

O-188-18

TRADE MARKS ACT 1994

IN THE MATTER OF:

TRADE MARK APPLICATION 3195207

IN THE NAME OF DENNIS WARE

FOR THE TRADE MARK:

Ezibike

AND

OPPOSITION THERETO (UNDER No 408624)

BY EASYGROUP LIMITED

Background and pleadings

1. The details of the mark the subject of these proceedings are:

Mark: **Ezibike**

Filing date: 6 November 2016

Publication: 25 November 2016

Applicant: Mr Dennis Ware

Goods: **Class 12:** Water bottle cages for bicycles; Water bottle holders for bicycles; Bottle cages for bicycles; Bicycle water bottle cages; Rims for wheels of bicycles, cycles; Bicycle rims; Rims for wheels of bicycles; Rims for bicycle wheels; Rims for bicycles; Wheel rims for bicycles; Bicycle wheel rims; Fittings for bicycles for carrying luggage; Racing bicycles; Road racing bicycles; Front fork joints [bicycle parts]; Cranks for bicycles; Bicycle cranks; Stands for bicycles [parts of]; Bicycle trailers (riyakah); Bicycle trailers; Chains [bicycle parts]; Change-speed gears [bicycle parts]; Pumps for bicycles, cycles; Bicycle pumps; Pumps for bicycle tyres; Pumps for bicycle tires; Brake shoes [bicycle parts]; Shock absorbers for bicycles; Inner tubes for bicycles, cycles; Inner tubes for bicycles; Inner tubes for bicycle tires; Inner tubes for bicycle tyres; Dress guards for bicycles, cycles; Dress guards for bicycles; Brakes [bicycle parts]; Metal bells for bicycles; Tyres for bicycles, cycles; Bicycle tires [tyres]; Tires for bicycles, cycles; Bicycle tyres; Tires for bicycles; Bicycle tires; Brakes for bicycles, cycles; Bicycle brakes; Brakes for bicycles; Bicycle horns; Warning horns for bicycles; Wheels for bicycles, cycles; Wheels being parts of bicycles; Wheels for bicycles; Bicycle wheels; Frames for bicycles, cycles; Bicycle frames; Frames for bicycles; Bicycle carriers; Carrying racks for bicycles; Bicycle

racks [carriers];Delivery bicycles; Saddle covers for bicycles or motorcycles; Drive chains [bicycle parts];Structural parts of bicycles; Bicycle structural parts; Handle bar ends [bicycle parts];Handle bar stems [bicycle parts];Touring bicycles; Bicycles; Spokes for bicycles, cycles; Bicycle spokes; Spokes for bicycle wheels; Spokes for bicycles; Spokes of bicycles; Bicycle wheel spokes; Air pumps for bicycles for the inflation of tyres; Air pumps for inflating bicycle tyres; Air pumps for bicycles; Baskets adapted for bicycles; Fork crown covers [bicycle parts];Pedal bicycles; Splash guards [mudguards] for bicycles; Mudguards for two-wheeled bicycles; Mudguards for bicycles; Bicycle mudguards; Hubs for bicycles; Bicycle hubs; Hubs for bicycle wheels; Wheel hubs for bicycles; Bicycle wheel hubs; Pedals for bicycles; Bicycle pedals; Luggage carriers for bicycles; Luggage racks for bicycles; Mountain bicycles; Frames, for luggage carriers, for bicycles; Chains for bicycles, cycles; Bicycle chains; Fittings for bicycles for carrying beverages; Chain guards for bicycles; Tandem bicycles; Inner tubes [for two-wheeled motor vehicles or bicycles];Gear wheels [bicycle parts];Sprockets [bicycle parts];Bicycle sprockets; Bicycle seat posts; Bicycle training wheels; Direction indicators for bicycles; Direction signals for bicycles; Bicycle stabilisers; Stabilizers [wheels] for use on bicycles; Stabilisers [wheels] for use on bicycles; Covers for bicycle saddles; Bicycle saddle covers; Saddle covers for bicycles; Disk wheels [bicycle parts];Drive trains [bicycle parts];Bicycle handlebar grips; Twist grips for bicycles; Handlebar grips for bicycles; Bags for bicycles; Bags [panniers] for bicycles; Forks [bicycle parts];Pumps for inflating bicycle tyres; Handle bars for bicycles, cycles; Bicycle handle bars; Handlebars for bicycles, cycles; Handle bars for bicycles; Bicycle handlebars; Tubeless tires [tyres] for bicycles, cycles; Tubeless tyres for bicycles; Tubeless tires for bicycles; Tires for children's bicycles; Children's bicycles; Brake cables for bicycles; Hydraulic rim brakes for bicycles; Hydraulic disc brakes for bicycles; Trailers for

