

BL O/1059/22

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003633140

BY THAMES BROS LTD

TO REGISTER THE TRADE MARK:



IN CLASS 39

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 427301

BY ALPITOUR S.P.A

BACKGROUND AND PLEADINGS

1. On 27 April 2021, Thames Bros Ltd (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 2 July 2021. The applicant seeks registration for the following services:

Class 39 Transportation; Transportation services; Transport services; Taxi transport; Transportation information; Air transport; Transport reservation; Passenger transport; Transport by air; Transport of goods; Transport; Reservation (Transport -); Air transportation.

2. The application was opposed by ALPITOUR S.P.A. (“the opponent”) on 4 October 2021. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following trade marks:

The logo consists of a large, stylized letter 'B' on the left, with a small ampersand (&) positioned between the 'B' and the word 'BRAVO'. The word 'BRAVO' is written in a bold, sans-serif font to the right of the 'B'.

UK registration no. UK00916979791

Filing date 12 July 2017; Registration date 18 January 2018.

(“The First Earlier Mark”)

The logo features a stylized, multi-pointed star or flower-like symbol on the left. To the right of the symbol, the word 'BRAVO' is written in a large, bold, sans-serif font, and the word 'CLUB' is written in a smaller, bold, sans-serif font directly below 'BRAVO'.

UK registration no. UK00801383589

Filing date 26 May 2017; Registration date 6 June 2018.

(“The Second Earlier Mark”)

3. On 1 January 2021, the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing EUTM. As a result, the opponent's First and Second Earlier Marks were automatically converted into comparable UK trade marks. Comparable UK marks are now recorded on the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.

4. The opponent relies upon all of the services for which both earlier marks are registered, as set out in the Annex to this decision.

5. The opponent claims that there is a likelihood of confusion because the marks are similar, and the services are identical.

6. The applicant filed a counterstatement denying the claims made.

7. The opponent is represented by Reddie & Grose LLP and the applicant is unrepresented. Neither party requested a hearing, but both parties filed written submissions during the course of the proceedings and in lieu of a hearing. I make this decision having taken full account of all the papers, referring to them as necessary.

8. Although the UK has left the EU, section 6(3)(a) of the European Union (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.

DECISION

9. Section 5(2)(b) reads as follows:

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

(a)...

(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.”

10. Although the applicant has requested that the opponent provide proof of use for “taxi service”, the earlier marks had not completed their registration processes more than five years before the relevant date (the filing date of the mark in issue). Accordingly, the use provisions at s.6A of the Act do not apply. The opponent may rely on all of the services it has identified without needing to demonstrate that it has used the marks.

Section 5(2)(b) case law

11. The following principles are gleaned from the decisions of the EU courts 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:

- (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 services

12. The competing services are as follows:

Opponent's services	Applicant's services
<p>The First Earlier Mark</p> <p><u>Class 39</u> Travel arrangement and arranging of tours; Travel information services; Providing an online computer database in the field of travel information services; Providing online travel information in the form of reviews of travel service providers, travel destinations, and local attractions; Providing an on-line computer database in the field of travel information services; Booking of air, train and boat transport.</p> <p><u>Class 43</u> Services for providing food and drink; Temporary accommodation; Room reservation services; Room booking; Restaurant reservation services; Hotel reservations; Boarding house bookings; Room reservation services; Room reservation services; Booking of hotel accommodation; Travel agency services for booking accommodation; Hospitality</p>	<p><u>Class 39</u> Transportation; Transportation services; Transport services; Taxi transport; Transportation information; Air transport; Transport reservation; Passenger transport; Transport by air; Transport of goods; Transport; Reservation (Transport -); Air transportation.</p>

services [food and drink]; Hotel restaurant services; Providing of websites and online databases containing rental information for rental accommodation for short-term holidays, namely descriptions and images of properties, places and comforts, availability, in which users can post and receive booking requests for rental accommodation for short-term holidays; Providing of information relating to rental accommodation for short-term holidays; making reservations for travel, namely, Bookings for rental accommodation for short-term holidays and rental of property by means of a global computer network; providing reviews of temporary vacation rental lodgings via computer networks and global information networks.

The Second Earlier Mark

Class 39

Travel organization; travel information; travel information through on-line databases; information by travel suppliers on travel services, travel destinations and local attractions; providing travel information through on-line databases; reservation and booking services for transportation.

