans-serif font, both set against a solid orange rectangular background.

greater role in the mark. In the mark  the word elements will play a greater role in the overall impression than the orange box. However, in respect of all of the earlier marks, the overall impression will reside in the marks as a whole.

51. The proprietor's mark also consists of the two conjoined English words 'Easy' and 'Bike', along with a device element consisting of two shaded square shapes in yellow and grey. The letter i in the word Bike is also dotted in yellow against the black text. Neither 'easy' nor 'bike' is distinctive in respect of the services, however, the word remains the most dominant element in the mark, and it is here that the consumer will direct their attention first. The device element will not be ignored, but it plays a lesser role in the overall impression. However, again, I find the overall impression is formed by the mark in its entirety.

52. As mentioned briefly in the comparison of the goods and services, I find the most similar of the earlier marks to be EASYBUS, as it shares the first five letters EASYB with the contested mark. However, as the earlier marks cover varying goods and services which range from identical to similar only to a low degree in the case of EASYBUS, I will also consider the similarity of all the earlier marks easyValue, EASYGROUP, EASYCAR, EASYLAND and

The logo for 'easyCoach' features the word 'easy' in a white, lowercase, sans-serif font and 'Coach' in a white, uppercase, sans-serif font, both set against a solid orange rectangular background.

with the contested mark.

Visual comparison

53. The earlier word marks coincide visually with the proprietor's mark to the extent that the word elements all begin with the word 'EASY'. As five of the


earlier marks are registered in word format they may be used in a range of fonts and in upper or lower case.

54. In respect of EASYBUS, the fifth letter in the earlier mark is also shared with the contested mark, however it differs at the end of the word elements through the use of 'US', and 'IKE'. These elements in themselves are visually dissimilar. The marks are of a similar length, with the earlier mark consisting of 7 letters, and the later mark of 8 letters.

55. Both EASYLAND and the contested mark consist of 8 letters, whereas EASYGROUP and easyValue are slightly longer at 9 letters each, and EASYCAR slightly shorter again at seven letters. The marks visually differ in the second half of the mark, namely 'LAND' 'GROUP' 'CAR' and 'Value' vs 'Bike', which share no visual similarities other than being the same or a similar length.

56. In addition to the above, the later mark includes a device element at the beginning of the mark that is not present in any of the earlier marks, creating a further point of visual difference. With consideration to the similarities and the differences, I find the earlier word marks all to be visually similar to the later mark at best to a medium degree.

The logo for 'easyCoach' features the word 'easy' in a white, lowercase, sans-serif font and 'Coach' in a white, uppercase, sans-serif font, both contained within a solid orange rectangular box.


57. In respect of the earlier mark , again the marks coincide in the use of the word 'EASY'. The marks use of different stylisation, including the different font and the use of an orange box in the earlier mark, and the small device in the contested mark. In addition, the length of the word elements differ slightly from 9 letters to 8. All these factors create points of visual difference between the marks. There are no similarities in the second half of the wording, namely 'Bike' and 'Coach'. I find these marks to be visually similar to between a low and medium degree.

Aural comparison

58. The element that will be verbalised in the later mark will be the wording 'easy-bike'. Recognising these as two English words conjoined, it is my view that the consumer will pronounce them as such, as 'easy-bike'. I find this also to be true in respect of the earlier marks, which will be pronounced as the English words 'easy-bus', 'easy-coach', 'easy-land', 'easy-value', 'easy-car' and 'easy-group'. Verbally, the marks coincide in the first two syllables and differ in the final one, or in the case of 'easy-value', the final two syllables.

59. Verbally, the earlier mark EASYBUS shares the highest level of verbal similarity with the contested mark, as the second syllables both begin with the 'buh' sound. However, I find that the 'ike' sound in the contested mark differs significantly to the 'us' sound in the earlier mark. Overall, I find the marks to be aurally similar to between a medium and high degree.

60. The second half of the remaining earlier marks, namely easyValue,

EASYGROUP, EASYCAR, EASYLAND and , bear no resemblance verbally to the second half of the contested mark. With consideration of the similarities and the differences, I find overall there is a medium degree of aural similarity between these marks and the contested mark.

Conceptual comparison


61. The marks all begin with the word 'easy', which as mentioned will convey the meaning that something is not difficult or requires little effort. This indicates to the consumer in respect of all the marks that the goods and services under the same will be easy to use.

62. The latter half of the earlier marks all create concepts that are distinct from


each other and from the later mark. The earlier mark  creates two

possible concepts, as the meaning of the later element may be interpreted as either a large vehicle for carrying multiple people from one destination to another via land, or as a trainer or educator, namely someone or something who provides advice, knowledge and motivation to improve a skill. As mentioned previously, 'value' will convey the meaning of getting lots for your money. 'Land' may convey two possible meanings to consumers, one being to land, i.e. to descend from a height and to settle on the ground beneath, or of the ground itself (as opposed to the air or the sea). 'BUS' indicates a mode of public transport. Overall, the conceptual meaning of all of the marks is created

 easyCoach

by the sum of their parts.  gives the concept of a coach (vehicle) that is easy to use, or coach services that are easy to use. EASYBUS and EASYCAR convey the concept of a bus or a car that is easy to use, or bus or


 easyCoach

car services that are easy to use.  may also give off the concept of a coach (trainer) that makes a skill easy to learn. EASYLAND may give off one of several concepts of something that is easy to land or that makes something easy to land, or of a forgiving terrain that is easy to travel across, or of something that makes it easy to do so. easyValue gives off the concept of an easy way to get the most for your money. EASYGROUP gives off the concept of something that is easy to group together, or alternatively of a group of companies that offer easy to use goods or services.

