

BL O/1136/23

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3622471

BY IGG SINGAPORE PTE. LTD

TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 9 AND 41

**Time Princess**

AND IN THE MATTER OF OPPOSITION THERETO UNDER NO. 428813

BY PLAY'N GO MARKS LTD

AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON

BY THE OPPONENT

AGAINST A DECISION OF LEISA DAVIES

DATED 2 FEBRUARY 2023

---

## DECISION

---

### Introduction

1. This is an appeal from a decision of Leisa Davies, acting for the Registrar, dated 2 February 2023, in which she found that the opposition by Play'n GO Marks Ltd ("the Appellant or the Opponent") failed against the registration in the UK in the name of IGG Singapore Pte. Ltd ("the Applicant" or "the Respondent") of trade mark application number 3622471 for the mark shown above in respect of the following goods and services ("the Trade Mark"):

**Class 9:** *Computer game programs; computer operating programs, recorded; computers; computer peripheral devices; computer game software, downloadable; computer software, recorded; computer programs [downloadable software]; computer programmes [programs], recorded; electronic publications, downloadable; video game cartridges; computer software applications, downloadable.*

**Class 41:** *Game services provided on-line from a computer network; entertainment information; entertainer services; providing on-line electronic publications, not downloadable; publication of electronic books and journals on-line; publication of texts, other than publicity texts; electronic desktop publishing; games equipment rental; entertainment; organization of competitions [education or entertainment]; club services [entertainment or education]; arranging and conducting of conferences; exhibitions (Organization of —) for cultural or educational purposes; publication of books.*

2. The opposition was based on sections 5(2)(b) of the Trade Marks Act 1994 ("the Act") relying on the following two earlier marks:

**The word mark:**

UK trade mark no. 3207500:

MOON PRINCESS

Filed: 19 January 2017

Registered: 7 April 2017

- Class 9:** *Computer games and video games; software for gaming machines.*
- Class 28:** *Slot machines for gambling; videogaming apparatus.*
- Class 41:** *Games services provided online (via computer networks); prize draws [lotteries]; organising and conducting lotteries.*

**The device mark:**

UK trade mark no. 918222785



**Filed:** 7 April 2020

**Registered:** 5 August 2020

- Class 9:** *Computer games and video games (software), hereunder software for slot machine games, betting and wagering games, video slot games, casino games and bingo games provided online and via computer networks and playable on any type of computing device including arcade games, personal computers, handheld devices and mobile phones; software for slot machine games, betting and wagering games, video slot games, casino games and bingo games provided online and via computer networks and playable on any type of computing device including arcade games, personal computers and handheld devices.*
- Class 28:** *Videogaming apparatus, hereunder slot machines for gambling, gaming machines, poker machines and other video based casino gaming machines; arcade games; gaming machines, namely, devices that accept a wager; reconfigurable casino and lottery 3 gaming equipment, hereunder gaming machines including computer games and software therefor sold as a unit.*

**Class 41:** *Games services provided online (via computer networks), hereunder providing slot machine games, betting and wagering games, video slot games, casino games and bingo games, playable via local or global computer networks; on-line gaming services; entertainment services, namely, conducting a game of chance simultaneously at multiple, independent gaming establishments; entertainment services, hereunder providing online computer games; prize draws [lotteries]; organising and conducting lotteries; Services for the operation of computerised bingo.*

3. Since the earlier marks had completed their registration process within five years of the date on which the application for registration of the Trade Mark was filed, the Opponent did not need to establish proof of use of the marks pursuant to s.6A of the Act.
4. The Opponent filed initial submissions during the evidence rounds, and thereafter both parties filed evidence. A hearing took place on 16 November 2022.

#### The Hearing Officer's Decision

5. Since the Opponent accepted at the hearing that the word mark offered the Opponent its best case, the Hearing Officer only compared the word mark with the Trade Mark. The Hearing Officer made the following findings:

##### The goods and services

The Applicant had conceded that there was an overlap of the goods in class 9 and the services in class 41 in so far as both related to computer games and the provision of online games. The Hearing Officer found that some of the goods were identical and others were similar to a medium degree. Some of the services were found to be identical and others similar to a low degree.

