

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3271967 IN THE NAME OF HAMID SHEIKH**

**AND IN THE MATTER OF OPPOSITION NO. 412242 THERETO IN THE NAME OF JUST AIRPORTS CHAUFFEUR SERVICES LIMITED**

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**DECISION**

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**Introduction**

1. This is an appeal against the decision of Ms Emily Venables, acting on behalf of the Registrar, dated 17 July 2019 (O-413-19). In her decision the Hearing Officer upheld the Opposition and ordered Hamid Sheikh (“*the Applicant*”) to pay Just Airports Chauffeur Services Limited (“*the Opponent*”) £1,100 as a contribution towards its costs.
2. On 21 November 2017 the Applicant filed a trade mark application (“*the Application*”) for the following mark:



3. The Application was accepted and published for opposition purposes on 19 January 2018 in respect of the following services in Class 39 ‘*Transportation of passengers and/or goods by car, bus, bike or plane*’.

4. On 29 April 2018 a Notice of Opposition was filed on behalf of the Opponent based upon section 5(2)(b) of the Trade Marks Act 1994 (“*the 1994 Act*”). For the purposes of section 5(2)(b) the Opponent relied upon Trade Mark Registration No. 2248049 in respect of the following mark (“*the UKTM*”):



5. The UKTM was filed on 9 October 2000 and registered in 16 March 2001 in respect of the following services in Class 39 ‘*Transportation of passengers and/or goods by car, bus, bike or plane*’. In the Notice of Opposition, the Opponent made a statement of use corresponding to the services upon which it relied.
6. On 17 June 2018 the Applicant filed a Counterstatement. In that Counterstatement the Applicant put the Opponent to proof of use of the UKTM. The Opponent denied that there was any likelihood of confusion on the basis that the marks in issue were not similar.
7. Both parties filed evidence. Neither party requested a hearing. Written submissions were filed on behalf of the Opponent by its representatives, National Business Register LLP. The Applicant represented himself.

### **The Hearing Officer’s Decision**

8. The Hearing Officer began her Decision by considering the question of proof of use. Having identified the relevant case law and analysed the evidence that was before her for the purposes of considering ‘variant use’ the Hearing Officer turned to consider whether there was ‘sufficient use’ proved by the Opponent such that the UKTM could be relied upon for the purposes of the objection under section 5(2)(b) of the 1994 Act. The Hearing Officer set out her findings as follows (footnotes excluded):

#### **Sufficient use**

30. I will now consider whether the evidence filed is sufficient to constitute genuine use of the mark.

31. As I have found in relation to the applicant’s evidence, ownership of an operator’s licence is not equivalent to use of a trade mark, neither is ownership of a domain name. As such,

exhibits NSM1 and NSM4 do not assist the opponent in proving use of its mark.

32. The invoices in relation to PC software at exhibit NSM2 are internal documents that would not be available to the public and, as such, do not show use by way of real commercial exploitation of the mark on the market for the relevant services.

33. The opponent's evidence includes 10 invoices which include use of the earlier mark (albeit in a satisfactory variant manner) all within the relevant period. Whilst the sales values have been redacted, they are a clear indication of genuine use of the mark.

34. The Google results at exhibit NSM4a, displaying the opponent's website, [www.justairports.com](http://www.justairports.com), as the first natural listing, would not by itself prove use of the mark. However, it is supported by a printout of the opponent's website (exhibit NSM4b), clearly displaying the mark in relation to the relevant services. The correct approach to assessing evidence is to view the picture as a whole, including whether individual exhibits corroborate each other, which these exhibits do. Although exhibit NSM4b is dated outside the relevant period (21 September 2018), I find it reasonable to conclude, on the balance of probabilities, that the website was up and running and displaying the mark during the relevant period, given the fairly short period of time between the end of the relevant period and the date on which the website was accessed.



35. Since the invoices and order form at exhibits NSM4c and NSM5: (i) do not show the opponent's trade mark; (ii) would not be available to the public, and (iii) show very little detail, I am not satisfied that they are sufficient to show actual use of the mark, in relation to the relevant services, which guarantees the identity of the origin of the services to the consumer.

