

O/156/20

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003378390

BY ASTROSCENT LTD

TO REGISTER THE TRADE MARK:

Astroscent

IN CLASSES 3, 4, 40, 44 AND 45

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 416292 BY

WENGO, SAS

5. The applicant filed a counterstatement denying the claims made and requested that the opponent provide proof of use.

6. The opponent is represented by NEXTMARQ and the applicant is unrepresented. Only the opponent filed evidence. Neither party requested a hearing and only the applicant filed written submissions in lieu of attendance. This decision is taken following a careful perusal of the papers.

EVIDENCE

7. The opponent filed evidence in the form of the witness statement of Louise Fortin dated 30 October 2019. This was accompanied by 12 exhibits. Ms Fortin is the Legal Director of the opponent, a position she has held since January 2012.

8. Ms Fortin explains that the opponent was established in 1999 as a reference of astrology on the internet, under the earlier marks. Ms Fortin states that they have been used in relation to “a range of astrology services including horoscope casting, consultancy in the field of astrology, numerology, divining sciences”.

9. Ms Fortin states that the marks are used on websites in France, Italy, the Netherlands and Germany. Ms Fortin has provided print outs from these websites, which are all undated.¹ The earliest date referred to in the title of an article is “2017”, but as the websites are not in English (and no translation is provided) it is not clear to me whether this is an article from 2017 or an article from a later period referring back to that time. I also note that three of the websites have a copyright date of 2019.

10. Ms Fortin has provided print outs from the opponent’s Astrocenter France, Netherlands, Italy and Germany Facebook pages.² These are followed by over 620,000, 10,000, 100,000 and 40,000 people respectively. Again, none of these documents are in English and no translations have been provided. The earliest post

¹ Exhibits 1 to 4

² Exhibits 5 to 8

visible on one of these pages is dated March 2018. I also note that the Germany-based Facebook page offers a Medium service. The pages display the following sign:



11. Ms Fortin has also supplied print outs of the opponent's website taken from the Wayback Machine archive.³ I note that some of the years displayed on the printout are not visible from the copies provided to the Registry. However, the earliest dates visible are 1 August 2015 for France and 12 April 2016 for the Netherlands. Again, these print outs are not in English. However, I note that they clearly refer to horoscopes, tarot, predictions, numerology and astrology. The word ASTROCENTER is clearly visible in the domain name for the website.

12. Ms Fortin has also provided the following website user statistics for the opponent's websites:

Country	Month	Users
France	January 2018	949,496
Germany	January 2018	75,746
Italy	August 2018	65,954
France	January 2017	834,345
Germany	January 2017	82,455 ⁴

DECISION

13. Section 5(2)(b) states as follows:

³ Exhibits 9 to 12

⁴ Witness statement of Louise Fortin, para. 7

“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 trade marks upon which the opponent relies qualify as earlier trade marks because they were applied for at an earlier date than the applicant’s mark pursuant to section 6 of the Act.

Proof of use

15. As noted above, the applicant has put the opponent to proof of use of its marks. However, I note that the applicant has requested proof of use of the following services:

“Cartomancy in relation to deciding which additional flowers, plants, trees and gems to use in beauty care products for example scents, perfumes, essential oils, essential oil blends, flower essences, flower remedies, aromatics, aromatherapy oils, toilet waters, flower waters, hair sprays, beauty care products, candles, room scents.

Astrological advice relating to planetary positions of designated flowers and gems as a basis for fragrance choice for astrology-matched beauty care products for example essential oils, perfumes, scents, flower essences (cosmetic), crystal gem essences, crystal gems.

Personal gift selection for others.

Preparation of customized gift boxes.”

16. I note that these are, in fact, services taken from the specification of the applicant and not the opponent. The request to provide “proof of use” is a request for the opponent to demonstrate that they have used their marks in relation to the services relied upon and for which their own marks are registered. This is not, therefore, a correctly pleaded request for proof of use.

17. However, as the applicant clearly intended to put the opponent to proof of use I will consider the opponent’s evidence in this regard for the sake of completeness.

18. The relevant statutory provisions are as follows:

“Raising of relative grounds in opposition proceedings in case of non-use

6A-(1) This section applies where –

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

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

(3) The use conditions are met if –

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put

to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

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

(4) For these purposes –

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form of which it was registered, and

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

(5) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

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

19. Section 100 of the Act is also relevant, which reads:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

20. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the earlier marks is the 5-year period ending with the date of the application in issue i.e. 27 February 2014 to 26 February 2019.

21. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others

which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

22. As the earlier mark is an EUTM, the comments of the Court of Justice of the European Union (“CJEU”) in *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, are relevant. The court noted that:

“36. It should, however, be observed that [...] the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.”

And:

“50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade

mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.”

And:

“55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77)”.

At paragraphs 57 and 58, the court held that:

“Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to ‘genuine use in the Community’ within the meaning of that provision.

A Community trade mark is put to ‘genuine use’ within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the mark concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.”

23. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. reviewed the case law since the *Leno* case and concluded as follows:

“228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issue in London and the Thames Valley. On that basis, the General Court dismissed the applicant’s challenge to the Board of Appeal’s conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant’s argument was not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guilford, and thus a finding which still left open the possibility of conversion of the community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that “genuine use in the Community will in general require use in more than one Member State” but “an exception to that general requirement

arises where the market for the relevant goods or services is restricted to the territory of a single Member State.” On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon’s analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use.”

24. The General Court (“GC”) restated its interpretation of *Leno Marken* in Case T-398/13, *TVR Automotive Ltd v OHIM* (see paragraph 57 of the judgment). This case concerned national (rather than local) use of what was then known as a Community trade mark (now a European Union trade mark). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of an EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM. This applies even where there are no special factors, such as the market for the goods/services being limited to that area of the Union.

25. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the EUTMs, in the course of trade, sufficient to create or maintain a market for the goods/services at issue in the Union during the relevant 5 year period. In making the required assessment I am required to consider all relevant factors, including:

- a. The scale and frequency of the use shown;
- b. The nature of the use shown;
- c. The goods and services for which use has been shown;
- d. The nature of those goods/services and the market(s) for them; and

e. The geographical extent of the use shown.

26. Proven use of a mark which fails to establish that “the commercial exploitation of the marks is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is, therefore, not genuine use.

Form of the mark

27. There are various examples, throughout the opponent’s evidence, of the First Earlier Mark in use. In particular, this forms part of the opponent’s domain name for its websites in Italy, the Netherlands, Germany and France. Clearly, use of the mark as registered will be use upon which the opponent can rely.

28. The following sign appears on the Facebook pages of the opponent:



29. It is necessary to consider whether this is an acceptable variant of the earlier marks.

30. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the CJEU found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration

and, accordingly, 'use' within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish 'use' within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestle*, the 'use' of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition of a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)". (emphasis added)

31. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold Q.C. (as he then was), sitting as the Appointed Person, summarised the test under section 46(2) of the Act as follows:

“33. ...The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all.”

32. Although this case was decided before the judgment of the CJEU in *Colloseum*, it remains sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered. The later judgment of the CJEU must also be taken into account where the mark is used as registered, but as part of a composite mark.

33. A word only mark can be used in any standard typeface. The differences between the First Earlier Mark and the stylised text in the variant shown above, are not significant. I also note that, as per *Colloseum*, use in combination with additional matter is acceptable variant use. I do not, therefore, consider that the addition of the star device prevents this from being an acceptable variant of the First Earlier Mark. With regard to the Second Earlier Mark, all of its elements are present in the variant (with the exception of the colours which are not visible from the black and white image), but rearranged. I do not consider that this alters the mark’s distinctive character as per *Nirvana*. Consequently, this variant is an acceptable use of both the First and Second Earlier Marks.

Sufficient Use

34. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.⁵

35. There are clearly issues with the opponent's evidence. A number of the exhibits are undated and none of them are in English (with no translations provided). However, the opponent clearly operates four different websites (one targeted at each Italy, the Netherlands, France and Germany). It is clear to me from the evidence, that at least two of these websites have been in operation since 2015/2016 and use of those websites has continued in 2019. These webpages clearly show a range of services on offer including horoscopes, tarot, predictions, numerology and astrology. The opponent has also clearly, been operating a social media account in at least one of these countries dating back to at least March 2018. I note that the opponent's website has received several thousand (and in some cases hundreds of thousands) of visitors per month within the relevant period in three different member states.

36. I recognise that there is no evidence that the opponent has generated any profits or revenue from its websites. However, I bear in mind the decision of the CJEU in *Antartica Srl v OHIM, The Nasdaq Stock Market, Inc.*, Case C-320/07 P, in which the court held that:

“29. It is sufficient to note in that respect that, even if part of the services for which the earlier mark is registered are offered by The Nasdaq Stock Market free of charge, that does not of itself mean that that commercial company will not seek, by such use of its trade mark, to create or maintain an outlet for those services in the Community, as against the services of other undertakings.”

37. To my mind, there is sufficient evidence to find that there has been use of the earlier marks by the opponent to create or maintain a share in the market for the services relied upon, notwithstanding the fact that there is no evidence of revenue

⁵ *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

before me. The number of users to the opponent's website is significant, and there is use across at least three members states during the relevant period. I consider that the opponent has demonstrated genuine use of the earlier marks.

Fair Specification

38. I must now consider whether, or the extent to which, the evidence shows use of the earlier marks in relation to the services relied upon.

39. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

40. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows:

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

41. As noted above, there is clear evidence of use in relation to horoscope casting, consultancy on astrology and numerology. The terms "divinatory sciences" would include the other services that the opponent has shown use of i.e. astrology, numerology and horoscope casting. Consequently, I consider that the opponent has shown genuine use of all of the services upon which it relies.

Section 5(2)(b) – case law

42. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer*

Inc, Case C-39/97, Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V. Case C-342/97, Marca Mode CV v Adidas AG & Adidas Benelux BV, Case C-425/98, Matratzen Concord GmbH v OHIM, Case C-3/03, Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH, Case C-120/04, Shaker di L. Laudato & C. Sas v OHIM, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P:

(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 be dominated by one or more of its components;

(f) however, it is also 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 to mind the earlier mark, 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;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of services

43. The competing services are as follows:

Opponent's services	Applicant's services
First Earlier Mark <u>Class 45</u> Horoscope casting; consultancy on astrology; numerology and divinatory sciences.	<u>Class 45</u> Cartomancy in relation to deciding which additional flowers, plants, trees and gems to use in beauty care products for example scents, perfumes, essential oils, essential oil blends, flower essences, flower remedies, aromatics, aromatherapy oils, toilet waters, flower waters, hair sprays, beauty care products, candles, room scents;
Second Earlier Mark <u>Class 45</u> Horoscope casting; consultancy in the field of astrology; numerology, divining sciences.	Astrological advice relating to planetary

	positions of designated flowers and gems as a basis of fragrance choice for astrology-matched beauty care products for example essential oils, perfumes, scents, flower essences (cosmetic), crystal gem essences, crystal gems; Astrological and spiritual services; Astrological forecasting; Astrological services; Astrology consultancy; Astrology consultation; Cartomancy services; Forecasting services in the nature of fortune telling; Fortune-telling; Horoscope casting; Horoscope forecasting; Horoscopes; Personal gift selection for others; Preparation of customized gift boxes; Providing horoscope information via computer networks; Provision of horoscopes; Provision of personal tarot readings; Psychic consultancy; Psychic reading services; Spiritual consultancy; Zodiac consultation; Psychic reading services; Spiritual advice.
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44. In the *Treat* case, [1996] R.P.C. 281, Jacob J. (as he then was) identified the following factors for assessing similarity:

- (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.