##### The average consumer and the nature of the purchasing act

The average consumer would be members of the public who played computer games or accessed games online save that in relation to gambling-related goods and services they are specifically directed to members of the public aged 18 and over. The average consumer would pay a normal level of attention, with the purchasing process being dominated by visual considerations, but there may be aural aspects as a result of word of mouth recommendations, for example.

#### Similarity between the marks

The marks were visually, aurally and conceptually similar to a medium degree.

#### Distinctive character of the earlier trade mark

The word mark possessed an average degree of distinctive character, but the evidence was insufficient to support a claim of enhanced distinctiveness.

#### Likelihood of confusion

There was no likelihood of direct or indirect confusion.

6. Accordingly, the Hearing Officer found that the opposition failed in its entirety under s.5(2)(b).

#### The Appeal

7. The Opponent filed a Notice of Appeal to the Appointed Person under s.76 of the Act. At the hearing before me, which was held remotely, Beverley Robinson of Appleyard Lees IP LLP appeared on behalf of the Appellant and Eleanor Coates of Murgitroyd & Company appeared on behalf of the Respondent.

#### Standard of review

8. It is well established that in order to interfere with the decision of the Hearing Officer I must be satisfied that there was a distinct and material error of principle in the decision or that the Hearing Officer was wrong. The relevant principles were set out in *Axogen Corporation v Aviv Scientific Limited* [2022] EQHC 95 (Ch) at [24]. An appeal is by way of review, not a rehearing. Neither surprise at a Hearing Officer's conclusion nor a belief that she or he has reached the wrong decision will justify interference. The decision of the lower court will be "wrong" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. In the absence of an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible" (*Actavis Group* at [80]). In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions (*TT Education v Pie Corbett Consultancy* [2017] RPC 17 at [52(iv)], *REEF Trade Mark* [2003] RPC 5 at [28] and *Fine &*

*Country Ltd v Okotoks Ltd* [2014] FSR 11 at [50]-[51]). I have borne those principles firmly in mind.

#### Grounds of Appeal

9. The Appellant appealed on the basis that the Hearing Officer failed to properly apply the law to the facts when considering the Opposition under s. 5(2)(b), which it then broke down into the following findings:
  - a. That the marks were visually similar to a medium degree;
  - b. That the marks were conceptually similar to a medium degree;
  - c. That the Appellant's mark had not acquired enhanced distinctiveness as a result of the use made of it; and
  - d. That there was no likelihood of confusion.

#### **Visual similarity**

10. The Hearing Officer set out her findings in respect of the visual similarity of the marks as follows:

*"45. The Opponent submits that "the marks at issue are highly similar and partially identical. The word PRINCESS which is positioned as the second word in all marks plays an independent distinctive role, especially in regard adult casino games and entertainment as it carries no descriptive, suggestive nor obvious meaning for those goods and services...and is seen, pronounced and understood entirely independently. The words TIME and MOON are qualifiers of the noun PRINCESS and they do not change the overall meaning of the distinctive term PRINCESS." Furthermore it was argued by Mr Hole [sic] that the words MOON and TIME bear a visual similarity since they are each four letters long and contain the letter M. Given these factors he argues that there is a high degree of similarity between the marks.*

*46. The Applicant refutes this argument. Whilst conceding that the word PRINCESS is identical in both marks, at the hearing Ms Coates submitted that the remaining words are dissimilar and the marks should be considered and compared as wholes and not artificially dissected. She disputes any similarity between the words MOON and TIME.*

*47. Given that notional and fair use of word only marks allows them to be presented in any font or case, nothing turns on the difference in casing between the respective marks, such that it will impact on my findings. Each mark contains the identical word PRINCESS which is a point of similarity between the respective marks. They differ to the extent that each comprises a different first word; the word TIME as opposed to the word MOON. I do not accept the arguments put forward by Mr Hoole that consumers will see similarity between the first words because they are each four letters long and contain the letter M. They will be seen as different words.*

*48. It is settled caselaw that the beginning of marks have more visual impact than their endings and therefore weighing up the identical use of the word PRINCESS against the differences arising from the use of different first words, I consider that the marks are visually similar to a medium degree.”*

