

O/0805/26

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATIONS NOS. 3887532 AND 3888877
BY AARON LAWEE, ROBERT LAWEE AND AARON ARIK LAWEE
TO REGISTER:

i. NOX HOTELS	ii. Nox Hotels
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(SERIES OF TWO)

AND

	
	

(SERIES OF FOUR)

AS TRADE MARKS IN CLASSES 35 AND 43

AND

IN THE MATTER OF THE OPPOSITIONS THERETO
UNDER NOS. 441697 AND 441698
BY SUNFLOWER MANAGEMENT GMBH & CO. KG

BACKGROUND AND PLEADINGS

1. On 10 and 14 March 2023, Aaron Lawee, Robert Lawee and Aaron Arik Lawee (“the applicants”) jointly applied to register the two series of trade marks nos. 3887532 and 3888877 shown on the cover page of this decision, in the UK. The applications were accepted and published in the Trade Marks Journal on 31 March 2023 and both seek to be registered in relation to the following services:

Class 35: *Business management of hotels; Administrative hotel management.*

Class 43: *Hotel services; Hotel accommodation services; Provision of hotel accommodation.*

2. Both applications were opposed in their entirety by Sunflower Management GmbH & Co. KG (“the opponent”) based upon Sections 5(2)(b) of the Trade Marks Act 1994 (“the Act”) with the opponent relying in both oppositions upon the following trade mark:

UK00801336310¹



Filing date: 05 January 2017

Priority date: 05 July 2016

Registration date: 11 September 2018

Class 43: *Temporary accommodation.*

¹ This is a comparable mark based on earlier IR designating the EU. On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing IRs designating the EU. These comparable marks enjoy the same filing and registration dates as their European counterparts.

3. By virtue of its earlier priority date, the trade mark relied upon by the opponent is an “earlier mark” in accordance with Section 6 of the Act. As the opponent’s mark had not been registered for more than five years at the filing dates of the contested marks, it is not subject to the use conditions under Section 6A of the Act.

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

5. The applicants defended both oppositions denying the claims made. In particular, the applicants denied that: (a) the word ‘HOTELS’ in the applications is wholly non-distinctive; (b) the respective marks are similar; (c) the applicants’ class 35 services are identical or similar; (d) the opponent’s temporary accommodation is identical to the applicants’ hotel services; (e) insofar as there is any similarity between the marks and the services, it would lead to a likelihood of confusion or association. In addition, the applicants say that they will further rely on the fact that the opponent has invariably/frequently used the earlier mark with the mark ‘LEONARDO HOTEL’, providing a further point of distinction. However, the likelihood of confusion must be assessed based on the marks as they are registered and applied for, so any matter which is extraneous to the marks at issue (such as the existence of another mark in conjunction with which the earlier mark has been used) must be disregarded. Hence, I shall say no more about this point.

6. On 3 April 2024, the IPO wrote to the opponent giving preliminary indications that both oppositions should be refused, because: *“...irrespective of any identity or similarity between the competing goods and services, there is insufficient similarity between the marks to give rise to a likelihood of confusion”*. As the applicants entirely correctly pointed out, these preliminary indications are not binding upon me, hence I will say no more about them.

7. The proceedings were consolidated on 13 June 2024 under Rule 62(1)(g) of the Trade Marks Rules 2008.

8. Only the applicants filed evidence during these proceedings.

9. The opponent is represented by Ashfords LLP. The applicants are represented by B M Nyman & Co Solicitors. A hearing took place before me, by video conference, on 8 July 2026. At the hearing, Ms Becky Knott, of Counsel, Hogarth Chambers, appeared for the opponent, and Mr Samuel Carter, of Counsel, Hogarth Chambers, appeared for the applicants.

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 applicants' evidence came in the form of a witness statement from Aaron Lawee dated 10 October 2024 (with exhibits AL1-AL4). Mr Lawee is one of three applicants who jointly applied for the contested mark. His witness statement is a mix of evidence and legal submissions and addresses the following: (i) the applicants' business (ii) the differences between the respective marks (iii) the nature of the services covered under the respective marks (iv) the characteristics of the average consumer and (v) the opponent's use.