45. 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 for 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.”

46. The applicant has made reference to the services provided by the parties' in practice. For the avoidance of doubt, the assessment that I must undertake is a notional one based upon the similarity between the services in the parties' respective specifications. I cannot, therefore, take into consideration the activities of the parties in practice, but rather must consider all the ways in which the services covered by their specifications may be used.

47. “Astrological advice relating to planetary positions of designated flowers and gems as a basis of fragrance choice for astrology-matched beauty care products for example essential oils, perfumes, scents, flower essences (cosmetic), crystal gem essences, crystal gems”, “Astrological [...] services”, “Astrological forecasting”, “Astrological services”, “Astrology consultancy” and “Astrology consultation” in the applicant's

specification are either self-evidently or *Meric* identical to “consultancy on astrology” and “consultancy in the field of astrology” in the opponent’s specification.

48. “Horoscope casting”, “Horoscope forecasting”, “Horoscopes”, “Providing horoscope information via computer networks”, “Zodiac consultation” and “Provision of horoscopes” in the applicant’s specification are either self-evidently or *Meric* identical to “horoscope casting” in the opponent’s specification.

49. “Horoscope casting”, “consultancy on astrology” and “numerology” in the opponent’s specification all fall within the broader categories of “Forecasting services in the nature of fortune telling” and “Fortune-telling” in the applicant’s specification. These services can, therefore, be considered identical on the principle outlined in *Meric*.

50. Cartomancy is the telling of fortunes with playing cards.⁶ I, therefore consider “Cartomancy in relation to deciding which additional flowers, plants, trees and gems to use in beauty care products for example scents, perfumes, essential oils, essential oil blends, flower essences, flower remedies, aromatics, aromatherapy oils, toilet waters, flower waters, hair sprays, beauty care products, candles, room scents”, “Cartomancy services” and “Provision of personal tarot readings” in the applicant’s specification to overlap in user, use and nature with “horoscope casting” in the opponent’s specification. These services will all be used by members of the general public in order to learn information. In my view, the average consumer would also perceive there to be an overlap in trade channels for the services. There may be a degree of competition between them. I consider the services to be highly similar.

51. I recognise that, in particular, in respect of the term “Cartomancy in relation to deciding which additional flowers, plants, trees and gems to use in beauty care products for example scents, perfumes, essential oils, essential oil blends, flower essences, flower remedies, aromatics, aromatherapy oils, toilet waters, flower waters, hair sprays, beauty care products, candles, room scents” in the applicant’s specification, the applicant seeks to differentiate this from the opponent’s services on

⁶ <https://www.collinsdictionary.com/dictionary/english/cartomancy>

the basis that Cartomancy does not typically involve the use of flowers and gems. However, the fundamental service of Cartomancy is the telling of fortunes through the use of playing cards. The fact that the term in the applicant's specification relates to a specific subject i.e. which flowers and gems should be used in beauty care products" does not prevent it from being used to tell the user something in the same way as other types of Cartomancy and fortune-telling services. I do not, therefore, consider that this line of argument assists the applicant.

52. "Psychic consultancy" and "Psychic reading services" (which is duplicated) in the applicant's specification generally involve providing the user with information about themselves, based on alleged extrasensory perception. There will, therefore, be overlap in user, use and nature with "horoscope casting" in the opponent's specification. I also consider that the average consumer would perceive there to be overlap in trade channels between these services. Further, there is a degree of competition between them. I consider the services to be highly similar.

53. The word 'spiritual' normally refers to matters that relate to people's thoughts and beliefs. This could include anything from religious beliefs to meditation. I consider that there may be a degree of overlap in nature, purpose and trade channels with the opponent's services. Spiritual services may include services that provide people with information about themselves or their future, in the same way as the opponent's services. There may be a degree of competition between "Spiritual services", "Spiritual consultancy" and "Spiritual advice" in the applicant's specification and the opponent's services. I consider the services to be similar to at least a medium degree.

54. "Personal gift selection for others" and "preparation of customized gift boxes" in the applicant's specification do not overlap in use, method of use, nature or trade channels with the opponent's services. I recognise that the services may all be used by members of the general public, but that is not enough on its own for a finding of similarity. The services are neither competitive nor complementary. Even to the extent that these services may involve gift selections containing goods relating to the opponent's services (e.g. tarot cards etc.), they will still differ in use, method of use, nature and trade channels. I consider the services to be dissimilar. As some degree

of similarity between the services is necessary to engage the test for likelihood of confusion⁷, the opposition must fail in respect of these services.

The average consumer and the nature of the purchasing act

55. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' services. I must then determine the manner in which the services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

56. The average consumer for the services will be a member of the general public. The cost of the purchase is likely to be relatively low and may be purchased reasonably frequently. However, the average consumer will still take various factors into account such as the specific nature of the services offered, the environment in which they are provided and the information that they are likely to be able to obtain through the services. Consequently, I consider that a medium degree of attention will be paid during the purchasing process for the services.

57. The services are likely to be purchased from specialist businesses or traders, or their online equivalents. The average consumer is likely to come into contact with the services following perusal of signage outside the business premises or following perusal of advertisements (such as posters, flyers or online adverts). Visual

⁷ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

considerations are, therefore, likely to dominate the selection process. However, I do not discount that there will also be an aural component to the purchase of the services, particularly as there are likely to be word-of-mouth recommendations.

Comparison of trade marks

58. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“... it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

59. 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.