transporting bicycles; Drivetrains for bicycles; Suspension systems for bicycles; Fitted bicycle covers; Bicycle saddles; Saddles for bicycles; Bicycle seats; Bicycle stands; Bicycle kickstands; Kickstands for bicycles; Stands for bicycles, cycles [parts of bicycles, cycles]; Bicycle stands [kickstands]; Bicycle gears; Gears for bicycles; Derailleurs for bicycles; Collapsible bicycles; Folding bicycles; Bicycle brake lever grips; Air pumps for two-wheeled motor vehicles or bicycles; Front forks for bicycles; Mudguards for two-wheeled motor vehicles or bicycles; Spindles of bicycles; Saddles for bicycles, cycles or motorcycles; Toeclips for use on bicycles; Freewheels for bicycles; Electric bicycles; Chainwheels for bicycles; Handlebars [bicycle parts]; Toe straps for use on bicycles; Puncture repair outfits for bicycle tyres; Saddlebags adapted for bicycles; Bicycle motors; Motorised bicycles; Motorized bicycles; Bicycle racks for vehicles; Roller chains for bicycles; Audible warning systems for bicycles; Bicycle bells; Bells for bicycles; Bells for bicycles, cycles; Children's bicycle seats; Folding electric bicycles; Spoke caps for bicycle wheels; Gear wheels for bicycles; Handlebar ends for bicycles; Panniers adapted for bicycles.

Class 25: Cyclists' clothing; Clothing for cycling; Clothing for cyclists; Clothing for leisure wear; Clothing; Clothing for babies; Clothing for infants; Children's clothing; Clothing for children; Childrens' clothing; Articles of sports clothing; Clothing for sports.

2. Registration of the mark is opposed by easyGroup Limited ("the opponent"). Its grounds of opposition are based on sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 ("the Act"). Under section 5(2)(b), the opponent relies on the following five marks:

European Union Trade Mark ("EUTM") 10584001 for the mark **EASYJET** which was filed on 24 January 2012 and registered on 9 January 2015. The opponent relies on its goods and services in classes 12, 25 and 39 (which I will detail later, to the extent required).

EUTM 15871554 for the mark  which was filed on 19 September 2016 and registered on 6 March 2017. The colours orange and white are claimed in relation to this mark. The opponent relies only on its class 12 goods “vehicles; vehicles parts and fittings; apparatus for locomotion by land, air or water”.

EUTM 10735561 for the mark **EASYBUS** which was filed on 16 March 2012 and registered on 20 December 2012. The opponent relies on its goods and services in classes 12 and 39 (which I will detail later, to the extent required).

EUTM 10735553 for the mark **EASYCAR** which was filed on 16 March 2012 and registered on 20 December 2012. The opponent relies on its goods and services in classes 12 and 39 (which I will detail later, to the extent required).

EUTM 12491841 for the mark **EASYVAN** which was filed on 10 January 2014 and registered on 3 June 2014. The opponent relies on its goods and services in classes 12 and 39 (which I will detail later, to the extent required).

3. The primary claims under section 5(2)(b) are based on the identity/similarity of the goods/services, together with the fact that the application is comprised of the word Ezi (which is said to be phonetically identical to Easy) combined with the non-distinctive word “bike”, with the result that the consumer would see the applied for mark as a brand extension of the opponent.

4. Under section 5(3), the opponent relies only upon marks 10584001 and 10735561, with a reputation being claimed in respect of various transport services in class 39.

