O/0287/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3656650
BY HASTINGS FUND MANAGEMENT (UK) LIMITED

TO REGISTER THE TRADE MARK

IN CLASSES 36 AND 37

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. 430055
BY VANTAGE AIRPORT GROUP LTD.

Background and pleadings

1. On 17 June 2021 Hastings Funds Management (UK) Limited ("**the Applicant**") applied to register as a UK trade mark:

2. In accordance with paragraph 25 of schedule 2A of the Trade Marks Act 1994 ("**the Act**"), the trade mark application claims the filing date of an EU Trade Mark which was pending registration on IP Completion day[1] at the end of the transition period of the UK's withdrawal from the EU. The date claimed in the application is 2 March 2018.

3. On 8 October 2021, the application was published for opposition purposes in respect of the following services:

> **Class 36:** Investment services; investing in debt and equity infrastructure projects, infrastructure assets, infrastructure business, infrastructure security and loans all for institutional clients; property and real estate management.
> **Class 37:** Construction, repair, refurbishment, maintenance and demolition of buildings and civil engineering structures and infrastructure (including roads, rail, bridges and utility supplies); civil engineering construction services; building services; on site project management services relating to the construction services; construction management services for the building, construction and engineering industries.

4. On 10 January 2022, the application was opposed, in full by Vantage Airport Group Ltd. ("**the Opponent**") under section 5(4)(a) of the Act. The Opponent relies upon three signs which it claims to have used throughout the UK since 2010. The

[1] 31 December 2020.

Opponent's signs, which I will refer to collectively as "**the Vantage signs**" are set out below:

The figurative sign  Word sign 1 VANTAGE Word sign 2 VANTAGE AIRPORT GROUP	**Used in respect of:** Investment services in relation to infrastructure, namely airports, and investment in infrastructure, namely airports; Management of infrastructure, namely airports. Used throughout the UK since 2010

The Opponent's case

5. The Opponent makes the same submissions in respect of each of its signs:

(i) as a result of use, the Opponent has acquired goodwill, which was established before the date for which the contested application claims priority.

(ii) due to the identity/similarity of the distinctive component VANTAGE and the similarity of the services which are either identical, or similar in nature (with shared relevant customers and trade channels), use of the contested application would create misrepresentation in that the relevant public would believe, or would assume, that the services of the Applicant originate from the Opponent, or are otherwise linked with it.

(iii) the misrepresentation would lead to damage, for example, to the distinctiveness of the Opponent's mark, as well as to potential loss of business. The Opponent would also see its investment in its earlier marks frustrated by the Applicant riding on its coattails.

(iv) For the above reasons, use of the contested application would amount to passing off.

The Applicant's case

6. The Applicant filed a counterstatement, requesting that the Opponent prove that it had used the Vantage signs since 2010, in respect of the services it claims. In response to the Opponent's claims under section 5(4)(a), the Applicant:

(i) denies that the Opponent owned goodwill connected to the claimed signs at the priority date of the application, or thereafter and submits that:

(a) prior to the priority date of the contested application (alternatively, prior to the date on which the opposition was filed), the Opponent abandoned or otherwise relinquished any goodwill by (without limitation) selling its interest in its business in the UK and announcing its intention to focus on markets outside the UK.
(b) alternatively by the priority date of the contested application (alternatively, prior to the date on which the opposition was filed) any goodwill the Opponent had in the UK had dissipated such that it ceased to exist as a result of the lack of use of the signs.

(ii) denies that the services under the Opponent's signs are identical or similar to the services under the contested mark, with the Applicant's services not being specifically linked to infrastructure and the Opponent's services all being limited to airports.

(iii) denies that use of the contested application would give rise to misrepresentation because:

(a) the word "VANTAGE" is not (and was not at the priority date of the Application or thereafter) distinctive of the Opponent, so no likelihood of deception exists;

(b) alternatively, VANTAGE" is not (and was not at the priority date of the Application or thereafter) sufficiently distinctive of the Opponent such that use of the Application would give rise to a misrepresentation;
(c) alternatively, there would be no actionable misrepresentation for the purposes of the law of passing off as any misrepresentation would not be material.

(iv) denies that any damage would flow from any misrepresentation as:

(a) the Opponent has no business, custom or trade in the UK that would be damaged;
(b) alternatively, any damage to the Opponent would not be substantial, such that there would be no actionable passing off.