11. The Appellant submitted that *“by simply concluding that the words are different, the Hearing Officer has failed to acknowledge that the words are similar in length and have a similar impact in the context of the marks as a whole.”*

12. I do not accept this criticism of the Hearing Officer. She expressly referred to the Appellant’s argument that the words were *“each four letters long”* and contained the letter M but did not agree that consumers would not see them as different words. She then went on to consider the effect of those words in the context of the marks as a whole in paragraph 48, as is confirmed by her references to the beginning of marks having more visual impact than their endings, and to the need to weigh up the identical use of the word PRINCESS against the differences arising from the use of different first words. I therefore reject the assertion that the Hearing Officer erred in her conclusion that the marks were visually similar to a medium degree, rather than to a high degree. That was a conclusion that a reasonable tribunal could have reached, and is not one which I see any reason to interfere with.

### **Conceptual similarity**

13. The Hearing Officer set out her findings in respect of the conceptual similarity of the marks as follows:

*“50. Individually each word will be given their ordinary meaning. The nouns MOON and TIME are not ones usually used to qualify the word PRINCESS. In combination these two words allude to the type or nature of the princesses namely one being related to time and the other being a mystical/celestial being originating or*

*associated with the moon. The Opponent submits that the concept of MOON and TIME are closely linked, with Mr Hoole specifically arguing that “the term MOON is intrinsically linked to TIME, being responsible for the earth's length of day and night by determining the speed of the earth's rotation around its axis. In English the term MOON is used as an indicator of TIME, including in many common phrases such as 'many moons ago', meaning a time in the past, and 'it has taken many moons to complete', referring to a duration of time. The term MOON has also been used for centuries to indicate the passing of time, passing a year, including a number of cultures including in a lunar calendar.”*

*51. In contrast Ms Coates argues that whilst “years ago, in medieval times we used to calculate time by the moon, that is no longer the case, such that there would be no conceptual overlap between the two words.” Furthermore, she submits that it is not “something that the average consumer would make the mental leap or jump to get to at first sight of the word.”*

*52. I agree with Ms Coates, whilst there may be, on a high level of generality, an overlap between the concept of TIME and MOON, for a conceptual message to be apparent it must be capable of immediate grasp by the average consumer. On the whole I do not consider that the average consumer would make the immediate connection between the two words without further thought process, which I do not consider will be undertaken on first impression. Consumers, being members of the general public will attribute the ordinary [sic] meaning to the word TIME namely the measure or interval between two periods/events, and in relation to the word MOON the earth's satellite. The word PRINCESS will be attributed the identical meaning in each, namely, understood to describe the female member of the royal family, usually the daughter of the king or queen. In combination the contested mark will be regarded as meaning a princess relating to Time and the earlier mark as a celestial princess being associated or originating from the MOON. Given the nature of the goods, the consumer, in my view, will see the respective trade marks as alluding to the theme or storyline of the game or relate to a character within the game. Conceptually, therefore, given that each mark refers to a princess, the concepts overlap, but differ to the extent as to the type of princess. Overall they are conceptually similar to a medium degree.”*

14. The Appellant alleged that the Hearing Officer erred by considering the conceptual similarity between the words TIME and MOON in isolation, as opposed to asking whether the relevant consumer would attribute a similar conceptual meaning to the marks TIME PRINCESS and MOON PRINCESS. Had she done so, the Appellant submitted that she should have found that both marks would be regarded as meaning a mythical, fictitious or imaginary princess such that the respective marks had a high degree of conceptual similarity.
15. Again, I do not accept this criticism of the Hearing Officer. The respective marks are each made up of two English words. The Hearing Officer therefore considered the meaning of each of the words, and then assessed their overall conceptual similarity in combination. In respect of the words MOON and TIME, she did not agree with the Appellant that consumers would make an immediate connection between the two, because they would attribute the ordinary meaning to the word TIME, namely the measure or interval between two periods/events, and to the word MOON, namely the earth's satellite. She found that the meaning of PRINCESS would be the same in each mark, namely the word to describe the female member of the royal family, usually the daughter of the king or queen. She then expressly went on to consider the overall conceptual meaning of the respective marks when the individual words making up the marks were considered "*in combination*", concluding that each mark overlapped to the extent that each referred to a princess, but differed as to the type of princess. Accordingly, her conclusion that "*overall they are conceptually similar to a medium degree*" was one which a reasonable tribunal could have reached, and is not one which I see any reason to interfere with.