36. Although some of the evidence filed has not assisted the opponent in proving use of its mark, the picture presented by the opponent's website and the invoices of sales is sufficient for me to establish that the opponent has used its mark in the relevant period.

9. The Hearing Officer then went on to consider in the light of those findings what a fair specification was. She concluded at paragraph [40] of her Decision that the Opponent had proved use within the relevant period for '*transportation of passengers by car*' and that this was the specification upon which she would consider for the purposes of the Opposition.

10. The Hearing Officer then turned to consider section 5(2)(b) of the 1994 Act. Having set out, in my view entirely correctly, the applicable principles of law the Hearing Officer then applied the principles to the facts.
11. The Hearing Officer began by making a comparison of the services of the UKTM and the Application and concluded that:
- (1) *‘transportation of passengers by car’* in both specifications was identical (paragraph [47] of the Decision);
  - (2) *‘transportation of passengers by car’* was similar to a medium degree to *‘transportation of passengers . . . by bus [and] bike’* (paragraph [48] of the Decision);
  - (3) *‘transportation of passengers by car’* was similar to a low degree to *‘transportation of passengers. . . by . . . plane’* (paragraph [49] of the Decision; and
  - (4) *‘transportation of passengers by car’* was similar to a low degree to *‘transportation of . . . goods by car, bus, bike or plane’* (paragraph [50] of the Decision).
12. The average consumer was held by the Hearing Officer to be a member of the general public or a company or businessperson. That consumer would take an average degree of care and consideration during the purchasing process. The purchase was likely to be predominately visual, the service being selected via the internet or phone book but it could not be discounted that there could be an aural element in the form of a word of mouth recommendation (see paragraph [53] of the Decision).
13. The Hearing Officer then turned to consider the comparison of the marks. Given the importance of this to the appeal I have set out those findings in full:

56. The marks to be compared are as follows:

Earlier mark	Applied for mark
	

57. The applicant has not made any submissions on the similarities (or differences) of the marks, except for “2 different names and also both logos are entirely different”. The

opponent has made slightly more detailed submissions, which I take into account when making my decision.

### Overall impression

58. The earlier mark consists of the words JUST AIRPORTS Chauffeur Service written in black in a fairly standard typeface and contained within a black oval device. There are two figurative elements in the mark: an aeroplane to the top-left of the oval, and a car to the top-right of the oval. I consider that the words JUST AIRPORTS have the greatest impact in the overall impression, given their size and position. A lesser role is played by the phrase Chauffeur Service which, positioned beneath the words JUST AIRPORTS and in a smaller typeface, will be seen as descriptive by the average consumer. The aeroplane and car devices play an insubordinate role in the overall impression of the mark since they simply reinforce the meaning of the textual components i.e. AIRPORTS and Chauffeur Service. The oval device is likely to be seen as little more than a border.

59. The applied-for mark consists of the words Just Airports London written in black in a fairly standard typeface. In front of the textual components is a blue circular device with three orange, curved lines across the width of the circle (presumably to resemble a jet stream) and a small, blue aeroplane device positioned above the word Just. These figurative elements appear to represent the globe with an aeroplane flying around it. The word London simply suggests that the applicant is a business in London. The figurative elements reinforce the meaning of the textual components i.e. Airports. Consequently, the words Just Airports play the greatest role in the overall impression of the mark.

### Visual comparison

60. The similarity lies in the first two words of each mark: JUST AIRPORTS and the addition of an aeroplane device. That JUST AIRPORTS is presented as Just Airports (in upper and lower case) in the applied-for mark does not create a difference because, notionally, the mark could be used in all upper-case lettering.

61. In terms of differences, the opponent's mark contains the descriptive phrase Chauffeur Service, a car device and an oval border, none of which are present in the applicant's mark. In addition, the applicant's mark contains the word London and a globe device, neither of which are present in the opponent's mark.

62. Taking all of these factors into account, and bearing in mind the overall impressions I have outlined, I consider the two marks in question to be visually similar to a medium degree.

