

O/0223/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003927809
BY THE SECRET GARDEN GLAMPING NORTH WEST LTD.
TO REGISTER THE TRADE MARK:

The Secret Garden

THE SECRET GARDEN

(SERIES OF 2)

IN CLASSES 35, 37, 39, 41, 42, 43 AND 44

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 443626
BY BACKWOODSMAN LIMITED

BACKGROUND AND PLEADINGS

1. On 28 June 2023, The Secret Garden Glamping North West Ltd. (“the applicant”) applied to register the series of two trade marks shown on the cover page of this decision in the UK. The application was published for opposition purposes on 14 July 2023, and the applicant seeks registration for the services contained in Annex 1 to this decision.

2. The application was partially opposed by Backwoodsman Limited (“the opponent”) on 16 October 2023 based upon sections 5(2)(b), 5(3), 5(4)(a) and 3(6) of the Trade Marks Act (“the Act”). The opposition is directed against the following services:

Class 39 Arranging of holiday transport; Holiday travel reservation services; Booking of holiday travel; Providing tourist travel information; Providing tourist travel information, via the Internet; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

Class 41 Education services relating to business franchise management; Holiday camp services; Holiday camp services [entertainment]; Holiday centre entertainment services; Recreational camp services; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.

Class 43 Holiday accommodation services; Rental of holiday accommodation; Hotels, hostels and boarding houses, holiday and tourist accommodation; Holiday lodgings; Arranging holiday accommodation; Rental of holiday homes; Holiday camp services [lodging]; Holiday planning services [accommodation]; Provision of holiday

accommodation; Letting of holiday accommodation; Arranging of holiday accommodation; Rental of holiday cabins; Booking agency services for holiday accommodation; Providing temporary lodging at holiday camps; Arranging of accommodation for holiday makers; Temporary accommodation services provided by holiday camps; Services for reserving holiday accommodation; Providing on-line information relating to holiday accommodation reservations; Providing campground facilities; Tourist camp services [accommodation]; Holiday camp services [lodging]; Providing temporary lodging at holiday camps; Booking of campground accommodation; Arranging of accommodation for tourists; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar.

3. Under sections 5(2)(b) and 5(3), the opponent relies upon the following marks:

THE SECRET GARDEN PARTY

SECRET GARDEN PARTY

(“Series of 2”)

UK registration no. UK00002542311

Filing date 18 March 2010; Registration date 20 August 2010.

(“The First Earlier Marks”)

THE SECRET GARDEN PARTY

Comparable trade mark (IR) registration no. UK00801066674¹

¹ Following the end of the transition period of the UK’s withdrawal from the EU, all international (EU) trade mark designations registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A ‘comparable trade mark (IR)’ retains the same designation date (filing date), priority date (if applicable) and registration date of the international (EU) trade mark designation.

Filing date 17 September 2010; Registration date 5 January 2012.

Priority date 18 March 2010.

(“The Second Earlier Comparable Mark”)

4. Under section 5(2)(b), the opponent relies upon some of the services for which its earlier marks are registered, which are contained in Annex 2 of this decision. The opponent claims that there is a likelihood of confusion because the marks are “virtually identical” (with the only difference being the word “PARTY”), and the services are “either identical, confusingly similar to a high degree, confusingly similar to an average degree or confusingly similar to a low degree”.

5. Under section 5(3), the opponent relies upon some of the services for which its earlier marks are registered, which are contained in Annex 3 of this decision. The opponent claims to have a well-established reputation for all of the services relied upon, which has been “acquired through extensive use as well as investment made in respect of significant marketing and promotional activity”. The opponent claims that as a result, a connection would be made between the opponent’s marks and the applicant’s mark, in the mind of the average consumer. The opponent claims that an implication of the association or link between the parties would “clearly damage” the opponent’s reputation and “potentially divert sales revenue” and therefore the applicant’s mark is “likely to take unfair advantage of or be detrimental to the reputation the opponent enjoys under its earlier marks”.

6. Under section 5(4)(a), the opponent relies upon its **THE SECRET GARDEN PARTY** and **SECRET GARDEN PARTY**² signs which it claims to have used throughout the UK since 2002 for transport; transport reservation; information relating to all the foregoing provided on-line from a computer database or the Internet; entertainment; cultural activities; concert and musical performances; provision of recreational, entertainment and educational facilities; organising and staging musical events,

² Whilst in section C of the opponent’s Form TM7 they only list “THE SECRET GARDEN PARTY” under the representation of its earlier unregistered mark, in paragraph 24 of its statement of grounds, the opponent refers to both unregistered marks being, “THE SECRET GARDEN PARTY” and “SECRET GARDEN PARTY”. Moreover, the two unregistered marks are the same variant of each other, with the only difference between them being the word “THE”. On this basis, I find that the opponent is able rely upon both unregistered marks for the purpose of section 5(4)(a).

festivals and live band performances; provision of temporary accommodation; provision of camping services; provision of boutique glamping accommodation; information relating to all the foregoing provided on-line from a computer database or the Internet. The opponent claims that use of the applicant's mark would be contrary to the law of passing off.

7. Under section 3(6), the opponent submits that the application was made in bad faith. The opponent states that the written decision of the related consolidated opposition proceedings (433951 and 434340) resulted in the applicant's applications being refused. At the time of filing their Form TM7, the decision was subject to appeal, which the opponent claims was the applicant attempting to have a "second bite at the cherry" and that to file the contested mark indicates "a dishonest intent to circumvent UKIPO procedure in a manner that departs from accepted standards of ethical behaviour or honest commercial and business practices".

8. The applicant filed a counterstatement, admitting that the "opponent's mark is renowned for an annual festival" and that the "opponent provides temporary accommodation in non-permanent structures during the duration of its four-day The Secret Garden Party festival which takes place once a year". However, the applicant denies the rest of the claims made and subject both of the opponent's marks to proof of use.

9. The opponent is represented by Lewis Silkin LLP and applicant is represented by The Trademark Helpline. The opponent filed evidence in chief. Neither party requested a hearing, nor provided submissions in lieu. I make this decision having taken full account of all the papers.

RELEVANCE OF EU LAW

10. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated

law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE

11. The opponent's evidence in chief consists of the witness statement of Freddie John Fellowes dated 28 May 2024. Mr Fellowes is the sole Director of the opponent, a position which he has held since 5 May 2005. Mr Fellowes' statement is accompanied by 14 exhibits (JFJ1-JFJ14).

12. Whilst I do not propose to summarise it here, I have taken all of the evidence into consideration in reaching my decision and will refer to them where necessary below.

DECISION

Section 5(2)(b)

13. 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.”

14. The opponent's marks qualify as earlier marks in accordance with section 6(1)(a) of the Act as their filing date and priority date is earlier than the filing date of the applicant's mark. As the opponent's marks have completed their registration process

more than five years before the filing date of the mark in issue, they are subject to proof of use pursuant to section 6A of the Act.

Proof of use

15. I will begin by assessing whether there has been genuine use of the earlier marks. The relevant statutory provisions are as follows:

16. Section 6A of the Act states:

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has 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, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes –

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

17. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the earlier marks is the five years ending on the filing date of the applicant’s mark, i.e. 29 June 2018 to 28 June 2023. By virtue of paragraph 7 of Part 1, Schedule 2A of the Act, use of the Second Earlier Comparable Mark within the EU is relevant for the part of the relevant period which falls prior to IP Completion Day (31 December 2020). After that date, only use in the UK will be relevant.

18. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable

number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, 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 Bunderversammlung 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 Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], 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], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles 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]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(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]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(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]. 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].

(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]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(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]; *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].”

Evidence of use

19. I bear in mind that, as noted in paragraph 8 above, the applicant has admitted that the “opponent’s mark is renowned for an annual festival”, and the “opponent provides temporary accommodation in non-permanent structures during the duration of its four-day The Secret Garden Party festival which takes place once a year”.

20. All of Mr Fellowes’ evidence pertains to the “Secret Garden Party”, a Festival which was launched by the opponent in 2004. The opponent also offers the ticketholders for the festival luxury accommodation options, including boutique camping (otherwise known as glamping). In March 2017, the opponent announced that the 2017 festival, which was held on the 20 to 23 July 2017, would be its last. However, in August 2021 the opponent announced that “The Secret Garden Party” would return in the summer of 2022. This is supported by the BBC article dated 1 September 2021 titled “Secret Garden Party: Festival returns after five-year break”.³ The article states that about 30,000 people attended the festival held in July 2017 and that the festival will return from 21 to 24 July 2022. In paragraph 7 of his witness statement, Mr Fellowes states that upon announcement of its return, over 70,000 participants pre-registered for tickets and once tickets were released for sale on 26 September 2021, they sold out in two hours.