5. All of the marks were filed before the applicant's mark and, therefore, qualify as earlier marks in accordance with section 6 of the Act. Furthermore, none of the earlier mark were registered more than five years before the publication of the applicant's mark and, as a consequence, there is no requirement for the opponent to establish that they have been genuinely used (as per section 6A of the Act). The earlier marks may, therefore, be relied upon for their specifications to the extent relied upon.

6. Mr Ware filed a counterstatement denying the grounds of opposition. He makes a number of points including that: easyJet is an airline whereas Ezibike is an electric assisted bicycle, that the spelling of the trade marks is different (save for one letter), that the “Ez” sound at the beginning of his mark represents an electrical buzzing sound (so making Ezi and Easy phonetically different), that he does not “express the riding of a bicycle as “Easy””, and that the opponent’s other trade marks also relate to airport passenger services. Pictures of a logo form of his mark are provided, but as this is not the mark sought to be registered I need not depict them here. Various other comments are made about the differences in the fields of business and the differences between the spellings of the marks.

7. Both sides filed evidence accompanied by written submissions. Neither side requested a hearing or filed written submissions in lieu. The opponent is represented by Kilburn & Strode LLP, the applicant has represented himself.

The evidence

The opponent’s evidence

8. This consists of a witness statement from Mr Ryan Pixton, a trade mark attorney at Kilburn & Strode, accompanied by 15 exhibits. There is no commentary in his witness statement, beyond statements as to the source of the exhibits. Indeed, I note that the first 12 exhibits provided by Mr Pixton were also filed in an unrelated opposition to the mark EASYSAIL on which a decision (BL O/102/18) was issued on 15 February 2018. In that decision, the hearing officer summarised the exhibits thus:

“13. The first is an extract from Wikipedia downloaded in March 2017. It sets out the history of EasyGroup since it was founded in 1998.

14. The second and third exhibits are copies of pages from easyJet’s website in March 2017. They show that easyJet is a large European airline.

15. The fourth, fifth and sixth exhibits are copies of EasyJet plc’s reports for the

years ending 30th September 2014, 2015 and 2016. This latest report shows that the company turned over more than £4.6 billion and that the airline carried 73.1m passengers during the financial year in question.

16. The seventh exhibit consists of an extract from the website campaignlive.co.uk, which appears to consist of a case study from 2002 of EasyJet as a 'superbrand' for airline services.

17. The eighth exhibit consists of a copy of some pages from the website 'rankingthebrands.com'. In the Global Brand Simplicity Index for 2015, EasyJet came 53rd out of 87 global brands. I note that none of the other earlier marks relied on by the opponent featured in this ranking.

18. The ninth exhibit consists of a copy of an advert for the Museum of Brands which invites readers to "*see the easy family of brands in a museum!*" [See exhibit REP1]. The advert is not dated and is barely readable.

19. The tenth exhibit consists of a copy of a witness statement by Christopher Griffin dated 4th April 2017. He is the Chief Executive of the Museum of Brands. Mr Griffin was a director of the Marketing Society for 20 years and is currently the Treasurer of the Worshipful Company of Marketors. He is also a Fellow of the Royal Society of Arts and Institute of Packaging. Mr Griffin says that he is an acknowledged expert in the field of branding. It is not clear who has acknowledged him as such.

20. According to Mr Griffin, the fame of the 'easy' brand commenced with the launch of the 'easyJet' airline in 1995. However, the 'easy' brand has always been "*more expansive than 'easyJet' alone and covers a diverse range of products and services.*" Mr Griffin says that the 'easy' brand uses a distinctive style, beginning with the word 'easy' followed by the relevant product or service, with its first letter capitalised. For example, 'easyHotel', 'easyGym', 'easyOffice'. Mr Griffin "*would expect there to be widespread knowledge of the 'easy' brand, because of the variety and number of 'easy' brands licensed or used by the easyGroup.*" In Mr Griffin's opinion, "*the widespread licensing of*

the mark 'easy' into fields such as travel, retail, foodstuffs, gyms and estate agency has led to a recognition that commercial activities with an 'easy' prefix and likely to emanate from easyGroup.” He claims that “...this association becomes a certainty where either the colour orange of the font Cooper Black is used together with an 'easy' prefixed name.”

