

BLO/241/22

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3298814

BY CAVIAR HOLDINGS INC.

TO REGISTER THE FOLLOWING MARKS AS A SERIES IN CLASSES 9, 14, 16, 18, 25, 32, 35, 38, 41 & 43:

MARQUEE

marquee

AND IN THE MATTER OF THE OPPOSITION THERETO UNDER NO. 413287

BY ROOF DECK ENTERTAINMENT LLC

AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON

BY THE OPPONENT

AGAINST A DECISION OF CLARE BOUCHER O/079/21

DATED 4 FEBRUARY 2021

DECISION

Introduction

1. This is an appeal from a decision of Clare Boucher, acting for the Registrar, dated 4 February 2021, in which she allowed UK trade mark registration number 3298814 (“the Trade Mark”) to proceed to registration for various goods and services in Classes 9, 14, 16, 18, 25, 35, 38 and 41. The Opposition was partially successful in respect of all of the goods and services in Classes 32 and 43, and in respect of certain services in respect of Classes 35 and 41.
2. The Opponent appeals against the decision allowing the Trade Mark to proceed to registration in respect of the following services in Class 35 (“the Appealed Services”):

“management and operation of restaurants, clubs, bars, recreational facilities for others; information, consultancy and advisory services in relation to all the aforesaid services”.

The Hearing Officer’s decision

3. In its Opposition the Opponent relied on its earlier EU Trade Mark No. 15626096 (“the Earlier Mark”) for the following mark:

MARQUEE

4. The Opponent based its opposition on sections 5(1) and 5(2)(a) and (b) of the Trade Marks Act 1994 (“the Act”). It opposed the goods and services applied for in Classes 32, 41 and 43, and some of the services applied for in Class 35, relying on all the services for which the Earlier Mark is registered, which consist of the following (“the Earlier Services”):

Class 41: Night clubs; beach clubs; entertainment services including parties, special events, dance and music events.

Class 43: Restaurants; bar services; cocktail lounge services; hotels; temporary accommodation; cafes; catering services; public house services; wine bars; take-away services; booking and reservation services for restaurants.

5. The Opponent argued that the Trade Mark was identical or at least visually “closely” similar and otherwise identical to the Earlier Mark and that the goods and services covered by the respective marks which the Opponent objected to were identical and highly similar.
6. Neither party filed evidence or requested a hearing, so the Hearing Officer reached her decision following careful consideration of the papers.
7. The Hearing Officer explained that section 6(3)(a) of the European (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period, and confirmed that because the provisions of the Act were derived from an EU Directive she would continue to make reference to trade mark cases of the EU courts.

Section 5(1) and section 5(2)(a)

8. In particular, the Hearing Officer referred to the Court of Justice of the European Union’s decision in *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, and concluded that the opposition based on section 5(1) and section 5(2)(a) of the Act failed because the marks were not identical. In paragraph 15 of the Decision, the Hearing Officer considered that the font used in the

Earlier Mark *“is not standard and the differences would not go unnoticed by the average consumer”*. The Opponent did not appeal this aspect of the Decision.

Section 5(2)(b)

9. The Hearing Officer proceeded to compare the various goods and services relied on by the Opponent with the corresponding goods and services covered by the Trade Mark. Her conclusions in relation to the Appealed Services are set out in paragraphs 32 of the Decision, as follows:

“Management and operation of restaurants, clubs, bars, recreational facilities for others; information, consultancy and advisory services in relation to all the aforesaid services

32. These are services that will be supplied to professional customers who wish to offer restaurants, clubs, bars or recreational facilities to their customers, but want the day-to-day running of the services to be the responsibility of another undertaking. They may involve the supply of front-of-house, catering and administrative staff, office services and other administrative functions. The nature of the service, users and purpose are different from those of the opponent’s Class 41 and 43 services, which will be used by the general public seeking a meal, a drink or entertainment. They are not in competition and are likely to be provided by different undertakings. In my view, the services are dissimilar.”