Aural comparison

63. Considering the descriptive nature of the words Chauffeur Service, the opponent's mark will most likely be referred to as JUST AIRPORTS. Similarly, considering London is suggestive of the company's location, the applicant's mark will most likely be referred to as Just Airports. Therefore, the marks at issue are aurally identical. If I am wrong and the average consumer does articulate the marks in full, I would find the aural similarity to be of a medium degree.

Conceptual comparison

64. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgements of the GC and the CJEU including *Ruiz Picasso v OHIM*. The assessment must be made from the point of view of the average consumer.

65. Both marks used for the services at issue will give the immediate indication to the average consumer that these are transportation services solely to and from airports. I therefore conclude that the marks are conceptually identical.

14. Turning to the distinctive character of the UKTM the Hearing Officer found that it has '*a low degree of inherent distinctive character*' (paragraph [69] of the Decision).
15. With regard to her assessment of the likelihood of confusion the Hearing Officer found as follows (footnotes not included):

72. The marks have been found to be visually similar to a medium degree, aurally identical (or aurally similar to a medium degree if the average consumer articulates all components of the marks) and conceptually identical. The services at issue have been found to be either identical or similar to a low or medium degree.

73. Taking into account the common elements between the marks (i.e. the words JUST AIRPORTS), the figurative elements simply reinforcing the message portrayed by the textual components of the marks (and both marks containing an aeroplane device), and bearing in mind the concept of imperfect recollection, I consider it likely that the average consumer will mistake one mark for the other, resulting in a likelihood of direct confusion. This is so even bearing in mind the earlier

mark's low level of inherent distinctive character. In reaching the conclusion that I have, I am mindful that a degree of caution is required before finding a likelihood of confusion on the basis of common elements which are either descriptive or are low in distinctive character. Nevertheless, I maintain that there is a likelihood of confusion. Bearing in mind that a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks (and vice versa), I find there to be a likelihood of confusion even for services which are similar to only a low degree.

74. For the sake of completeness, and in case I am found to be wrong with my finding of direct confusion, I go on to consider indirect confusion.

...

77. I go on now to consider whether the average consumer, if they do recognise that the marks are different, considers the common element of both marks and determines, through an instinctive mental process, that the marks are related and originate from the same, or an economically linked undertaking.

78. In this case I consider there to be two circumstances in which the average consumer will come to this conclusion. Considering that the differences in the marks are descriptive words/phrases (Chauffeur Service versus London) and the figurative elements (an aeroplane and a car versus an aeroplane flying around the globe) reinforce those words, I think it likely that the consumer will either consider the differences in the non-distinctive elements as expected in a sub-brand or brand extension, or consider that the change in figurative elements is entirely logical with a re-branding of one of the marks.

### **The appeal**

16. On 14 August 2019 an appeal against the Hearing Officer's decision was filed by AV Law Solicitors on behalf of the Applicant pursuant to section 76 of the 1994 Act. The Form TM55P accompanied by a letter which contained Grounds of Appeal in narrative form together with what appears to be an application to introduce further evidence on appeal. That evidence was in the form of various documentary materials that were contained in Annexes A and B to the letter.
17. No Respondent's Notice was filed.
18. The hearing of the appeal was listed to take place on 14 January 2020. On 13 January the Application made an application to adjourn the hearing. I directed that the

application to adjourn the hearing (which was resisted by the Respondent) should be made at the hearing that had been fixed for the appeal.

19. In the event the Respondent chose not to attend the hearing but instead indicated that it wished to rely upon the written submissions that it had made with respect to both the application to adjourn and in respect to the substantive appeal in lieu of attendance.
20. The Applicant attended the hearing in person (assisted by Mr Masood Abbas for the purposes of translation). I am very grateful to the Applicant (and to Mr Abbas) for the assistance provided to me by way of oral submissions.
21. For reasons set out in my decision of 14 January 2020 the application to adjourn was refused. The hearing of the appeal therefore went ahead on the date and at the time fixed for that purpose.