21. Mr Griffin opines that the values consumers associate with the 'easy' brand include “*excellent value, innovation and an entrepreneurial approach.*” He considers that these values are likely to be tarnished by third parties offering easy-branded services without the authority or control of easyGroup.

22. The eleventh exhibit consists of a copy of a witness statement dated 7th August 2013 by Paul Griffiths, who was at that time the Finance Controller for easyGroup (and had been since 2010). This witness statement appears to have been drawn up in relation to earlier opposition proceedings at the IPO concerning a third party trade mark application. There were 64 exhibits to the original statement, but these have not been filed. The most relevant parts of Mr Griffiths statement are, in my view, as follows.

- Mr Griffiths says that easyGroup Limited was incorporated in 2000 with a view to establishing a group of companies that traded under the “EASY” brand.
- He says that the brand is associated with the values: “great value”, “taking on the big boys”, “for the many not the few”, “relentless innovation”, “keep it simple”, “entrepreneurial”.
- He says that the ‘current’ list of businesses operating under the EASY brand (in 2013) included EASYJET, EASYCAR and EASYBUS. He did not claim that any of the other marks listed in the notice of opposition were in use at the time of his statement.
- He provides EASYJET’s booking figures for 2010/11 which show that most of the airline’s bookings came from the EU, with the UK, France, Italy & Spain the top four.
- EASYJET was active “not only in airline services but in respect of in-flight magazines, car rental, travel insurance and airport parking.”

- EASYCAR was first used in 2004. It allowed customers (via its website) to hire a vehicle in 60 countries, including all the Member States of the EU. Turnover in 2009 was £26m (no figures were provided for later than 2009).
- EASYBUS was first used in 2004 in relation to a bus service operating between London and Luton Airport. At the time of Mr Griffiths' statement in 2013, additional routes between London and Gatwick and Stanstead Airports had been added.
- EASYBUS turned over around £8m in 2009/2010 (the latest figures provided).

23. The twelfth exhibit consists of "extracts from various national publications and websites." They appear to have been downloaded from the internet in 2015. They mostly relate to the use of EASY brand extensions, such as EASYHOTEL. I note the following.

- A copy of an article from theguardian.com website dated 23rd October 2014 about brand extensions in which it is noted that easyGroup had "*successfully launched sub-brands from property to pizza to gyms*" (although no such sub-brands are listed).
- Copies of webpages from the easy.com website downloaded in June 2017. The website appears to be a portal with links to various 'easy' brands.
- An article from Management Today dated August 2014 describes EasyCar Club as a new 'peer-to-peer car rental platform'. According to the article, the original EasyCar car rental business "hit something of a wall" after losing money."

9. I adopt the above summary as a clear and accurate summary of the first 12 exhibits before me. However, lest there be any doubt, I confirm that I have read and taken the exhibits into account. There are, though, 3 further exhibits before me:

- The thirteenth exhibit contains extracts from the website easybus.com. It shows the provision of airport transfer services via bus. The only dates visible are

from 2017, presumably when the page was printed. The pages carry the sign easyBus.

- The fourteenth exhibit contains a Wikipedia extract for EasyBus. The history of the business is set out, including that it was founded in 2003. Over the years, it has offered various routes to certain London airports and Manchester airport from their respective city centres. Some routes have closed and have been replaced with others. It is difficult to clearly see what routes were in existence at particular points in time, although, at the relevant date, it seems that routes to Manchester Airport (although this only opened in October 2016, two months before the relevant date), Gatwick and Stansted (although one route was closed in November 2015 and another changed to act merely as a reseller for National Express) were operating. There are also other routes to airports on the continent, including Paris.
- The fifteenth exhibit consists of further “extracts from various national publications and websites” relating to the easyBus business. They relate mainly to the opening of new routes. A number come from 2015, one is from 2011 and one is from after the relevant date.