10. Finding the Appealed Services were dissimilar to the Earlier Services, the opposition failed under section 5(2)(b) of the Act in respect of the Appealed Services without the need for the Hearing Officer to go on to consider the likelihood of confusion.
11. With the exception of a few services under Class 41 which the Hearing Officer also found to be dissimilar to the Earlier Services, the Hearing Officer found the other goods and services challenged by the Opponent to be identical, highly similar or similar to a low or medium degree. Accordingly, for those goods and services, she did go on to consider the likelihood of confusion. She found the marks to be highly visually similar, and aurally and conceptually identical. The Earlier Mark was inherently distinctive at a medium level, but lower in relation to *“entertainment services including parties, special events, dance and music events and catering services”*. Applying a global assessment, including in particular the independency principle, she concluded in paragraph 71 of the Decision that *“the average consumer is likely to be directly confused and mistake one mark for the other.”*
12. The Opposition was therefore successful in respect of all of the goods and services opposed by the Opponent save in respect of the services within Classes 35 and 41 which the Hearing Officer had found to be dissimilar to those covered by the Earlier Mark.

The Appeal

13. On 4 March 2021, the Opponent filed a Notice of Appeal to the Appointed Person under section 76 of the Act in respect to the Appealed Services in Class 35 only.
14. At the hearing before me, which was held remotely on 20 January 2022, Alaina Newnes, instructed by Taylor Wessing LLP, appeared on behalf of the Appellant. The Respondent did not attend the hearing, but the Respondent's representatives, Trade Mark Owners Association, had written to the UKIPO shortly before the hearing submitting that the Decision should be upheld in its totality and objecting to the inclusion of the evidence which the Appellant sought to rely on in the appeal.

Standard of review

15. It is well established that in order to interfere with the decision of the Hearing Officer I must be satisfied that there was a distinct and material error of principle in the decision or that the Hearing Officer was wrong. The relevant principles were set out in particular in *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17 by Daniel Alexander QC and by the Supreme Court in *Actavis Group PTC EHF v ICOS Corporation* [2019] UKSC 15. An appeal is by way of review, not a rehearing. Neither surprise at a Hearing Officer's conclusion nor a belief that she or he has reached the wrong decision will justify interference. The decision of the lower court will be "wrong" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "*outside the bounds within which reasonable disagreement is possible*" (*Actavis Group* at [81]). I have borne those principles firmly in mind.

Grounds of appeal

16. The Appellant's Notice of Appeal set out one ground of appeal, namely that the Hearing Officer erred in finding that the Appealed Services are not similar to the Earlier Services, which it divided into three sub-grounds.

Ground 1(a): The Hearing Officer failed to give full meaning and effect to the words "booking and reservation services for restaurants" when considering the scope of the Appellant's earlier services in Class 43.

17. The Appellant submitted that "*booking and reservation services for restaurants*" embraces providing those services to third parties that run restaurants. In contrast, an operator of a restaurant who offers consumers the ability to reserve a table at their restaurant does not amount to providing "*booking and reservation services for restaurants*". The Appellant compared these

services to third parties that arrange the booking of travel services e.g. travel agencies, or hotel booking services. These “*booking and reservation services for restaurants*” would therefore be provided to the same owners/managers of restaurants who may be expected to be the target of the Appealed Services, namely professional customers who want to outsource the day-to-day running of restaurants to another undertaking.

Ground 1(b): The Hearing Officer erred in concluding that the respective services were not in competition and are likely to be provided by different undertakings

18. In the Appellant’s skeleton argument for the hearing before me this submission had been amended from the respective services not being “*in competition*” to their being “*complementary and similar*”. The Appellant submitted that it is common practice for businesses that run restaurants and other similar establishments to also provide their specialist support services to third parties to help with the management and operation of establishments operated by those third parties. The Hearing Officer was therefore wrong to conclude that the respective services are not provided by the same undertakings, and so were not complementary or similar.

Ground 1(c): The Hearing Officer failed to give any consideration to the end-users of the respective services

19. In the Appellant’s skeleton argument for the hearing before me this submission had been amended to the Hearing Officer not having given “*proper*” rather than “*any*” consideration to the end-users of the respective services. The Appellant submitted that the Hearing Officer failed to take into account that, although the Appealed Services will be supplied to professional customers who wish to offer restaurant, club, bar or recreational facilities to their customers, but want the day-to-day running of those restaurants, clubs, bars or recreational facilities to be the responsibility of a third party, those services are also intended for the general public.

Evidence

20. In support of its submissions under Grounds 1(a) and 1(b), the Appellant sought leave in its Grounds of Appeal to adduce evidence in the form of a witness statement of Simon Jupp of Taylor Wessing LLP plus three exhibits which featured screenshots from various websites. The purpose of this evidence was said to be to correct assumptions wrongly made by the Hearing Officer in the absence of any evidence to support those assumptions. At the hearing before me, Ms Newnes only sought to rely on the evidence in support of Ground 1(b). When I questioned this, she confirmed that while the evidence did have some bearing on Ground 1(a), the Appellant submitted that Ground 1(a) could be made out even without the evidence.