### **Standard of review**

22. An appeal against decisions taken by the Registrar is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was wrong. See Reef Trade Mark [2003] RPC 5; and Actavis Group PTC v. ICOS Corporation [2019] UKSC 1671 at [78] to [81].
23. Moreover, where the decision below involves the making of a value judgment the decision maker on appeal must be especially cautious about interfering with that judgment on appeal: see most recently Actavis (above) at [80]:

80. What is a question of principle in this context? An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. What is the nature of such an evaluative error? In this case we are not concerned with any challenge to the trial judge's conclusions of primary fact but with the correctness of the judge's evaluation of the facts which he has found, in which he weighs a number of different factors against each other. This evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible:

*Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR 577, paras 14-17 per Clarke LJ, a statement which the House of Lords approved in *Datec Electronic Holdings Ltd v United Parcels*

*Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46 per Lord Mance.

24. In Fage UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5; [2014] E.T.M.R. 26 at paragraphs [114] and [115] Lewison LJ said:

114 Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

- i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
- ii) The trial is not a dress rehearsal. It is the first and last night of the show.
- iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
- iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
- v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
- vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115 It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell

out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: *see Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] Fam. 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135.

25. It is necessary to bear these principles in mind on this appeal.

### **The Decision**

26. Before turning to the questions raised by the substantive appeal there are three preliminary points which need to be dealt with.
27. First, it is important from the start of the consideration of this appeal to keep firmly in mind that the Hearing Officer was not concerned with an absolute ground of objection under section 3 of the 1994 Act. The Hearing Officer was solely concerned with an objection on the basis of a relative right, namely the UKTM, under section 5(2)(b) of the 1994 Act. Necessarily therefore the Hearing Officer's analysis and findings entirely proceeded upon the section 5(2)(b) objection.
28. Therefore, in so far as the Grounds of Appeal are based on legal principles that are applicable to section 3 of the 1994 Act (or the equivalent under either the Trade Marks Directive or the European Trade Mark Regulation) or under section 5(3) of the 1994 Act those grounds of appeal are entirely misconceived. Such principles are wholly irrelevant to the appeal as has been correctly submitted on behalf of the Opponent.
29. Second and relatedly, the question for determination by the Hearing Officer under section 5(2)(b) of the 1994 Act is the question of whether or not the mark applied for conflicts with the earlier right relied upon. That involves considering normal and fair use of the mark as applied for and does not involve consideration of whether the applicant has or has not actually conducted a business under the mark applied for i.e. used the mark applied for and/or generated a goodwill and reputation as a results of the commercial activities undertaken under and by reference to that mark.
30. In the circumstances, in so far as reference is made on behalf of the Applicant in the Grounds of Appeal to the mark applied for having been used such that the Applicant was the proprietor of a goodwill and reputation by reason of the use of the mark applied for that was not material to the issues that were before the Hearing Officer and are likewise not material to the issues that are before me.
31. Third, there is the question of the additional evidence that the Applicant sought to have admitted on this appeal.

32. The further evidence which it would appear that the Applicant wished to rely upon on this appeal was attached to the letter containing the Grounds of Appeal in Annexes A and B.
33. The material was contained in Annex A to the letter containing the Grounds of Appeal was introduced in the Grounds of Appeal as follows:

We submit that the words ‘airport service’ are in regular use within the same industry as the parties in these proceedings. We request that the honorable (sic) faculty to peruse attached to this letter Exhibit A. You will note that there are on around 13 companies using the work (sic) with the industry (not limited to)(sic).

The materials in Annex A included a list of 12 domain names and print outs from what appear to be the home pages of each of the domain names identified. All the print outs were dated 13 August 2019.

34. The material contained in Annex B to the letter containing the Grounds of Appeal was introduced in the Grounds of Appeal as follows:

. . . our submission customers are able to look at the two products and tell they are different by the trade mark. Our clients submitted trademark should be assessed when looking at the expectations of the reasonably well-informed, observant and circumspect consumer in the market of the goods in question. There are many companies trading under similar names and please see attached Exhibit B which is a print out from companies house which also confirms that are (sic) still trading and are dissolved.