The applicant's evidence

10. A witness statement was filed by Mr Dennis Ware, the applicant in these proceedings. A good deal of Mr Ware's statements are in the nature of submission rather than evidence of fact. I will bear them in mind but will not summarise the submissions here. Mr Ware sets out the competing logos (and goods/services) under which the opponent and applicant apparently trade. Whilst, again, I bear this in mind, it has little pertinence to the required decisions given that the logos he depicts do not constitute the marks before me and, further, in terms of the respective fields, I must make a notional assessment based upon the goods/services which are covered by the application/registrations. Mr Ware also comments upon offers to mediate, which, again, are not pertinent to the matters before me.

11. A witness statement was also filed by Mr David Spruce, a vehicle engineer who seems to be in the same “family business” as Mr Ware. He asserts that the goods of the parties are not identical and share no similarity. He adds that electric bicycle parts and those of airplanes, cars, vans and buses are “completely different visually, functionally and from an engineering perspective”.

12. A witness statement was also provided by Mr Christopher Lamb, a vehicle engineer also in the same family business. He gives identical evidence to that of Mr Spruce.

Section 5(2)(b)

13. Section 5(2)(b) of the Act states that:

“5.-(2) A trade mark shall not be registered if because – ..

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

14. The following principles are gleaned from the judgments 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 the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(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 goods/services

15. Goods and services may be considered identical if one term in a specification falls within the ambit of something in the competing specification, as per the guidance provided by the General Court in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05 (“*Meric*”):

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

16. The above is important because all of the earlier marks cover, one way or the other, vehicles and vehicles parts. The applicant seeks registration in respect of bicycles (including electric bicycles) and a long list of parts thereof. Consequently, the applied for goods fall within the more general category covered by the earlier marks, a bicycle being a vehicle, a mode of transport. The applied for goods in class 12 are identical to class 12 goods covered by the earlier marks.

17. The applicant also seeks registration in class 25 for various items of clothing. However, the opponent’s EASYJET mark covers clothing, footwear and headgear in class 25 which, again, is a more general category in which the applicant’s goods fall. The applied for goods in class 25 are identical to class 25 goods covered by this earlier mark.

18. The opponent also relies on the class 39 services of the earlier marks. Any argument here must be based upon similarity not identity. In terms of similarity, when making a comparison of goods/services, all relevant factors relating to them should be taken into account. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the Court of Justice of the European Union (“the CJEU”) stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

19. Guidance on this issue has also come from Jacob J where, in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, the following factors were highlighted as being relevant:

“(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.”

20. In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v OHIM* Case T- 325/06 it was stated:

“It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI) [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 P Rossi v OHIM [2006] ECR I-7057; Case T-364/05 Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL) [2007] ECR II-757, paragraph 94; and Case T-443/05 El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños) [2007] ECR I-0000, paragraph 48).”

21. In relation to complementarity, I also bear in mind the guidance given by Mr Daniel Alexander QC, sitting as the Appointed Person, in case B/L O/255/13 *LOVE* where he warned against applying too rigid a test:

“20. In my judgment, the reference to “legal definition” suggests almost that the guidance in Boston is providing an alternative quasi-statutory approach to evaluating similarity, which I do not consider to be warranted. It is undoubtedly right to stress the importance of the fact that customers may think that responsibility for the goods lies with the same undertaking. However, it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together. I therefore think that in this respect, the Hearing Officer was taking too rigid an approach to Boston.”

22. The specifications of the earlier marks cover various services, but all include transport, as well as specific forms of the same. The best that one can say is that both a transport service and a bicycle can get a person from a to b. However, the exact purpose, the methods of use, the nature and the channels of trade are all different. The goods and the services do not compete and neither are they complementary in

the sense described by the case-law. Some of the earlier marks in class 39 also cover rental of vehicles, which would include the rental of bicycles. Whilst it could be argued that this creates a degree of competition, it is unlikely in my view that a real competitive choice will be made between buying and renting. This is because the choice about whether to buy or rent will be based primarily on the length of time the bike is needed. If it is for a short time then the bike may be rented (say a day or a week), otherwise the bike will most likely be purchased. However, some bike shops may sell and hire bikes, so creating a closer channel of trade and the similarity in purpose (to avail oneself of a bicycle) is stronger. There is also a possible complementary relationship, although, whether the consumer would regard the undertaking responsible for a bike rental service and the undertaking responsible for a bicycle is less clear. I conclude that any similarity with transport services is very low. However, similarity with the rental of vehicles (because this includes rental of bicycles) is, in my view, of a moderate (between low and medium) degree.