12. I do not intend to summarise the evidence in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

DECISION

Section 5(2)(b)

13. Section 5(2)(b) of the Act 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 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 Pairs 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 goods and services

15. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment 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.”

16. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

17. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the General Court (“GC”) stated that “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 that the responsibility for those goods lies with the same undertaking.”

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

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.”

19. Whilst on the other hand:

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

20. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the 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 fur Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

21. The competing goods and services are as follows:

The applicant's services	The opponent's services
Class 35: <i>Business management of hotels; Administrative hotel management.</i>	Class 43: <i>Temporary accommodation.</i>
Class 43: <i>Hotel services; Hotel accommodation services; Provision of hotel accommodation.</i>	

22. In his skeleton argument, Mr Carter accepted that the opponent's *Temporary accommodation* is identical to the applicants' *Hotel accommodation services; Provision of hotel accommodation*. These services are identical.

23. As to the applicants' *hotel services*, Mr Carter argued that (a) hotel services can include such things as spa, wellness, swimming pool, fitness or gym services; concierge services; restaurant and bar services (including room service); banquet/event/conference services; laundry services, none of which would be covered under the opponent's temporary accommodation and (b) whilst temporary accommodation includes such accommodation in hotels (my emphasis), it also includes a wide variety of other services such as hostels, BandBs, Air BandBs, holiday lets, campsites, glamping, holiday parks, houseboats, etc. Mr Carter further argues that "*whilst it is accepted there may be a degree of overlap in nature and users (insofar as the hotel services comprise the provision of temporary hotel accommodation), taking the penumbra of services covered under each term as a whole there are also significant points of difference, including as regards the nature, uses and users of the services, and whether they might be in competition or complementary (e.g. hotel spa or restaurant services are neither in competition with nor complementary to offering various types of temporary accommodation).*" Overall, Mr Carter stated that the degree of similarity is low, or at most medium.

24. Accordingly, Mr Carter conceded that temporary accommodation includes accommodation in hotels; however, he also argued that hotel services consist not only in the provision of accommodation through a hotel but include other characteristic hotel-service offerings. I am not persuaded by this line of argument. The core of hotel services is the provision of temporary accommodation for travellers, tourists or business guests; the provision of other services which are ancillary to hotel accommodation, including all activities and offerings associated with the operation of an hotel (such as a spa or a restaurant) does not take away from this fact. In addition, the EUIPO's TM Class taxonomy tool places 'Hotel services' under Class 43: 'temporary accommodation – hotels, hostels and boarding houses, holiday and tourist accommodation'. Lastly, the explanatory note to the Nice classification tool suggests that 'hotel services' are a sub-category of 'temporary accommodation':

'Explanatory Note

Class 43 includes mainly services provided in relation to the preparation of food and drink for consumption, as well as services for providing temporary accommodation.'

The above demonstrate that 'hotel services' is a subcategory within the broader concept of temporary accommodation. Accordingly, I consider that the opponent's temporary accommodation is sufficiently broad to include the applicant's hotel services, and I conclude that these services are identical on the principle outlined in *Meric*.

25. Turning to the class 35 services, the question is whether *Business management of hotels; Administrative hotel management* are similar to temporary accommodation, the latter including hotel accommodation. In his skeleton argument, Ms Knott, for the opponent, argued that the applied-for class 35 services are highly specific, directed to the hotel industry and are comprised of activities which will assist in the operation and management of a provider of hotel services. She stated: *"These services are therefore essential to the supply of the opponent's services and, in some circumstances, may be provided by the same undertaking, through the same trade channels. The services are also complementary, which is an autonomous criterion capable of being the sole basis for the existence of similarity. The services share a common purpose, being the*

operation and provision of hotel accommodation. The average consumer is liable to believe that the responsibility for the services lies with the same undertakings. In the premises, the Applicants' Class 35 services and the Opponent's Services are similar to a medium degree."