63. The later mark also includes the element 'easy', which alone creates the same concept as in the earlier marks. The second element creates the concept of a bicycle. The mark in its whole conveys the concept of a bicycle that is easy to use or that makes cycling less difficult.

64. Where the earlier marks end with a type of transport, such as in the case of

 easyCoach

EASYBUS, EASYCAR and , I have considered that there is a commonality to the extent that the marks convey to the consumer the meaning of a type transport that is easy to use. However, the type of transport

is clearly different, and I find the concept of a bicycle that is easy to use to be different to that of a car, bus or coach, or related services.

65. Whilst there is an overlap in respect of the shared concept of something being “easy” this concept alone is not distinctive, and the overall concept created by the earlier marks is dissimilar to that conveyed by the contested mark. I find the marks to be conceptually dissimilar.

Average consumer and the purchasing act

66. 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*.

67. 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.”

68. Before deciding on the likelihood of confusion, I must first identify the relevant consumer of the goods and services. In this instance, I find the average consumer and their degree of attention will vary between the goods and services offered under the marks.

69. In respect of the class 12 goods, I find that both vehicles broadly, as well as electric bicycles are likely to be infrequent and expensive purchases that require additional care and attention. One group of consumers of these goods will be members of the general public, and I find this group will pay an above average to high degree of attention when making these purchases. The consumers will want to carefully consider quality, safety, value and aesthetics of the purchase. I note that these goods may also be purchased by professionals, whether they be running a business by leasing these goods or otherwise, and I find the degree of attention paid by professionals will be high due to the increased responsibility and liability of making a correct purchase. The vehicle repair and maintenance services in class 37, and the parts and accessories across classes 11 and 12 are unlikely to warrant the same high level of attention as the initial purchase. However, I find that the general consumer will generally pay at least an average level of attention when it comes to engaging repair and maintenance services, as they will wish to ensure that their vehicle is in safe hands, and I find again that the attention of professional consumers will be elevated to between an average and high level. In respect of the parts and accessories I find it likely an average level of attention will generally be paid to ensure an appropriate purchase is made for the item already owned. The services in class 35 appear to be aimed primarily at the professional consumer, and I find that the level of attention paid will likely be increased on this basis for the reasons given, falling above average. If it is the case that these are offered to the general consumer, for example in the case of intermediary services for retail and the purchasing of goods for others, I find at least an average degree of attention will be paid to these services by the general public, as hiring a professional to undertake these services will require a level of trust, which will transfer through to the attention paid when engaging the services.

70. I find the purchasing process in respect of the goods and services will be primarily visual, with types of transport often viewed or purchased showrooms or and in retail establishments or online and via brochures, and transport services also often engaged with online. However, I note that verbal

recommendations may also be made, and that in respect of class 35, services may be engaged with over the telephone as well as online, and I therefore find I cannot completely disregard the aural considerations.

Distinctive character of the earlier trade mark

71. 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).”

72. All of the earlier marks will be understood by the consumer as being the sum of two English words, the first of which being the word ‘easy’. The word ‘easy’ will be clearly understood by the consumer and is defined in the Collins

English Dictionary as describing that something is not difficult or that requires little effort,⁴¹ and as such it holds no distinctive character alone due to its descriptive nature. The same is true for the words 'group' and 'value'. 'Value' conveys the descriptive or laudatory meaning of getting a lot for your money, and 'group' indicates that the services are offered by a group of companies. Where the words 'car', 'bus' and 'coach' are used, these will be descriptive or allusive of some of the goods and services to which they relate, namely the services relating to transport and those associated with this. In respect of some of the services in class 39, LAND also alludes to the type of transport services offered, but it is more distinctive in respect of the remaining services.

73. The distinctiveness of the earlier marks varies depending on the goods and services covered, as follows:

- In instances where the second half of the word element of the earlier marks is entirely descriptive or non-distinctive, it is the combination of 'easy' with the later element makes the earlier marks inherently distinctive. However, it is my view that the level of distinctiveness remains below average;
- Where the second element is not descriptive and is distinctive for the goods or services, I find the earlier marks hold at best an average level of distinctiveness, all being the combination of two known English words.

74. Where it is the case that the second element of the earlier marks is entirely descriptive, the 'easy' prefix may appear to be the slightly stronger element, but the distinctiveness of the marks remains reliant on the combination of the words.


75. The cancellation applicant has claimed that the three earlier marks EASYGROUP, EASYBUS and EASYCAR have an "elevated" distinctive character.