60. The respective trade marks are shown below:

Opponent's trade marks	Applicant's trade mark
ASTROCENTER (the First Earlier Mark)	Astroscent



(the Second Earlier Mark)

61. The applicant's mark consists of the invented word ASTROSCENT, presented in title case. There are no other elements to contribute to the overall impression which lies in the word itself. The First Earlier Mark consists of the invented word ASTROCENTER, presented in upper case. Again, there are no other elements to contribute to the overall impression, which lies in the word itself. The Second Earlier Mark consists of the word ASTROCENTER presented in lower case, with the word ASTRO in pink and the word CENTER in purple. The word is accompanied by a star device. It is the word itself which plays the greater role in the overall impression of the mark, as the eye is naturally drawn to the element that can be read. The use of colour and the star device play a lesser role in the overall impression.

Visual Comparison

62. Visually, both the applicant's mark and the First Earlier Mark start with the letters ASTRO. They also both contain the four letters CENT. However, the marks differ in the presence of the letters ER at the end of the First Earlier Mark, which have no counterpart in the applicant's mark, and the presence of the letter S in the middle of the applicant's mark which has no counterpart in the First Earlier Mark. I consider the marks to be visually similar to between a medium and high degree.

63. The same applies for the Second Earlier Mark. However, this has the additional differences of the use of colour and the star device. Taking these into account, I consider the marks to be visually similar to a medium degree.

Aural Comparison

64. Aurally, the First Earlier Mark will be pronounced ASSS-TROW-SENT-ERRR. The applicant's mark will be pronounced ASSS-TROW-SENT. I consider the marks to be aurally similar to a high degree.

65. As the additional elements in the Second Earlier Mark will be not be articulated, the same aural comparison applies. I consider the marks to be aurally similar to a high degree.

Conceptual Comparison

66. Conceptually, the word ASTRO is likely to be recognised, in the context of the services, as a reference to astrology i.e. the study of the movements of the planets, sun, moon and stars in the belief that they impact upon people's lives.⁸ This meaning will be the same for both the First Earlier Mark and the applicant's mark. CENTER, in the First Earlier Mark will be recognised as the American spelling of the word CENTRE i.e. a building in which people might gather for a particular activity or meeting. As a whole, therefore, the First Earlier Mark is likely to be recognised as a reference to a place from which astrological-type services can be obtained. SCENT in the applicant's mark will be given its ordinary dictionary meaning i.e. the fragrance of something. Whilst the word ASTRO will be seen as a reference to astrology, when taken as a whole, the meaning of this mark is far less clear. I consider the marks to be conceptually similar to no more than a medium degree.

67. The same conceptual comparison will apply for the Second Earlier Mark. The presence of the colour serves to further distinguish the words ASTRO and CENTER as separate. Further, the use of the star device reinforces the meaning of the term ASTRO. I consider the marks to be conceptually similar to no more than a medium degree.

⁸ <https://www.collinsdictionary.com/dictionary/english/astrology>

68. I note that the applicant has suggested that the term CENTER may also be seen as a reference to “the midpoint in space and time” which “applied to absolutely everything in the Universe”. I consider it unlikely that this is the meaning that would be understood by the average consumer. In any event, this does not impact upon my findings with regard to conceptual similarity as the ordinary dictionary meaning of the word CENTER differs from the word SCENT in any event, creating the conceptual differences identified above.

69. As it is the First Earlier Mark which shares the greater degree of similarity with the applicant’s mark, and therefore represents the opponent’s best case, I will continue my assessment in respect of this mark only.

Distinctive character of the earlier trade marks

70. 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-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in 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).”

71. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctive character of a mark can be enhanced by virtue of the use that has been made of it.

72. The First Earlier Mark consists of the word ASTROCENTER. As noted above, the term ASTRO is likely to be seen as a reference to astrology, which for some of the services, will be descriptive. The word CENTER is the American spelling of CENTRE and will be seen as a reference to a particular place from which the services are provided. As a whole, I consider the First Earlier Mark to be inherently distinctive to a low degree for astrology-related services and a low to medium degree for the opponent’s other services.

73. The opponent has, of course, filed evidence of use of the earlier marks. However, this evidence relates to Italy, the Netherlands, France and Germany. As it is the UK average consumer who is relevant for the assessment of likelihood of confusion, and the opponent has shown no use of its mark in the UK, I do not consider that the distinctiveness of the First Earlier Mark has been enhanced through use.

Likelihood of confusion

74. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa. As I mentioned

above, it is necessary for me to keep in mind the distinctive character of the First Earlier Mark, the average consumer for the services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

75. I have found the marks to be visually similar to between a medium and high degree, aurally highly similar and conceptually similar to no more than a medium degree. I have found the First Earlier Mark to have a low degree of inherent distinctive character for astrology-related services and between a low and medium degree of inherent distinctive character for the opponent's remaining services. I have identified the average consumer to be a member of the general public who will select the services primarily by visual means, although I do not discount an aural component. I have concluded that a medium degree of attention will be paid during the purchasing process for the services. I have found the parties' services to vary from being similar to at least a medium degree to identical (except for those that I have found to be dissimilar).

76. The fact that a medium degree of attention will be paid during the purchasing process is a factor in favour of the applicant, as is the First Earlier Mark's relatively low degree of inherent distinctive character. However, the fact that the earlier mark has a weak distinctive character does not preclude a likelihood of confusion.⁹ I recognise that, as a general rule, the beginnings of marks tend to make more of an impact than the ends.¹⁰ However, in this case, the beginning of both marks is the element that is likely to be seen as descriptive for at least some of the services. A finding of indirect confusion should not be made merely because two marks share a common element,¹¹ particularly where that common element is descriptive. Nonetheless, the real similarity between these marks is the fact that, not only do they share the common element ASTRO at the start, but that they also share the letters CENT at the end of the marks. I recognise that the elements CENTER and SCENT in each mark create a point of conceptual difference and that conceptual differences may counteract visual and aural

⁹ *L'Oréal SA v OHIM*, Case C-235/05 P

¹⁰ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

¹¹ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

similarities.¹² However, I also recognise that even where there are conceptual differences between the signs, they cannot always neutralise the visual and aural similarities between them.¹³

77. Taking all of this into account, as well as the principle of imperfect recollection, I consider that the marks are likely to be mistakenly recalled or misremembered as each other when used on services that are similar to at least a medium degree. This will particularly be the case where the marks are encountered aurally. I do not consider that the conceptual differences between them will be sufficient to counteract the visual and aural similarities. For those services, I consider there to be a likelihood of direct confusion.