21. Mr Fellowes has provided the annual revenue generated from the sales of (a) tickets to the festival, (b) the provision of food and drink, and (c) the provision of glamping services. I note that the following sales were made during the relevant period:

³ Exhibit FJF2

Year of Event	Revenue Category	Amount (GBP)	Comments
2022	Boutique camping (glamping)	£800,237.00	Of this figure, £768,689.00 was generated by 1 March 2022. Introduced at Exhibit FJF9 is a breakdown of monthly bookings of boutique camping accommodation provided under the SGP Marks.
2022	Concessions (provision of food and drink)	£1,938,188.93	
2022	Ticket sales	£4,038,067.76	Introduced at Exhibit FJF10 is a breakdown of ticket sales for the 2022 SGP festival.
2023	Boutique camping (glamping)	£398,115.00	

22. I have also been provided with the summary of the number of adult tickets sold at the Secret Garden Party festival. The number of tickets sold during the relevant period are as follows:

Year of Event	Number of Adult Tickets sold
2022	21,272
2023	12,300

23. Mr Fellowes has also provided me with the following summary of the proportion of tickets sold that included the provision of accommodation services provided by the opponent:

Year of Event	Proportion of tickets that included accommodation
2022	15%
2023	18%

24. At paragraph 26 of his witness statement, Mr Fellowes says that all entry tickets include camping accommodation as standard, and that the opponent organises coaches to collect and return participants throughout England which included, but was not limited to, Birmingham, Brighton, Bristol, Coventry, Crawley, London, Manchester, Oxford, Stockport and Swindon. This is supported by **exhibit FJF11** which contains screenshots from the opponent’s website “as it appeared on 4 February 2023” which lists coach returns from the aforementioned locations. At paragraph 26 of his

statement, Mr Fellowes also confirms that “by the time the Opponent's ticket allocation for its 2022 festival sold out in August 2021, it had sold 7,446 additional vehicle passes, generating revenue of £149,597.34”.

25. At **exhibit FJF12**, Mr Fellowes has provided the following screenshot that demonstrates where the participants of the 2022 Secret Garden Party Festival were located (the tickets for which were sold out on 26 September 2021):



26. I have also been provided with the opponent’s following marketing figures:

Year of Event	Marketing Expenditure
2022	£47,439.00
2023	£104,748.00

27. These figures are supported by the spreadsheet evidence contained in **exhibit FJF1**, which contains a breakdown of the marketing spend for 2022, which highlights that the opponent paid for design, photography, printing, social media, PR services and web design. I have also been provided with examples of press coverage regarding the opponent’s festival in **exhibit FJF2**. Whilst the majority of these articles are dated either before or after the relevant period, pertaining to the opponent’s festivals held in 2012, 2014, 2015, 2017 and 2024, I note that the articles were published in large

online publications such as The Independent, Mail Online and the BBC. I bear in mind that an article dated 17 June 2016 states that the festival normally takes place on the last weekend of July, it lasts for four days, is held in Huntingdon, Cambridgeshire, England, and costs £170 for an early bird ticket, or £190 for a standard ticket (with an added £7 booking fee).⁴ It also states that the site has more than 15 stages with a capacity of up to 32,000, with a variety of camping options (including caravans and yurts), and food options, including fast food (such as burgers and mac and cheese) or a dine-in 80-cover restaurant which was available at the 2017 event. An article dated 20 May 2023, from Cambridgeshire Live, also announces the theme and line up for the Secret Garden Party 2023 which was said to take place between 20 and 23 July, which I note is after the relevant date.

28. At **exhibit FJF4**, I have been provided with screenshots from the opponent's website (www.secretgardenparty.com) "as it appeared on 26 September 2021 and on 16 February 2023". These screenshots show the boutique camping accommodation options that were for sale at the opponent's 2022 and 2023 festivals, including the naked bell tent, belle pad, emperor bell tent, lotus belle, lotus mahal, super luxe lotus, tipi (naked or with beds) and the yurt. I have been provided with the Bell Tent Lux webpage which shows that it was priced at £1,450 for two singles. The remaining screenshots within this exhibit pertain to the opponent's upcoming 2024 festival, which lists the Boutique Elysium and the Boutique Xanadu tent accommodations which has access to the cabaret restaurant, champagne bar and coffee shop and also includes free admission to workshops, from whiskey tastings to sound baths. I note that all of these screenshots use the following mark on the top left corner of the website:



⁴ The article does not state where it is from/where it was published.

29. Mr Fellowes provides screenshots of the opponent’s website in **exhibit FJF7**, which shows a gallery of photographs from the opponent’s festivals in 2012, 2013, 2014, 2015, 2016, 2022 and 2023. The same marks above are shown on the top of the opponent’s website, and the following 2022 photograph shows how the tent accommodation was set up at the festival:



Secret Garden Party
23 July 22
Photo credit: Gabe Smith

30. The opponent also provides the numbers of followers of its social media pages, that being:

Platform	Account Handle	Account Creation Date	No. of Followers
Facebook	@secretgardenpartyhq	2008	180,00
Twitter	@secretgardenhq	February 2009	48,000
Instagram	@thesecretgardenparty	October 2013	70,800
TikTok	@thesecretgardenparty	October 2023	1,250

31. Screenshots of these pages are exhibited in **JFJ3**. However, as they are undated, I am unable to determine how many followers these pages had during the relevant period, and I am unable to ascertain how many followers were from the UK. I have also been provided with screenshots of posts made on Twitter and Instagram exhibited in **JFJ6**. I note that all of these posts are dated after the relevant period, apart from the following post which is dated 10 May 2023:



32. Lastly, the opponent has won a number of awards since 2005, including the UK Festival Awards' Best Small Festival (2005 and 2008) and Best Medium Sized Festival (2011),⁵ Live Music Business Awards (2011, 2012, 2014) and the Act of Independence Award from the Association of Independent Festivals (AIF). Moreover, the opponent was nominated for the Best Medium Sized Festival in 2012 at the UK Festival Awards'.⁶ The opponent's director, in a personal capacity, also won the Outstanding Contribution Award at the UK Festival Awards (2017).⁷

Assessment of genuine use

33. As far as the form of the marks is concerned, I am satisfied that the marks have been used as registered on the website evidence.

34. For the sake of completeness, the evidence above also shows use of the words "The Secret Garden Party" presented in a stylised typeface (in either the colour black or white), with an orange butterfly device resting on the letter "S", shown in paragraph 28 to this decision. I bear in mind the butterfly device does not alter the distinctive character of the mark, neither does the stylised typeface,⁸ as the distinctive character

⁵ Exhibit JFJ13

⁶ Exhibit JFJ13

⁷ Exhibit JFJ13

⁸ *Dreamersclub Ltd v KTS Group Ltd*, BL O/091/19

resides in the words “The Secret Garden Party”, which is clearly visible and still continues to indicate origin.⁹ Consequently, the marks contained in paragraph 28 above are acceptable use of the opponent’s marks.

35. I will now consider whether the evidence shows that the earlier marks have been genuinely used.

36. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.¹⁰ As indicated in the case law cited above, use does not need to be quantitatively significant in order to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of the mark which can be regarded as “warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark”.

37. The opponent’s period of non-activity (that being from 2017 to 2022) coincides with most of the relevant period (that being 29 June 2018 to 28 June 2023). Nevertheless, the festival held in 2022 falls within the relevant period, as well as advertisements for the 2023 festival. In 2021, upon announcement of its return, over 70,000 participants pre-registered for tickets and once tickets were released for sale on 26 September 2021, they sold out in two hours. Mr Fellows also states that by the time the opponent’s ticket allocation for its 2022 festival sold out, it had sold 7,446 additional vehicle passes, generating revenue of £149,597.34. The total revenue generated for the 2022 festival, including the boutique camping, the provision of food and drink and ticket sales amounted to £6,776,493.69 (the breakdown of which is contained in the table in paragraph 21 to this decision). While I note that the 2023 festival took place between 20 and 23 July 2023, which falls one month after the relevant period, I consider it reasonable to infer that the turnover of £398,115.00 for the boutique camping and the 12,300 tickets sold for the 2023 festival would have likely fallen within the relevant period. Therefore, taking into account (a) the amount of tickets sold within the relevant

⁹ *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, paras 31-35

¹⁰ *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

period (which amounts to 33,572), (b) the revenue generated by the sale of tickets and accommodations within the relevant periods (which amounts to over £7.1 million), (c) the marketing spend which is dated 2022 and 2023 (which amounts to £152,187.00),¹¹ which is supported by the press coverage, (d) and the geographical spread of the opponent's customers across England, Scotland, Wales and Ireland, I am satisfied that the opponent has shown genuine use of the earlier marks within the relevant period.

Fair Specification

38. I must now consider whether, or the extent to which, the evidence shows use of the goods relied upon. 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.”

39. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors*, [2017] EWCA Civ 1834, Kitchin LJ (as he then was) set out the approach to be followed when considering partial revocation of a trade mark. The same approach is relevant when framing a fair specification. He said:

“244. As I described in *Maier v Asos*, the approach to be adopted is relatively straightforward (although I readily acknowledge that it may on occasion be difficult to apply) and it is in my view consistent with the earlier decisions of the Court of Appeal to which I referred at paragraph [63]. On reflection, I think it can be expressed more clearly as follows.

¹¹ Albeit some of that figure could cover expenditure from after June 2023.

245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.

246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other subcategories.

247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.

248. Fourthly, these issues are to be considered having regard to the perception of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark.

249. This approach does strike an appropriate balance. It gives effect to the clear intention of the EU legislature that marks must actually be used or, if not used, be subject to revocation. [...] It is also fair to proprietors for it does not require a proprietor to prove that he has used his mark in relation to all possible variations of the goods or services covered by its registration but only those which are sufficiently distinct to constitute coherent categories or subcategories. I am also satisfied that it gives appropriate protection to the legitimate interest of a proprietor in being able in the future to extend his range of goods or services within the scope of the terms describing the goods or services for which its mark is registered.”