(v) further or alternatively, the Opponent's signs are not 'used in the course of trade' as required under section 5(4) of the Act because they were not in use in the UK at the relevant dates;

(vi) further or alternatively, in light of the circumstances in this case, including the absence of commercial activity under the Opponent's signs in the UK for numerous years, the Opponent would not be entitled to an injunction restraining use of the application or to otherwise prevent use of the application as required by section 5(4) of the Act.

Representation and papers filed

7. The Applicant in these proceedings is represented by Dechert LLP, the Opponent by Keltie LLP.

8. Both parties filed evidence in these proceedings. The Opponent's evidence in chief comprises the witness statement of Sami Teittinen, dated 3 July 2022. Mr Teittinen is the Chief Financial Officer of the Opponent company; he introduces 19 exhibits numbered ST1 to ST19. The Applicant filed observations in response, and evidence comprising the witness statement of Paul Kavanagh, dated 7 September 2022. Mr Kavanagh is solicitor and partner of Dechert LLP; he introduces five

exhibits numbered PK1 to PK5. The Opponent filed evidence in reply, comprising the witness statement of Manuela Macchi, Chartered Trade Mark Attorney and Partner at Keltie. Ms Macchi introduces four exhibits, numbered MM01 to MM04.

9. Neither party requested a hearing and both parties filed written submissions in lieu of a hearing. This decision is taken following a careful review of the papers.

Decision

10. 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 upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

11. Section 5(4)(a) of the Act states:

> "(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-
>
> (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,
>
> (aa) […]
>
> (b) […]
>
> A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an "earlier right" in relation to the trade mark."

12. Subsection (4A) of section 5 states:

"(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application."

13. Section 5A states:

"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."

14. In *Discount Outlet v Feel Good UK,* [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

"55. The elements necessary to reach a finding of passing off are the 'classical trinity' of that tort as described by Lord Oliver in the Jif Lemon case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether "a substantial number" of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21)."

15. Halsbury's Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

"Establishing a likelihood of deception generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

(a) the nature and extent of the reputation relied upon,
(b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;
(c) the similarity of the mark, name etc used by the defendant to that of the claimant;
(d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and
(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action".

16. The requisite goodwill must be based on the presence of customers in the UK. Customers situated elsewhere do not contribute to the required goodwill in the UK.[2]

[2] See *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others, [2015]* UKSC 31.

17. In the absence of evidence of use of the contested mark by the Applicant from a date prior to the date of filing the contested application, the relevant date for establishing the Opponent's claimed passing off right is the filing date of the application, or as applies in this case, the priority date claimed, this being 2 March 2018. Events after that date are, in principle, irrelevant, except to the extent that they shed light backwards on the position at the relevant date.[3]

18. The Opponent must show that its business had sufficient goodwill which was distinguished by use of the signs VANTAGE AIRPORT GROUP ; VANTAGE; VANTAGE AIRPORT GROUP at the relevant date so that it can be concluded that misrepresentation would occur, and damage would follow. The concept of goodwill was explained in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1902] AC 217 at 223:

> "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start."

The Opponent's evidence

Background and UK operations

19. Mr Teittinen describes the history of the Opponent company, indicating that it was formed in 1994 "to market the expertise and airport management techniques honed at the multi-award-winning Vancouver International Airport". The Opponent is described as "a leading developer, investor, and manager of airports around the globe" and Mr Teittinen states that the company has worked with more than 30 airports. The Opponent's investment and financing activities are described as involving the submission of proposals to governments and/or private entities to become the developer of an airport. Successful bids see the Opponent leading on

[3] *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O/410/11.

the development and structuring of infrastructure transactions, providing direct investment, and performing airport management services. Mr Teittinen claims that the Opponent has managed more than $5 billion in airport development and construction projects, with another $1 billion underway, and has led over $4.7 billion in airport financing.

20. Mr Teittinen brings evidence of the Opponent's involvement in the development of two airports in New York, with a press release describing the development at LaGuardia airport, and a Wall Street Journal article describing the development of JFK Airport:

02/08/2016

Infrastructure financing takes off in the US with the largest greenfield public-private partnership project ever done.