Class 43

Serving for food and drinks; services of temporary accommodation; lodges reservation; rooms reservation; restaurants reservation; hotels reservation; guest-houses reservation; temporary lodges reservation; temporary accommodation reservation; hotels accommodation reservation; travel agency services for making hotel reservations; providing food and drink as part of hospitality services; hotel restaurant services; providing information on temporary accommodation in relation to rent, namely, descriptions and pictures of lodges, location and comfort, via websites and on-line databases, where users can post and receive requests of information for reservation of temporary accommodation on rent; providing information on temporary accommodation in relation to rent; travels reservation, namely, reservation of temporary accommodation on rent and of lodges on rent through global networks; providing temporary accommodation information through networks and global networks.

13. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the

Court of Justice of the European Union (“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.”

14. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- (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

15. 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.”

16. 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.”

17. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

18. 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 stated that “complementary” means:

“... 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 the responsibility for those goods lies with the same undertaking.”

19. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. (as he then was) noted, as the Appointed Person, in *Sandra Amalia Mary Elliot v LRC Holdings Limited*, BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.” Whilst on the other hand: “... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

Whilst on the other hand:

“... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

20. For the purposes of a comparison, it is appropriate to group related services together where they are sufficiently comparable to do so.¹

¹ *Separode Trade Mark* decision, BL O/399/10 (AP)

Transportation information.

21. I consider that the opponent's "travel information services" in the First Earlier Mark's specification and "travel information" in the Second Earlier Mark's specification falls within the applicant's above broader category. I consider them identical on the principle outlined in *Meric*.

Transport reservation; Reservation (Transport -).

22. I consider that the applicant's above services fall within the opponent's broader category of "reservation and booking services for transportation" in its Second Earlier Mark's specification. I consider them identical on the principle outlined in *Meric*.

Transportation; Transportation services; Transport services; Taxi transport; Air transport; Passenger transport; Transport by air; Transport; Air transportation.

23. The opponent submits that the applicant's above services overlaps with its "booking of air, train and boat transport" services in its First Earlier Mark's specification, and with its "reservation and booking services for transportation" in its Second Earlier Mark's specification. I consider that there would be an overlap in trade channels and users because transport undertakings will provide a means of booking their services. I consider that there may be an overlap in end purpose, which is to provide its users with a form of transport, however, the specific purpose of the opponent's services is to book said transport services. The services do not overlap in nature and method of use, nor are they in competition. However, they are complementary because the services are important and indispensable to one another, and the consumer would believe that the services originate from the same undertaking. Consequently I consider that the services are similar to a medium degree.

Transport of goods.

24. The opponent submits that the applicant's above services overlaps with its "booking of air, train and boat transport" services in its First Earlier Mark's specification, and with its "reservation and booking services for transportation" in its

Second Earlier Mark's specification. I consider that there may be an overlap in user and trade channels because the same undertaking would provide all of the above services. Therefore, I consider that the services are also complementary. I consider that there may be an overlap in end purpose, which is to transport either an object or person from one place to another, however, the specific purpose of the opponent's services is to book said transport services. The services do not overlap in nature and method of use, nor are they in competition. Consequently, I consider that they are similar to a medium degree.

The average consumer and the nature of the purchasing act

25. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' services. I must then determine the manner in which the services are likely to be selected by the average consumer. 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.”

26. The average consumer for the applicant's transportation services will be members of the general public and businesses. The cost of purchase and the frequency of purchase is likely to vary. For example taxi and coach services are low-cost services which would be purchased more frequently, whereas the transport of passengers using sea or flight based transport, is more expensive, and a less-frequent purchase. Notwithstanding cost and frequency of purchase, various other factors are still likely to be taken into consideration during the purchasing process, such as the reputational

standing of the provider, the frequency of service, destinations and suitability for the users' needs. Taking all of the above into account, I consider that at least a medium degree of attention will be paid during the purchasing process.

27. The services are likely to be obtained through online materials, such as websites, and brochures. Alternatively, the services may be purchased following perusal of advertisements. Consequently, visual considerations are likely to dominate the selection process. However, I do not discount that there will also be an aural component to the purchase of the services given that they may be booked over the telephone, or a recommendation for the services may have been given through word-of-mouth.



Comparison of the trade marks

28. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade 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.”

29. 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.