40. This approach was approved by the Supreme Court in *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, subject to the proviso that it must be seen in light of more recent guidance by the CJEU that that the essential criterion to apply for the purposes of identifying a coherent subcategory of goods or services capable of being viewed independently is their purpose and intended use (for example, *Ferrari SpA v DU* (Joined Cases C-720/18 and C-721/18) EU:C:2020:854; [2021] Bus LR 106, at paragraphs 36-53).

41. In regard to the opponent's class 39 services contained in Annex 2 to this decision, I find that the evidence shows use of the opponent's marks in relation travel arrangement for festivals and related information provided online. The purpose and intended use of the services is to transport users to and from the festival, and on this basis, I consider that a fair specification for the opponent's class 39 services is "travel arrangement for festivals" and "information relating to all the foregoing provided on-line from a computer database or the Internet".

42. In regard to the opponent's class 41 services contained in Annex 2 to this decision, I find that the evidence shows use of the opponent's marks in relation to organising and staging festivals. Accordingly, I consider that "organising and staging festivals" is a term which fairly describes the opponent's class 41 services. There is also evidence of the opponent providing related information services on-line from a computer database or via the internet. I therefore find that the opponent has shown use of "information relating to all the foregoing provided on-line from a computer database or via the internet" in relation to its aforementioned class 41 "organising and staging festivals" services.

43. In regard to the ticket agency services contained in its class 41 specification, I find that the opponent has not shown use of such a service. A ticket agency is a middleman between an event provider and a customer, and the evidence does not show the opponent selling, distributing or managing tickets on behalf of event organisers, venues or promoters. It simply sells its own tickets for its own events. The opponent therefore does not act in the capacity of an agency, and on this basis, the opponent has not shown use of the ticket agency services contained in class 41.

44. Lastly, in regard to the opponent's class 43 services contained in Annex 2 to this decision, I find that the evidence shows use of the opponent's marks in relation to the provision of campground accommodation (as the purchase of the campground accommodation by the opponent's customers included the reservation of the accommodation itself) and related information provided online. Accordingly, I find that the intended use and purpose of the opponent's term "reservation services for temporary accommodation" is too broad (as it would cover any type of accommodation including, for example, hotels). I therefore consider that a fair specification for the opponent's class 43 services is "reservation services for campground accommodation" and "information relating to all the foregoing provided on-line from a computer database or via the Internet".

45. For the remaining class 43 services, that being "consultancy, advisory and information services relating to the foregoing", I have not been provided any evidence to show that these services were provided to consumers by the opponent.

46. Consequently, I consider a fair specification for the opponent's marks to be:

Class 39 Travel arrangement for festivals; information relating to all the foregoing provided on-line from a computer database or the Internet.

Class 41 Organising and staging festivals; information relating to all the foregoing provided on-line from a computer database or the Internet.

Class 43 Reservation services for campground accommodation; information relating to all the foregoing provided on-line from a computer database or via the Internet.

Section 5(2)(b) - case law

47. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25:

(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 greater 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; and

(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

48. The parties' competing services are as follows:

Opponent's services	Applicant's services
<u>Class 39</u> Travel arrangement for festivals; information relating to all the foregoing provided on-line from a computer database or the Internet.	<u>Class 39</u> Arranging of holiday transport; Holiday travel reservation services; Booking of holiday travel; Providing tourist travel information; Providing tourist travel information, via the Internet; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.
<u>Class 41</u> Organising and staging festivals; information relating to all the foregoing provided on-line from a computer database or the Internet.	
<u>Class 43</u>	

Reservation services for campground accommodation; information relating to all the foregoing provided on-line from a computer database or via the Internet.

Class 41

Education services relating to business franchise management; Holiday camp services; Holiday camp services [entertainment]; Holiday centre entertainment services; Recreational camp services; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.

Class 43

Holiday accommodation services; Rental of holiday accommodation; Hotels, hostels and boarding houses, holiday and tourist accommodation; Holiday lodgings; Arranging holiday accommodation; Rental of holiday homes; Holiday camp services [lodging]; Holiday planning services [accommodation]; Provision of holiday accommodation; Letting of holiday accommodation; Arranging of holiday accommodation; Rental of holiday cabins; Booking agency services for holiday accommodation; Providing temporary lodging at holiday camps; Arranging of accommodation for holiday

	<p>makers; Temporary accommodation services provided by holiday camps; Services for reserving holiday accommodation; Providing on-line information relating to holiday accommodation reservations; Providing campground facilities; Tourist camp services [accommodation]; Holiday camp services [lodging]; Providing temporary lodging at holiday camps; Booking of campground accommodation; Arranging of accommodation for tourists; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar.</p>
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49. When making the comparison, all relevant factors relating to the services in the specifications should be taken into account. 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.”

50. 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.

51. In *Gérard Meric v OHIM*, 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.”

52. For the purposes of considering the issue of similarity of services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade*

Mark (BL O/399/10) and *BVBA Management, Training en Consultancy v. BeneluxMerkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

53. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the 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.”

Class 39

Arranging of holiday transport; Holiday travel reservation services; Booking of holiday travel; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

54. The applicant’s above services encompass or include the arrangement of holiday transport. The opponent’s closest service is its “travel arrangement for festivals”. The parties’ services can be both defined as the arrangement or organisation of travel/transport, and therefore overlap in nature. I also appreciate that when booking a holiday, a user might also book to attend a festival and travel to and from it all within one holiday booking. I therefore find that the services are likely to overlap in trade channels, which can be booked through travel agencies and online booking platforms. There will also be an overlap in user. The services are clearly neither in competition or complementary in the way described by the case law cited above. Taking the above into account, I find that the services are similar to a medium degree.

Providing tourist travel information; Providing tourist travel information, via the Internet; All the aforementioned in relation to the provision of year-round holiday-resort services

and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

55. The applicant's above services are used to give travellers information which is useful for planning or undertaking a trip. However, as stipulated by the applicant's limitation, its tourist travel information pertains to temporary accommodation in the form of permanent structures such as cabins and glamping pods. I consider that these services will overlap in trade channels with the opponent's class 43 "reservation services for campground accommodation" which also encompasses permanent structures such as cabins and glamping pods. I therefore find that the parties' services will overlap in trade channels (with the same undertaking providing both reservation services in relation to campground accommodation and travel tourist information in relation to this). There will be a limited overlap in purpose to the extent that all of the services pertain to temporary accommodation (albeit the applicant's services pertain to information whereas the opponent's services are for reservation). There will also be an overlap in user. On this basis, I find that the services are similar to between a low and medium degree.

Class 41

Holiday centre entertainment services; Recreational camp services; Holiday camp services; Holiday camp services [entertainment]; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.

56. The applicant's above services are those run by holiday camps and centres to entertain their guests, which can include hosting festivals, putting on live shows and music, craft workshops, fitness activities such as yoga classes, or adventure activities. I bear in mind that the opponent's class 41 services, that being "organising and staging festivals", also encompasses live music. I consider that the parties' services overlap in purpose, as they all involve organising events for public enjoyment/entertainment. However, the opponent's festival services are typically produced on a larger scale

(hosting up to thousands of people), whereas the applicant's events are likely to be smaller as they are provided to those staying at a holiday campsite. Therefore, to some extent, they differ in nature. I nevertheless consider that there could be an overlap in trade channels, as holiday camp centres can organise and stage their own festivals. Consequently, the services could be in competition. On this basis, I find the services to be similar to between a medium and high degree.

Education services relating to business franchise management; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.

57. The applicant's above services encompass training and teaching aimed at owning, operating or managing a franchise business. I understand that the above limitation means that the services will specifically train and teach users as to how to own, operate and manage a business which pertains to temporary accommodation in permanent holiday structures. Whilst the opponent's class 43 "reservation services for campground accommodation" also encompasses permanent structures such as cabins and glamping pods, I still do not consider that the parties' services are similar. This is on the basis that the parties' services differ in nature, method of use and purpose (as the applicant's services are for training and teaching whereas the opponent's services are used to make reservations). I do not consider that there would be an overlap in trade channels as educational undertakings would provide the applicant's services, and the opponent's services would be provided by campground and holiday park/accommodation undertakings. The services are neither in competition nor complementary. Whilst there may be an overlap in user, this is not enough on its own to find similarity. I therefore consider that the parties' services are dissimilar.

Class 43

Providing on-line information relating to holiday accommodation reservations; All the aforementioned in relation to the provision of year-round holiday-resort services and

temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar.

58. I find that the term “reservation services for campground accommodation” in the opponent’s class 43 specification would encompass permanent holiday structures such as cabins and glamping pods. On this basis, I find that the opponent’s “reservation services for campground accommodation; information relating to all the foregoing provided on-line from a computer database or via the Internet” falls within the applicant’s above broader category. The services are identical on the principle outlined in *Meric*.

Booking agency services for holiday accommodation; Booking of campground accommodation; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar.

59. I find that the opponent’s “reservation services for campground accommodation” falls within the applicant’s above broader categories. The services are identical on the principle outlined in *Meric*.

Providing temporary lodging at holiday camps; Temporary accommodation services provided by holiday camps; Services for reserving holiday accommodation; Providing campground facilities; Tourist camp services [accommodation]; Holiday camp services [lodging]; Providing temporary lodging at holiday camps; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar.