#### **Enhanced distinctiveness**

16. The Appellant argued that the Hearing Officer incorrectly concluded that the earlier mark had not acquired enhanced distinctiveness through use, as a result of assessing each piece of evidence in isolation and focussing on what that evidence did not show, rather than what it did show in totality.
17. The Appellant's evidence in support of a claim of enhanced distinctiveness through use consisted of a witness statement given by a director of the Appellant together with 17 exhibits. It had been filed in response to the Applicant having filed evidence which sought to demonstrate that the word PRINCESS was commonly used as part of the title for computer games, and that a princess commonly featured as the main character in computer games.

18. At the hearing before the Hearing Officer, the Applicant had argued that the Opponent's evidence should be dismissed in its entirety because the Opponent had not pleaded enhanced distinctiveness and had not filed any evidence in chief. The Opponent had argued that there was no need for it to have filed evidence in chief as its position was that its mark had a normal level of distinctive character, and that it only became necessary to file evidence on the issue after the Applicant had questioned the distinctiveness of the mark. The Hearing Officer referred to the decision in *YS Garments, LLC v Next Retail Limited* BL O/379/19, where the hearing officer found that a failure to plead enhanced distinctiveness was not fatal as it was one of the fundamental factors that needed to be assessed in every case. Accordingly, where evidence had been filed, the hearing officer concluded that it was incumbent upon them to factor in that evidence in the assessment of the overall distinctiveness of the earlier mark. While the Hearing Officer in this case acknowledged that that decision was not binding on her, she adopted the same approach and dismissed the Applicant's submissions that the evidence should be disregarded. She therefore went on to consider the Opponent's evidence in her Decision.
19. At the hearing before me, Ms Coates, on behalf of the Applicant, sought to argue that the Hearing Officer had erred in allowing the evidence because it had not been pleaded and had not been filed as evidence in chief. However, when I pointed out that there had been no cross-appeal by the Respondent, Ms Coates accepted that I should proceed to review the Hearing Officer's assessment of the evidence.
20. Accordingly, since both parties addressed me at the hearing on this issue, I will go on to consider the Hearing Officer's assessment of the evidence and her conclusions. However, ultimately I do not see that this issue can advance the Appellant's position beyond that found by the Hearing Officer. According to paragraph 59 of the Decision, the Appellant had not relied on enhanced distinctiveness at the outset because its position was that the earlier mark had a "*normal level of distinctive character*". The Hearing Officer concluded in paragraph 58 of the Decision that the earlier mark "*possesses an average degree of distinctive character*". It is therefore not open for the Appellant to argue a higher degree of distinctive character on appeal than the degree of distinctive character it was prepared to accept before the Hearing Officer.

Exhibit 4

21. At paragraph 65 of the Decision the Hearing Officer stated:

*“65. Ms Nattfogel states that the MOON PRINCESS game was released on 26 July 2017 in various countries, including the UK and two sequels were subsequently released on 1 December 2021 and 6 April 2022 (MOON PRINCESS:CHRISTMAS KINGDOM and MOON PRINCESS 100). Screenshots of promotional posts at the time of launch, taken from the Opponent’s websites are produced, accessed on 2/08/21 (a footnote referred to exhibit 3). The following text are included in the releases, “The princesses return in a magical sequel.”; “Everyone’s favourite princesses in their next adventure. Love, Storm and Star are back...”; “Love, Storm and Star find themselves on a journey into the realm of The Christmas Kingdom.”*

*66. It is said that the three games in the series are available to play on various UK licensed online casino platforms including bet365, Play Ojo and Grosvenor Casinos. Undated screenshots are produced showing the availability of the Opponent’s MOON PRINCESS games on these platforms taken from [www.playojo.com](http://www.playojo.com); [www.grosvenorcasinos.com](http://www.grosvenorcasinos.com) and [www.games.bet365.com](http://www.games.bet365.com). The prices on the Grosvenor Casino platform are in pounds sterling and the screenshots are all dated with an access date 16 August 2022 (a footnote referred to exhibit 4). The other screenshots display the prices in euros.”*