Annex B contained a print out from Companies House made on 13 August 2019 of a list of companies having the words ‘JUST AIRPORTS’ in their registered names.

35. At the hearing the Applicant maintained the application for permission to rely upon the additional evidence.
36. The general principles to be applied in respect of the admissibility of fresh evidence in trade mark appeals were summarised by Henry Carr J in Consolidated Developments Ltd v. Cooper [2019] FSR 2 at paragraph [33]:

33. The cases to which I have referred establish the following principles in respect of the admissibility of fresh evidence in trade mark appeals, sought to be introduced for the first time on appeal:

- (i) the same principles apply in trade mark appeals as in any other appeal under CPR part 52 . However, given the nature of such appeals, additional factors may be relevant;
- (ii) the *Ladd v Marshall* factors are basic to the exercise of the discretion, which are to be applied in the light of the overriding objective;
- (iii) it is useful to have regard to the Hunt-Wesson factors;
- (iv) relevant factors will vary, depending on the circumstances of each case. Neither the *Ladd v Marshall* factors nor the *Hunt-Wesson* factors are to be regarded as a straightjacket;
- (v) the admission of fresh evidence on appeal is the exception and not the rule;
- (vi) the *Gucci* decision does not establish that the court or the Appointed Person should exercise a broad remedial discretion to admit fresh evidence on appeal so as to enable the appellant to re-open proceedings in the Registry; and
- (vii) where the admission of fresh evidence on appeal would require that the case be remitted for a rehearing at first instance, the interests of the parties and of the public in fostering finality in litigation are particularly significant and may tip the balance against the admission of such evidence.

37. Applying these principles I am not prepared to give permission for this material to be admitted at this late stage for the following reasons. Firstly, as accepted by the Applicant at the hearing this was material that had been available to the Applicant at all relevant times. Secondly the material the subject of the application is provided without any explanation as to precisely what it is. It is not provided as an exhibit to a witness statement or affidavit. Further in so far as the materials are dated the date is nearly 2 years after the relevant date for the purposes of the assessment being 21 November 2017. Thirdly and relatedly, it is not clear exactly what issue that was before the Hearing Officer this material is said to be relevant to. In particular with regard to the introductory paragraph in the Grounds of Appeal relative to Annex A the reference to ‘airport service’ is unclear. In the circumstances it does not seem to me that the contents of Annexes A and B could have any or any material relevance to the issues on this appeal.
38. I therefore turn to the two substantive issues that seem to arise on this appeal. First whether the Opponent has demonstrated that the UKTM has been used within the relevant period. Although not conventionally set out it would seem that the gravamen of this complaint is that the evidence filed was insufficient for the Hearing Officer to reach the conclusion that she did as to the genuine use of the UKTM.
39. Second, that the Hearing Officer has erred in her assessment of the likelihood of confusion by placing too little weight on the differences in the figurative elements of the two marks namely as stated in the Grounds of Appeal as being a ‘dark circle with

*an aeroplane next to it* in the Application in contradistinction to the *'wide circle . . . with an aeroplane and vehicle inside the circle'*.

40. At the hearing of the appeal it was submitted that the Hearing Officer erred in her assessment of the likelihood of confusion by placing too much weight on the ordinary dictionary words being common elements between the UKTM and the Application and insufficient weight on the other figurative elements of the UKTM and the Application. It is said that had she put the appropriate weight on the figurative elements of the mark she could not and would not have found a likelihood of confusion.
41. In my view, quite correctly there is no suggestion that with respect to the proof of use under section 6A of the 1994 Act; and the assessment under section 5(2)(b) of the 1994 there is no suggestion that the applicable legal principles were incorrectly identified by the Hearing Officer. Instead the issue on this appeal is whether the Hearing Officer correctly applied the principles to the facts in the present case.