60. The applicant’s above services can be broadly described as providing holiday camp accommodation services, and as per the applicant’s limitation, its above terms can only encompass permanent structures such as cabins and glamping pods. I find that these services will overlap in user, and trade channels, with the opponent’s class

43 “reservation services for campground accommodation”, as the same undertakings are likely to provide both accommodation services and reservation services for their accommodation. However, they differ nature in the sense that one service is the accommodation itself and the other is used to reserve it. The services are likely to be complementary, as the user will believe that both services are provided and come from the same undertaking, and they are indispensable to one another on the basis that you are unable to access the accommodation without reserving it. Therefore, taking all of the above into account, I find that the parties’ services are similar to between a medium and high degree.

Holiday accommodation services; Rental of holiday accommodation; Holiday lodgings; Arranging holiday accommodation; Holiday camp services [lodging]; Holiday planning services [accommodation]; Provision of holiday accommodation; Letting of holiday accommodation; Arranging of holiday accommodation; Rental of holiday cabins; Arranging of accommodation for holiday makers; Arranging of accommodation for tourists; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar.

61. All of the applicant’s above services can be broadly described as holiday accommodation services which provide accommodation to those on holiday. I find that “holiday accommodation” is a broad category that can encompass holiday camping accommodation. On this basis, I find that the same comparison applies in paragraph 60 above. The parties’ services are similar to between a medium and high degree.

Rental of holiday homes; Hotels, hostels and boarding houses, holiday and tourist accommodation.

62. I find that the applicant’s above services will overlap in user and purpose with the opponent’s “reservation services for campground accommodation”, on the basis that they all provide temporary holiday accommodation to the general public. I also find that the services are likely to overlap in trade channels. However, they are neither in

competition nor complementary. I therefore find that the services are similar to a medium degree.

63. It is a prerequisite of section 5(2)(b) that the services be identical or at least similar. The opposition will, therefore, fail in respect of the services that I have found to be dissimilar.¹² The opposition under section 5(2)(b) fails for the following services:

Class 41 Education services relating to business franchise management; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.

The average consumer and the nature of the purchasing act

64. 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 services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97. In *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

(a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;

(b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;

¹² *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

(c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;

(d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling courts and tribunals to determine such issues so far as possible without the need for evidence;

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

65. The average consumer for the services will be members of the general public. The cost of the services in question is likely to vary, and the frequency of purchase, on balance, is likely to be relatively low. The average consumer will take various factors into consideration, such as the cost, location, reputational standing of the provider and the suitability of the services for their specific needs. I therefore find that a medium degree of attention will be paid during the purchasing process.

66. The services may be purchased via a website or signage on the physical premises of a travel agency. The services may also be purchased following the perusal of advertisements. Visual considerations are, therefore, likely to dominate the selection process. However, I do not discount that there may also be an aural component to the purchase through advice sought from a sales assistant, or via recommendations given through word-of-mouth.

Comparison of the trade marks

67. 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.”

68. 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.

69. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
<p data-bbox="231 1675 778 1715">THE SECRET GARDEN PARTY</p> <p data-bbox="272 1760 735 1800">SECRET GARDEN PARTY</p> <p data-bbox="413 1845 596 1886">("Series of 2")</p> <p data-bbox="336 1895 673 1935">("The First Earlier Marks")</p>	<p data-bbox="895 1675 1321 1715">The Secret Garden</p> <p data-bbox="847 1760 1369 1800">THE SECRET GARDEN</p> <p data-bbox="1007 1868 1209 1908">(SERIES OF 2)</p>

THE SECRET GARDEN PARTY	
("The Second Earlier Comparable Mark")	

70. I will base my comparison on the opponent's Second Earlier Comparable Mark which is closer to the applicant's marks.¹³

71. The opponent's Second Earlier Comparable Mark consists of the ordinary dictionary words "THE SECRET GARDEN PARTY". I find that the overall impression lies in the combination of these words, as they will be seen as a single complete phrase by the average consumer, with no single word or words dominating the mark.

72. The applicant's series of 2 marks consists of the ordinary dictionary words "THE SECRET GARDEN" either presented in a capitalised or title-case typeface. I find that the overall impression lies in the combination of these words, as they will be seen as a single complete phrase by the average consumer, with no single word or words dominating the mark.

73. Visually, the applicant's marks "THE SECRET GARDEN", is encompassed at the beginning of the Second Earlier Comparable Mark, a position to which the average consumer usually pays more attention.¹⁴ This acts as a visual point of similarity. However, the Second Earlier Comparable Mark ends in the word "PARTY" which acts as a visual point of difference. Nonetheless, I find that the marks are visually similar to between a medium and high degree.

74. Aurally, both of the parties' marks consist of ordinary dictionary words which will be given their usual pronunciation. The beginning of both parties marks, that being "THE SECRET GARDEN", is identical, with the word "PARTY" at the end of the

¹³ This mark is also the same as the first mark in the First Earlier Mark's series of 2 marks, the difference in the series being the presence or absence of the word "THE" at beginning of the marks.

¹⁴ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

Second Earlier Comparable Mark acting as an aural point of difference. I therefore find that the marks are aurally similar to between a medium and high degree.

75. Conceptually, neither party has made any submissions as to the meaning conveyed by the marks. However, as noted above, both of the parties' marks consist of ordinary dictionary words, which together will be seen by the average consumer as a single complete phrase. The applicant's mark evokes the meaning of a garden that is secret, and the opponent's mark evokes the meaning of a party that is being hosted in a garden which is secret. On this basis, I find that the marks are conceptually similar to a high degree.

Distinctive character of the earlier trade marks

76. 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 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).”

77. 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 services, 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.

78. I will begin by assessing the inherent distinctive character of the opponent’s Second Earlier Comparable Mark.

79. The earlier mark consists of the ordinary dictionary words “THE SECRET GARDEN PARTY”. The mark being perceived a reference to a party held in a secret garden is neither descriptive or laudatory in relation to the services for which genuine use has been shown. Whilst at paragraph 1(a) of its counterstatement, the applicant states that “the use of the words ‘the secret garden’ are not unique to either the applicant or the opponent” because “several other marks use this phrase”, the applicant has not filed any evidence which would demonstrate widespread use of the phrase in the context of the services at issue. Therefore, this submission does not assist them. Consequently, I find that the Second Earlier Comparable Mark is inherently distinctive to a medium degree.

80. I will now assess whether the evidence filed by the opponent is sufficient to demonstrate enhanced distinctiveness. The relevant market for assessing this is the UK market. I also bear in mind that within my comparison of the parties’ services, similarity has been established with the opponent’s “travel arrangement for festivals”, “reservation services for campground accommodation”, and “organising and staging festivals”.

81. In addition to the turnover figures and ticket sales for 2022 to 2023 provided in paragraph 21 above, I have also been provided with the following sales figures and ticket sales for 2013 to 2017:

Year of Event	Revenue Category	Amount (GBP)	Comments
2013	Boutique camping (glamping)	£180,597.00	-
2014	Boutique camping (glamping)	£177,719.79	-
2015	Boutique camping (glamping)	£270,763.51	-
2016	Boutique camping (glamping)	£252,278.01	-
2017	Ticket sales	£3,193,035.00	Introduced at Exhibit FJF8 is a breakdown of ticket sales for the 2017 SGP festival.
2017	Concessions (provision of food and drink)	£328,128.00	-
2017	Boutique camping (glamping)	£308,149.00	-

Year of Event	Number of Adult Tickets sold
2013	17,172
2014	23,534
2015	24,322
2016	16,970
2017	21,852

82. Therefore, the total revenue generated from boutique camping (glamping) between 2013 and 2017 under the Second Earlier Comparable Mark is £1,189,507.31. This in combination with the total revenue generated from boutique camping (glamping) for the years 2022 and 2023, which amounted to £1,198,352.00, means that from 2017 to 2023, the opponent generated a total of £2,387,859.31 for its glamping services.

83. Whilst the above figure is high, the opponent has not provided any supporting invoice evidence, nor a breakdown of these figures to show how many reservations for its campground accommodation was made, and what type of accommodation was reserved. Nevertheless, I bear in mind that the website evidence contained in **exhibit FJF4** shows that there was a range of accommodation that could be booked by users, and the only accommodation that was priced within the evidence was its Bell Tent Lux priced at £1,450 for two singles.

84. I have not been provided with any evidence of the opponent's market share, and on the basis that its reservation services pertain to boutique camping (otherwise

known as glamping), which has a more premium price (and experience) compared to tent camping, for example, I find that the opponent's market share is likely to be low. I am therefore not satisfied that the distinctiveness of the opponent's Second Earlier Comparable Mark has been enhanced through use in relation to its "reservation services for campground accommodation".

85. I note that the only evidence I have been provided in relation to the opponent's "travel arrangement" is screenshots from the opponent's website showing how users were to book these services, alongside Mr Fellow's statement that "by the time the Opponent's ticket allocation for its 2022 festival sold out in August 2021, it had sold 7,446 additional vehicle passes, generating revenue of £149,597.34". I do not have any sales figures for any other years, nor any supporting invoice evidence. Whilst I have not been provided with any market share figures, I find that based on the sales figures before me, that the opponent's market share for its travel arrangement is likely to be low. I am therefore, again, not satisfied that the distinctiveness of the opponent's Second Earlier Comparable Mark has been enhanced through use in relation to its "travel arrangement for festivals".