⁴¹ <https://www.collinsdictionary.com/dictionary/english/easy> [accessed February 2021]


76. In respect of the earlier EASYGROUP mark, it is not clear from the evidence filed that the mark is consumer facing, or that it has been used as a trade mark in respect of goods or services, rather than as the name of a commercial entity under which various trade marks are owned, controlled and licensed. I note the cancellation applicant's claim that "easyGroup was not just a corporate or legal vehicle, it is the owner and creator but also a member of the EASY family of brands and became recognised in its own right."⁴² However, it is not clear from the evidence for what it is claimed that the mark easyGroup is recognised exactly, and I struggle to find use of the mark as a trade mark, let alone that its use is such that its inherent distinctive character has been enhanced.

77. In respect of the mark EASYCAR, it is not clear from the evidence when the use of this mark took over from the mark "easyRentacar", which is referred to interchangeably with EASYCAR within the evidence. The extent and duration of the use of the mark EASYCAR is therefore unclear, and the proportion of revenue generated under EASYCAR rather than easyRentacar (figures for which have only been provided up until 2003) is not clear. The evidence provided does not show that the distinctiveness of this mark has been enhanced through the use.

78. Again, very little evidence has been provided in respect of the extent of the use of the mark EASYBUS. No turnover or advertising expenditure figures have been provided. I cannot find from the evidence filed that the mark will benefit from an enhanced degree of distinctive character due to the use made of the same.

79. It is not claimed that the distinctive character of the earlier marks , easyValue or EASYLAND has been enhanced through use. However, for the avoidance of doubt, I note at this stage that it is my view it has not been. In

⁴² REP1 Paragraph 41

respect of the marks  and EASYLAND, no turnover figures have been provided. Where turnover figures have been provided in respect of the mark easyValue, these are both minimal and historic, and there is no evidence as to how the use of these marks interacts with the UK market for their respective goods or services. There is little evidence relating the marketing and advertisement of goods or services under these marks in the UK market, and it is my view that there is no reason I should find the inherent distinctiveness of these marks has been enhanced through use.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

80. Prior to reaching a decision under Section 5(2)(b), I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 28 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 they have kept in their mind. I must consider the level of attention paid by the average 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 the level of distinctive character held in the earlier marks will have an impact on the likelihood of confusion. I must consider that the likelihood of confusion may be increased where the distinctive character held in the earlier mark is high and may be less likely where it is low. I must remember that the distinctive character of the earlier mark may be inherent, but that it may also be increased through use, and that the distinctiveness of the common elements is key.⁴³ I must keep in mind that a lesser degree of similarity between the

⁴³ See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, in which 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.

goods and services may be offset by a greater degree of similarity between the marks, and vice versa. I must also consider that both the degree of attention paid by the average consumer and how the goods or services are obtained will have a bearing on how likely the average consumer is to be confused.

81. I consider at this point that there are two types of confusion that I may find.

The first type of confusion is direct confusion. This occurs where the average consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the average 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.⁴⁴

82. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), 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.

83. I found the inherent distinctiveness of the earlier marks to be between below average and average, and I did not find this had been enhanced through use. I found the average consumer's attention will range from average to high, depending on the goods and services. I found that the common element of the earlier marks and the contested mark is the word 'easy', which holds no distinctive character alone. I found the goods and services to range from identical to similar to a low degree. I have found the marks to be visually similar to a medium degree at best, and aurally similar to medium degree with the exception of EASYBUS, which I found to be aurally similar to between a medium and high degree.

⁴⁴ *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10

84. I found the marks to be conceptually dissimilar. To the extent that the marks coincided through the use of 'easy', I found the concept is weak due the lack of inherent distinctiveness of the word 'easy' and its indication simply that the goods and services under the marks are easy to use. When considered in the context of the mark as a whole, I did not find this element was sufficient for conceptual similarity, nor did I find that reference to different types of transport rendered the marks conceptually similar.

85. I found that the goods and services will generally be engaged with visually, but that aural considerations cannot be disregarded entirely.

86. Firstly, I consider the position in respect of direct confusion. I consider that the beginning of marks generally makes more impact on the consumer,⁴⁵ and it is here that the similarities between the marks, or at least between the dominant word elements, is found. I have considered that the identity between the goods and services may go some way to counteract the differences between the marks themselves. However, I find that the differences between the marks are such that in this instance, even where consumers are paying only an average degree of attention, they will not be directly confused between the same.

87. In respect of indirect confusion, I consider again the identity of many of the goods and services. I note the common element of the earlier and later marks is the word 'easy', or in the case of the earlier mark EASYBUS, the common element is 'EASYB'. I have found the common element 'easy' to lack distinctive character alone, but I also found in some instances the additional elements of the mark are equally weak, and that the distinctive character is created by the combination of the two non-distinctive elements. I have taken into consideration the cancellation applicant's argument regarding the particular layout of the marks, with the later mark following the same pattern as the earlier marks. With this in mind, I have considered if the presence of the same non-distinctive element in the marks (or the non-distinctive element

⁴⁵ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

combined with a second word beginning with the letter 'B'), residing in the same position within the word element, will cause the consumer to believe that goods and services under the marks derive from an economically linked undertaking. It is my conclusion that this will not be the case, and I do not believe that the presence of the non-distinctive word 'easy' in the same would lead consumers to believe that origin of the goods or services was economically connected. I therefore find no likelihood of indirect confusion between the marks.