30. The respective trade marks are shown below:

Opponent's trade marks	Applicant's trade mark
 <p data-bbox="300 600 687 636">("The First Earlier Mark")</p> <p data-bbox="279 947 708 983">("The Second Earlier Mark")</p>	

Overall Impression

31. The opponent submits that its First Earlier Mark consists of the word "BRAVO" with a stylised letter "B" in front of the word. I am satisfied that this is the manner in which the average consumer will read the mark. However, I also note that there is an ampersand contained in a white cut out circle between both letter Bs. Therefore, despite the stylisation, including the letter 'A' missing the cross bar, I shall proceed on the basis that the majority of average consumers will read the mark as "B&BRAVO". The letters are presented in a capitalised grey typeface, with the first letter B and the letter R containing a white diagonal line cutting through the top left hand side of the letters. The overall impression of the mark lies in the combination of all these elements.

32. The Second Earlier Mark consists of the words BRAVO CLUB. I note that the word BRAVO is presented in the same style as the First Earlier Mark, with the letter 'A' missing the cross bar, the diagonal lines cutting through the letters B and R, all presented in a grey capitalised typeface. The word CLUB is presented in black, directly below the word BRAVO, with the letter B also containing a white diagonal line cutting

through the top left hand side of the letter. To the left hand side of these words is a device. The opponent hasn't provided any submissions on what the device is. However, I consider that a significant proportion of average consumers would recognise it as some sort of star shape. Although the eye is naturally drawn to the element of the mark that can be read, given the size and positioning of star device at the beginning of the mark, I consider that it plays a roughly equal role in the overall impression with the words BRAVO CLUB, with the stylisation of the mark playing a lesser role.

33. The applicant's mark consists of the word "bravoo" presented in a lower-case green typeface, with the strapline "RIDE SMART. LIVE LARGE." presented underneath in a smaller font size. On the left hand side of this wording, is a device with a green lower-case letter 'b', presented in vertical and horizontal lines, with is contained within 4 grey lines to create a square around it. Although the eye is naturally drawn to the element of the mark that can be read, given the size and positioning of the 'b' box device at the beginning of a mark, I consider that it plays a roughly equal role in the overall impression with the word "bravoo". I consider that the strapline, due to its reduced size and position, plays a much lesser role in the overall impression of the mark.

Visual Considerations

The First Earlier Mark and the applicant's mark

34. Visually, the marks coincide in the presence of the letters B, R, A, V and O. This acts as a visual point of similarity. However, I also note that another letter B and an ampersand contained in the white circle cut out is present before the letters 'BRAVO' in the First Earlier Mark. The 'b' box device is also present at the beginning of the applicant's mark. I bear in mind that greater attention is normally paid to the beginning of the marks.

35. The opponent's mark also contains stylised differences such as the letter A missing the crossbar, and the white diagonal lines going through the letters B and R. The applicant's "bravo" contains an additional "o" at the end making it "bravoo", and it

includes the wording “RIDE SMART. LIVE LARGE.” underneath. I bear in mind that registration of a mark in black and white covers use in any colour, however, it is not appropriate to notionally apply complex colour arrangements, which appears in the applicant’s mark. Consequently, these all act as visual points of difference. Therefore, taking the above into account, I consider that the marks are similar to between a low and medium degree.

The Second Earlier Mark and the applicant’s mark

36. Visually, the marks coincide in the presence of the letters B, R, A, V and O. This acts as a visual point of similarity. However, the Second Earlier Mark ends in the word CLUB, and includes the star device on the left hand side. The Second Earlier Mark also includes stylistic differences such as the letter A missing the crossbar, and the white diagonal lines going through both letter Bs and the letter R. The applicant’s word “bravo” ends in an additional letter ‘o’, includes the wording “RIDE SMART. LIVE LARGE.” underneath and has the ‘b’ box device on the left hand side. These all act as visual points of difference. Consequently, I consider that the marks are visually similar to a low degree.

Aural Considerations

The First Earlier Mark and the applicant’s mark

37. I consider that the First Earlier Mark will be pronounced as BEE-AND-BRA-VO. The opponent’s submits that the strapline “RIDE SMART. LIVE LARGE.” in the applicant’s mark will not be pronounced. I agree that it is unlikely that a significant proportion of average consumers would articulate this part of the mark, because it acts as a strapline. I also do not consider that the device in the applicant’s mark will be pronounced. I consider that the applicant’s mark will be pronounced as BRA-VOOOO.

38. The marks clearly overlap in the pronunciation of the ‘BRA’ syllable. I note that the ‘VO’ syllable in the First Earlier Mark and the ‘VOOOO’ syllable in the applicant’s mark, will also to some extent overlap in pronunciation, but the “OOOO” element is extended verbally in the applicant’s mark. However, BRA-VO is articulated at the end of the First

Earlier Mark. Consequently, the beginnings of the marks differ aurally. Therefore, I consider that the marks are aurally similar to a medium degree. However, if the strapline were to be pronounced, it would serve to reduce the aural similarities between the marks, resulting in a lower degree of aural similarity between them.