26. Mr Carter, for the applicants, argued that these are hotel management services, targeted at hotel owners or operators seeking managers for their hotel business which are fundamentally different from the opponent's temporary accommodation because (a) the nature of the services is different (supplying management assistance or personnel vs supplying temporary accommodation); (b) the uses and users are different; (c) the trade channels are different; (d) the services are not in competition; (e) the services are not even complementary, in that not all temporary accommodation providers require or offer hotel business or administration management. In support of this argument, Mr Carter relies on the evidence of Mr Lawee that the applicants operate and manage hotels within the Nox Hotels group on behalf of the companies that own the respective hotels. This, Mr Lawee says, involves, amongst other things, operations management (front desk/housekeeping), financial management (budgets and forecasts, revenue management, payroll), marketing and sales, guest experience and customer service, innovation, HR (training and recruiting), property management and maintenance, compliance (Health and Safety).

27. Accordingly, it is common ground that the contested *Business management of hotels; Administrative hotel management* are business to business services. Most of the services included in the provision of these services (i.e. financial management, marketing and sales, HR, property management and maintenance, Health and Safety) do not involve dealing with the users of hotel services. Since the customers of the opponent's temporary accommodation are travellers, tourists and businesses seeking hotel services (temporary accommodation including the provision of hotel services), whereas the users of the applicants' *Business management of hotels; Administrative hotel management* are businesses who provide hotel services, the customers of the respective services are not the same. This is crucial because in Case T-237/21, *Fidelity National Information Services v EUIPO*, the GC reiterated the principle that complementarity is not possible where the users are different:

“47. In that case, after stating that the Board of Appeal had been fully entitled to find that the goods and services covered by the marks at issue were intended for different publics, the Court noted that the complementary nature of the goods and services implied that they could be used together, which presupposed that they were intended for the same public. By definition, goods intended for different publics cannot be complementary (see, to that effect, judgments of 27 September 2012, Pucci International v OHIM – El Corte Inglés (Emidio Tucci), T-357/09, not published, EU:T:2012:499, paragraph 50, and of 17 February 2017, Batmore Capital v EUIPO – Univers Poche (POCKETBOOK), T-596/15, not published, EU:T:2017:103, paragraph 43). The Court inferred from this that there could be no complementary connection between, on the one hand, the goods or services which were necessary for the running of a commercial undertaking and, on the other, the goods or services produced or supplied by that undertaking. It found that, in the case in question, the two categories of goods and services referred to in paragraph 46 above were not used together, since those in the first category were used by the relevant undertaking itself, whereas those in the second were used by the customers of that undertaking (see, to that effect, judgment of 22 January 2009, easyHotel, T-316/07, EU:T:2009:14, paragraph 58).

28. The same principle applies here, the applicants' business services being necessary for the running of the opponent's temporary accommodation business. It is, therefore, obvious that, even where the applicants' business services involve dealing with the end-users of hotel services (i.e. front desk), they are not targeted at the users of hotel services/temporary accommodation but are sought by businesses which run hotels. The services have different users, uses, nature, purpose, method of use, are neither complementary nor in competition and do not share trade channels. Lastly, the opponent has in no way substantiated its reasoning with evidence designed to demonstrate that most hotels provide business management of hotels services and/or administrative hotel management to other hotels services. These services are dissimilar.

29. Some similarity of goods and services is essential for a finding of a likelihood of confusion.² Since there is no similarity between the opponent's services and the applied-for services in class 35 there is no likelihood of confusion to be considered.

30. Hence, the opposition fails in relation to the applied-for services in class 35.

Average consumer and the nature of the purchasing process

31. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

32. In *Iconix Luxembourg Holdings* (cited above), 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;

(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;

² *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA,

(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.

33. The average consumer of the parties' services in class 43 is a member of the general public or a business user seeking hotel services.

34. Both parties agreed that the marks will be encountered primarily visually, but aural considerations may also be significant; taking into account the possibility of oral recommendations, or telephone bookings. Accordingly, I will continue to that effect.