88. I note at this stage that the cancellation applicant has made reference to owning several trade marks beginning in the same way. There are comments in the cancellation applicant's pleadings under Section 5(3) that appear to allude to a "family of marks" argument, as the proprietor has also pointed out within its submissions. I note that this argument is not pleaded under Section 5(2)(b) of this opposition, and so I am not required to address this at this stage. However, I also note the cancellation applicant's apparent attempt to rely on this argument under this ground in its submissions despite its pleadings. The cancellation applicant states:

*"Lastly, the likelihood of confusion, which includes a likelihood of association, is increased when one considers the extent of the use of "easy" by the Applicant across numerous fields and in numerous forms, particularly in relation to transport. The "easy" prefix is common to many of the Applicant's businesses, including the well-known airline **easyJet**. Further evidence and details of this are below. The Applicant's marks would be called to mind when the average consumer is confronted with the contested mark, thus increasing the likelihood of confusion."*

89. For the sake of completeness, I will briefly address this argument here. Firstly, I note the reference to the cancellation applicant's mark 'easyJet' is not relevant under this ground, as it has not been relied upon under section 5(2)(b). Further, I note that in order for a family of marks argument to succeed, the trade marks constituting that family must be present on the market.⁴⁶ The use provided in respect of the mark EASYGROUP being used

⁴⁶ *Il Ponte Finanziaria SpA v OHIM*, Case 234/06 at paragraph 64

as a trade mark 'on the market' within the relevant time period is limited at

The logo for 'easyCoach' is displayed in white text on an orange rectangular background.

best. Further, there is no evidence relating to the use of . The small reference made to EASYLAND does not specify the territory or the purpose of the "retail spaces" to which the evidence refers, and I do not find reference to this as an address sufficient to find this mark is used on the market. Reference to EASYBUS is very limited, and the evidence referring to EASYCAR does not specify the dates at which this mark was used, and it is used interchangeably with the mark easyRentacar. The evidence referring to the use of easyValue is also limited and ends in 2003. It is not clear to what extent these marks were in use on the market during the relevant time. The evidence does not sufficiently substantiate the use of at least three of the earlier marks to the extent that a family of marks may be relied upon under this ground.

Section 5(3)

Legislation

90. Section 5(3) states:

“(3) A trade mark which-

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

91. 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

92. Proof of use has been requested by the proprietor in respect of the earlier EU mark no. 10584001 for the mark EASYJET. This earlier registration was filed on 21 January 2012 and registered on the 9 January 2015. The application for invalidation of this registration was filed on 10 March 2020. As per section 47(2A) of the UK Trade Mark Act 1994 (the Act), as the mark upon which the invalidation has been based finished its registration process more than five years prior to the date of filing the invalidation action, the mark subject to the invalidation action may only be declared invalid on the basis that the use conditions set out under Section 47(2B) of the Act are met. These provisions are set out below:

47 Grounds for invalidity of registration.

...

(2B) The use conditions are met if—

(a) the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with their consent in relation to the goods or services for which it is registered—

(i) within the period of 5 years ending with the date of application for the declaration, and

(ii) within the period of 5 years ending with the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application where, at that date, the five year period within which the earlier trade mark should have been put to genuine use as provided in section 46(1)(a) has expired, or

(b) it has not been so used, but there are proper reasons for non-use.

93. As section 47(2B)(ii) makes reference to the five year period as provided in section 46(1)(a), I have set this out below for reference:

46 Revocation of registration.

(1) The registration of a trade mark may be revoked on any of the following grounds—

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

94. As the earlier registration was less than five years old at the filing date of the proprietor's registration on 22 October 2019, the use provisions under section 47(2B)(ii) are not applicable. There is therefore only one period within which the cancellation applicant must show genuine use of the mark in this matter, namely the five years prior to the date of filing the application for invalidation, that being 11 March 2015 – 10 March 2020.

Proof of Use case law

95. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal*

Market (Trade Marks and Designs) [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the

purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

96. Section 100 of the Act states that:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

97. In this matter the burden is on the cancellation applicant to show that the earlier registration has been used within the relevant territory of the European Union, within the relevant timeframe as outlined above, and in respect of the services relied upon.

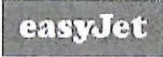
FORM OF THE MARK

98. Before proceeding with my assessment of genuine use, I will briefly address the use of the mark in the varying forms within the evidence. I note that the evidence shows the mark being referred to in the press articles as EASYJET / EasyJet and easyJet. Sir Haji-loannou refers in his witness statement to “easyJet” and provides a detailed description of how the mark is used, or the “get-up” of the mark. I have copied this description below:

23. I decided that in addition to the 'easy' prefix, all my EASY businesses would have to use the same get-up. The get-up is essentially the cooper black font and white letters on an orange background. Each EASY business is obliged to use the EASY get-up, or brand identity. This obligation is set out in the various easyGroup brand licences.