Average consumer and the purchasing act

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

24. The average consumer of the identical class 12 goods is likely to be a member of the general public. The choice of a bicycle is likely to be reasonably well considered. They are not frequent purchases and they are not inexpensive. In relation to parts, although they will be less expensive, care will be taken to ensure that the right fitting is obtained. That said, the purchasing process for both will not be as high for other types of vehicle such as cars. Therefore, whilst the degree of care and consideration may be slightly higher than the norm, it is not of the highest level. Whilst some more general establishments may sell the goods, they are more likely to be purchased through specialist establishments (and their online equivalents). Although the marks will be encountered at the point of sale, on websites and brochures etc, this an area where the marks will be spoken when advice is being sought from salespersons. I consider there to be a slight skew towards the visual impact of the marks, but the aural impacts are still reasonably important.

25. The average consumer of the class 25 goods will, again, be a member of the general public. Such goods are not, generally speaking, greatly expensive. They are bought fairly frequently, albeit not normally everyday. Some care will be applied in respect of style, colour, fitness for purpose etc. I consider that this equates to a reasonable, no higher or lower than the norm, level of care and consideration. The goods will be perused in traditional bricks and mortar retail establishments and their online equivalents and will be subject to self-selection. The goods and the marks used in relation to them may also be seen in advertisements and on websites. This means that the visual impression of the marks will take on more significance, but the aural impact of the marks should not be ignored from the assessment completely.

26. For the opponent's services in class 39, I consider this to be an area where a medium degree of care and attention will be applied, with, like the class 12 goods, a slight skew toward the visual impact of the marks, but where the aural impact is still reasonably important.

Comparison of marks

27. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its

various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The 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.”

28. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks. The marks to be compared are:

Ezibike

v

EASYJET



EASYBUS

EASYCAR

EASYVAN

29. In terms of overall impression, and as the opponent points out, the marks all comprise, essentially, the words EASY/Ezi followed by the name of a type of vehicle. However, the words combine to create the name of which each of the marks consist. Neither word performs an independent distinctive role. Whilst the vehicle name may be wholly descriptive (at least for certain goods and services in the class 12 and 39 specifications), it still contributes to the overall distinctiveness of the marks. The word

EASY (in the opponent's mark) has connotations of ease of use. I come to the view that the overall impression is based predominately on the combination of elements, with both words making a roughly equal contribution to the overall impression. I say roughly equal because it may be the case that EASY plays a slightly stronger role, but it is a close thing. The same applies to Ezibike, although, because Ezi is a more unusual spelling, it will be the case that this word contributes more, although the word "bike" still plays a reasonably important role in the overall impression of the mark, the distinctiveness of which is still based predominantly on the combination of elements. The colour in the easyCoach marks play only a minor role in its overall impression.

30. From a visual perspective, all of the marks are of a similar length, and they begin with the same letter E. However, that is where the similarity ends. None of the remaining letters are shared. The only exception to this is that Ezibike and EASYBUS both have the letter B towards the middle, but this hardly stands out. Visual similarity is extremely low for all of the comparisons.

31. From an aural perspective, notwithstanding the applicant's submission that Ezi will be articulated with a buzzing sound, I come to the view, in line with the opponent, that the Ezi element of the applicant's mark will be articulated in the same way as EASY. This creates a degree of aural similarity. However, the second syllable of each of the marks are quite different. The closest is BUS and BIKE (because both syllables start with a B sound), but this is a very superficial aspect of similarity. I consider there to be a medium degree of aural similarity in each of the comparisons.

32. Conceptually, the fact that both marks make reference to a type of vehicle (although the vehicles are all different) and a nod towards ease of use creates, overall, a medium level of conceptual similarity.

Distinctiveness of the earlier mark(s)

33. The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark, based either on inherent qualities or because of use made, the greater the likelihood of confusion (see *Sabel BV v. Puma*

AG, paragraph 24). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

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

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

34. From an inherent perspective, none of the earlier marks will strike the average consumer as particularly distinctive in relation to their class 12 goods and class 39 services, given what I have said earlier about the likely conceptual message they portray. I consider that they possess a moderate (between low and medium) level of inherent distinctive character. EASYJET for class 25 goods is clearly more distinctive; I consider this mark to have a medium degree of inherent distinctiveness.