22. The Appellant criticises the Hearing Officer’s reference to *“the other screenshots display the prices in euros”*, stating that none of the screenshots exhibited at exhibit 4 display the prices in euros. While it is correct that the screenshots which appear in exhibit 4 all show prices in pounds sterling, screenshots in exhibit 5 do show prices in euros. There is nothing in paragraph 66 of the Decision which states that the Hearing Officer was referring to the screenshots in exhibit 4 in the final sentence of that paragraph. On the contrary, my reading of paragraphs 65 and 66 together is that in the last sentence of paragraph 66 she was referring to the screenshots shown in exhibits 5 and other exhibits, contrasting them with the screenshots shown at exhibit 4, which she had referred to in the previous sentence (one of which showed prices in pounds sterling, with the other two screenshots not showing any prices at all). However, there are also some screenshots of websites in exhibit 5 which do refer to pounds sterling, dollars or cents, so the Hearing Officer was not correct to suggest that all the other screenshots referred to prices in euros.

#### Exhibit 11

23. In paragraph 68 of the Decision, the Hearing Officer stated:

*“67. The game is said to be heavily promoted and advertised on various platforms to include YouTube, LinkedIn, Facebook and Instagram. Screenshots of these accounts are produced. Ms Nattfogel states that the Opponent is a: “buyer to buyer business where marketing and promotional materials are provided to their partners such as licensed online casinos. These are provided via a platform known as Client Zone. The Client Zone is a portal accessible via Playngo.com, where [its] clients and partners can get updates on game data and information and independently download assets pertaining to our games for marketing purposes.”*

*68. Screenshots consisting of Client Zone Login details are produced dated 4 August 2022 (a footnote referred to exhibit 11). The screenshots appear to consist of generic stills of the process a client goes through to access this platform. No reference is made to the earlier mark.”*

24. The Appellant criticised the final sentence of paragraph 68, stating that exhibit 11 consisted of 10 screenshots, seven of which very clearly showed and specifically related to the earlier mark. However, I do not read paragraph 68 as referring to the whole of exhibit 11. The first sentence refers to screenshots consisting of login details. Those were the first 3 pages of exhibit 11. Those pages were stills showing the process a client of the Appellant goes through to access the platform, and they make no reference to the earlier mark. It is only once the client has logged in that they can access materials relating to the Appellant’s MOON PRINCESS game. I therefore do not believe that the Hearing Officer was referring to the last seven pages of exhibit 11 in paragraph 68, since the focus of the Hearing Officer’s statement in this paragraph related to the login process.

25. The Appellant explained at the hearing before me that the purpose of the platform was for online casino clients of the Appellant to be able to log in and access materials relating to the Appellant’s games. However, the average consumer was found by the Hearing Officer to be members of the general public (following submissions to that effect by the Opponent), rather than business professionals. The screenshots at exhibit 11 are therefore of little value in supporting enhanced distinctiveness of the earlier mark among members of the general public, who would have been unable to access them.

#### Exhibit 5

26. In paragraph 69 of the Decision, the Hearing Officer stated:

*“69. Exhibit 5 includes rankings and reviews of the MOON PRINCESS trilogy of games taken from various sources including [www.bigwinboard.com](http://www.bigwinboard.com); [www.bonuscode.co.uk](http://www.bonuscode.co.uk); [www.freebieslots.co.uk](http://www.freebieslots.co.uk); [www.gamblegenie.co.uk](http://www.gamblegenie.co.uk); [www.luckymobileslots.com](http://www.luckymobileslots.com); [www.casino.partycasino.com](http://www.casino.partycasino.com); [www.slotstemple.com](http://www.slotstemple.com); [www.slotsource.ie](http://www.slotsource.ie); [www.lcb.org.org](http://www.lcb.org.org); [www.casiomentor.com](http://www.casiomentor.com). The screenshots are all undated save for an access date of 11/12 August 2022. Each website gives a general overview of the games and provides its own rating and ranking system as to ease of use, enjoyability and available wins and bonuses. The images on bigwinboard and luckymobileslots show that access to the UK is restricted and the prices in the photographs are displayed in euros.”*