35. As to the level of attention paid by the consumers when selecting the services, Ms Knott, for the opponent, submitted that given that accommodation services could equally cover high end hotels to hostels, the average consumer will pay between an average to medium level of attention. As I understand 'average' to mean 'medium', I take the submission to mean 'medium'.

36. Mr Carter, for the applicants, submitted that consumers are very choosy when they select a hotel; and the degree of attention will be high, decreasing the likelihood of confusion. In this connection, Mr Carter relied on Mr Lawee's evidence that bookings through online travel agents have gone down from 39%, in 2022, to 34%, in 2023; while direct bookings through hotels' own websites increased from 20% to 29% over the same period. Mr Lawee also states that direct bookings through hotels' own websites *"are a clear indication that consumers are able to distinguish between one brand of hotel and another"*. He also states that the main factors that drive direct

bookings include: the quality of the accommodation; the convenience of the locations; the value for money relative to the quality of accommodation on offer and the convenience of the locations; and previous positive experience of staying with a particular hotel group. Whilst I accept that all these factors will be considered by the average consumer when selecting the services, I do not think that the increasing rate of direct bookings necessarily results in the average consumer paying a high degree of attention. I cannot really see why the fact that the user of hotel services might encounter the mark on the provider's own website, which is more origin-specific than a travel agent, would result in a high (or higher) degree of attention.

37. Since the services at issue include services provided by less expensive hotels, but bearing in mind the factors identified by Mr Lawee, I consider that the average consumer will pay an above medium (but not high) degree of attention.

Comparison of marks

38. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union ("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."

39. 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. The respective marks are shown below:

The applied-for marks	The earlier mark
NOX HOTELS Nox Hotels (SERIES OF TWO)	
 (SERIES OF FOUR)	

Overall impression

The opponent's earlier mark

40. The opponent's earlier mark consists of the three capital letters 'N', 'Y' and 'X' presented in white against a black square background. Whilst the background and the

colour have a visual impact, it is minimal, and the overall impression of the mark resides in the three letters 'N Y X'.

The applicants' first series of marks

41. The applicants' first series of marks consists of the two words 'NOX HOTELS' presented in capital letters and title case, respectively. As Ms Knott correctly pointed out, given that the marks in the series are word-only marks, nothing turns on the capitalisation given that a word-only mark protects all forms of the word, regardless of capitalisation and/or font.

42. As regards the overall impression, Ms Knott stated that the dominant and distinctive element of the applicants' marks is the word "NOX" because (a) it is well-established that consumers tend to pay the greatest attention to the first part of a mark; and (b) the secondary element of the mark, being "HOTELS", will have less impact on the average consumer due to its descriptive and non-distinctive nature for the applicants' services which are hotel services. Conversely, Mr Carter argued that the overall impression of the first series resides in the composite phrase 'NOX HOTELS'. Nevertheless, he also conceded that the word 'NOX' will carry greater distinctive weight and that the word 'HOTELS' is to a degree descriptive of the applicants' services. However, Mr Carter argued that the word 'HOTELS' is not negligible, and will not be wholly disregarded.

43. Accordingly, Mr Carter agreed that 'NOX' is more distinctive, and that 'HOTELS' is descriptive; then again, he argues that 'HOTELS' is not wholly descriptive. I disagree. The word 'HOTELS' is self-evidently descriptive in relation to the applied-for services in class 43 which are *Hotel services; Hotel accommodation services; Provision of hotel accommodation*. These services go to the core of hotel services, i.e. the provision of temporary accommodation for travellers, tourists or business guests. It follows that, whilst the word 'HOTELS' is not invisible (and only to this extent it is not wholly negligible), it will not be given any trade mark significance; instead, the average consumer will identify the word 'NOX' as the only element of the mark denoting the origin of the services.