86. Lastly, in relation to the opponent's "organising and staging festivals", I also find that the evidence is limited. Whilst between 2013 to 2023 the number of adult tickets sold to the opponent's events amounted to 137,422, I have only been provided with turnover generated from the ticket sales in 2017 and 2022 (which amounts to £7,231,102.76). I do not have any sales figures for the remaining years, and I have not been provided with any supporting invoice evidence showing the sale of its tickets to customers. While I appreciate that the sales provided before me are high, I consider that in the context of the festival market, these sales are most likely to be low. I bear in mind that I have been provided with marketing figures for 2022 and 2023, supported by a breakdown of the types of marketing used by the opponent in **exhibit FJF1**, including its social media marketing. However, the evidence which shows use of the opponent's social media in **exhibit FJF3** is undated and does not show what the UK user engagement was before the relevant date, and the Twitter and Instagram posts exhibited in **JFJ6** are all from after the relevant date (apart from the 1 post shown in paragraph 31 of this decision). Nevertheless, I bear in mind that in the applicant's counterstatement, they admit that "the Opponent's mark is renowned for an annual

festival". I take this as an admission that the distinctiveness of the opponent's mark has been enhanced for these services, but based on the limited evidence before me, I find that the Second Earlier Comparable Mark has only been enhanced to between a medium and high degree for "organising and staging festivals".

Likelihood of confusion

87. 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. Nevertheless, the following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25:

(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 greater 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; and

(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.

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

- I have found the marks to be visually similar to between a medium and high degree.

- I have found the marks to be aurally similar to between a medium and high degree.
- I have found the marks to be conceptually similar to a high degree.
- I have found the Second Earlier Comparable Mark to be inherently distinctive to a medium degree.
- I have found the distinctiveness of the Second Earlier Comparable Mark has been enhanced for its “organising and staging festivals” services to between a medium and high degree.
- I have identified the average consumer as members of the general public, who will select the services primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process.
- I have found the parties’ services to range from being identical to similar between a low and medium degree.

89. I have found the marks to be visually and aurally similar to between a medium and high degree, and conceptually similar to a high degree, on the basis that the applicant’s “THE SECRET GARDEN” mark is fully encompassed at the beginning of the opponent’s Second Earlier Comparable Mark. This is a position which tends to make more of an impact than its ends, and therefore consumers will pay more attention to the beginning ‘THE SECRET GARDEN’ element, which will be retained in their minds more. On this basis, bearing in mind the principle of imperfect recollection, I am satisfied that the parties’ marks are likely to be mistakenly recalled as each other on the basis that the average consumer paying a medium degree of attention could easily overlook or imperfectly recall the word “PARTY” at the end of the Second Earlier Comparable Mark. In my view, all of the above results in a likelihood of direct confusion on all of the parties’ services, which I have found to be identical and similar.

90. Although it is not strictly necessary, I will go on to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis 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.”

91. 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.

92. If the differences between the marks are noticed, I consider that the shared common use of the words “THE SECRET GARDEN” in the parties’ marks will lead the average consumer to conclude that they originate from the same or economically linked undertakings.

93. I find that the average consumer will see the addition of the word “PARTY” at the end of the opponent’s Second Earlier Comparable Mark and perceive the mark as a whole as a sub-brand mark (with THE SECRET GARDEN being the house brand and THE SECRET GARDEN PARTY being the sub-brand mark). Therefore, taking all of the above into account, I consider there to be a likelihood of indirect confusion.

94. The opposition under section 5(2)(b) partially succeeds.

Section 5(3)

95. Section 5(3) of the Act states:

“5(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 repute of the earlier trade mark.”

96. Section 5(3A) of the Act states:

“Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.”

97. The relevant case law can be found in the following judgments of the CJEU: *General Motors Corp v Yplon SA* (Case C-375/97), *Intel Corporation Inc v CPM United Kingdom Ltd* (Case C-252/07), *Adidas Salomon AG v Fitnessworld Trading Ltd* (Case C-408/01), *L’Oréal SA & Ors v Bellure & Ors* (Case C-487/07), *Interflora Inc & Anor v Marks and Spencer plc & Anor* (Case C-323/09) and *Environmental Manufacturing LLP v OHIM* (Case C-383/12 P). 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) The more immediately and strongly the earlier mark is brought to mind by the later mark, the greater the likelihood that use of the latter will take unfair advantage of, or will be detrimental to, the distinctive character or the repute of the earlier mark; *L'Oréal, paragraph 44*.

(g) 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*.

(h) 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*.

(i) 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'Oréal v Bellure NV*, paragraph 40.

(j) 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; *Interflora*, paragraph 74, and the court's answer to question 1 in *L'Oréal*.

98. The conditions of section 5(3) are cumulative. Firstly, the opponent's and applicant's marks must be identical or similar, and I have discussed their level of similarity in paragraphs 72 to 75 above. Secondly, the opponent must show that its earlier marks have achieved a level of knowledge/reputation amongst a significant part of the public. Thirdly, it must have established that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the opponent's marks being brought to mind by the later mark. Fourthly, assuming that the first, second and third conditions have been met, section 5(3) requires that one or more types of damage claimed will occur. It is unnecessary for the purposes of section 5(3) that the services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks. The relevant date for the assessment under section 5(3) is the date of application of the applicant's mark i.e. 28 June 2023. Moreover, under section 5(3), I shall also only be relying upon the opponent's Second Earlier Comparable Mark as it is closer to the applicant's marks.

Reputation

99. 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.”

100. In determining whether the opponent has demonstrated a reputation for the services in issue, it is necessary for me to consider whether its mark will be known by a significant part of the public concerned with the services. In reaching this decision, I must take all of the evidence into account including “the market share held by the trade mark, the intensity, geographical extent and duration of use, and the size of the investment made by the undertakings in promoting it.”

101. In its counterstatement, the applicant admits that “as outlined above the Opponent’s mark is renowned for an annual festival. The Applicant has not applied for anything outside of class 43 or any term unrelated to temporary holiday accommodation.”

102. I take this as an admission that the opponent had a reputation for organising and staging festivals (in class 41) at the relevant date. Although the opponent also relies on other services in class 43,¹⁵ contained in Annex 3 to this decision, I have found that the distinctive character of the opponent's Second Earlier Comparable Mark has not been enhanced through use for these services. I recognise that reputation is not the same as enhanced distinctive character, but the same factors are to be taken into account in both assessments.¹⁶ On the basis that I have not been provided with any supporting invoices or market share evidence, I find that the evidence is, for the reasons set out above, insufficient to establish a reputation in the UK for the opponent's class 43 services.

Link

103. As I noted above, my assessment of whether the public will make the required mental 'link' between the marks must take account of all relevant factors. The factors identified in *Intel* are:

The degree of similarity between the conflicting marks

As noted in paragraphs 72 to 75 above, I have found the Second Earlier Comparable Mark and the applicant's mark to be visually and aurally similar to between a medium and high degree, and conceptually similar to a high degree.

The nature of the goods and services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods, and the relevant section of the public

The applicant's contested services in class 39 (the arranging and reservation of holiday transport and travel) clearly do not overlap in nature, method of use, purpose or trade channels with the opponent's "organising and staging

¹⁵ The opponent also relies upon other class 41 services such as "entertainment" and "provision of recreation and entertainment facilities". However, these are very broad terms/categories which would encompass the organisation and staging of festivals, of which the applicant has admitted the opponent has a reputation for.

¹⁶ *O2 Worldwide Limited v CX02.COM (UK) Limited*, BL O/393/19, paragraph 39

festivals”. The services are also neither in competition nor complementary. I therefore find them to be dissimilar.

In regard to the applicant’s class 41 “holiday camp services”, “holiday camp services [entertainment]”, “holiday centre entertainment services” and “recreational camp services”, I have found these services to be similar to the opponent’s “organising and staging festivals” services to between a medium and high degree in paragraph 56 above.

The applicant’s contested services in classes 43 consist of the provision of holiday accommodation and related reservation and booking services pertaining to temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar. The evidence shows that the opponent has offered camping accommodation such as tents and yurts, and I find that this type of accommodation is typically offered by other festivals which are based in the UK. However, I do not have any evidence or submissions before me that confirms or shows that permanent structures such as cabins and glamping pods are typically provided at festivals based in the UK. I therefore do not consider that the parties’ services overlap in trade channels, nor are they complementary in the way described by the case law cited above. They also clearly do not overlap in nature and purpose, on the basis that the opponent’s services organise and stage the festival, whereas the applicant’s services provide holiday accommodation. Moreover, the services are clearly not in competition. I therefore find that the parties’ services are dissimilar.

The strength of the earlier marks’ reputation

The applicant admits that the opponent’s mark has a reputation for festivals but did not specify what level of reputation it has. As noted in paragraph 86 above, while between 2013 to 2023 the number of adult tickets sold to the opponent’s events amounted to 137,422, I have only been provided with turnover generated from the ticket sales in 2017 and 2022 (which amounts to

£7,231,102.76). I do not have any sales figures for the remaining years, and I have not been provided with any supporting invoice evidence showing the sale of its tickets to customers. Furthermore, in the context of the festival market, the sales provided are most likely to be low. I also note that the opponent did not trade for five years, that being between 2017 and 2022, and I bear in mind that the 2023 festival occurred two months after the relevant date. Therefore, taking all of the above into account, I find that that the opponent's reputation at the relevant date was small.

The degree of the earlier marks' distinctive character, whether inherent or acquired through use

I found the Second Earlier Comparable Mark to be inherently distinctive to a medium degree. I also found that based upon the applicant's admission in its counterstatement, the distinctive character of the Second Earlier Comparable Mark in relation to the opponent's "organising and staging festivals" has been enhanced to between a medium and high degree.