27. The Appellant objected to the second sentence of this paragraph, submitting in its Grounds of Appeal that the Hearing Officer had *“failed to acknowledge that some of the articles are dated prior to the access date, and some of the documents show the earlier release dates of the games. The documents also show that the MOON PRINCESS sequels were launched as a result of the success of the original MOON PRINCESS, which is pertinent to the Opponent’s claim of enhanced distinctiveness.”*. The Hearing Officer would have appreciated that all of the articles must have predated the access date, or at least subsisted on the same date as the access date, otherwise they could not have appeared on the screenshots. The point she was making was that they were undated, and the access date, 11 or 12 August 2022, post-dated the relevant date, 7 April 2021, so that it was quite possible that the screenshots showed pages which did not exist prior to the relevant date.
28. At the hearing before me, Ms Robinson submitted that some of the content of the pages did have relevant earlier dates in them. I asked her to give me the details of the pages she was specifically relying on. She referred me to pages 161 and 162 of the evidence. Those pages contained six reviews of the MOON PRINCESS game which pre-dated the relevant date, one of which appears to have been posted by a user in Greece, one in South Africa, and one in Malaysia, with the location of the other three reviewers unstated, although one of them referred to the prizes in euros. That leaves just two reviews from reviewers who may or may not have been UK consumers.
29. There was a significant amount of evidence relating to the two sequels to the Appellant’s MOON PRINCESS game, namely MOON PRINCESS: CHRISTMAS KINGDOM and MOON PRINCESS 100. However, both of the sequels were released after the relevant date so are only really relevant to the extent that they suggest that the original MOON PRINCESS game

was sufficiently successful that it led to two sequels. Documents showing details of the sequel games or how successful they were do little to support an argument of enhanced distinctiveness in relation to the original game.

#### Gross revenue

30. The Appellant also criticized the Hearing Officer for saying that she had not been told what proportion of the gross revenue figures related specifically to the UK market. The figures were stated in the Appellant's witness statement in pounds sterling, and the Appellant submitted that this, coupled with the fact that *"there were numerous references throughout the witness statement to the UK makes it clear that the evidence exhibited and relied upon is UK specific"*.

31. This issue had been argued before the Hearing Officer, and she set out her conclusions as follows:

*"75. The gross revenue figures amount to some £13 million over five years but I am not told as to what proportion specifically relates to the UK market. At the hearing Mr Hoole stated that the gross revenue figures should be read in the context of paragraph 3 (of Ms Nattfogel's statement) which "...provide[s] the Office with information about the Opponent's extensive use of MOON PRINCESS in the UK." On this basis, it was argued that the gross figures should be read as relating to UK figures. The way in which Ms Nattfogel has described the figures and phrased paragraph 21, however, does not appear to suggest that this is the way in which the table is to be interpreted. The statement sets out that "the MOON PRINCESS game generated a gross gaming revenue" which leads me to believe that they represent the total revenue generated for the game across all jurisdictions. There is nothing to suggest that they solely relate to the UK or UK consumers. This is particularly so, given the context of the other evidence produced which does not exclusively relate to the UK. For example the evidence consists of a number of screenshots where the prices are displayed in euros, screenshots of non UK websites and the promotional video expenditure referred to is produced in euros. This clearly demonstrates that they are directed at a European audience and not specifically restricted to the UK. I cannot therefore with any degree of certainty accept the submission put forward by Mr Hoole. In any event, even if I am wrong and they do represent revenue figures only for the UK, this does not assist the Opponent, given that the figures are fairly modest. Over a five year period they do not represent a significant market share,*

*taking into account that the gambling/betting industry within the UK is a multi-billion pound industry. Accepting that the first column represents the number of bets placed in pounds sterling, the number of unique players is less than 73,000 in 2022 which appears to suggest that these unique players place multiple bets. Furthermore, the figures are not broken down by category or attributed to the specific goods and services of the Opponent's specification as relied upon."*

