

O-212-15

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2635151
BY EZYORDER.COM LTD

AND

OPPOSITION THERETO UNDER NO 104366
BY EASYGROUP LTD

Background

1. On 17 September 2012, EzyOrder.com Ltd (“the applicant”) applied to register the mark EzyOrder (under application No 2635151) for the following services:

Class 35:

Order processing services for the supply of food and drink

2. Following publication of the application in *Trade Marks Journal* no 6962 on 19 October 2012, notice of opposition was filed by easyGroup IP Licensing Ltd. The company later notified the registrar of a change of name to easyGroup Ltd (“the opponent”). The opposition was founded on grounds under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”), relying upon 14 earlier trade marks under section 5(2) of the Act based on a very wide range of goods and services. It also relied on 5 earlier marks under section 5(3) of the Act and 6 earlier rights under section 5(4) of the Act.

3. The applicant filed a counterstatement in which, essentially, it denied the claims made and put the opponent to proof of use of its marks, where appropriate.

4. Both parties filed evidence and the matter came before me for a hearing on 12 January 2015. The applicant was represented by Ms Charlotte Scott of Counsel instructed by Wragg Laurence Graham. Ms Scott confirmed a statement made in her skeleton argument that the applicant was no longer putting the opponent to proof of use of any of its marks, though it did not accept the claimed reputation on all goods and services. The opponent was represented by Ryan Pixton of Kilburn & Strode LLP. Mr Pixton confirmed the statement made in his skeleton argument that the number of earlier rights relied on under sections 5(2) and (3) of the Act was being reduced. Indeed he went further and stated that the objections founded on section 5(4) added nothing over and above the objection under section 5(2)(b) and did not merit separate consideration.

5. As regards the objection under section 5(2)(b) of the Act, Mr Pixton stated that the opponent’s strongest case was based on those of its registrations with a specification which includes the retailing of food and drink, the provision of food and drink, restaurant, bar and catering services or booking services for restaurants. Taking this into account, the UK and Community trade mark (“CTM”) registrations and services relied upon by the opponent under section 5(2)(b) of the Act are as follows:

Mark	Dates	Specification
CTM10584001 EASYJET	Filing date: 24 January 2012 Date of entry in register: 9 January 2015	Class 35 Retail services connected with the sale of food and drink Class 43 Services for providing food and drink; restaurant, bar and catering services; booking and reservation services for restaurants
CTM10583111 EASYGROUP	Filing date: 23 January 2012	Class 35: Retail services connected with the sale of food

6. Under section 5(3) of the Act it now relies upon the following marks and services:

Mark	Dates	Specification
2260901 easyJet	Filing date: 9 February 2001 Date of entry in register 20 September 2002	Class 39 Transportation of goods, passengers and travellers by air; arranging of transportation of goods, passengers and travellers by land; airline services; cargo handling and freight services; rental of vehicles; travel agency services
2313408A (Series of two) EASYBUS easyBus	Filing date: 17 October 2002 Date of entry in register: 14 October 2005	Arranging of transportation of passengers by land; bus transport services, coach services
2266270 easyCar	Filing date: 3 April 2001 Date of entry in register: 23 August 2002	Rental and hire of vehicles; travel agency services; information services relating to transportation services
CTM4433272 EASYHOTEL	Filing date: 8 June 2005 Date of entry in register: 16 January 2007	Temporary accommodation

The Evidence

7. The evidence consists of witness statements from Paul David Griffiths who has been the opponent's Finance Controller since 2010 and from Shane Frith who has been a Director of the applicant company since its incorporation in April 2012. Noting that much of Mr Griffiths's evidence relates to marks on which the opponent has never relied or no longer relies in these proceedings, I do not intend to summarise the evidence here but will refer to it, as necessary, later in the decision.

The objection under section 5(2)(b) of the Act

8. Sections 5(2)(b) of the Act is as follows:

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

9. As can be seen from the information set out above at paragraph 5, the trade marks relied on by the opponent have filing dates which predate that of the application and are earlier marks as set out in Section 6 of the Act. As indicated above, the applicant does not put the opponent to proof of use of those marks (where it would apply) and the opponent is therefore entitled to rely on them in respect of the services claimed.

10. 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.

The principles

- (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 great 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 services

11. At the hearing, there was some discussion about the applicant’s specification of services as set out at paragraph 1 above. This discussion centred on whether it properly reflected the applicant’s business given what was set out in its evidence and consequently, whether the application should have sought registration for goods in a different class.