Whether there is a likelihood of confusion

I have found there to be a likelihood of confusion between the opponent's "organising and staging festivals" and the applicant's class 41 "holiday camp services", "holiday camp services [entertainment]", "holiday centre entertainment services" and "recreational camp services". For the remaining services that I have found to be dissimilar, there can be no likelihood of confusion.¹⁷

104. I am now required to determine whether, in this particular case, the relevant public would bring the opponent's mark to mind when confronted with the applicant's mark. That is, to make a link between them. I remind myself at this stage that finding similarity between the services, or indeed a likelihood of confusion, is not required in order to find a link would be made between the marks. However, the closeness of the services

¹⁷ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

is a factor to taken into account when considering if the use of the later mark would bring the earlier marks to mind.

105. Where I have found there to be a likelihood of confusion, there is automatically a link. I therefore find there to be a link between the opponent's mark and the applicant's mark being used on services that I have found to be similar to a high degree, that being "holiday camp services", "holiday camp services [entertainment]", "holiday centre entertainment services" and "recreational camp services" in class 41.

106. However, in relation to the applicant's remaining services in classes 39, 41 and 43, I consider that, taking into account the small size of the opponent's reputation and the distance between the services,¹⁸ I find that a link will not be made between them and the opponent's "organising and staging festival" services.

107. Notwithstanding the fact that the parties' services are likely to overlap in user, I find that the parties' services are too removed from one another, and the opponent's small reputation is not strong enough to bridge the gap between them. I consider that the distance between the services is sufficient to offset any similarity between the parties' marks. As I have found there to be no link between the marks in the minds of the relevant public in the UK, there can be no resulting damage caused to the opponent's earlier mark. However, even if a link is made, it would be so fleeting that it would not suffice to result in an unfair advantage or damage to the opponent or its mark. As I have found there to be no link, the opposition based upon section 5(3) fails for the following services:

Class 39 Arranging of holiday transport; Holiday travel reservation services; Booking of holiday travel; Providing tourist travel information; Providing tourist travel information, via the Internet; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

¹⁸ *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA)

Class 41 Education services relating to business franchise management; Holiday camp services; Holiday camp services [entertainment]; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.

Class 43 Holiday accommodation services; Rental of holiday accommodation; Hotels, hostels and boarding houses, holiday and tourist accommodation; Holiday lodgings; Arranging holiday accommodation; Rental of holiday homes; Holiday camp services [lodging]; Holiday planning services [accommodation]; Provision of holiday accommodation; Letting of holiday accommodation; Arranging of holiday accommodation; Rental of holiday cabins; Booking agency services for holiday accommodation; Providing temporary lodging at holiday camps; Arranging of accommodation for holiday makers; Temporary accommodation services provided by holiday camps; Services for reserving holiday accommodation; Providing on-line information relating to holiday accommodation reservations; Providing campground facilities; Tourist camp services [accommodation]; Holiday camp services [lodging]; Providing temporary lodging at holiday camps; Booking of campground accommodation; Arranging of accommodation for tourists; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar.

Damage

108. Within the opponent's Form TM7, at paragraph 16 of its statement of grounds, it states that "the Opponent contends that the Opposed Application is highly similar to the Earlier Registrations and use without due cause of the Opposed Application would

take unfair advantage of, or be detrimental to, the distinctive character and reputation of the Opponent's Trade Mark Marks.”

109. I also note that in *Argos Limited v Argos Systems Inc* [2018] EWCA Civ 2211, the Court of Appeal held that a change in the economic behaviour of the customers for the goods and/or services offered under the later trade mark was required to establish unfair advantage. This may be inferred where the later trade mark would gain a commercial advantage from the transfer of the image of the earlier trade mark to the later mark: see *Claridges Hotel Limited v Claridge Candles Limited & Anor* [2019] EWHC 2003 (IPEC).

110. Unfair advantage does not require proof of a subjective intention by the applicant to benefit from the reputation of the opponent's mark. In *Jack Wills Limited v House of Fraser (Stores) Limited* [2014] EWHC 110 (Ch) Arnold J. (as he then was) considered the earlier case law and concluded that:

“80. The arguments in the present case give rise to two questions with regard to taking unfair advantage. The first concerns the relevance of the defendant's intention. It is clear both from the wording of Article 5(2) of the Directive and Article 9(1)(c) of the Regulation and from the case law of the Court of Justice interpreting these provisions that this aspect of the legislation is directed at a particular form of unfair competition. It is also clear from the case law both of the Court of Justice and of the Court of Appeal that the defendant's conduct is most likely to be regarded as unfair where he intends to benefit from the reputation and goodwill of the trade mark. In my judgment, however, there is nothing in the case law to preclude the court from concluding in an appropriate case that the use of a sign the objective effect of which is to enable the defendant to benefit from the reputation and goodwill of the trade mark amounts to unfair advantage even if it is not proved that the defendant subjectively intended to exploit that reputation and goodwill.”

111. For there to be an unfair advantage, it means that consumers are more likely to buy the services of the contested mark than they would otherwise have been if they

had not been reminded of the earlier mark. Where there is a likelihood of confusion, the applicant will benefit from an unfair advantage.

112. Consequently, I find that damage is made out in respect of the following services, for which the section 5(3) claim succeeds:

Class 41 Holiday camp services; Holiday camp services [entertainment]; Holiday centre entertainment services; Recreational camp services; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.

Section 5(4)(a)

113. Section 5(4)(a) of the Act states as follows:

“5(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”.

114. Subsection (4A) of section 5 of the Act 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.”

115. 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).”

Relevant date

116. Whether there has been passing off must be judged at a particular point (or points) in time. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC, sitting as the Appointed Person, considered the relevant date for the purposes of s.5(4)(a) of the Act and stated as follows:

“43. In *SWORDERS TM* O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows: ‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before

the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.”

117. As the applicant has filed no evidence of use of its mark, I have only the prima facie relevant date to consider i.e. 28 June 2023.

Goodwill

118. The House of Lords in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL) provided the following guidance regarding goodwill:

“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 customers. It is the one thing which distinguishes an old-established business from a new business at its first start.”

119. 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 than 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; 54 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.”

120. 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.”

121. Goodwill arises as a result of trading activities, and it is clear from the turnover figures provided by Mr Fellowes, that the opponent's company has been trading under “The Secret Garden Party” sign since 2017.

122. From 2017 to 2023, the opponent generated a total of £2,387,859.31 for its boutique camping (glamping) services. I am therefore satisfied that the opponent has demonstrated a modest degree of goodwill prior to the relevant date in relation to the provision of temporary campground accommodation and the provision of camping services.¹⁹ I note that the turnover figures are supported by website screenshot evidence of the opponent's website before the relevant date, and third party article

¹⁹ This includes the reservation of temporary accommodation and camping services such as their grounds and facilities and as well providing the temporary accommodation, camping grounds and camping facilities itself.

evidence. In light of this, I am also satisfied that THE SECRET GARDEN PARTY sign was distinctive of the opponent's goodwill at the relevant date.

123. I note that again, in its counterstatement, the applicant admits that "the Opponent's mark is renowned for an annual festival". I take this as an admission that the opponent had goodwill in relation to organising and staging festivals before the relevant date. I am also satisfied that based on the turnover figures provided for ticket sales, the list of awards won by the opponent, the website screenshots and the third party article evidence that the opponent has generated a modest degree of goodwill in relation to festivals and that its sign was distinctive of the opponent's goodwill at the relevant date.

Misrepresentation and damage

124. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated that:

"There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is

"is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents' [product]"

The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148. The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 R.P.C. 147 at page 175; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101."

And later in the same judgment:

“... for my part, I think that references, in this context, to “more than *de minimis*” and “above a trivial level” are best avoided notwithstanding this court’s reference to the former in *University of London v. American University of London* (unreported 12 November 1993). It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion.”

125. I recognise that the test for misrepresentation is different from that for likelihood of confusion in that it entails “deception of a substantial number of members of the public” rather than “confusion of the average consumer”. However, as recognised by Lewison L.J. in *Marks and Spencer PLC v Interflora*, [2012] EWCA (Civ) 1501, it is doubtful whether the difference between the legal tests will produce different outcomes. Certainly, I believe that to be the case here.

126. The services for which the opponent has shown goodwill listed above, are identical or similar (to a high degree to between a low and medium degree) to the applicant’s providing tourist travel information in class 39, holiday centre entertainment services and recreational/holiday camp services in class 41 and its accommodation services in class 43, for the same reasons set out in paragraphs 55 to 56, and 58 to 62 above. Taking the closeness of the parties’ fields of activity into account, as well as the marks being similar (due to the applicant’s “THE SECRET GARDEN” mark being fully replicated at the beginning of the opponent’s “THE SECRET GARDEN PARTY” sign), I consider that a substantial number of members of the relevant public would be misled into purchasing the applicant’s services in the mistaken belief that they are the services of the opponent. Damage through diversion of sales is easily foreseeable.

127. The applicant’s remaining services are its class 41 “education services relating to business franchise management; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41”. I find that these services are dissimilar to the opponent’s provision of temporary

accommodation and camping services, for the same reasons contained in paragraph 57 to this decision. On this basis, I also consider that the differences between these services would be sufficient to avoid misrepresentation occurring. Albeit the applicant's services are also related to temporary accommodation in the form of permanent holiday structures, its core service is education. I therefore find that the parties' actual fields of activity (education services vs the provision of temporary accommodation/camping services) are not close enough. On this basis, I find that these differences are sufficient to avoid a substantial number of members of the relevant public purchasing the applicant's services in the mistaken belief that they are provided by the opponent's business. As there is no misrepresentation, there can be no damage.