CONCLUSION

78. The opposition is partially successful in respect of the following services, for which the application is refused:

Class 45 Cartomancy in relation to deciding which additional flowers, plants, trees and gems to use in beauty care products for example scents, perfumes, essential oils, essential oil blends, flower essences, flower remedies, aromatics, aromatherapy oils, toilet waters, flower waters, hair sprays, beauty care products, candles, room scents; Astrological advice relating to planetary positions of designated flowers and gems as a basis of fragrance choice for astrology-matched beauty care products for example essential oils, perfumes, scents, flower essences (cosmetic), crystal gem essences, crystal gems; Astrological and spiritual services; Astrological forecasting; Astrological services; Astrology consultancy; Astrology consultation; Cartomancy services; Forecasting services in the nature of fortune telling; Fortune-telling; Horoscope casting; Horoscope forecasting; Horoscopes; Providing horoscope information via computer networks; Provision of horoscopes; Provision of personal

¹² *The Picasso Estate v OHIM*, Case C-361/04 P

¹³ *Nokia Oyj v OHIM*, Case T-460/07

tarot readings; Psychic consultancy; Psychic reading services; Spiritual consultancy; Zodiac consultation; Psychic reading services; Spiritual advice.

79. The application can proceed to registration in respect of the following services for which the opposition has been unsuccessful and in respect of those goods and services that were not subject to this opposition:

Class 3 Flower water for cosmetic use; Flower & mineral water for cosmetic use; Flower essences (cosmetic); Rose Water for cosmetic use; Orange flower water (cosmetic); Birch water, birch sap, birch alcohol for cosmetic use in beauty products for example perfume bases; Grape alcohol (cosmetic) for use in beauty care products for example perfume blends, essential oil blends; Base alcohol for cosmetic use in beauty products for example scent and perfume blending, essential oil blending; Organic essential oils; Organic scents; Organic perfumes; Wine for use as a carrier in perfume and scent bases (cosmetic) including use in beauty products for example flower waters, colognes, eau de colognes; Natural scents; Bamboo oil (cosmetic); Hemp oil for cosmetic use; Absolutes (concrete essential oils); Sesame oil for cosmetic purpose; Aftershave balms; Aftershave creams; Aftershave lotions; Aftershave preparations; Aftershaves; Air fragrance preparations; Air fragrance reed diffusers; Almond soaps; Aloe vera preparations for cosmetic purposes; Amber [perfume]; Ambergris; Amla oil for cosmetic purposes; Anti-ageing creams [for cosmetic use]; Anti-ageing moisturiser; Anti-ageing serum; Anti-aging skincare preparations; Aromatherapy creams; Aromatherapy lotions; Aromatherapy oils; Aromatherapy preparations; Aromatic essential oils; Aromatic oils; Aromatic plant extracts; Aromatics; Badian essence; Balms (Non-medicated -); Bases for flower perfumes; Bay rums; Bay rums for cosmetic use; Beauty care cosmetics; Beauty care preparations; Beauty creams; Beauty creams for body care; Beauty lotions; Beauty serums; Beauty serums with anti-ageing properties; Beauty tonics for application to the body; Beauty tonics for application to the face; Blended essential oils; Body and facial creams [cosmetics];

Body and facial oils; Body lotions; Body massage oils; Cedarwood (Essential oils of -); Cedarwood perfumery; Cocoa butter for cosmetic purposes; Cologne water; Cosmetic hand creams; Cosmetic preparations; Cosmetic preparations for skin care; Cosmetics all for sale in kit form; Cosmetics containing hyaluronic acid; Cosmetics containing keratin; Cosmetics for the use on the hair; Coconut oil for cosmetic purposes; Colognes; Cosmetic hair care preparations; Emulsified essential oils; Essences (Ethereal -); Essences for skin care; Essential oils; Essential oils and aromatic extracts; Essential oils for aromatherapy; Essential oils for aromatherapy use; Essential oils for cosmetic purposes; Essential oils for soothing the nerves; Essential oils for the care of the skin; Essential oils for use in air fresheners; Essential oils for use in the manufacture of scented products; Essential oils of cedarwood; Essential oils of sandalwood; Essential vegetable oils; Ethereal essences and oils; Etheric oils; Extracts of flowers [perfumes]; Extracts of perfumes; Eye cream; Eye gels; Facial care preparations; Facial creams; Floral water; Flower perfumes (Bases for -); Flowers (Extracts of -) [perfumes]; Fragrance preparations; Geraniol; Geraniol for cosmetic purposes; Geraniol for fragrancng; Hair balms; Hair lotions; Hair oils; Hair sprays; Hair tonics; Hand creams; Hand soaps; Handmade soap; Helichrysum [essential oils]; Heliotropin; Heliotropin fragrancng compounds; Heliotropine; Humectants; Incense sticks; Ionone [perfumery]; Japanese hair fixing oil (bintsuke-abura); Jasmine oil; Lavender oil; Lavender oil for cosmetic use; Lavender water; Massage oils and lotions; Mineral oils [cosmetic]; Mineral water sprays for cosmetic purposes; Mint essence [essential oil]; Mint for perfumery; Musk [natural]; Musk [perfumery]; Natural cosmetics; Natural essential oils; Natural oils for perfumes; Natural perfumery; Oils for cosmetic purposes; Organic cosmetics; Peppermint oil [perfumery]; Perfume; Perfume oils; Perfume oils for the manufacture of cosmetic preparations; Perfume water; Perfumed creams; Perfumed oils for skin care; Perfumed soaps; Perfumery and fragrances; Perfumery, essential oils; Perfumery products; Perfumes; Perfumes in solid form; Perfuming preparations for the atmosphere; Pine oil; Preparations for the care of

the body; Room perfume sprays; Rose oil; Rosemary oil for cosmetic use; Scented body lotions and creams; Scented body spray; Scented oils; Scented oils used to produce aromas when heated; Scented room sprays; Scented soaps; Scented toilet waters; Scented water; Scents; Skin balms [cosmetic]; Solid perfumes; Terpenes [essential oils]; Toiletry preparations; Tonics [cosmetic]; Vanilla perfumery; Room scenting sprays; Lemon [Essential oils of -]; Lip balm; Bath soap.