35. In terms of whether the distinctiveness has been enhanced, EASYJET is the name of the opponent’s well-known airline. It is a highly distinctive mark in relation to airline services.

36. Very little information has been provided about easyCoach and EASYVAN; no enhancement of distinctive character can be found here.

37. Some of the evidence is directed at EASYBUS. It is clearly a name in use. However, the evidence is lacking in terms of turnover, passenger numbers etc, and no detailed evidence of promotion or advertising has been provided. It is also a geographically limited service given that it serves only certain airports. Therefore, I am unable to conclude that the distinctiveness of this mark has been enhanced to any material extent from the perspective of the UK average consumer. That is my finding, but if I am wrong on that, its distinctiveness has been enhanced but only to a medium level (from its moderate starting point), in relation to airport transfer bus services.

38. Some of the evidence (notably exhibit 11) is also directed at EASYCAR, but as no turnover figures beyond 2009 are provided, I am unable to say that at the relevant date this earlier mark had any form of enhanced distinctive character.

Likelihood of confusion

39. The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused. Confusion can be direct (which effectively occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same, but puts the similarity that exists between the marks/goods down to the responsible undertakings being the same or related). In terms of indirect confusion, this was dealt with by Mr Iain Purvis QC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10 where he noted that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it

is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

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

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ("26 RED TESCO" would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as "LITE", "EXPRESS", "WORLDWIDE", "MINI" etc.).

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

40. I begin the assessment with the applied for goods in class 12. That the goods are identical is an important point because this may offset a lower degree of similarity between the marks. However, even though I have accepted that there is greater aural and conceptual similarity, the extremely low level of visual similarity between the applicant's marks and all of the opponent's marks means, in my view, that there is no likelihood of direct confusion. Whilst I said earlier that aural similarity plays a reasonably important role in some of the purchases, there is still a slight skew towards

the visual impacts of the marks. In any event, the aural and conceptual similarity is still not high. Further, for the goods in class 12, there is a slightly higher degree of care and consideration in the purchasing process. Further again, the earlier marks, in so far as they cover class 12 goods, are only moderately distinctive. Whilst there is a higher degree of distinctiveness in relation to the EASYJET mark in relation to airline services, this reputation relates to a service which has only a very low (if any) degree of similarity to the applicant's class 12 goods. All things considered, I find myself very quickly ruling out the likelihood of any direct confusion.

41. That then leads to indirect confusion. This appears to be the primary argument of the opponent, particularly bearing in mind its various comments which indicate that it considers that it has a family of marks, with the applied for mark being perceived as an extension of that family group. The CJEU provided guidance in relation to claims based on a family of marks in *Il Ponte Finanziaria SpA v OHIM* (Case C-234/06), where it was stated:

“62. While it is true that, in the case of opposition to an application for registration of a Community trade mark based on the existence of only one earlier trade mark that is not yet subject to an obligation of use, the assessment of the likelihood of confusion is to be carried by comparing the two marks as they were registered, the same does not apply where the opposition is based on the existence of several trade marks possessing common characteristics which make it possible for them to be regarded as part of a ‘family’ or ‘series’ of marks.

63. The risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically linked undertakings, constitutes a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 (see *Alcon v OHIM*, paragraph 55, and, to that effect, *Canon*, paragraph 29). Where there is a ‘family’ or ‘series’ of trade marks, the likelihood of confusion results more specifically from the possibility that the consumer may be mistaken as to the provenance or origin of goods or services covered by the trade mark applied for or considers erroneously that that trade mark is part of that family or series of marks.

64. As the Advocate General stated at paragraph 101 of her Opinion, no consumer can be expected, in the absence of use of a sufficient number of trade marks capable of constituting a family or a series, to detect a common element in such a family or series and/or to associate with that family or series another trade mark containing the same common element. Accordingly, in order for there to be a likelihood that the public may be mistaken as to whether the trade mark applied for belongs to a 'family' or 'series', the earlier trade marks which are part of that 'family' or 'series' must be present on the market."