The Second Earlier Mark and the applicant's mark

39. Aurally, the Second Earlier Mark will be pronounced as BRA-VO-CLUB. As established above, the applicant's mark will be pronounced as BRA-VOOOO. The devices in both marks will not be pronounced. Consequently, as the marks share the beginning 'BRA' syllable, and overlap to some extent with their 'VO' and 'VOOOO' syllables, I consider that the marks are aurally similar to a medium degree. However, as established above, if the strapline were to be pronounced, it would serve to reduce the aural similarities between the marks, resulting in a lower degree of similarity between them.

Conceptual Considerations

The First Earlier Mark and the applicant's mark

40. The opponent submits that the word BRAVO has a recognised meaning in English. I note that it is a word which is used "to express appreciation when someone has done something well".² However, I note that the First Earlier Mark, as a whole, is "B&BRAVO". The average consumer will recognise the ampersand as meaning 'and'. However, I do not consider that the average consumer would know, nor assign any meaning to the letter B at the beginning of the mark.

41. The opponent further submits that because the words "bravoo" and "bravo" are so close, it is highly likely that "bravoo" will be mis-read as "bravo". However, I do not consider that the applicant's mark will be misread as "bravo". Firstly, the average consumer rarely has the opportunity to compare the marks side-by-side, and therefore, the applicant's mark in isolation will not be directly compared with the ordinary

² <https://www.collinsdictionary.com/dictionary/english/bravo> accessed 20 November 2022

dictionary word “bravo”. Secondly, the average consumer does not dissect the mark, it will be read as a whole. Therefore, I do not consider that the average consumer would extract the word “bravo” from the word “bravoo”. Consequently, I consider that the average consumer would read the word “bravoo” as an invented word with no conceptual meaning.

42. The applicant’s mark also includes the strapline “RIDE SMART. LIVE LARGE.”. I consider that the wording RIDE SMART is allusive of the applicant’s transport services. The wording LIVE LARGE is neither allusive nor descriptive of transport services. I also do not consider that the device adds to the conceptual message of the mark. Therefore as the marks do not overlap in any concept, I consider that they are conceptually dissimilar.

The Second Earlier Mark and the applicant’s mark

43. The word club in the Second Earlier Mark will be assigned its ordinary dictionary meaning of “an organisation of people interested in a particular activity or subject who usually meet on a regular basis”.³ Therefore, I consider that the mark will be assigned the meaning of a club called bravo. I do not consider that the star device adds to the conceptual meaning of the mark. Taking the above into account, as neither marks overlap in concept, I consider that they are conceptually dissimilar.

Distinctive character of the earlier trade marks

44. 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

³ <https://www.collinsdictionary.com/dictionary/english/club> accessed 20 November 2022

undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, 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 promotion of the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

45. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

46. As established above, the First Earlier Mark will be read by the average consumer as “B&BRAVO”, in a stylised grey, capitalised typeface. The ordinary dictionary meaning of the word BRAVO will be assigned to the mark. However, the mark as a whole, does not have an apparent meaning. The mark is neither allusive nor descriptive of the opponent’s transport services. Therefore, I consider that the mark is inherently distinctive to above a medium degree.

47. The Second Earlier Mark consists of the stylised capital words “BRAVO CLUB” presented in the colours grey and black, with a star device on the left hand side. As highlighted above, the mark has a clear meaning, a club which is called BRAVO. However, the mark is neither allusive nor descriptive of the opponent’s transport services. Consequently, I consider that that the mark is inherently distinctive to above a medium degree.

Likelihood of confusion

48. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier marks, the average consumer for the services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

49. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the First Earlier Mark and the applicant's mark to be visually similar to between a low and medium degree.
- I have found the Second Earlier Mark and the applicant's mark to be visually similar to a low degree.
- I have found all of the marks to be aurally similar to a medium degree, however, if the strapline in the applicant's mark were to be pronounced, it would serve to reduce the aural similarities between the marks, resulting in a lower degree of aural similarity between them.
- I have found the marks to be conceptually dissimilar.
- I have found the First Earlier Mark to be inherently distinctive to above a medium degree.

- I have found the Second Earlier Mark to be inherently distinctive to above a medium degree.
- I have identified the average consumer to be members of the general public and businesses who will select the services primarily by visual means, although I do not discount an aural component.
- I have concluded that at least a medium degree of attention will be paid during the purchasing process for the services.
- The parties' services vary between identical and similar to a medium degree.