12. As I indicated at the hearing, it is a matter for the applicant to determine the specification of goods and/or services that it wishes to include as part of a particular application. That specification could reflect an applicant’s current business operation or could, instead, reflect planned or potential future business ventures but the particular specification is one for the applicant to determine. Whatever the reason behind the request for registration in respect of a particular specification of goods or services, the comparison I have to make is one based on the services for which registration has been applied by the applicant and the services as relied on by the opponent.

13. With that in mind, the services to be compared are as follows:

Applicant’s services	Opponent’s services
<p>Class 35: Order processing services for the supply of food and drink</p>	<p>Class 35 Retail services connected with the sale of food and drink (CTM 10584001 and CTM 10583111)</p> <p>Class 42: Restaurant, cafe and bar services (2265184)</p> <p>Class 43 Services for providing food and drink; restaurant, bar and catering services; booking and reservation services for restaurants (CTM 10584001)</p> <p>Class 43: Provision of food and drink; restaurant, cafe and bar services (CTM 10583111)</p> <p>Class 43: Services for providing food and drink; restaurant, bar and catering services; booking and reservation services for restaurants; provision of food and drink; restaurant, cafe and bar services (CTM 9981689 and CTM 9903949)</p>

	<p>Class 43: Provision of food and drink; restaurant, cafe and bar services (2349891 and CTM 9220799)</p> <p>Class 43: Provision of food and drink; restaurant, cafe and bar services; reservation services (CTM 3069861)</p>
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14. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated, at paragraph 23:

“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”.

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

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services
- c) The respective trade channels through which the goods or services reach the market
- d) 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;
- e) 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.

16. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

17. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“GC”) stated:

“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”.

Whilst, in *Merica*, the GC was referring to ‘goods’ the same holds true, by analogy, in respect of ‘services’.

18. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

19. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

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

Whilst on the other hand:

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

20. The opponent’s specification in class 35 (CTMs 10584001 and 10583111) are *Retail services connected with the sale of food and drink*. These are services that will include *Order processing services for the supply of food and drink* as covered by the applicant’s specification in class 35. The respective services are therefore identical, on the basis set out in *Merica*.

21. *Booking and reservation services for restaurants* in Class 43 encompass booking or reserving a table at restaurants so that the purchaser can partake of a meal. Restaurants may also be booked for particular events (e.g. family celebrations) and

for which the organiser may arrange the menu in advance. I am also aware that some restaurants promote their services by laying on set or themed meals. The booking and reservation services are complementary to the taking of an order for food and drink and on this basis I find there is a reasonable degree of similarity between the respective services. The same is true of each of the opponent's remaining services as relied upon as each will involve the supply of food or drink.

The average consumer and the nature of the purchasing process

22. 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*.

23. 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. Each of the respective services is such as is likely to be bought by the general public. The visual considerations are likely to be of most importance given that the services will be brought to the attention of the consumer by means of promotional material delivered to the home or via the internet, from point of sale material or a menu or other advertising etc. at the physical location where the food and drink is available. That said, I do not exclude the possibility that the services may be brought to the potential customer's attention by personal recommendation where aural considerations will also apply. They are services which are very widely available but an average degree of care will be taken over their purchase given the need to satisfy the personal preferences of the consumer.

Comparison of the respective marks

25. 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 them, 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.”

26. It would be wrong, therefore, artificially to 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. For ease of reference, the marks to be compared are:

Applicant's mark	Opponent's marks
EzyOrder	EASYJET
	EASYGROUP
	EASYTRAIN
	EASYHOLIDAY
	
	
	
	
	
	EASYPIZZA

27. It is accepted by the opponent, and Mr Griffiths states in his witness statement, that each of the earlier marks consists of or includes a word made up two others: the word EASY/easy conjoined with a descriptive word. Each of those words needs no explanation as they are ordinary words in common use and easily understood by the

average consumer. In the case of its marks EASYJET, EASYGROUP, EASYTRAIN, EASYHOLIDAY and EASYPIZZA, the opponent's marks are presented in plain block capitals. The remaining marks are presented with the conjoined words in lower case with the exception of the first letter of the descriptive element, which is capitalised. With the exception of the second mark in the easyHire series which is presented in black, these remaining marks are presented in white on a black or orange rectangular background. The word EASY is a common and very descriptive one and is not one that is likely, on its own, to be distinctive of any goods or services. The distinctiveness of each of the opponent's marks as relied upon, rests in the combination of their elements.

28. The applicant's mark is also presented as a single word though the capitalisation of the first and fourth letters leads to it being broken down to the two component parts Ezy and Order. The word Order is not distinctive for order processing services. The Ezy element is not, as far as I have been made aware, a known word but I consider it will be understood by the average consumer to be a clear misspelling of the word EASY. Again, the distinctiveness of the mark rests in its whole.