Societe Generale is supporting the comprehensive redesign project of LaGuardia, one of the major airports in New York, which aims at becoming a world-class transportation hub with an enhanced passenger experience.

Societe Generale acted as **Financial Advisor** to **LaGuardia Gateway Partners**, owned by Vantage Airport Group, Meridiam and Skanska Infrastructure Development, for the **USD 4 billion redevelopment project**, the largest airport financing deal and the largest greenfield public-private partnership project ever done in the US. [4]

On the airport's north side, JetBlue Airways Corp. will almost triple its footprint, expanding from its base at Terminal 5 into a new $3 billion terminal on the site of the former Terminal 6 and, eventually, across the current Terminal 7. That plan is being financed by a joint venture between Canadian airport management company Vantage Airport Group and New York developer RXR Realty. [5]

21. In paragraph 9 of his witness statement, Mr Teittinen states the following about the Opponent's other airport management and investment services:

[4] Exhibit ST1.
[5] Exhibit ST2.

In 2018, my company was providing airport management services as well as investment services in airport infrastructure at its portfolio of ten airports worldwide, including the airports at Larnaka and Pafos, Cyprus, Europe; Kamloops, British Columbia, Canada; Hamilton, Ontario, Canada; Moncton, New Brunswick, Canada; Fort St. John, British Columbia; Nassau, The Bahamas; Montego Bay, Jamaica; LaGuardia Terminal B in New York, New York, United States of America; and Midway International Airport in Chicago, Illinois, United States of America.

22. Mr Teittinen explains that the nature of the industry in which the Opponent offers its services is such that there are a limited number of projects as each country only has a limited number of airports, and projects are very large. He also claims that relevant operators in the UK would be aware of his company's involvement in projects outside the UK.

23. In terms of services provided in the UK, in 2010, Mr Teittinen states that the Opponent invested in Liverpool John Lennon Airport ("**the Liverpool Airport**"), Doncaster-Sheffield Airport and Durham Tees Valley Airport (I will refer to all three airports collectively as "**the UK Airports**"). Mr Teittinen states that "my company provided airport management services as well as investment services in airport infrastructure to the UK Airports through its affiliate, Vantage Airports UK, until my company sold its interests in UK Airports in 2014". Two press releases from the website of the Liverpool Airport describe (i) a change in leadership of the airport in January 2013 and (ii) the sale of Vantage Airport Group's stake in the airport in April 2014:

Vantage Airports UK, the company that owns Liverpool John Lennon Airport (JLA), today announced a change in leadership at JLA.

Outgoing CEO, Craig Richmond, will leave the post on 1st March 2013 to take up a senior position within the Vantage Airport Group network in Cyprus. Incoming CEO Matthew Thomas is currently Commercial Director for the Vantage Airport Group, having held a number of senior airport positions both in the UK and internationally.

"This is an exciting time for Liverpool John Lennon Airport," said Richmond. "There were a number of announcements made towards the end of last year, including new routes from Ryanair and easyJet and the signing of a long term deal with Wizz Air. We also came to an agreement with Norwegian – Europe's third largest low cost airline that will see them commence flights from Liverpool for the first time, with a service to Copenhagen in the spring."

Vantage Airports UK is the new name for the partnership between Vantage Airport Group and The Peel Group which jointly own Liverpool John Lennon Airport. The new branding aligns the Company more closely with majority shareholder Vantage Airport Group, an industry-leading investor, developer and manager of airports around the world. [6]

[6] Exhibit ST3.

And

Liverpool John Lennon Airport (JLA) today announced a change to the structure of its ownership. The Peel Group, which previously held a 35% shareholding in Vantage Airports UK, the current owners of JLA, has reached an agreement to acquire the remaining 65% stake in the business from Vantage Airport Group.

This change of ownership is effective immediately and Peel will now become the sole owner of the Airport Company.
Over the past four years, under the ownership of Vantage Airport Group, Liverpool JLA has undergone significant improvements and now provides a best in class airport experience for both passengers and airlines. Vantage now wishes to focus on projects that position the company for growth in North America and other markets. [7]

24. Extracts from the Opponent's website obtained through the Wayback Machine show that in 2012 and 2013, Liverpool and Doncaster-Sheffield airports were part of its network of airports.[8] A Department for Transport publication "UK International Air Services" publication dated December 2012, confirms that Liverpool Airport was part of the Vantage Airport Group at the time, and had been since 2010.[9]

25. Though the Opponent sold its interest in the UK airports in 2014, Mr Teittinen states that investment services in the UK did not cease, and since 2014 the Opponent has annually met with over 120 potential investors in relation to investment opportunities for global airport infrastructure projects managed by the Opponent. Between 2010 and 2019, Mr Teittinen claims that the Opponent has run and concluded three separate fundraising processes in the UK, raising over $1.1 billion, which he argues shows the Vantage signs are well known in the UK.