24. Each business uses the EASY prefix (the word EASY being in lower case) immediately followed by a second word or phrase (the first letter of which is capitalized), which is appropriate to the goods or services provided by the individual business within the group. As I have explained, the font used for the wording is the cooper black fat font, which was also decided by me at the offices of White Knight at the same time as the discussions referred to above.

99. The use in the “get-up” as described above is best evidenced by the images

of the website booking page showing the mark as  , and the planes using the mark featuring the mark on the livery in the same stylisation as shown below:



100. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the

meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, 'use' within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish 'use' within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the 'use' of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

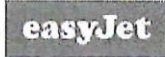
33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35 Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)". (emphasis added)

101. The mark itself is registered as a word mark, meaning it may be used in a variety of fonts and colours, and in upper-case or lower-case lettering. It

is clear that the use of the mark as 'easyJet' in its "cooper black fat font" is use of the word mark as registered. Where the mark is used with additional matter, namely the orange box, I must consider if the mark will still be perceived by the consumer as an indicator of origin. I find the wording easyJet clearly retains an independent distinctive role within the mark, and would continue to be perceived by the consumer as the indicator of origin within the

same. I therefore find use of the mark  as shown in the evidence to be acceptable as use of the registered mark.

Use of the mark

102. Of the evidence that has been provided by the cancellation applicant, a significant amount of this falls outside of the relevant period for proving use. In addition, the most recent use shown in the evidence provided falls on 13 November 2017, consisting of a print out from <http://corporate.easyjet.com/default.aspx>. At best, the evidence shows use spanning just over 2.5 years of the relevant timeframe between 11 March 2015 – 13 November 2017.

103. It is clear from the evidence, including the press articles and the witness statement of Sir Haji-loannou's that the use shown under the mark during this time is in respect of low-cost airline services, with Sir Haji-loannou stating:

"46. I launched easyJet with the vision of creating a low-cost, no frills airline..."

104. Although Sir Haji-loannou is referring above to the launch of easyJet in 1995, the evidence shows that these remained the primary services offered under the mark up until the evidence stops in 2017. The turnover figures provided focus on the passenger numbers and revenue per seat, and the press articles provided consistently refer to easyJet as an airline. Whilst I note Sir Haji-loannou states that easyJet has also provided "holiday and

accommodation services” as well as an “in-flight magazine” since the “early years” of easyJets operation as an airline,⁴⁷ little detail of these offerings have been given, and the timeframe, territory and extent of these goods and services under the mark is not clear. There is also a claim that advertising services are offered under the easyJet mark, but as these services have not been relied upon within the invalidation, I do not need to consider this use further. I note finally that there is a single article referring to “easyjet” offering an “immersive theatre experience”, but again even if I were to find use for these services based on this alone, they are not relied upon under the mark and are therefore of little relevance.

105. It is made clear in the witness statement of Sir Haji-loannou that in the main, where alternative services were offered, these were intentionally offered by separate entities under alternative ‘easy’ marks.

Genuine Use

106. In my mind, there is no doubt that the evidence provided shows there has been some use of the mark EASYJET in the EU, in respect of airline services, and during the relevant time period by the cancellation applicant. I therefore turn my attention to the question of whether I find the use shown to be genuine use, sufficient for the cancellation applicant to enforce its rights within these proceedings. As set out in the case law above, for use of the earlier EU trade mark to be considered genuine, it must not be token use for sole purpose of maintaining rights in the territory. I must also remember that not every case of real commercial use will be sufficient to show that use is genuine, as the use must be warranted for the purpose of maintaining a market share in its particular sector.

107. Whether the use shown is sufficient for this purpose will depend on whether the opponent has shown there has been real commercial exploitation of the EUTM, in the course of trade, sufficient to create or maintain a market

⁴⁷ Paragraph 53


for the goods at issue in the Union during the relevant 5 year period. In making this assessment I am required to consider all relevant factors, including:

- i) The scale and frequency of the use shown
- ii) The nature of the use shown
- iii) The goods and services for which use has been shown
- iv) The nature of those goods and the market(s) for them
- iv) The geographical extent of the use shown

108. In respect of the scale and frequency of the use of the mark for airline services, the use shown up until 4 August 2017 is clearly significant. Turnover under the mark has been provided as 4,686 million for the year ending September 2015, and I find it is reasonable to assume at least a significant portion of this will fall after 11 March 2015. The turnover for the period ending September 2016 is 4,669 million, all of which will fall within the relevant period. The number of passengers using the airline are given as upwards of 68 million for the first period referenced, and upwards of 71 million for the second. Again, I find that on balance at least a significant portion of these passengers will have used these services within the relevant timeframe, considering the high number of the same. However, evidence is not provided in respect of the second half of the relevant period. Whilst I find it is likely this was to save the cancellation applicant the time and cost of tailoring its evidence for the current proceedings, I cannot make any concrete assumptions about the use during this time, although I find it unlikely that turnover and passenger numbers of the levels shown would drop off entirely and immediately following 2017 when the most recent yearly passengers of over 70 million was provided.