32. In my view, it was reasonable for the Hearing Officer to conclude that it was not clear that the turnover figures related to the UK alone, based on the evidence before her. In addition to the specific points she refers to in paragraph 75 of the Decision, I have already referred to the fact that the reviews of the game were largely from users outside of the UK. The awards relied on also included several which were specific to countries outside the UK (with no evidence demonstrating their awareness amongst UK consumers).
33. The evidence did not break down the revenue figures between the various classes covered by the specification of the earlier mark, and there was no evidence which enabled the Hearing Officer to put the revenue figures into context with the UK market, even if the figures did relate solely to the UK.
34. The Appellant also argued at the hearing before me that the Hearing Officer had simply dismissed the evidence which post-dated the relevant date, without taking into account its content, referring me to the 28 reviews which formed part of the evidence. As I have explained above, all of these reviews were undated and simply bore an access date of 11 or 12 August 2022, after the relevant date. However, some of these reviews referred to prices in currencies other than pounds sterling, or did not mention a currency at all. Many of them were screenshots taken from .com websites without any indication of whether they were directed at the UK consumer. The vast majority of them were reviews of one of the sequels rather than the original MOON PRINCESS game, although some of them appear to have been relied upon by the Appellant because they referred to the original MOON PRINCESS game in terms such as being "*hugely popular*", "*one of the most popular games of all time*", "*worldwide success*" and "*famous*". Nevertheless, while those reviews may suggest that the original MOON PRINCESS game was successful and popular in the UK, it could equally have been the case that the game was successful and popular elsewhere in the world, but not in the UK. I therefore do not criticise the Hearing Officer for questioning the relevance of those reviews in themselves.

35. Finally, the Appellant argued that the Hearing Officer had failed to consider the nature of the industry and the effects of strict advertising regulations which limited the evidence which it could rely on. However, at the hearing before me, Ms Robinson confirmed that there was nothing in the evidence before the Hearing Officer which explained the nature of such limitations.
36. Overall, I am satisfied that the Hearing Officer's conclusion, based on the evidence before her, that the Appellant had failed to demonstrate enhanced distinctiveness through the use made of its mark, was one which a reasonable tribunal could have reached, and is not one which I should interfere with. In particular, I do not consider that the Hearing Officer's incorrect statement in paragraph 65 of the Decision relating to screenshots displaying prices in euros (discussed at paragraph 22 above) affected the reasonableness of her conclusion. Had she taken into account the few screenshots which did show prices in pounds sterling, it would not have changed her conclusion.

#### **Overall assessment**

37. The Appellant's final ground of appeal was that the Hearing Officer reached an incorrect conclusion even if, as I have found, she was entitled to have reached the conclusions that she did on each of the various factors which had to be considered in deciding whether or not there was a likelihood of confusion.
38. In particular, the Appellant submitted that the Hearing Officer had wrongly based her decision on the belief that the Appellant would need to show a monopoly right in the word PRINCESS alone. In particular, the Appellant referred to the Hearing Officer's statement in paragraph 95 of the Decision, when she was commenting on the evidence filed by both parties showing that it was common practice in the gaming industry for retailers to market and use the same elements in sequels to denote trade origin. She said:

*"I would need to conclude that the distinctiveness of the Opponent's mark resides in the element PRINCESS alone so that consumers will see any mark which includes the word PRINCESS as a sequel or that it is connected to the earlier mark and that the goods/services originate from the same or related undertaking".*

39. The Appellant also relied on paragraph 98, where the Hearing Officer said:

*"98. When assessing whether as a result of the common word PRINCESS, consumers will be confused between the two entities, I place considerable weight on the fact that the evidence filed by the Opponent does not show that it has a reputation solely*

*in the word PRINCESS alone, or that the average consumer of these products would consider that any mark including the word PRINCESS will be from the same stable or family. There is no evidence to suggest that consumers have learned to associate the word PRINCESS as designating goods/services from one particular source and more importantly particularly with the Opponent.”*

40. The Appellant submitted that the correct assessment was the likelihood of confusion between TIME PRINCESS and MOON PRINCESS, so that the Appellant did not have to show a monopoly right in the word PRINCESS nor that the relevant consumer would see any mark containing the word PRINCESS to be a sequel of MOON PRINCESS.