Class 4 Aromatherapy fragrance candles; Beeswax for use in the manufacture of candles; Beeswax for use in the manufacture of cosmetics; Beeswax for use in the manufacture of ointments; Candles; Candles (Perfumed -); Floating candles; Fragranced candles; Grave candles, non-electric; Musk scented candles; Nightlights [candles]; Perfumed candles; Scented candles; Sumac wax [sumach wax]; Table candles; Tapers for lighting; Tealights; Vegetable wax; Votive candles; Wicks for candles for lighting.

Class 40 Custom/Bespoke natural flower and plant based materials such as essential oils, concretes, absolutes, aromatic oils and essences, flowers, plants, flowers and tree/plant essences, flowers and trees/plant extracts, hyaluronic acid, keratin, emulsified essential oils with carriers such as aromatherapy oils, soy oils, sesame oils, Bay rum oil, Amla oil, mineral oil, mineral water, flower water, sap, alcohol, wine, waxes, beeswax, bintsuke-abura, resins, butters, gels, bases such as oils, lotions and creams, cosmetic bases, coconut oil, soaps and crystal gems and crystal gem essences as determined by custom astrological profiles relating to astrologically assigned beneficial flowers and gems and Cartomancy for the purpose of producing astrology-matched cosmetic beauty care products for example scents, perfumes, aftershaves, waters, colognes, lotions, creams, hair sprays, balms, gels, serums, tonics and atmospheric room scented sprays, candles, incense sticks; Custom/Bespoke natural flower and plant based materials such as essential oils, concretes, absolutes, aromatic oils and essences, flowers, plants, flowers and tree/plant essences, flowers and trees/plant extracts,

hyaluronic acid, keratin, emulsified essential oils with carriers such as aromatherapy oils, soy oils, sesame oils, Bay rum oil, Amla oil, mineral oil, mineral water, flower water, sap, alcohol, wine, waxes, beeswax, bintsuke-abura, resins, butters, gels, bases such as oils, lotions and creams, cosmetic bases, coconut oil, soaps and crystal gems and crystal gem essences as determined by custom astrological profiles relating to astrologically assigned beneficial flowers and gems and Cartomancy for the purpose of producing astrology-matched cosmetic beauty care products for example scents, perfumes, aftershaves, waters, colognes, lotions, creams, hair sprays, balms, gels, serums, tonics and atmospheric room scented sprays, candles, incense sticks; Processing natural flower and plant based materials such as essential oils, concretes, absolutes, aromatic oils and essences, flowers, plants, flowers and tree/plant essences, flowers and trees/plant extracts, hyaluronic acid, keratin, emulsified essential oils with carriers such as aromatherapy oils, soy oils, sesame oils, Bay rum oil, Amla oil, mineral oil, mineral water, flower water, sap, alcohol, wine, waxes, beeswax, bintsuke-abura, resins, butters, gels, bases such as oils, lotions and creams, cosmetic bases, coconut oil, soaps and crystal gems and crystal gem essences as determined by astrological planetary placements of assigned flowers and gems to specified planetary placements e.g. planet Venus and/or generally known zodiac signs for the purpose of producing astrology-matched cosmetic beauty care products for example scents, perfumes, aftershaves, waters, colognes, lotions, creams, hair sprays, balms, gels, serums, tonics and atmospheric room scented sprays, candles, incense sticks; Steam distillation of flowers and plants for cosmetic use in beauty products for example use in scents, perfumes, waters, flower essences (cosmetic);Extraction of flower scents by enfleurage process in wax and/or coconut base; Blending natural flower and plant based materials such as essential oils, concretes, absolutes, aromatic oils and essences, flowers, plants, flowers and tree/plant essences, flowers and trees/plant extracts, hyaluronic acid, keratin, emulsified essential oils with carriers such as aromatherapy oils, soy oils, sesame oils, Bay rum oil, Amla oil, mineral oil, mineral water, flower

water, sap, alcohol, wine, waxes, beeswax, bintsuke-abura, resins, butters, gels, bases such as oils, lotions and creams, coconut oil, soaps and crystal gems and crystal gem essences as determined by astrological planetary placements of assigned flowers and gems to specified planetary placements e.g. planet Venus and/or generally known zodiac signs for the purpose of producing astrology-matched cosmetic beauty care products for example scents, perfumes, aftershaves, waters, colognes, lotions, creams, hair sprays, balms, gels, serums, tonics and atmospheric room scented sprays, candles, incense sticks; Bottling beauty products for example perfumes, scents, waters, colognes, eau de colognes, aftershaves, hair sprays, room scent sprays; Custom blending of essential oils for aromatherapy use; Filtration of liquids; Treatment of materials using chemicals; Treatment of water; Rolling.

Class 44 Beauty advice; Cultivation of plants for use in beauty care products for example perfumery, scents, flower essences, flower waters, toilet waters, colognes, eau de colognes, hair sprays; Advice relating to Flower choice for use in beauty care products for example flower essences (cosmetic), essential oils, perfumes, scents, flower remedies (cosmetic), crystal gem essences, crystal gems as determined by astrological profile of associated beneficial flowers and gems; Beauty care; Hair treatment; Aromatherapy services; Ayurveda therapy.