21. Before I consider whether to allow this evidence, I will therefore consider Ground 1(a), since that is said not to require any evidence. However, since there is an overlap between Ground 1(a) and Ground 1(c), as both relate to the users of the services, I will consider them together.

“Booking and reservation services for restaurants”

22. In my opinion, the words *“booking and reservation services for restaurants”* can be read in two ways. Firstly, it can be a reference to booking and reservation services *in relation to* restaurants, as distinct from booking and reservation services in relation to, for example, hotels or holidays i.e. the services are *for* restaurant services, rather than for hotel or holiday services. These services could be provided by the restaurants themselves and would be offered to the general public as the end-users. I will consider below whether they could also be provided by third parties to the general public *on behalf of* restaurants. I will refer to this as the first interpretation.

23. Alternatively, the words can be read as a reference to the provision of booking and reservation services by a third party *to* restaurants i.e. the services are provided *for* the restaurants, so that the restaurants do not have to provide those services themselves. These services would be provided by third-party service providers to the restaurants. I will refer to this as the second interpretation.

24. The Hearing Officer summarised the relevant case law relating to the comparison of goods and services as follows:

“20. When comparing the goods and services, all relevant factors should be taken into account, per Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc (Case C-39/97):

“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 complementary.”

21. In Kurt Hesse v OHIM, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods or services. The General Court (GC) clarified the meaning of “complementary” goods or services in Boston Scientific Ltd v OHIM, Case T-325/06:

“... 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.”

22. 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. chickens against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods and services is to assess whether the relevant public are liable to believe that responsibility for the goods and services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander QC, sitting as the Appointed Person, noted in *Sandra Amalia Mary Elliot v LRC Holdings (LUV/LOVE Trade marks)*, BL O-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.”

And

“... 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.”

23. Guidance was also given by Jacob J (as he then was) in *British Sugar Plc v James Robertson & Sons Limited (TREAT)* [1996] RPC 281. At [296], he identified the following relevant factors:

“(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.””

25. I am also conscious of the comments of Jacob J (as he then was) in *Avnet Incorporated v Isoact Limited* [1998] FSR 16:

“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.”

I consider that that reference to *“the core of the possible meanings attributable to the rather general phrase”* recognises that there may be cases where more than one possible meaning of a phrase should be taken into account when undertaking the comparison of goods and services. I therefore conclude that both of the two alternative interpretations set out in paragraphs 22 and 23 fall within the core of the possible meanings attributable to the phrase *“booking and reservation services for restaurants”*.

26. Neither party provided any evidence on this issue for the Hearing Officer to consider. The Appellant argued in its skeleton argument at the hearing before me that none was needed *“given the plain and ordinary meaning of the words “for restaurants”*”.
27. Given the two alternative meanings of the phrase *“booking and reservation services for restaurants”* it is interesting to note that the same phrase had been used in trade marks which featured in three other cases which Ms Newnes referred me to. She argued that in these three cases hearing officers had taken judicial notice of the fact that *“booking and reservation services for restaurants”* are those which are commonly provided by third-party companies, and that the Hearing Officer should have done the same. In *Fernando’s Grill* O-689-21, at paragraph 42, James Hopkins said of the same phrase: *“It is not uncommon in the trade for these services to be provided by third parties on behalf of restaurants”*. In ADHOC O-429-14, at paragraph 18, C J Bowen said of the phrase: *“Such a service is, in my experience, more likely to be provided by a third party, with the average consumer contacting the provider of that service to make a booking which will be taken on the restaurant’s behalf.”* In *Buddha* O-194-13, at paragraph 28, Al Skilton said of the phrase: *“A restaurant booking service goes beyond the consumer telephoning a restaurant to make a reservation. Such services are provided by third-party companies which may be contacted by the consumer, the booking then being taken by the third-party company on behalf of the restaurant.”*
28. Although these cases are not binding on me, they do lend support to my opinion that the phrase *“booking and reservation services for restaurants”* has two possible meanings, neither of which are extreme or far-fetched. I note that the *Buddha* decision in fact supports the first interpretation of the phrase set out in paragraph 22 above because the full phrase covered by the specification in issue, in that case, was *“booking and reservation services for restaurants and hotel accommodation”*. For that trade mark the words *“restaurants and hotel accommodation”* were being used to describe the type of services rather than the identity of the recipient of the services.