26. Mr Teittinen provides the following turnover figures which he describes as being "from UK-originating business in relation to airport management and investment in airport infrastructure under the VANTAGE marks":

Year	Amount (in GBP millions)
2010	32.8
2011	46.2
2012	100.8
2013	99.9
2014	68.4
2015	58.9
2016	85.2

Year	Amount (in GBP millions)
2017	106.8
2018	103.3

[7] Exhibit ST3.
[8] Exhibit MM01.
[9] Exhibit MM04.

27. The figures indicate very substantial turnover by the Opponent from its services in the UK, though the Opponent has provided little supporting evidence to show where its turnover has been generated. Up to 2014, it appears likely that the revenues would have been come, at least in part, through the Opponent's ownership of the UK airports, however, there are no invoices, or accounts showing this. After the sale of the Opponent's interests in its UK Airports when the Opponent stated its desire to focus "growth in North America and other markets"[10] there is no evidence of where the very high levels turnover were generated in the UK. Though Mr Teittinen states that fundraising processes have taken place, raising the astounding sum of $1.1 billion from investors in the UK, no accounts, brochures, statements from investors, or any other documentation is provided to verify or support the Opponent's operations in the UK after 2014.

28. In *Awareness Limited v Plymouth City Council,* Case BL O/236/13, Mr Daniel Alexander K.C. as the Appointed Person stated that:

> "22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public."

[10] Exhibit ST4, reproduced above.

29. The lack of evidence supporting the Opponent's generation of investment in the UK and generation of UK turnover (which reached its highest levels after the Opponent's decision to focus on markets outside the UK) casts doubts over the claims made by the Opponent. I shall make further comment on this later in my decision.

Industry conferences, awards and the Opponent's website

30. A large proportion of Mr Teittinen's evidence is devoted to conferences that the Opponent has appeared at, including those where its executives have given speeches and appeared on panels. These events are described as being utilised to market and advertise the Opponent's airport management and investment services. None of the events listed were held in the UK but Mr Teittinen states that the conferences are attended by representatives from the UK sector. In respect of this, Mr Teittinen provides an agenda from the 2015 Global Airport Development ("GAD") conference, showing that the CEO of the Opponent company appeared as a speaker, alongside representatives from a list of UK airports.[11] In a similar vein, Exhibit ST14 features a speakers list from the Passenger Terminal Expo ("PTE") in 2018, which was attended by a number of the Opponent's executives and representatives from a range of UK airports.

31. At paragraph 14 of his witness statement, Mr Teittinen lists a number of awards that the Opponent has received for its airport management and investment services. As the Applicant highlights, none of these awards relate to operations within the UK and I note that most of the awards concern activities carried out in North America, or Cyprus. There are two awards described as "European", which could cover the UK, however, these were attained in 2006 and 2007, prior to the date of claimed use in the UK.

32. Mr Teittinen describes the Opponent's online activity, with its website receiving around 15,000 visitors annually between 2015 and 2017, with between 10% and 15% of these stated to be UK based visitors. No evidence is provided to confirm the

[11] Exhibit ST8.

number of UK visitors, but even if 15% are from the UK, the Opponent has provided no information about the activity of those visitors when accessing its website, and there is no evidence that the visitors became customers of the Opponent. In terms of the Opponent's social media presence, the Opponent's Twitter handle @VantageAirportG is stated to have over 800 followers. The Opponent provides no evidence confirming the location of its followers, and no examples of the 1,300 tweets it claims to have made.