### ***Proof of use***

42. On this Ground of Appeal the complaints made on behalf of the Applicant are very broad. In essence it is asserted that the Opponent has not shown that the UKTM has been put to genuine use. The Grounds of Appeal then sets out categories of evidence that it is said should be filed by the Opponent in order to demonstrate genuine use. In relation to each category that is identified it is stated that *'Limited information has been provided and considered'*.
43. Whilst the categories of evidence identified in the Grounds of Appeal are certainly ones that are relevant to the issue of proof of use what is not done in the Grounds of Appeal is to identify by reference to the Hearing Officer's findings where the Hearing Officer went wrong in her assessment of the evidence of use that was before her. A point that is quite rightly made by the Opponent in the written submissions filed on its behalf.
44. The Hearing Officer considered the question of proof of use by first considering the question of variant use before turning to consider the question of whether the material before her was sufficient to establish genuine use. Finally, the Hearing Officer considered what a fair specification would be for the purposes of the Opposition on the basis of the evidence before her.
45. It is clear from the Hearing Officer's analysis that she carefully considered each of these issues in turn by reference to the evidence before her. It is also apparent that the Hearing Officer did not accept that all of the evidence filed on behalf of the Opponent provided support for its claim to have used the UKTM (see for example paragraph

[36] of the Decision). This is particularly the case in so far the Hearing Officer limited the specification of the UKTM for the purposes of the Opposition to ‘*transportation of passengers by car*’ (see paragraph [40] of the Decision).

46. It seems to me that having looked at the evidence filed on behalf of the Opponent and considered the findings of the Hearing Officer in her Decision that these were findings that it was open to the Hearing Officer to make. I therefore dismiss the appeal put forward on the basis that the Opponent had not proved genuine use of the UKTM.

### ***Likelihood of confusion***

47. I now turn to the question of whether the Hearing Officer made a distinct and material error of principle in making her assessment of the likelihood of confusion in the present case. As noted above the gravamen of this Ground of Appeal is that the Hearing Officer did not give sufficient weight to the figurative elements of the marks in issue in making her assessment and gave too much weight to the common word elements which are dictionary words. Such a challenge requires consideration both of the Hearing Officer’s assessment of the overall impression of the marks and the subsequent assessment of the likelihood of confusion.
48. The Applicant is entirely correct that when considering the likelihood of confusion between marks where the common elements of the marks are either descriptive or are low in distinctive character the decision taker must be cautious before making a finding of a likelihood of confusion. This has been made very clear in the judgments of Arnold J as he then was in Whyte and Mackay Ltd v. Origin Wine UK Ltd [2015] EWHC 1271 (Ch) and Birss J in Nicoventures Holding Limited v. The London Vape Company Ltd [2017] EWHC 3393 (Ch).
49. However it is also the position that:
- (1) With regard to a registered mark the fact of registration carries with it an implication that the mark has a minimum inherent distinctiveness as registration of mark which is devoid of distinctive character is precluded (see Case C-196/11P Formula One Licensing BV v. EUIPO);
  - (2) The fact that a mark relied upon for the purposes of an opposition has a weak distinctive character does not preclude a finding of a likelihood of confusion (see Case C-235/05P L’Oréal v. EUIPO); and
  - (3) Although in general the relevant public will not consider a descriptive element forming part of a composite mark to be the dominant element of the mark specific circumstances may justify a descriptive element as having a dominant

character (see Case T-112/17 Pelikan Vertriebsgesellschaft mbH & Co. KG v. EUIPO at paragraph [40])