128. For the sake of completeness, I also find that the applicant's class 41 education services are dissimilar to the opponent's festival services. The parties' services clearly do not overlap in nature, method of use, purpose or trade channels. They are also neither in competition nor complementary. I therefore find them dissimilar based on the factors identified in *Treat*.²⁰ On this basis, I find that the differences between these services would be sufficient to avoid misrepresentation occurring. The parties' fields of activity (that being festivals vs education services relating to business franchise management) are clearly not close enough, and therefore, I find that the differences are sufficient to avoid a substantial number of members of the relevant public purchasing the applicant's education services in the mistaken belief that they are provided by the opponent's business. As there is no misrepresentation, there can be no damage.

129. The opposition based upon section 5(4)(a) is partially successful, and the section 5(4)(a) claim succeeds in respect of the following services:

Class 39 Arranging of holiday transport; Holiday travel reservation services;
Booking of holiday travel; Providing tourist travel information; Providing

²⁰ While this case is usually applied in the context of a section 5(2)(b) claim, I find that the *Treat* factors can be considered, and are useful when assessing the similarity of the parties' services in the context of section 5(4)(a).

tourist travel information, via the Internet; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

Class 41 Holiday camp services; Holiday camp services [entertainment]; Holiday centre entertainment services; Recreational camp services; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.

Class 43 Holiday accommodation services; Rental of holiday accommodation; Hotels, hostels and boarding houses, holiday and tourist accommodation; Holiday lodgings; Arranging holiday accommodation; Rental of holiday homes; Holiday camp services [lodging]; Holiday planning services [accommodation]; Provision of holiday accommodation; Letting of holiday accommodation; Arranging of holiday accommodation; Rental of holiday cabins; Booking agency services for holiday accommodation; Providing temporary lodging at holiday camps; Arranging of accommodation for holiday makers; Temporary accommodation services provided by holiday camps; Services for reserving holiday accommodation; Providing on-line information relating to holiday accommodation reservations; Providing campground facilities; Tourist camp services [accommodation]; Holiday camp services [lodging]; Providing temporary lodging at holiday camps; Booking of campground accommodation; Arranging of accommodation for tourists; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar.

Section 3(6)

130. Section 3(6) of the Act states:

“(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

131. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin summarised the general principles applicable to bad faith at [240] as follows:

“(i) [...]”

(ii) The date for assessing whether an application to register [a] trade mark was made in bad faith is the date the application for registration was made (*Lindt*, para 35).

(iii) Bad faith in this context is an autonomous concept of EU law which must be given a uniform interpretation [...], and must be interpreted in the context of Directive 89/104 in the same manner as in the context of Regulation 40/94 ([*Malaysia Dairy Industries Pte Ltd v Ankenævnet for Patenter og Varemaerker* (C-320/12) EU:C:2013:435 (“*Malaysia Dairy*”), para 29; [*Sky plc v SkyKick UK Ltd* (C-371/18) EU:C:2020:45 (“*Sky CJEU*”), para 73).

(iv) While, in accordance with its usual meaning in everyday language, the concept of bad faith presupposes the presence of a dishonest state of mind or intention, the concept must also be understood in the context of trade mark law, which involves the use of marks in the course of trade. Further, it must have regard to the objectives of the [...] law of trade marks, namely the establishment and functioning of [...] a system of undistorted competition in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable consumers, without any possibility of confusion, to distinguish those goods or services from those which have a different origin (*Lindt*, para 45;

[*Koton Mağazacılık Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 (“*Koton*”), para 45].

(v) Consequently, the objection will be made out where the proprietor made the application for registration, not with the aim of engaging fairly in competition but either (a) with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties; or (b) with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, and in particular the essential function of indicating origin (*Koton*, para 46; *Sky CJEU*, para 75).

(vi) The intention of the applicant is a subjective matter, but it must be capable of being established objectively by the competent administrative or judicial authorities having regard to the objective circumstances of the case (*[Hasbro Inc v EUIPO, Kreativni Dogaaji d.o.o. (intervening)* (Case T-663/19) EU:T:2021:211 (“*Hasbro*”), paras 39 and 40; *Koton*, para 47).

(vii) The burden of proving that an application for a registered mark was made in bad faith lies on the party making the allegation. But where the circumstances of the case may lead to a rebuttal of the presumption of good faith, it is for the proprietor of the mark to explain and provide a plausible explanation of the objectives and commercial logic pursued by the application for registration (*Hasbro*, paras 42 and 43).

(viii) Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all of the factors relevant to the particular case (*Lindt*, para 37).

(ix) The applicant for a trade mark is not required to indicate or to know precisely when the application is filed or examined, the use that will be made of it (*Sky CJEU*, para 76; [*AS v Deutsches Patent-und Markenamt* (C-541/18) EU:C:2019:725], para 22).

(x) Nevertheless, the registration by an applicant of a mark without any intention to use it in relation to the goods and services covered by the registration may constitute bad faith where there is no rationale for the application in the light of the aims referred to in Regulation 40/94 and Directive 89/104 (*Sky CJEU*, para 77).

(xi) Such bad faith may, however, be established only where there are objective, relevant and consistent indicia tending to show that, when the application was filed, the applicant for registration had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark (*Sky CJEU*, para 77).

(xii) It follows that the bad faith of the applicant cannot be presumed on the basis of a mere finding that, at the time of filing the application, the applicant had no economic activity corresponding to the goods and services referred to in the application (*Sky CJEU*, para 78).

(xiii) When the absence of an intention to use the mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for registration, that constitutes making the application in bad faith only in so far as it relates to those goods or services (*Sky CJEU*, para 81).

(xiv) If, at the end of the day, the court concludes that, despite formal observance of the relevant rules and conditions for obtaining registration, the purpose of the rules has not been achieved, and that there was an intention to take advantage of the rules by creating artificially the conditions laid down for obtaining the registration, this may amount to an abuse sufficient to find that the application was made in bad faith (see, for example, *Hasbro*, para 72).

(xv) Directive 89/104 does not preclude a provision of national law under which an applicant for registration must state that the mark is being used in relation to

the goods or services in relation to which it is sought to register the mark, or that the applicant has a *bona fide* intention that it should be used, provided that infringement of such an obligation cannot constitute a ground for invalidity. It may, however, constitute evidence for the purposes of establishing possible bad faith on the part of the applicant when the application was filed (*Sky CJEU*, paras 86 and 87).”


132. According to *Alexander Trade Mark*, BL O/036/18, the key questions for determination in a claim of bad faith are:

- (a) What, in concrete terms, was the objective that the applicant has been accused of pursuing?
- (b) Was that an objective for the purposes of which the contested application could not be properly filed? and
- (c) Was it established that the contested application was filed in pursuit of that objective?

133. It is also necessary to ascertain what the applicant knew at the relevant date: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch). Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others*, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16). The relevant date in this decision is 28 June 2023.

What, in concrete terms, was the objective that the applicant has been accused of pursuing?

134. The opponent states that on 18 May 2023, a Hearing Officer issued a decision in related consolidated opposition numbers 433951 and 434340. In these consolidated proceedings, the opponent opposed the following marks applied for by Mr Derry Green, who is the sole Director of the applicant:

Application number	Depiction of Trade Mark	Applied for services
UK00003756077	The Secret Garden Glamping	Class 43
UK00003760642		Class 43

135. The consolidated opposition was successful, and the above applied-for marks were refused registration. The applicant filed an appeal with the Appointed Person, and a final decision on the appeal was published on 21 November 2023 under BL number O/1106/23. At paragraph 45 of this decision, the Appointed Person found that the applicant did not identify any error of principle or material error in the Hearing Officer’s decision and thus the appeal failed and was dismissed. I nevertheless bear in mind that the appeal decision was clearly published after the filing date of the applicant’s marks.

136. The opponent claims that the filing of the applicant’s marks in these proceedings is an attempt to have a “second bite at the cherry” as the applicant has sought to protect “virtually identical trade marks” and class 43 services which were covered by the previous marks. The opponent also claims that as the earlier decision found a likelihood of confusion, and given that the applicant is professionally represented, “its attempts to relitigate matters that have already been decided [...] suggests that the opposed application was filed in a manner that constitutes an abuse of the UK trade mark system”.

137. The opponent also adds that the “opposed application was filed without a bona fide intention to use the applicant’s sign”, because in paragraph 2(b) of the applicant’s Form TM8 in the previous opposition proceedings, they “stated that its reason for filing a trade mark application was to stop third party use of identical or similar trade marks on social media” and therefore “has been filed with the positive intention of obtaining

an exclusive right for the purposes other than those falling within the functions of a trade mark”.

Was that objective for the purposes of which the contested mark could not be properly filed?

138. I consider an abuse of the UK trade mark system could be the basis of a bad faith objection, if proven. Therefore, the key question is whether the applicant has satisfied the burden of proving the existence of the applicant’s intention which is inconsistent with honest practices.

Was it established that the contested mark was filed in pursuit of that objective?