The applicants' second series of marks

44. Similar considerations apply to the applicants' second series of marks which consists of the two words 'NOX HOTELS' presented with a degree of stylisation, in dark blue and gold, with a horizontal line (in the first two marks of the series) and a vertical line (in the last two marks of the series) separating the two elements. Furthermore, in the two marks, where the word 'NOX' is presented in a larger size, it is even more dominant.

Visual similarity

45. Visually, the marks coincide in the first letter 'N' and the last letter 'X' of the sequences 'NOX' (in the applications) and 'NYX' (in the earlier mark) which are the dominant and distinctive element of the competing marks. However, the middle letter 'O' and 'Y' are different. Mr Knott argued that the marks are visually highly similar. Conversely, Mr Carter argued that the marks are dissimilar, or at most very lowly similar.

46. Considering that one out of three letters in the sequences 'NOX' and 'NYX' is different, I find that the change of the middle letter does make a striking impression in this case because: (a) it appears within short three letter sequences; (b) this is not a case where the respective letters resemble each other or have a similar visual appearance; (c) traditionally, the letters 'A', 'E', 'I', 'O' and 'U' are vowels and the rest of the letters are consonants; whilst the letter 'Y' might function as a vowel when it appears in the middle or at the end of a word or syllable, especially if there is no other vowel present, 'NYX' is not an ordinary English word (such as gym) – hence, the letter 'Y' in 'NYX' might not work as a vowel; (d) as Mr Lawee noted in his evidence, the spacing between the letters 'N', 'Y' and 'X' is larger than in ordinary words - this detail will assist the perception of the sequence 'N Y X' as three separate letters and (e) following from the previous two points, whilst the verbal element 'NOX' is likely to be perceived as a word (invented), the verbal element 'NYX' is likely to be perceived either as a word (invented) or as an acronym, abbreviation or initialism – this was confirmed at the hearing by Mr Carter's discussion about the pronunciation of this element either as the word 'nix', or as an acronym articulated as 3 distinct letters.

Overall, I consider that the verbal elements 'NOX' and 'NYX' are visually similar to a low to medium degree.

47. In addition, there are other differences in the marks, namely the presence of the word 'HOTELS' in both applications, the background in the earlier mark, and the stylisation and colour in the applicants' second series of marks. However, since these differences relate to elements which are either ornamental or descriptive, they will have less weight.

48. Accordingly, I consider that the earlier mark and the first series of marks are visually similar to a low degree. Further, I consider that the earlier mark and the second series of marks are visually similar to a very low degree.

Aural similarity

49. Aurally, Ms Knott argued that the marks will be pronounced closely and that it cannot be ruled out that some consumers may drop the 'HOTELS' element of the applications, given its descriptive and non-distinctive nature, and simply pronounce the word 'NOX'.

50. Conversely, Mr Carter stated that the marks are very different and argued that 'NOX HOTELS' would be articulated as 2 words and 3 syllables, whereas 'NYX' might be pronounced as the word 'NIX', or as 3 distinct letters. In the first instance, Mr Carter said the comparison is 1 versus 3 syllables, none of them coinciding; in the second instance, the comparison is 3 versus 3 syllables, none of them coinciding.

51. I agree with Mr Carter that the earlier mark might be pronounced either as the word 'NIX' or as three separate letters 'ENN', 'UAI', 'ECCS'. In the first scenario, the element 'NOX' and 'NIX' are aurally similar to a medium degree; regardless of whether the word 'HOTELS' will be pronounced or not, it is not going to make any distinctive difference, being 'HOTELS' descriptive for the services. In the second scenario, the marks are aurally different.

Conceptual similarity

52. Conceptually, Ms Knott argued that none of the marks at issue convey a clear conceptual meaning to the average consumer. Conversely, Mr Carter argued that the marks are conceptually different. In this connection, Mr Carter relied on Mr Lawee's evidence about the definition of 'NOX' as 'night' (Oxford English dictionary)³ and stated that although 'NOX' is the (Latin) word for night, it is widely used and understood by English speakers. Mr Carter also relied on Mr Lawee's evidence that (a) insofar as 'NYX' is perceived as a single word and articulated as 'nix', it is suggestive of the English word 'nix', which means "*to cancel, reject, forbid, refuse (a thing or person)*" (Oxford English dictionary);⁴ and (b) insofar as 'NYX' is perceived as an acronym 'N Y X', it is not immediately clear what it would be intended to stand for, but it may be perceived as suggestive of the well-known NYC acronym for New York City.