109. The nature of the use could be better evidenced by the documents provided. However, I note various press articles from within the relevant timeframe show use of the mark 'easyJet' on the planes livery, and the articles refer to 'easyJet' as the provider of the airline services and the winner of the various awards.

110. One of the better examples of how the easyJet mark is used by the cancellation applicant is at page 132 of the evidence with REP2. A print out of



the route map along with the mark is dated 26 June 2017 and featuring a copyright notice of 2017 on the map itself. The print out is taken from the proprietor's website. I note the page is primarily concerned with the booking of flights and possibly other services, and it is not actually clear from the page whether these are airline services or simply booking services on behalf of others that are being provided, but from the sum of the additional evidence provided alongside this it appears that this is simply a means of booking airline services provided by the cancellation applicant.

111. I do not have any figures relating to the exact size of the EU market for the airline services, however, noting the turnover up until September 2016, and passenger numbers up until January 2017, I find it reasonable to assume that the business under the EASYJET mark held at least a significant proportion of this market during the relevant time period. I note the evidence provided referencing EASYJET as the UK's biggest airline, but I bear in mind this refers only to '2008-2015'.⁴⁸ It is therefore not necessarily the case that this was true during the relevant timeframe, but it supports a finding that at least a significant share of the market would have been held under the mark during the beginning of the same. I also note reference to easyJet being "the second-largest airline in Europe in passenger numbers" on the Wikipedia page provided, but I treat this with the appropriate caution, not least due to the reference to Europe rather than the EU.

112. In respect of the geographical extent of the use, it is clear from the witness statement of Sir Haji-loannou that the airlines routes were operating throughout the EU, and "by 2014" the airline operated 675 routes, of which all but 50 were split between EU territories including the UK, Italy, Portugal,

⁴⁸ See page 106 of REP2

Spain and Germany. I find it likely at least a number of these routes continued to operate during at least the first part of the relevant period. I note the possibility that the users of these routes are confined to the UK only, but I also note the figures relating to website visits show that 3,797,300,717 visits were received from the UK between 2011 and 2016 and 536,756,400 were viewed from Germany within the same period. Of course, a significant portion of the timeframe given falls outside of the relevant period in respect of these views, but I find this gives a good indication that the services offered are also used by consumers outside of the UK. Whilst this evidence all points to the mark being in use in the EU within the relevant timeframe, to confirm this I note particularly reference in the press articles provided of EU routes operated under the EASYJET mark during the relevant time period, such as the route between Gatwick and Athens in 2017.⁴⁹

113. With consideration to the size of the cancellation applicant's operation as shown from the turnover figures at the start of the relevant period, it is my view that the evidence of use provided could be significantly improved. The evidence has clearly been prepared without the requirements for the present proceedings in mind and there are significant gaps in the evidence and no evidence at all provided post 2017. However, considering all of the relevant factors, I find that despite its flaws, I am able to find from the sum of the evidence that on balance, it is apparent there has been real commercial exploitation by the cancellation applicant of the earlier mark within the relevant period, within the territory of the EU, for the purpose of creating and maintaining a real market share for airline services. I therefore find there has been genuine use of the mark in respect of airline services.

114. I note there is reference to EASYJET charging separate baggage fees in the press articles⁵⁰ and on the Wikipedia pages⁵¹ provided. However, I do not find that these references to an additional fee charged to consumers for

⁴⁹ See Page 75 of the evidence under REP2

⁵⁰ See Page 81 of the evidence under REP2

⁵¹ See page 123 of REP2

bringing luggage onto a flight is sufficient on its own to show that the EASYJET mark is being used in respect of the following services:

Class 39: packaging and storage of goods; transportation of goods by air; baggage handling services; cargo handling and freight services;

115. In addition whilst I note one page has been provided from the proprietor's website showing what appears to be an online booking facility for flights, it is my view that this is insufficient to show genuine use for "travel booking services provided on-line from a computer database or the Internet". From the sum of the evidence provided, it appears the booking facility shown is simply a way of securing a seat on an 'easyJet' plane, that was offered to the consumer at some point during 2017, and there is no evidence that travel booking has been genuinely offered as a service as such by the cancellation applicant.

116. I also find no evidence had been provided to show that the mark is being used in respect of the following services within the relevant timeframe:

Class 39: travel arrangement; travel information; shipping services; airport check-in services; arranging, operating and providing facilities for cruises, tours, excursions and vacations; chartering of aircraft; airport transfer services; airport parking services; aircraft parking services; travel agency services; tourist office services; advisory and information services relating to the aforesaid services; information services relating to transportation services, travel information services provided on-line from a computer database or the Internet.

Fair specification

117. Of the services registered by the earlier mark, I found genuine use in respect airline services, which fall within the following categories of its specification relied upon:

Class 39: Transport; transportation of passengers and travelers by air; airline services;

118. I must now consider the extent to which I find the cancellation applicant's use for airline services justifies the enforcement of the earlier mark within these cancellation proceedings in relation to the services covered by the registration.

119. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

"In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned."

120. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows:

"iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly

describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

121. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834 (Court of Appeal), a case which concerned pharmaceutical substances and preparations, Kitchen LJ held that it was well established that (1) a category of goods/services may contain numerous subcategories capable of

being viewed independently and, (2) the purpose and intended use of a pharmaceutical product are of particular importance in identifying the subcategory to which it belongs.

122. With consideration to the case law, I find the wording included within the cancellation applicant's specification relating to *transport* to be broad, and to cover a wide range of subcategories all of which have significant differences. I find the wording *transportation of passengers and travelers by air* to be more specific, although I appreciate it includes the possibility of transportation of people via other airborne vessels such as helicopters. However, when considering how the consumer would fairly describe the services offered by the cancellation applicant, I find that neither the arguably narrower *transportation of passengers and travelers by air*, nor the broad wording *Transport* would be used. Instead, I find the consumer would fairly describe the services offered as *airline services*. It is therefore these services for which I find the cancellation applicant may enforce its protection within these proceedings under this mark.

The principles

123. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Addidas-Salomon*, Case C-487/07, *L'Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora* and Case C383/12P, *Environmental Manufacturing LLP v OHIM*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman, paragraph 29* and *Intel, paragraph 63*.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77* and *Environmental Manufacturing, paragraph 34*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by

the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV*, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

124. An opposition under section 5(3) of the Act can only be successful via the establishment of several individual elements, the culmination of which must satisfy all elements of the claim. To be successful on this ground, firstly the cancellation applicant must establish that the marks are similar. Should this be shown, the cancellation applicant must go on to prove that they hold a reputation for the earlier mark in respect of a significant part of the public. If it is found both that the marks are similar, and that the earlier mark holds a qualifying reputation, it must then be shown that the result of this reputation, combined with the similarity between the earlier mark and the applied for mark will result in the public establishing a link between the marks. A link may be found on the basis that the later mark brings the earlier mark to mind. Importantly, if all three of these elements have been established, it must then be shown that the result of the link made by the public will manifest in one of the pleaded types of damage. In this instance, the opponent claims the application will both take unfair advantage of the investment made in respect

of the earlier mark, as well as cause detriment to the distinctive character of the same.

Similarity of the marks

125. Visually, the marks coincide in the use of 'easy' at the beginning of the mark, which alone is inherently non-distinctive. They differ via the three letter word 'JET' compared with the four letter word 'BIKE', both of which are also inherently non-distinctive or descriptive of the goods and services offered. The marks also differ visually due to the device element in the contested mark, and the overall impression is held in both marks in their entirety. Visually, I find the marks similar to a medium degree at best. Aurally, the marks coincide in the use of the initial two syllable word 'easy' and differ in the final single syllable elements 'bike' and 'jet'. I find the marks aurally similar to a medium degree. I have considered the conceptual meaning of the contested mark under the 5(2)(b) ground, and found it to convey a meaning of a bicycle that is easy to use. In respect of the earlier mark, it includes two elements conveying the concept of something being 'easy' (not difficult), and a 'jet', being an aircraft. When viewed in its totality as it would be by the consumer, the mark conveys the concept of an aircraft or aircraft services that are easy to use. I note that the marks both convey the meaning of a type of transport that is easy to use, but I find the types of transport to which they refer to be very different, and as far as the marks coincide conceptually through the use of the word 'easy', this concept is weak. Overall, I find the marks to be conceptually dissimilar.

Reputation

126. As mentioned, success on the basis of section 5(3) of the Act requires the cancellation applicant to establish that it holds a reputation in respect of its services relied upon under the earlier mark. I have only found genuine use of the mark in respect of airline services, and as such there can be no success under this ground based on any other services, in line with the provisions set out in section 47(2A)(c) and 47(2B).

127. The courts have provided guidance on the factors to consider when assessing if a reputation has been established for a trade mark. In *General Motors*, Case C-375/97, the CJEU held that:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation ‘in the Member State’. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation ‘throughout’ the territory of the Member State. It is sufficient for it to exist in a substantial part of it.”

128. Before considering the cancellation applicant’s position in respect of its reputation, I note firstly the following comments of the proprietor within its submissions:

“The Applicant accepts that the Registrant has a reputation in class 39 for ‘airline Services’ but submits that, as per recent decisions

mentioned above, this reputation does not extend to any other goods or services”.

129. The proprietor has gone on to refer me to various decisions issued by other hearing officers within the Tribunal, within which it was found that the cancellation applicant’s reputation does not extend beyond airline services.

130. As the proprietor has accepted the cancellation applicant’s reputation for airline services, I do not need to consider if a reputation amongst a significant part of the relevant public has been established in respect of these services. However, I do need to consider the strength of this reputation, as this will factor into my assessment on whether the public will make a link between this earlier mark and the contested mark. I note the earlier mark has been in use in the UK since 1995, and the business under the mark has grown considerably and consistently since that time. The airline has had over 50 million passengers every year since 2010, increasing yearly to 74 million in 2017. The revenue under the mark was 4669 million under the mark in 2016, and its website received 3,797,300,717 page views from the UK and 536,756,400 page views from Germany between 2011 and 2016. The airline operated 625 flight routes within the EU by 2014, and won many awards for best low cost airline at EU level between 2002 and 2016. The airline was the subject of a popular ITV show that run for nine series, with some series bringing in several million viewers per episode. Considering all of these factors, it is my view that the reputation held for airline services under the EASYJET mark is strong.