50. In the present case, the Hearing Officer quite correctly made a comparison between the marks in issue. In relation to both marks the Hearing Officer found that the words JUST AIRPORTS had the greatest impact in the overall impression. It seems to me that this was a finding that it was open to the Hearing Officer to make.
51. Firstly, in making her findings with regard to the comparison of the marks in issue the Hearing Officer made clear findings that the words ‘Chauffeur Service’ in the UKTM (paragraph [58] of the Decision) and the word ‘London’ in the Application (paragraph [59] of the Decision) were descriptive. It has not been suggested that these were findings that the Hearing Officer was not entitled to make.
52. Secondly, in making her findings with regard to the comparison of the marks in issue the Hearing Officer took the view that the figurative elements of each of the marks in issue reinforced the meaning of the textual components of the respective marks (paragraphs [58] and [59] of the Decision). It has not been suggested that these were findings that the Hearing Officer was not entitled to make.
53. Thirdly, although the Hearing Officer took the view in her analysis of conceptual similarity that ‘*Both marks used for the services at issue will give the immediate indication to the average consumer that these are transportation services solely to and from airports*’ (paragraph [65] of the Decision) it is clear that she did not take the view that in the circumstances of the present case that the words JUST AIRPORTS were precluded, whether or not such words could be properly regarded as descriptive, from having the greatest impact in the overall impression of the marks.
54. I am fortified in the view that it was open to the Hearing Officer to find that the words JUST AIRPORTS had the greatest impact in the marks in issue by the unchallenged finding of the Hearing Officer that both marks were aurally identical i.e. that the average consumer being likely to refer to both marks as JUST AIRPORTS (paragraph [63] of the Decision).
55. In the circumstances it seems to me that the Hearing Officer was entitled to find to conclude that (1) the words JUST AIRPORTS play the greatest role in the overall impression of both marks (paragraphs [58] and [59] of the Decision); (2) that the marks were visually similar to a medium degree (paragraph [62] of the Decision); (3) that the marks in issue were aurally identical/or aurally similar to a medium degree (paragraph [63] of the Decision); and (4) that the marks were conceptually identical (paragraph [65] of the Decision).
56. With regard to the inherent distinctiveness of the UKTM the Hearing Officer had the judgment in Case C-196/11P Formula One Licensing BV v. EUIPO firmly in mind

when she concluded that the UKTM has a ‘*low degree of inherent distinctive character*’ (paragraph [69] of the Decision). A finding which quite correctly has not been challenged on this appeal.

57. As noted above any finding that the earlier mark has weak distinctive character does not preclude a finding that there is a likelihood of confusion. Although the distinctive character of the earlier mark must be taken into account in assessing the likelihood of confusion, it is only one factor among others involved in that assessment. Therefore, even in a case involving a weakly distinctive earlier mark, there may be a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods or services covered (see most recently Case T-135/19 Corporació Catalana de Mitjans Audiovisuals, SA v. EUIPO at paragraph [66]).
58. Turning to the assessment of the likelihood of confusion it is clear that the Hearing Officer had firmly in mind the guidance in Whyte and Mackay Ltd (supra) and Nicoventures Holding Limited (supra). She refers by way of footnote to both cases in paragraph [73] of her Decision.
59. It is also clear from the Decision itself that the Hearing Officer had in mind the different figurative elements as between the two marks when making that assessment (see paragraphs [73] and [78] of the Decision).
60. Given that was the position it seems to me that when making her assessment of the likelihood of confusion and having regard to the common elements between the marks, namely the words JUST AIRPORTS, it was open to the Hearing Officer to take the view that the figurative elements of each of the marks simply reinforced the message contained in the textual components of the marks rather than, as submitted on the part of the Applicant, acting as points of difference sufficient to preclude a finding of a likelihood of confusion.
61. In all the circumstances it seems to me that the Hearing Officer was entitled to conclude as regards the services in issue that even though the distinctive character of the UKTM was low there was nonetheless a likelihood of confusion (see paragraphs [73] and [78] of the Decision)

### **Conclusion**

62. To conclude, for the reasons set out above, it does not seem to me that there is any error of principle or material error in the Hearing Officer’s decision. It was in my view open to the Hearing Officer to make the decision that she did. In the result the appeal fails and is dismissed.
63. Neither of the parties has asked for any special order as to costs. Since the appeal has been dismissed Just Airports Chauffeur Service Limited is entitled to a contribution

towards its costs of the appeal. There was also the small amount of costs that will have been associated with the unsuccessful application to adjourn the hearing which I will also consider. Having regard to all the circumstance on this appeal I order Hamid Sheikh to pay the sum of £650 to Just Airports Chauffeur Services Limited in addition to the sum of £1,100 ordered by the Hearing Officer below. I therefore order Hamid Sheikh to pay a total of £1,750 to Just Airports Chauffeur Services Limited within 21 days of this decision.

Emma Himsworth QC  
Appointed Person

14 February 2020