Class 45 Personal gift selection for others; Preparation of customized gift boxes.

COSTS

80. The opponent has enjoyed the greater degree of success and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. I have made a reduction to reflect the opponent's only partial success. In the circumstances, I award the opponent the sum of £750 as a contribution towards the costs of the proceedings. This sum is calculated as follows:

Preparing a Notice of opposition and considering the applicant's counterstatement	£150
Filing evidence	£500
Official fee	£100
Total	£750

81. I therefore order Astroscent Ltd to pay WENGO SAS the sum of £750. This sum should 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 11th day of March 2020

S WILSON

For the Registrar

ANNEX

Registration is sought for the following goods and services:

Class 3

Flower water for cosmetic use; Flower & mineral water for cosmetic use; Flower essences (cosmetic); Rose Water for cosmetic use; Orange flower water (cosmetic); Birch water, birch sap, birch alcohol for cosmetic use in beauty products for example perfume bases; Grape alcohol (cosmetic) for use in beauty care products for example perfume blends, essential oil blends; Base alcohol for cosmetic use in beauty products for example scent and perfume blending, essential oil blending; Organic essential oils; Organic scents; Organic perfumes; Wine for use as a carrier in perfume and scent bases (cosmetic) including use in beauty products for example flower waters, colognes, eau de colognes; Natural scents; Bamboo oil (cosmetic); Hemp oil for cosmetic use; Absolutes (concrete essential oils); Sesame oil for cosmetic purpose; Aftershave balms; Aftershave creams; Aftershave lotions; Aftershave preparations; Aftershaves; Air fragrance preparations; Air fragrance reed diffusers; Almond soaps; Aloe vera preparations for cosmetic purposes; Amber [perfume]; Ambergris; Amla oil for cosmetic purposes; Anti-ageing creams [for cosmetic use]; Anti-ageing moisturiser; Anti-ageing serum; Anti-aging skincare preparations; Aromatherapy creams; Aromatherapy lotions; Aromatherapy oils; Aromatherapy preparations; Aromatic essential oils; Aromatic oils; Aromatic plant extracts; Aromatics; Badian essence; Balms (Non-medicated -); Bases for flower perfumes; Bay rums; Bay rums for cosmetic use; Beauty care cosmetics; Beauty care preparations; Beauty creams; Beauty creams for body care; Beauty lotions; Beauty serums; Beauty serums with anti-ageing properties; Beauty tonics for application to the body; Beauty tonics for application to the face; Blended essential oils; Body and facial creams [cosmetics]; Body and facial oils; Body lotions; Body massage oils; Cedarwood (Essential oils of -); Cedarwood perfumery; Cocoa butter for cosmetic purposes; Cologne water; Cosmetic hand creams; Cosmetic preparations; Cosmetic preparations for skin care; Cosmetics all for sale in kit form; Cosmetics containing hyaluronic acid; Cosmetics containing keratin; Cosmetics for the use on the hair; Coconut oil for cosmetic purposes; Colognes; Cosmetic hair care preparations; Emulsified essential oils; Essences (Ethereal -); Essences for skin care; Essential oils; Essential oils and

aromatic extracts; Essential oils for aromatherapy; Essential oils for aromatherapy use; Essential oils for cosmetic purposes; Essential oils for soothing the nerves; Essential oils for the care of the skin; Essential oils for use in air fresheners; Essential oils for use in the manufacture of scented products; Essential oils of cedarwood; Essential oils of sandalwood; Essential vegetable oils; Ethereal essences and oils; Etheric oils; Extracts of flowers [perfumes]; Extracts of perfumes; Eye cream; Eye gels; Facial care preparations; Facial creams; Floral water; Flower perfumes (Bases for -); Flowers (Extracts of -) [perfumes]; Fragrance preparations; Geraniol; Geraniol for cosmetic purposes; Geraniol for fragrancng; Hair balms; Hair lotions; Hair oils; Hair sprays; Hair tonics; Hand creams; Hand soaps; Handmade soap; Helichrysum [essential oils]; Heliotropin; Heliotropin fragrancng compounds; Heliotropine; Humectants; Incense sticks; Ionone [perfumery]; Japanese hair fixing oil (bintsuke-abura); Jasmine oil; Lavender oil; Lavender oil for cosmetic use; Lavender water; Massage oils and lotions; Mineral oils [cosmetic]; Mineral water sprays for cosmetic purposes; Mint essence [essential oil]; Mint for perfumery; Musk [natural]; Musk [perfumery]; Natural cosmetics; Natural essential oils; Natural oils for perfumes; Natural perfumery; Oils for cosmetic purposes; Organic cosmetics; Peppermint oil [perfumery]; Perfume; Perfume oils; Perfume oils for the manufacture of cosmetic preparations; Perfume water; Perfumed creams; Perfumed oils for skin care; Perfumed soaps; Perfumery and fragrances; Perfumery, essential oils; Perfumery products; Perfumes; Perfumes in solid form; Perfuming preparations for the atmosphere; Pine oil; Preparations for the care of the body; Room perfume sprays; Rose oil; Rosemary oil for cosmetic use; Scented body lotions and creams; Scented body spray; Scented oils; Scented oils used to produce aromas when heated; Scented room sprays; Scented soaps; Scented toilet waters; Scented water; Scents; Skin balms [cosmetic]; Solid perfumes; Terpenes [essential oils]; Toiletry preparations; Tonics [cosmetic]; Vanilla perfumery; Room scenting sprays; Lemon [Essential oils of -]; Lip balm; Bath soap.

Class 4

Aromatherapy fragrance candles; Beeswax for use in the manufacture of candles; Beeswax for use in the manufacture of cosmetics; Beeswax for use in the manufacture of ointments; Candles; Candles (Perfumed -); Floating candles; Fragranced candles; Grave candles, non-electric; Musk scented candles; Nightlights [candles]; Perfumed

candles; Scented candles; Sumac wax [sumach wax]; Table candles; Tapers for lighting; Tealights; Vegetable wax; Votive candles; Wicks for candles for lighting.