53. Although Mr Lawee has provided dictionary definitions of the words 'nox' and 'nix' this only establishes the meaning of the words. But I do not think that it is right to conclude that the average consumer of hotel services in the UK would be aware of this. No doubt, some people are aware these meanings; however, that is not sufficient to impute such knowledge to the average consumer of hotel services. This is because 'nox' and 'nix' are very unusual words; for example, the definition of 'nox' says that the word is "chiefly literary ad poetic". As Ms Knott correctly pointed out at the hearing, at the bottom of the page showing the definition of 'nox' there is a statement which says "Cite historical thesaurus" and the examples given illustrate use of the word from 1567 to 1926 – this would suggest an historical use and I am not convinced that the meaning of 'nox' is capable of immediate grasp by the average consumer of hotel services in the UK. As regards the word 'NYX', I reject the submission that it will evoke the word 'nix' simply because there is no evidence that, contrary to my own experience, 'nix' is a well-known word; and, second, even if the average consumer was aware of such meaning as "*to cancel, reject, forbid, refuse (a thing or person)*", it is not relevant to the hotel services at issue and would not be brought to mind in that context by the different word 'NYX'. Likewise, 'NYX' is not the same as 'NYC' and would not evoke the city of New York.

³ AL1

⁴ AL2

54. Accordingly, I agree with the opponent that none of the marks will convey any concept, and the conceptual position is neutral.

Distinctive character of the earlier mark

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

56. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or 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 made of it.

57. The opponent has filed no evidence of use, hence I have only the inherent distinctiveness to consider. The opponent states that the earlier mark will be perceived as an invented word with no conceptual meaning and has a medium degree of inherent distinctive character.

58. As I have already observed, 'NYX' is likely to be perceived either as an invented word or as an acronym. Whilst words which do not belong to the English language and are perceived as invented are normally considered to enjoy a high degree of distinctiveness, 'NYX' is a short sequence being made of only three letters – this, in turn, means that its brevity somehow affects its distinctiveness. In this connection, in *Kunze Folien GmbH v Kartell UK Limited* (BL-O-085-14) Mr Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, referred with approval to a decision of the fourth Board of Appeal of OHIM (now the EUIPO), in which it was noted that:

‘...letters or combinations of two or three letters are inherently weak, given the limited number of letters in the alphabet, the great number of meanings that acronyms and abbreviations may have and the fact that consumers frequently encounter abbreviations and letter combinations of all kinds in everyday life and business as generic abbreviations but not as marks’.

Overall, I consider this mark to be distinctive to a medium degree.

Likelihood of confusion

59. 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, including that a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the respective services and vice versa. I must keep in mind the distinctive character of the earlier mark, the average consumer for the services and the nature of the purchasing process. I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

60. Confusion can be direct or indirect. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, Mr Iain Purvis Q.C.,(as he then was) as the Appointed Person, explained that:

“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’.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (‘26 RED TESCO’ would no doubt be such a case).
- (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as ‘LITE’, ‘EXPRESS’, ‘WORLDWIDE’, ‘MINI’ etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)."

61. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ approved Mr Purvis's formulation but added:

"13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16] 'a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say that, if there is no likelihood of direct confusion, 'one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion'. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion."

62. It is not sufficient that a mark merely calls to mind another mark: *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17. This is mere association not indirect confusion.

63. Earlier in this decision I found that:

- The earlier mark and the first series of applied-for marks are visually similar to a low degree, aurally similar to a medium degree (if 'NYX' is pronounced as the word 'NIX') or dissimilar (if 'NYX' is pronounced as three separate letters) and conceptually neutral.
- The earlier mark and the second series of applied-for marks are visually similar to a very low degree, aurally similar to a medium degree (if 'NYX' is pronounced as the word 'NIX') or dissimilar (if 'NYX' is pronounced as three separate letters) and conceptually neutral.
- The parties' services are similar to identical.