29. From a visual consideration, each of the respective marks will be seen as being made up of two elements with the first element beginning with a letter E and ending with a letter Y but that is the extent of the similarity. From an aural consideration, each of the respective marks begins with an element that will be identically pronounced but ends in an element which is very different. Conceptually, there is a degree of similarity between the respective marks in that each suggests a service which is uncomplicated or easy to use but the descriptive nature of the second part of each of the respective marks leads to very different images being brought to mind. Considered overall, any similarity between the marks is one of the very lowest degree.

The distinctive character of the earlier marks

30. 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).”

31. Under this ground, the opponent relies on eight earlier marks. The opponent has filed a significant volume of evidence. Despite a careful review of that evidence, I can see no mention of any use of those marks in relation to the services on which it relies with one exception. The one exception is the earlier mark EASYPIZZA. Even then, whilst Mr Griffiths states the mark was first used in 2004 in relation to a service offering, not surprisingly, pizza, he goes on to say that by 2010, the business had become an online portal allowing customers to view and order pizzas from a number of sources. No evidence is given on when this change took place or what the position was at the relevant date. At exhibits PG60 to PG64, Mr Griffiths exhibits a variety of documents. They include some material downloaded from Google Analytics giving details of visitors to the easyPizza.com website from 2008 to July 2013. Whilst there is one year showing a high of some 19,000 visitors from the UK, for most years the number is well under 5,000. There are also three pages showing screenshots of that website taken from the Internet Archive, one for each of the three years 2007-2009. The remaining exhibits consist of a menu, an advertising poster and five pages said to be copies of newsletters. Whilst some of this material is dated, most of it is not and there is no evidence to show where and when it may have been displayed or who and how many might have seen it. The opponent has not provided any evidence of e.g. any turnover or advertising figures nor anything to indicate the volume of any sales under the mark. On the basis of the evidence filed, the opponent has not shown that the distinctive character of any of the earlier marks on which it relies has been enhanced through use in relation to the services claimed. The earlier marks are each one with a low degree of inherent distinctiveness.

The likelihood of confusion

32. In determining whether there is a likelihood of confusion, a number of factors have to be borne in mind. The first is the interdependency principle whereby 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. I also have to factor in the distinctive character of the earlier mark as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the services, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely on the imperfect picture of them he has retained in mind.

33. Earlier in this decision I found:

- There is at least a reasonable degree of similarity between the respective services with some being identical;
- The services are such as are widely available and they will be bought by the general public with an average degree of care with the visual considerations playing the most important role in that purchase and aural considerations also playing a part;

- Any similarity between the marks is one of the very lowest degree;
- The earlier marks have a low degree of inherent distinctive character which have not been shown to have been enhanced through use in relation to the services relied upon.

34. I accept that the start of a trade mark is likely to have more visual and aural impact than the end (the comments of the GC in *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02 refer). This is, however, only a rule of thumb and is of little assistance in cases, such as the present, when the shared element is descriptive and/or non-distinctive. In these circumstances, in order to establish if there is a likelihood of confusion it is necessary to look to the other elements of the respective trade marks. Those other elements of the opponent's mark are very different to that of the applicant's mark.

35. Comparing the trade marks as wholes and bearing in mind the concept of ordering which will be evoked by the applicant's trade mark which is absent from the opponent's trade marks, combined with the nature of the purchasing process and the degree of care the average consumer is likely to take, I find that there is no likelihood of either direct confusion (i.e. where one trade mark is mistaken for the other) or indirect confusion (i.e. where the average consumer assumes the services come from undertakings which are economically linked), even where identical services are concerned. Neither am I persuaded by the opponent's claim that there is a likelihood of confusion because it has a family of "easy plus descriptive word" trade marks: the evidence does not show it has used the marks in relation to the vast majority of the services claimed nor is there any evidence that it has ever used anything other than "easy" in its proper English spelling.

36. The opposition founded on section 5(2)(b) of the Act fails.

The opposition under section 5(3) of the Act

37. Under this ground, the opponent now relies on the following earlier marks:

Mark	Services relied upon
2260901 easyJet	Transportation of goods, passengers and travellers by land and air; airline services, cargo and freight services; rental of vehicles; travel agency services
2313408A EASYBUS easyBus	Arranging of transportation of passengers by land; bus transport services; coach services
2266270 easyCar	Rental and hire of vehicles; travel agency services; information

	services relating to transportation services
CTM4433272 EASYHOTEL	Temporary accommodation

38. Section 5(3) states:

“(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 Community trade mark or international trade mark (EC), in the European Community) 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.”