Class 40

Custom/Bespoke natural flower and plant based materials such as essential oils, concretes, absolutes, aromatic oils and essences, flowers, plants, flowers and tree/plant essences, flowers and trees/plant extracts, hyaluronic acid, keratin, emulsified essential oils with carriers such as aromatherapy oils, soy oils, sesame oils, Bay rum oil, Amla oil, mineral oil, mineral water, flower water, sap, alcohol, wine, waxes, beeswax, bintsuke-abura, resins, butters, gels, bases such as oils, lotions and creams, cosmetic bases, coconut oil, soaps and crystal gems and crystal gem essences as determined by custom astrological profiles relating to astrologically assigned beneficial flowers and gems and Cartomancy for the purpose of producing astrology-matched cosmetic beauty care products for example scents, perfumes, aftershaves, waters, colognes, lotions, creams, hair sprays, balms, gels, serums, tonics and atmospheric room scented sprays, candles, incense sticks; Custom/Bespoke natural flower and plant based materials such as essential oils, concretes, absolutes, aromatic oils and essences, flowers, plants, flowers and tree/plant essences, flowers and trees/plant extracts, hyaluronic acid, keratin, emulsified essential oils with carriers such as aromatherapy oils, soy oils, sesame oils, Bay rum oil, Amla oil, mineral oil, mineral water, flower water, sap, alcohol, wine, waxes, beeswax, bintsuke-abura, resins, butters, gels, bases such as oils, lotions and creams, cosmetic bases, coconut oil, soaps and crystal gems and crystal gem essences as determined by custom astrological profiles relating to astrologically assigned beneficial flowers and gems and Cartomancy for the purpose of producing astrology-matched cosmetic beauty care products for example scents, perfumes, aftershaves, waters, colognes, lotions, creams, hair sprays, balms, gels, serums, tonics and atmospheric room scented sprays, candles, incense sticks; Processing natural flower and plant based materials such as essential oils, concretes, absolutes, aromatic oils and essences, flowers, plants, flowers and tree/plant essences, flowers and trees/plant extracts, hyaluronic acid, keratin, emulsified essential oils with carriers such as aromatherapy oils, soy oils, sesame oils, Bay rum oil, Amla oil, mineral oil, mineral water, flower water, sap, alcohol, wine, waxes, beeswax, bintsuke-abura, resins, butters, gels, bases such as oils, lotions and creams, cosmetic bases, coconut

oil, soaps and crystal gems and crystal gem essences as determined by astrological planetary placements of assigned flowers and gems to specified planetary placements e.g. planet Venus and/or generally known zodiac signs for the purpose of producing astrology-matched cosmetic beauty care products for example scents, perfumes, aftershaves, waters, colognes, lotions, creams, hair sprays, balms, gels, serums, tonics and atmospheric room scented sprays, candles, incense sticks; Steam distillation of flowers and plants for cosmetic use in beauty products for example use in scents, perfumes, waters, flower essences (cosmetic); Extraction of flower scents by enfleurage process in wax and/or coconut base; Blending natural flower and plant based materials such as essential oils, concretes, absolutes, aromatic oils and essences, flowers, plants, flowers and tree/plant essences, flowers and trees/plant extracts, hyaluronic acid, keratin, emulsified essential oils with carriers such as aromatherapy oils, soy oils, sesame oils, Bay rum oil, Amla oil, mineral oil, mineral water, flower water, sap, alcohol, wine, waxes, beeswax, bintsuke-abura, resins, butters, gels, bases such as oils, lotions and creams, coconut oil, soaps and crystal gems and crystal gem essences as determined by astrological planetary placements of assigned flowers and gems to specified planetary placements e.g. planet Venus and/or generally known zodiac signs for the purpose of producing astrology-matched cosmetic beauty care products for example scents, perfumes, aftershaves, waters, colognes, lotions, creams, hair sprays, balms, gels, serums, tonics and atmospheric room scented sprays, candles, incense sticks; Bottling beauty products for example perfumes, scents, waters, colognes, eau de colognes, aftershaves, hair sprays, room scent sprays; Custom blending of essential oils for aromatherapy use; Filtration of liquids; Treatment of materials using chemicals; Treatment of water; Rolling.

Class 44

Beauty advice; Cultivation of plants for use in beauty care products for example perfumery, scents, flower essences, flower waters, toilet waters, colognes, eau de colognes, hair sprays; Advice relating to Flower choice for use in beauty care products for example flower essences (cosmetic), essential oils, perfumes, scents, flower remedies (cosmetic), crystal gem essences, crystal gems as determined by astrological profile of associated beneficial flowers and gems; Beauty care; Hair treatment; Aromatherapy services; Ayurveda therapy.

Class 45

Cartomancy in relation to deciding which additional flowers, plants, trees and gems to use in beauty care products for example scents, perfumes, essential oils, essential oil blends, flower essences, flower remedies, aromatics, aromatherapy oils, toilet waters, flower waters, hair sprays, beauty care products, candles, room scents; Astrological advice relating to planetary positions of designated flowers and gems as a basis of fragrance choice for astrology-matched beauty care products for example essential oils, perfumes, scents, flower essences (cosmetic), crystal gem essences, crystal gems; Astrological and spiritual services; Astrological forecasting; Astrological services; Astrology consultancy; Astrology consultation; Cartomancy services; Forecasting services in the nature of fortune telling; Fortune-telling; Horoscope casting; Horoscope forecasting; Horoscopes; Personal gift selection for others; Preparation of customized gift boxes; Providing horoscope information via computer networks; Provision of horoscopes; Provision of personal tarot readings; Psychic consultancy; Psychic reading services; Spiritual consultancy; Zodiac consultation; Psychic reading services; Spiritual advice.