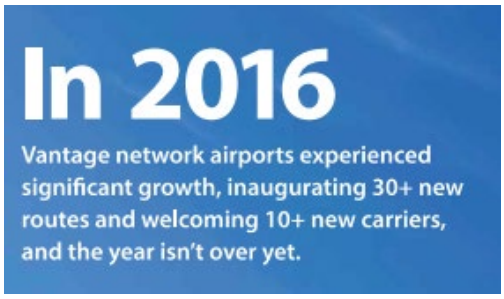
33. In terms of how the Vantage signs appear on its website, and in marketing materials (which are mainly related to the industry conferences), the following examples are shown:

[12]

[13]

[14]

[15]



[16]

[12] Exhibit ST5.
[13] Exhibit ST10.
[14] Exhibit ST12.
[15] Exhibit ST17.
[16] Exhibit ST18.

34. Though the evidence concerning attendance at industry events, awards and the Opponent's website shows use of the Vantage signs, none of that evidence shows use in or targeted to the UK market and UK customers. I will consider this further below.

Assessment of goodwill

35. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

> "27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent that the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark* [1969] R.P.C. 472). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.
>
> 28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur."

36. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J. (as he then was) stated that:

> "[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered

of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application."

37. Briefly stated, the services claimed under the Vantage signs are investment in airport infrastructure and management of airport infrastructure. Mr Teittinen describes his company's services as involving the submission of bids to develop airports, which includes structuring of infrastructure transactions (including financing thereof), direct investment and airport management services in connection with the airport infrastructure.

38. Almost all of Mr Teittinen's evidence refers to services the Opponent has provided, events it has attended, and awards that it has received outside the UK. In *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*, [2015] UKSC 31, Lord Neuberger (with whom the rest of Supreme Court agreed) stated (at paragraph 47 of the judgment) that:

"I consider that we should reaffirm that the law is that a claimant in a passing off claim must establish that it has actual goodwill in this jurisdiction, and that such goodwill involves the presence of clients or customers in the jurisdiction for the products or services in question. And, where the claimant's business is abroad, people who are in the jurisdiction, but who are not customers of the claimant in the jurisdiction, will not do, even if they are customers of the claimant when they go abroad."

39. And later said , at paragraph 52:

"As to what amounts to a sufficient business to amount to goodwill, it seems clear that mere reputation is not enough, as the cases cited in paras 21-26 and 32-36 above establish. The claimant must show that it has a significant goodwill, in the form of customers, in the jurisdiction, but it is not necessary that the claimant

actually has an establishment or office in this country. In order to establish goodwill, the claimant must have customers within the jurisdiction, as opposed to people in the jurisdiction who happen to be customers elsewhere. Thus, where the claimant's business is carried on abroad, it is not enough for a claimant to show that there are people in this jurisdiction who happen to be its customers when they are abroad. However, it could be enough if the claimant could show that there were people in this jurisdiction who, by booking with, or purchasing from, an entity in this country, obtained the right to receive the claimant's service abroad. And, in such a case, the entity need not be a part or branch of the claimant: it can be someone acting for or on behalf of the claimant."

40. While the evidence shows that the Opponent has been involved in very large contracts, for example with major airports in New York, and that it has received awards for its running of a Cypriot airport, these factors are not relevant in showing goodwill within the UK. Mr Teittinen has sought to show that UK businesses will be aware of the Opponent's business because they have attended the same industry events. Even if attendance has led to an awareness of the Opponent's business (which is not confirmed in the evidence), *Starbucks* confirmed that "reputation is not enough".

41. In terms of showing goodwill in the UK I consider the high points of the Opponent's evidence to be (i) the investment in three UK airports, with a majority share in at least one of these (the Liverpool Airport); and (ii) the very high reported UK turnover and investment generated.

42. With regards to the services of management of airport infrastructure, that the Opponent had investments in three UK airports is not in dispute. What the evidence does not make clear is what services were provided and who the customers were. Where a company manages an airport, one might expect to see the name of the company in and around the airport itself; the staff that work at the airport may be employed by the management company; or the directives set by the management company might be produced on documents under the company's name. No such evidence has been provided. Though the Government publication at Exhibit MM04 states that Vantage Airport Group have "invested heavily to create an excellent

passenger experience and one of the UK's most efficient regional airports", there is no wider evidence of these claims, or third party verification of them. With regards to the management of airport infrastructure, it is not clear who would have been aware of the Opponent's involvement in UK airports, or the nature and extent of their services.