42. There are, though, a number of problems with the family claim. First, of the marks pleaded, only two (EASYJET and EASYBUS) were clearly in use at the relevant date. There is evidence relating to EASYCAR, but how significant this was at the relevant date is difficult to assess. Therefore, the family, in so far as it covers the pleaded marks, is a small one. Second, the pleaded marks, where they have been used, have been used in relation to transport services, not as the brand of physical goods. This lessens the likelihood of the applied for mark being seen as a new member of the family. Third, the family trait is based upon the word EASY together with a form of transport JET/BUS/CAR. However, the applicant's mark begins Ezi not EASY, which, again, lessens the likelihood of the applied for mark being seen as a new member of the family. For all these reasons, I do not consider that the family of marks argument advances the opponent's case. I should add that in terms of the family of marks argument, I have focused on the earlier marks as pleaded. I accept that in the witness statement of Mr Griffin (submitted as an exhibit to Mr Pixton's evidence) he refers to other "easy" based brands. However, as none are pleaded it is not possible to ascertain whether such marks are in the name of the opponent nor what they are registered for, not what significance they would have had on the average consumer in the years leading up to the relevant date; consequently, for the purposes of this decision, they cannot rightfully form part of the opponent's family, nor is it clear what impact they will have had on the likelihood of the applicant's mark being seen as part of the same family group.

43. I must also consider indirect confusion based upon a more conventional indirect confusion test. However, in my view, and in agreement with the applicant, I agree that the different spellings of EASY and EZI go a long way to avoiding a "same stable"

assumption. That coupled with the moderate degree of inherent distinctiveness of the earlier marks in class 12, and given that where the earlier marks (EASYJET) is highly distinctive is in field with only a very low (if any) degree of similarity, leads me to conclude that the average consumer is not likely to assume that the class 12 goods sold under the applicant's marks are from the same (or related) undertaking as either the class 12 goods of the earlier marks or the services in class 39.

44. The final point is to consider whether there is a likelihood of confusion in relation to the class 25 goods. The conflict here is with the EASYJET mark. Despite the earlier mark being more inherently distinctive in this class than the others (although still of just a medium degree), the very low similarity between the marks is not enough for direct confusion to be likely. Similarity, in relation to indirect confusion, I do not regard it likely that Ezibike will be seen as a brand extension (or any other type of indirect confusion) of EASYJET in the clothing field.

45. The opposition under section 5(2)(b) is dismissed.

Section 5(3)

46. Section 5(3) states:

“5(3) A trade mark which (a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

47. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Addidas-Salomon*, [2004] ETMR 10 and C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; General Motors, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; General Motors, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; Adidas Saloman, paragraph 29 and Intel, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; Intel, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; Intel, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; Intel, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; Intel, paragraphs 76 and 77.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; Intel, paragraph 74.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; L'Oreal v Bellure NV, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure).

48. The opponent's case under section 5(3) is based upon its EASYJET and EASYBUS marks. I accept that the EASYJET mark possesses the requisite reputation but only in respect of airline services. Indeed, it is a particularly strong reputation. The position with regard to EASYBUS is less clear. If it does possess the requisite reputation then it is not a strong one and limited to the field of airport transfer services via bus. The upshot of this, and bearing in mind the factors such as the marks' similarity, the goods/service similarity (including the assessment in relation to transport services) and the inherent and enhanced distinctive character, I consider it unlikely that the relevant public will bring the opponent's mark to mind if they were to encounter the Ezibike mark in relation to either the class 12 or 25 goods. This means that the requisite link will not be made and the claim under section 5(3) is dismissed accordingly.

Conclusion

49. The opposition fails. Subject to appeal, the application may proceed to registration in respect of all of the applied for goods.

Costs

50. At the end of the proceedings the applicant was sent a costs pro-forma to complete should he wish to claim costs in these proceedings. It was not returned. Consequently, I make no award of costs in these proceedings.

Dated this 23rd day of March 2018

**Oliver Morris
For the Registrar
the Comptroller-General**