39. 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*).

40. The opponent puts its case as follows:

“The use of the Sign by the Applicant would take unfair advantage of or be detrimental to the distinctive character or repute of the Trade Marks. The Applicant’s adoption of the Sign is liable to cause a public expectation that the Applicant’s business is a diversification of the Opponent’s business, and/or the public would have cause to believe that the Applicant’s trade is from an undertaking linked to the Opponent. The applicant would gain an unfair commercial advantage through the adoption of the Sign because the Applicant would be piggy backing on the extensive reputation of the Opponent and the Trade Marks and thus unfairly increase the marketability of the services to be offered under the Sign. Further, use of the Sign blurs or dilutes the distinctive character of the Trade Marks, as it will make it more difficult for the Trade Marks to operate as trade marks (i.e. to distinguish the goods and services of one undertaking from another). The repute of the Earlier Marks will also be harmed if the services offered under the Sign are inferior as the public will believe that the inferior services offered under the Sign originate from or are licensed by the Opponent. The Opponent appreciates that the Registry must look at the marks in dispute at face value and not necessarily consider the use of the Sign in the course of trade. However, the Opponent would like to bring to the attention of the Registry the fact that the Applicant is using an ezy prefixed mark in conjunction with orange and white livery (livery which is strongly associated with the Opponent). It is therefore obvious that the Applicant had the Opponent in mind when creating its brand...”

41. No evidence has been filed to show how the applicant uses its mark. Even if it were to use orange and white as part of it, it is not “obvious” to me nor has it been shown that it had the Opponent in mind when creating its brand. I am aware that other companies use, or have used, those colours.

42. The applicant accepts the opponent has a reputation in each of the four earlier marks relied on and in respect of the services claimed which are all, broadly, transportation and accommodation. These areas of trade are self-evidently different to the services applied for. It is well established that it is not necessary for the respective services to be similar in order to establish confusion between the respective marks and succeed under this ground (see *Typhoon* at page 1094 et seq). If the similarities between the marks are such as to lead to an association being made between them, which in turn lead to one of the adverse consequences envisaged by the section, then the opponent may succeed.

43. In *Intra-Press SAS v OHIM*, Joined cases C-581/13P & C-582/13P, the CJEU stated (at paragraph 72 of its judgment):

“The Court has consistently held that the degree of similarity required under Article 8(1)(b) of Regulation No 40/94, on the one hand, and Article 8(5) of that regulation, on the other, is different. Whereas the implementation of the protection provided for under Article 8(1)(b) of Regulation No 40/94 is conditional upon a finding of a degree of similarity between the marks at issue so that there exists a likelihood of confusion between them on the part of the relevant section of the public, the existence of such a likelihood is not necessary for the protection conferred by Article 8(5) of that regulation. Accordingly, the types of injury referred to in Article 8(5) of Regulation No 40/94 may be the consequence of a lesser degree of similarity between the earlier and the later marks, provided that it is sufficient for the relevant section of the public to make a connection between those marks, that is to say, to establish a link between them (see judgment in *Ferrero v OHIM*, C-552/09 P, EU:C:2011:177, paragraph 53 and the case-law cited).”

44. The marks relied upon by the opponent are each made up of the word EASY/easy plus the descriptive word Jet/BUS/Car/HOTEL. In my view, any points of similarity between the marks relied on by the opponent and the mark applied for are minor, rest in non-distinctive elements and are far outweighed by their differences having regard to the distinctive character of the respective marks. As indicated earlier, there is no evidence that the opponent uses anything other than EASY spelled that way and whilst there does not have to be similarity of services, in this case the services are so distant that, coupled with the distance in the marks, no link would be made. The opposition under section 5(3) fails.

Summary

45. The opposition fails and, subject to any appeal being successful, the application will proceed to registration.

Costs

46. The applicant having succeeded, it is entitled to an award of costs in its favour. In making that award, I note that the opponent filed a significant volume of evidence, much of which related to marks which were not at any time relied on in these proceedings. It also reduced the grounds of opposition and the marks relied on under them at the hearing. The applicant would have had to review all of the evidence when it was filed and prepare for the hearing on the basis of the opposition as filed. I therefore make the award as follows:

Preparing a statement and considering the other party's statement:	£400
Preparing and consideration of evidence:	£800
Preparation for and attendance at the hearing:	£600
Total	£1800

47. I order easyGroup Ltd to pay Ezyorder.com Ltd the sum of £1800 as a contribution towards its costs. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 7th day of May 2015

**Ann Corbett
For the Registrar
The Comptroller-General**