43. As well as the evidence being limited in respect of the ownership of the UK airports, the evidence suggests that the connection to the Vantage signs was short lived. The 2013 press release reproduced earlier suggests that leadership under the Vantage name (albeit Vantage Airports UK) only commenced in 2013, one year prior to the Opponent selling its share to the Peel Group:

> "Vantage Airports UK is the new name for the partnership between Vantage Airport Group and The Peel Group which jointly own Liverpool John Lennon airport. The new branding aligns the Company more closely with majority shareholder Vantage Airport Group"

44. The desire to align the company owning the airport more closely with the Opponent who at the time was the majority shareholder, suggests that prior to 2013, it was not generally known that Liverpool Airport was owned, or run by the Opponent, or under the Vantage signs.

45. There are also questions about whether the recipients of the Opponent's investment support saw the Opponent as providing "investment services". The Applicant points out that businesses often make investments in stock or assets from a third party, for their own business purposes, but those kinds of investments are not the kind of investment service that can generate goodwill. Similarly, the Applicant submits that businesses seeking funding for their own projects are not providing an investment service and so these activities described by the Opponent in relation to its activity in the UK would not generate goodwill. These points asserted by the Applicant raise an additional point of doubt as to whether goodwill was accrued from the ownership of the UK airports and I find that the Opponent's evidence and submissions – even in reply – do not provide clarity on the identity of its customers or the detail of its services.

46. With regards to the Opponent's investment services that it claims have continued after 2014, though Mr Teittinen claims that the Opponent has met with over 120 investors each year, and generated huge sums of investment, no evidence is provided of, for example the bids that the Opponent purports to have made, nor of the investors approached. Generating the significant sums of turnover claimed in the UK implies that the Opponent had a substantial operation in the UK, however, there is no evidence to show this. Evidence of the existence of a website with unsubstantiated claims that it is accessed by people in the UK, and evidence that representatives from the UK sector attended the same industry events as the Opponent is not sufficient in my view to show that the Opponent had customers in the UK.

47. During the evidence rounds, the Applicant made many criticisms of Mr Teittinen's evidence, including that "it is not apparent how the Opponent's Marks were used or in relation to what (if any) services". The Opponent had the opportunity to respond to the criticisms and did provide evidence in reply, however, this evidence (and the Opponent's submissions in lieu of a hearing) do not provide clarity about what services were provided in the UK and who the Opponent's customers were.

48. Despite the noted high points the Opponent advances in showing goodwill, the evidence is starkly at odds with the claims, both in terms of its richness of detail and the unexplained mismatch between its evidence of withdrawal from the UK in 2014 to concentrate on North America and the claimed subsequent revenue. With such significant operations in the UK, the Opponent should have had a wealth of evidence to draw from in evidencing its claims of goodwill. The evidence of activity in the UK in relation to investments in the UK airports ended four years prior to the priority date of the application, with no evidence of an intention to return. Though UK airport executives may be aware of the Opponent, awareness is not enough and it is not clear that these executives would be customers of the Opponent.

49. *South Cone Incorporated*[17] confirmed that "Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use". Such evidence is lacking in this case and I find that actionable goodwill in the UK has not been shown for any of the claimed services.

50. In conclusion, I consider that the Opponent has failed to show that it held actionable goodwill stemming from its ownership of the UK airports. The lack of evidence of how the Vantage signs were used in the UK, the identity of its customers, and questions about what services were offered lead me to conclude that goodwill has not been shown. In case goodwill did accrue following the change in name in 2013 to "Vantage Airports UK", which contains the same distinctive element as the Opponent's signs, this change only took place one year prior to the sale of the airport and I consider that any goodwill that may have accrued would have dissipated by the priority date of the Applicant's trade mark, some four years later.

Outcome

51. The opposition under section 5(4)(a) has failed and the application may proceed to registration.

Costs

52. The Applicant is entitled to a contribution to his costs, based on the scale published in Tribunal Practice Notice 2/2016. I award costs as follows:

Preparing a statement and considering the other side's statement	£350
Preparing evidence and considering and commenting on the other side's evidence	£1250
Preparation of submissions	£500
TOTAL	£2,100

[17] Referenced previously.

53. I order Vantage Airport Group Ltd. to pay Hastings Funds Management (UK) Limited the sum of £2,100. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 20th day of March 2023

Charlotte Champion
For the Registrar