- The average consumer is a member of the general public, with a smaller number of business consumers, who will select the services mainly visually, with an above medium degree of attention.
- The earlier mark is inherently distinctive to a medium degree.

64. The opponent's case is that there is a likelihood of direct or indirect confusion. In her skeleton argument, Ms Knott stated that the average consumer "*is unlikely to recall the Mark and the Signs accurately and is likely to overlook the ancillary, decorative elements of the Mark and the Figurative Sign, and the second element of the Signs (HOTELS) due to it being descriptive and non-distinctive*" and that "*given the closeness of NOX / NYX, they are likely to mistake the Mark for the Signs or vice versa*". Conversely, Mr Carter maintained that the marks are not sufficiently similar to give rise to confusion, either direct or indirect. I think the crucial point here is whether the average consumer will misremember or mistake the distinctive verbal elements of the marks, 'NOX' and 'NYX'.⁵ The other differences between the marks are either ornamental or descriptive and the only relevance they might have is in creating a different visual impression which will further assist the average consumer in avoiding misremembering or mistaking 'NOX' and 'NYX'. In my view, that is the case here.

65. Applying the interdependence principle and starting with the position that a significant proportion of the consumers will perceive 'NYX' as an acronym as opposed to a pronounceable word – such perception being assisted by the spacing between the letters which is slightly larger than it appears in ordinary words – I have no hesitation in concluding that the marks are sufficiently different that even when identical services are involved, the average consumer paying an above medium degree of attention, is unlikely to mistake or misremember 'N Y X' for 'NOX' or vice versa. Even considering that the average consumer is not in a position to compare the marks side by side, the different structure of the marks (i.e. short word versus acronym) and the change in the middle letter make a striking impression, and I think

⁵ In this connection the opponent did not argue indirect confusion on the basis that 'NOX' could be perceived as a variant mark deriving from 'NYX'.

such impression will be sufficient to avoid confusion through imperfect recollection of the earlier mark.⁶

66. Moving to the alternative position that a significant proportion of the consumers will perceive 'NYX' as a pronounceable word, I reach the same conclusion. Whilst I accept that the different letters are placed in the middle of the words 'NOX' and 'NYX', the letter 'O' is sufficiently different from the letter 'Y' that the average consumer is unlikely to confuse them, being also aware that the letter 'Y' is not a traditional vowel. Taking into account the visual and aural difference between the letters 'O' and 'Y' and the rule of thumb that the change of a letter makes a striking impression when it appears with short words, I consider that it is unlikely that the consumer will confuse the mark, the distinction also being assisted by the presentation of the letters within the earlier mark which would be wrong to assume fall within notional use of the first series of marks.

67. There is no likelihood of confusion. The oppositions fail in their entirety. The series of marks nos. 3887532 and 3888877 will proceed to registration

OUTCOME

68. The applicants have been successful under Section 5(2)(b) and, subject to any appeal of my decision, the applications will proceed to registration.

COSTS

69. The applicants have been successful and are therefore entitled to a contribution towards their costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the applicants the sum of £1,900, calculated as follows:

⁶ See Case T-36/09, *dm-drogerie markt GmbH & Co. KG v OHIM* in which it was observed at paragraph [42] that 'in the context of word signs which are relatively short, even a difference consisting of a single consonant will preclude a finding that there is a high degree of visual similarity between the two signs'.

Preparing counterstatements and considering the notices of opposition:	£600 (£300x2)
Filing evidence:	£500
Preparing for and attending a hearing:	£800
Total:	£1,900

70. I therefore order Sunflower Management GmbH & Co. KG to pay jointly to AARON LAWEE, ROBERT LAWEE AND AARON ARIK LAWEE the sum of £1,900. 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 4th day of September 2026

TERESA PINTO
For the Registrar