Link

131. In order to determine if a link will be established between the marks, I must consider the position globally, taking into account all the factors as set out in the case law including the degree of similarity between the marks and the services, the extent of the overlap between the relevant consumers, and the strength of the earlier mark’s reputation and distinctiveness.

132. I have found above that the earlier mark is visually and aurally similar to the contested mark to a medium degree and conceptually dissimilar. I have found the mark holds a strong reputation in respect of airline services. I find airline services to be similar to the proprietor's services *Intermediary services in the field of import-export relating to electric bicycles, parts, components, accessories and spare parts* to a low degree, for the same reasoning as set out under paragraph 42 of this decision. I find airline services to be dissimilar to the remaining goods and services covered by the proprietor's mark. To be clear, I find the nature, method of use, and trade channels of airline services and the proprietor's remaining goods and services to all be different. I find there will be no complementarity between the goods and services. I find it very unlikely for competition to exist between airline services and electric bicycles, and impossible in respect of the remaining goods and services covered by the proprietor. I acknowledge that very broadly, there may be some commonality in the intended purpose of electric bicycles and airline services, in that they both are intended to assist with the transportation of people or goods from a to b. I also acknowledge the intended users of these services may be shared, but only to the extent that these are both aimed broadly at the general public. However, I do not find that an overlap of this nature sufficient to find a level of similarity between the goods and services. If I am wrong, then at best I find any similarity shared will be at a very low level. I note also at this stage that a finding of similarity between the goods and services is not a requirement for success under this ground, instead it is simply one factor to consider within the cumulative assessment.

133. I find the earlier mark to hold only a below average level of inherent distinctiveness in respect of airline services, as the mark consists of two elements which are entirely descriptive, or at least non-distinctive in respect of the same. The inherent distinctive character held relies on the combination of the two words. However, I acknowledge the longstanding and extensive use of the mark in respect of airline services as discussed, and I find on this basis that the distinctive character for 'EASYJET' in respect of airline services has been raised to a high level. It remains however, that the distinctive character

of the mark is held in the full mark 'EASYJET'. There is no evidence that the element 'EASY' alone has been elevated through use.

134. I note the cancellation applicant's claim that the consumer would believe that the goods and services under the marks would derive from the same economic undertaking. However, considering all the factors above, it is my view that there would be neither direct, nor indirect confusion between the marks in question in this instance.

135. At this stage, I refer again to the cancellation applicant's reference to a family of marks argument under section 5(3). The proprietor has responded to the cancellation applicant's comments made regarding this family of marks, stating that although this has not been specifically argued, if the cancellation applicant wishes to rely on this mark it must show evidence of at least three marks in use, and without such evidence "the marks cannot be considered cumulatively and their potential impact as a family of marks cannot be shown".

136. It is my view that the argument made by the cancellation applicant regarding the family of marks, and its reputation for using 'easy' as a prefix followed by a descriptive word is misplaced under its section 5(3) claim, not least because the cancellation applicant has sought to rely on only one mark under this ground. Although I was not obliged to consider the argument under section 5(2)(b), I have already dismissed this based not only on the lack of pleadings but additionally on the sparse evidence filed in respect of use made of the additional marks relied upon under section 5(2)(b). This argument is again dismissed under section 5(3).

137. I will now consider all of the above factors cumulatively to decide if the necessary link has been established. I consider that the marks are visually and aurally similar to a medium degree and conceptually dissimilar, and the marks both begin with 'easy'. I consider also that the cancellation applicant has a strong reputation and that the mark EASYJET is highly distinctive in respect of airline services. However, I find no evidence that 'easy' alone has become distinctive through use. In addition, I found that the services protected

under the contested registration had either only a low level, or no similarity with airline services, and that the sharing of consumers takes place on no more than a superficial level amongst professionals generally in all types of business, and the general public. With all of these factors in mind, it is my view that the existence of the word 'easy' in both marks, which I find to be non-distinctive and for which I found no evidence that it had become 'synonymous' with the cancellation applicant in and of itself, will not cause the consumer to make a link between the same, even considering its identical placement within the word elements. Alternatively, if a link is made, it would be too fleeting to for the image of the earlier mark to transfer to the later mark to give it an unfair advantage, and indeed too fleeting to give rise to any damage as claimed.

138. The invalidation under section 5(3) is unsuccessful.

Final Remarks

139. The invalidation has failed in its entirety, and the registration under no. 3438411 will remain on the register.

COSTS

140. The proprietor has been successful and is entitled to a contribution towards its costs. In the circumstances I award the proprietor the sum of £1050 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering the application and filing a counterstatement:	£200
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Considering the other party's evidence:	£500
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Written submissions: £350

Total: £1,050

141. I therefore order easyGroup Ltd to pay LKQ CZ s.r.o the sum of £1050.
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 4th day of March 2021

**Rosie Le Breton
For the Registrar**