50. Taking all of the above factors listed in paragraph 49 into account, particularly the visual and conceptual differences between the marks, I am satisfied that all of the marks are unlikely to be mistakenly recalled or misremembered as each other. This is particularly the case given the lower visual similarity (between a low and medium degree, and to a low degree) between the marks and the visual purchasing process. As highlighted above, greater attention is normally paid to the beginning of the marks. Therefore, I do not consider that the average consumer would overlook the letter B and the ampersand in the First Earlier Mark, nor will the 'b' square device be overlooked in the applicant's mark. Furthermore, I do not consider that the word "CLUB" and the star device mark will be overlooked in the Second Earlier Mark. I also do not consider that the additional "o" at the end of the applicant's mark will be overlooked, especially because the effect of this element is to create a clear conceptual hook in which to differentiate the marks; BRAVO is a recognisable dictionary word vs "bravoo" which is an invented word with no concept. For all of the above reasons, I am satisfied that the marks are unlikely to be mistakenly recalled or misremembered as each other, even when used on identical transport services. Taking the above into account, I do not consider there to be a likelihood of direct confusion.

51. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis K.C. (formally Q.C.), sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

52. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

53. Having noticed that the competing trade marks are different, I see no reason why the average consumer would assume that they come from the same or economically linked undertakings. I do not consider that the average consumer would think the applicants trade mark was connected with the opponent or vice versa on the basis that they both start with the letter combination B, R, A, V and O. It is more likely to be viewed as a coincidence, especially, as highlighted above, the average consumer does not dissect the mark. Consequently, they are not natural variants or brand extensions of each other. Taking all of the above into account, I consider there is no likelihood of indirect confusion.

CONCLUSION

54. The opposition is unsuccessful, and the application may proceed to registration.

COSTS

55. Award of costs are governed by TPN 2/2016. The applicant has been successful and would normally be entitled to a contribution towards its costs.

56. However, as the applicant is unrepresented, at the conclusion of the evidence rounds the tribunal wrote to the applicant and invited them to indicate whether they intended to make a request for an award of costs. The applicant was informed that, if so, they should complete a Pro Forma, providing details of their actual costs and accurate estimates of the amount of time spent on various activities associated with the proceedings. They were informed that “if the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time) may not be awarded”.

57. The applicant did not file a completed Pro Forma and paid no official fees. That being the case, I make no award of costs in this matter.

Dated this 1st day of December 2022

L FAYTER

For the Registrar

ANNEX

The First Earlier Mark

Class 39

Travel arrangement and arranging of tours; Travel information services; Providing an online computer database in the field of travel information services; Providing online travel information in the form of reviews of travel service providers, travel destinations, and local attractions; Providing an on-line computer database in the field of travel information services; Booking of air, train and boat transport.

Class 43

Services for providing food and drink; Temporary accommodation; Room reservation services; Room booking; Restaurant reservation services; Hotel reservations; Boarding house bookings; Room reservation services; Room reservation services; Booking of hotel accommodation; Travel agency services for booking accommodation; Hospitality services [food and drink]; Hotel restaurant services; Providing of websites and online databases containing rental information for rental accommodation for short-term holidays, namely descriptions and images of properties, places and comforts, availability, in which users can post and receive booking requests for rental accommodation for short-term holidays; Providing of information relating to rental accommodation for short-term holidays; making reservations for travel, namely, Bookings for rental accommodation for short-term holidays and rental of property by means of a global computer network; providing reviews of temporary vacation rental lodgings via computer networks and global information networks.

The Second Earlier Mark

Class 39

Travel organization; travel information; travel information through on-line databases; information by travel suppliers on travel services, travel destinations and local attractions; providing travel information through on-line databases; reservation and booking services for transportation.

Class 43

Serving for food and drinks; services of temporary accommodation; lodges reservation; rooms reservation; restaurants reservation; hotels reservation; guest-houses reservation; temporary lodges reservation; temporary accommodation reservation; hotels accommodation reservation; travel agency services for making hotel reservations; providing food and drink as part of hospitality services; hotel restaurant services; providing information on temporary accommodation in relation to rent, namely, descriptions and pictures of lodges, location and comfort, via websites and on-line databases, where users can post and receive requests of information for reservation of temporary accommodation on rent; providing information on temporary accommodation in relation to rent; travels reservation, namely, reservation of temporary accommodation on rent and of lodges on rent through global networks; providing temporary accommodation information through networks and global networks.