139. The only evidence filed in regard to the opponent’s bad faith claim was **exhibit FJF14**. This exhibit contains an excerpt from the Companies House register which shows that Mr Derry Green is the sole Director of The Secret Garden Glamping North West Ltd” (that being the applicant). It is therefore clear that the applicant in the previous consolidated proceedings, and the current proceedings, is connected in some capacity. I also bear in mind that Mr Green’s marks which were successfully opposed, and the applicant’s applied for marks are as follows:

Mr Green’s unregistered marks	The applicant’s applied for marks
<p data-bbox="272 1458 716 1496">The Secret Garden Glamping</p> <p data-bbox="485 1541 504 1570">&</p> 	<p data-bbox="882 1556 1310 1601">The Secret Garden</p> <p data-bbox="834 1646 1358 1691">THE SECRET GARDEN</p> <p data-bbox="997 1749 1198 1783">(SERIES OF 2)</p>

140. It is clear that applicant's applied for marks are clearly different from those that were refused in the previous oppositions. Albeit they share the words "the secret garden", the previous marks either included the word "glamping" or was presented with a figurative glamping pod, wooden hot tub and trees.

141. I also bear in mind that when the applicant applied for the series of 2 marks, it had appealed the outcome of the previous decision. I therefore find it reasonable to infer that the applicant believed they had an appealable case and wished to challenge the Hearing Officers finding. It was nearly 5 months after filing for its new mark that the appeal decision was published upholding the Hearing Officer's decision.

142. It is open to a party that has been previously refused a trade mark application to subsequently apply for another trade mark. Admittedly, it might be possible to prevent an applicant from continuously filing applications to register the same trade mark when another party has successfully objected to the same mark in previous proceedings on the basis that it would be relitigating matters, which would indicate an abuse of process. However, in this instance, at the time of filing, the applicant may have reasonably believed that it was entitled to apply for the series of 2 marks on the basis that it was different to their previous marks which were at that point subject to being heard on appeal. I find that if the applicant had received the appeal decision and then pursued re-filing identical marks from the previous consolidated oppositions, then this would have more likely indicated an intention to relitigate matters and abuse the trade mark system.

143. In relation to the opponent's argument as to the wording used in the Form TM8 filed in the previous consolidated oppositions, I find that it has no bearing here on the basis that this wording was not used in the Form TM8 filed in these proceeding. It is, therefore, not relevant to my assessment.

144. I bear in mind that an allegation of bad faith is a serious one, and the burden of proof is on the opponent. I find that the opponent has failed to establish a prima facie case of bad faith. As such, the application based upon section 3(6) of the Act is dismissed.

CONCLUSION

145. The opposition is partially successful under sections 5(2)(b), 5(3) and 5(4)(a). The application is therefore refused in respect of the following services:

- Class 39 Arranging of holiday transport; Holiday travel reservation services; Booking of holiday travel; Providing tourist travel information; Providing tourist travel information, via the Internet; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.
- Class 41 Holiday camp services; Holiday camp services [entertainment]; Holiday centre entertainment services; Recreational camp services; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.
- Class 43 Holiday accommodation services; Rental of holiday accommodation; Hotels, hostels and boarding houses, holiday and tourist accommodation; Holiday lodgings; Arranging holiday accommodation; Rental of holiday homes; Holiday camp services [lodging]; Holiday planning services [accommodation]; Provision of holiday accommodation; Letting of holiday accommodation; Arranging of holiday accommodation; Rental of holiday cabins; Booking agency services for holiday accommodation; Providing temporary lodging at holiday camps; Arranging of accommodation for holiday makers; Temporary accommodation services provided by holiday camps; Services for reserving holiday accommodation; Providing on-line information relating to holiday accommodation reservations; Providing campground facilities; Tourist camp services [accommodation]; Holiday camp services

[lodging]; Providing temporary lodging at holiday camps; Booking of campground accommodation; Arranging of accommodation for tourists; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar.

146. The application can proceed to registration in respect of the following services for which the opposition has been unsuccessful:

Class 41 Education services relating to business franchise management; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.

147. The opposition was not directed against the following services for which the application can proceed to registration:

Class 35 Assistance in franchised commercial business management; Administration of the business affairs of franchises; Advisory services relating to publicity for franchisees; Business assistance relating to the establishment of franchises; Advisory services relating to the operation of franchises; Advice in the running of establishments as franchises; Providing assistance in the management of franchised businesses; Business assistance relating to starting and running a franchise; Assistance in business management within the framework of a franchise contract; Providing assistance in the field of business management within the framework of a franchise contract; Providing marketing consulting in the field of social media; Advertising and marketing services provided by means of social media; Marketing; Marketing information; Marketing assistance; Promotional marketing; Online marketing; Business marketing consultancy; All the aforementioned in

relation to holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

Class 37 Construction of holiday accommodation; Constructing [erecting and glazing] garden buildings.

Class 39 Booking of holiday tours; Arranging tours; Arranging excursions for tourists; Services for the arranging of excursions for tourists; Providing information to tourists relating to excursions and sightseeing; All the aforementioned in relation to holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

Class 42 Construction design; Interior design; Interior decoration consultation; Commercial interior design; Space planning [design] of interiors; Consultancy services relating to interior design; Interior and exterior design services; All the aforementioned in relation to holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

Class 44 Spa services; Provision of spa facilities; Health spa services for health and wellness of the body and spirit; Design of gardens and landscapes; Advisory services relating to the design of gardens.

COSTS

148. In these proceedings, the opponent has enjoyed a greater degree of success and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the opponent the sum of **£850** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Filing a Notice of opposition and Considering the applicant's counterstatement	£150
Preparing and filing evidence	£500
Official Fee	£200
Total	£850

149. I therefore order The Secret Garden Glamping North West Ltd. to pay Backwoodsman Limited the sum of £850. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 17th day of March 2026

L FAYTER

For the Registrar

ANNEX 1

The applicant's applied for services

Class 35

Assistance in franchised commercial business management; Administration of the business affairs of franchises; Advisory services relating to publicity for franchisees; Business assistance relating to the establishment of franchises; Advisory services relating to the operation of franchises; Advice in the running of establishments as franchises; Providing assistance in the management of franchised businesses; Business assistance relating to starting and running a franchise; Assistance in business management within the framework of a franchise contract; Providing assistance in the field of business management within the framework of a franchise contract; Providing marketing consulting in the field of social media; Advertising and marketing services provided by means of social media; Marketing; Marketing information; Marketing assistance; Promotional marketing; Online marketing; Business marketing consultancy; All the aforementioned in relation to holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

Class 37

Construction of holiday accommodation; Constructing [erecting and glazing] garden buildings.

Class 39

Arranging of holiday transport; Holiday travel reservation services; Booking of holiday travel and tours; Arranging tours; Providing tourist travel information; Arranging excursions for tourists; Providing tourist travel information, via the Internet; Services for the arranging of excursions for tourists; Providing information to tourists relating to excursions and sightseeing; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

Class 41

Education services relating to business franchise management; Holiday camp services; Holiday camp services [entertainment]; Holiday centre entertainment services; Recreational camp services; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar and excluding any other terms that fall under Class 41.

Class 42

Construction design; Interior design; Interior decoration consultation; Commercial interior design; Space planning [design] of interiors; Consultancy services relating to interior design; Interior and exterior design services; All the aforementioned in relation to holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees or similar.

Class 43

Holiday accommodation services; Rental of holiday accommodation; Hotels, hostels and boarding houses, holiday and tourist accommodation; Holiday lodgings; Arranging holiday accommodation; Rental of holiday homes; Holiday camp services [lodging]; Holiday planning services [accommodation]; Provision of holiday accommodation; Letting of holiday accommodation; Arranging of holiday accommodation; Rental of holiday cabins; Booking agency services for holiday accommodation; Providing temporary lodging at holiday camps; Arranging of accommodation for holiday makers; Temporary accommodation services provided by holiday camps; Services for reserving holiday accommodation; Providing on-line information relating to holiday accommodation reservations; Providing campground facilities; Tourist camp services [accommodation]; Holiday camp services [lodging]; Providing temporary lodging at holiday camps; Booking of campground accommodation; Arranging of accommodation for tourists; All the aforementioned in relation to the provision of year-round holiday-resort services and temporary accommodation in permanent holiday structures [Cabins; Glamping Pods] excluding non-permanent structures such as tents, yurts, tepees, campervans or similar.

Class 44

Spa services; Provision of spa facilities; Health spa services for health and wellness of the body and spirit; Design of gardens and landscapes; Advisory services relating to the design of gardens.

ANNEX 2

The First Earlier Marks and Second Earlier Comparable Marks specification

Class 39

Travel arrangement; information relating to all the foregoing provided on-line from a computer database or the Internet.

Class 41

Entertainment; cultural activities; concert and musical performances; provision of recreational and entertainment facilities; organising and staging musical events, festivals and live band performances; ticket agency services relating to all of the foregoing provided on-line, by telephone, mobile telephone, and through ticket outlets; information services relating to the foregoing.

Class 43

Reservation services for temporary accommodation; information relating to all the foregoing via the Internet; consultancy, advisory and information services relating to the foregoing.

ANNEX 3

The First Earlier Marks and Second Earlier Marks services, which the opponent claims to have a reputation for

Class 41

Entertainment; cultural activities; concert and musical performances; provision of recreational and entertainment facilities; organising and staging musical events, festivals and live band performances.

Class 43

Reservation services for temporary accommodation, namely, reservation services for campground accommodation; information relating to all the foregoing provided on-line from a computer database or the Internet.