41. The extracts relied on by the Appellant from paragraphs 95 and 98 have to be read in the context of the Hearing Officer’s prior findings in relation to the words TIME and MOON, namely that they would be seen as different words which would not be seen by consumers as being similar to each other (see paragraphs 47, 48 and 52 of the Decision). Thus, she concluded at paragraph 89 in relation to direct confusion:

*“89. Given that the marks each include a different first word, the word MOON as opposed to TIME, and given that as a general rule the beginning of marks have more impact, I do not believe that the differences arising from these first elements will go unnoticed by the relevant consumer. Consequently they are unlikely to mistake or imperfectly recall one mark for the other. There is no likelihood of direct confusion.”*

42. She was clearly entitled to reach this conclusion on direct confusion given her findings on the different impressions given by the first words of each mark, which I agree with.

43. She set out her conclusions on indirect confusion as follows:

*“98. When assessing whether as a result of the common word PRINCESS, consumers will be confused between the two entities, I place considerable weight on the fact that the evidence filed by the Opponent does not show that it has a reputation solely in the word PRINCESS alone, or that the average consumer of these products would consider that any mark including the word PRINCESS will be from the same stable or family. There is no evidence to suggest that consumers have learned to associate the word PRINCESS as designating goods/services from one particular source and more importantly particularly with the Opponent [a footnote cited Il Pont Finanziaria C-2354/06 at 61-64].*

99. *As I have already found I believe the distinctiveness of the earlier mark lies in its totality. Therefore given that the beginning of the later mark is different and the evidence filed shows that a number of entities use the word PRINCESS to refer to a character or theme of the game, I do not consider that the average consumer would consider that the one mark is a sub brand or brand extension of the other. Even without evidence, the word PRINCESS it is not so strikingly distinctive of the Opponent that the use of this word in combination with a totally different word would lead consumers to consider that it is a brand extension or linked to the Opponent.*

100. *Bearing in mind my assessment of the overall impression and the role each element plays within the marks as wholes, when coming across the respective marks, I find that the average consumer will not consider that the same provider is responsible for the goods/services. I am fortified in this finding by the fact that the Opponent's own evidence shows that the title of its sequels and subsequent editions include both the words MOON and PRINCESS and not solely the word PRINCESS.*

101. *If consumers note that the marks are different, I find it improbable that they would then acknowledge those differences but conclude that the goods and services are provided by one and the same undertaking. At best if the average consumer goes through this mental process in my view it would merely bring to mind the other's mark in a scenario as envisaged in Duebros. Consumers may consider that the marks coincidentally refer to a princess character or theme but this is where the similarity ends.*

102. *Noting that the interdependency principle allows for a lower degree of similarity between the marks to be offset by the identity between the goods/services, in my view the differences between the marks as identified are sufficient for no confusion to arise. Consumers will not view the contested mark as independent components or that the word 'PRINCESS' will have distinctive significance independent of the whole [a footnote cited Whyte and Mackay Ltd v Origin Wine UK Ltd and Another [2015] EWHC 1271 (Ch)]. I do not find that there would be indirect confusion."*

44. It is clear from these paragraphs that the Hearing Officer did have in mind the need to compare the respective marks as a whole. In particular, she starts paragraph 100 by referring to her "assessment of the overall impression" and "the role that each element plays within the marks as wholes", which led to her finding that the average consumer will not

consider that the same provider was responsible for the goods/services. She specifically refers to the fact that the titles of the Appellant's sequels and subsequent editions included both the words MOON and PRINCESS and not solely the word PRINCESS. I can see no error made by the Hearing Officer in her reasoning, and find that her conclusion that there was no likelihood of direct or indirect confusion was a reasonable one for her to reach.

### Conclusion

45. The appeal fails and is dismissed.

### Costs

46. Since the appeal has been dismissed, the Respondent is entitled to a contribution towards its costs of the appeal.

47. I therefore make an order that the Appellant pays to the Respondent a contribution of £1,500 towards the costs of the appeal, to be added to the award of £1,600 made by the Hearing Officer, making a total of £3,100 to be paid within 21 days of the date of this decision.

Simon Clark  
The Appointed Person  
24 November 2023

### **Representation:**

Appellant: Beverley Robinson (Appleyard Lees IP LLP)

Respondent: Eleanor Coates (Murgitroyd & Company)