29. I also find some support for the first interpretation as an alternative interpretation in the reference to “*reservation services for show tickets*” which also appears as part of the specification in Class 41 of the Trade Mark. The reference to “*show tickets*” can only be read as a description of the type of services rather than as an indication of the recipient of those services.

30. Having decided that there are two possible ways in which the phrase “*booking and reservation services for restaurants*” can be interpreted, I will now go on to consider who is the provider of those services.

The provider of “*booking and reservation services for restaurants*”

31. In paragraph 32 of the Decision the Hearing Officer does not expressly say who the providers of the “*booking and reservation services for restaurants*” are. After referring to the end-users of the Opponent’s Class 41 and 43 services as all being the general public, she concludes that the respective services “*are not in competition and are likely to be provided by different undertakings*”. However, it is widely known, and I take judicial notice of the fact, that there are companies which operate online booking and reservation services through which you can book or reserve a table at a wide range of different restaurants – for example, www.opentable.co.uk and www.quandoo.co.uk. It would therefore be correct to say that the providers of “*booking and reservation services for restaurants*” includes both the restaurants themselves and third party booking and reservation companies.

32. Bearing this in mind I will now apply the two alternative interpretations to the comparison of the Appealed Services with the Earlier Services.

Comparison of the Appealed Services with the Earlier Services

“*Management and operation of restaurants ... for others*”

33. I do not criticise the Hearing Officer for concluding that the third-party providers of “*Management and operation of restaurants ... for others*” are not in competition with the restaurants when the online booking companies referred to in paragraph 31 are considered. No evidence was produced to show what the relationship is between the two.

34. Under the second interpretation, these “*booking and reservation services for restaurants*” could be the same as, or certainly similar to, the services of “*management and operation of restaurants ... for others*” as used in Class 35 of the Trade Mark. The Hearing Officer gave examples of the types of services that could fall within the latter wording as “*the day-to-day running*” including “*the supply of front-of-house, catering and administrative staff, office services and other administrative functions*”. It is likely that a restaurant owner or operator who wishes to contract out their front-

of-house and administrative functions will also contract out their booking and reservation services, as they fall within front-of-house and administrative functions.

35. Under the first interpretation, *“booking and reservation services for restaurants”* would be complementary and similar to *“management and operation of restaurants ... for others”* to the extent that those management and operational activities includes booking and reservation services. Many restaurants will operate their own booking and reservation services while at the same time allowing their customers to book or reserve a table on one of the third-party websites. The services are the same or at least very similar when looked at from the point of view of the general public as the end-user, since both offer the general public the ability to book or reserve a table at their chosen restaurant. As argued by the Appellant under Ground 1(c), and as required by *Treat*, the respective users of the respective goods and services must be considered, and in this case, a class of users is the same. It is true that the third-party providers are also providing their services to their professional restaurant clients, but this simply means that there are two classes of users of their services – the restaurants and the general public.
36. Furthermore, *“booking and reservation services”* are not *“essential”* for restaurants, in the sense that it is possible in some restaurants to simply turn up without a prior booking or reservation, but in my view, they are certainly *“important”*, in such a way that customers may think that the responsibility for those goods lies with the same undertaking, as those words are used in *Boston Scientific*.
37. I therefore conclude that, with respect to *“booking and reservation services for restaurants”*, the Hearing Officer erred in finding that *“the nature of the service, users and purpose are different from those of the opponent’s ... Class 43 services”*. This is the case in respect of both of the two possible interpretations of the phrase *“booking and reservation services for restaurants”*. Under the second interpretation, the users of the respective services are the same, namely the restaurants, and may be provided by the same undertakings, and are likely to be in competition. Under the first interpretation, the respective services share the same class of end-user, namely the general public, who will experience the same or a very similar service, such that customers may think that the responsibility for those services lies with the same undertaking.
38. It therefore does not matter that the Hearing Officer chose one interpretation over the other – in both cases, she should have found the respective services to be similar to at least a low degree.
- “Management and operation of ... clubs, bars, recreational facilities for others”*
39. The Appellant submitted in its skeleton argument that if the Hearing Officer had applied the second interpretation to the phrase *“booking and reservation services for restaurants”* then she should

have found that all of the Appealed Services were similar to at least a moderate level to *“booking and reservation services for restaurants”*. Ms Newnes submitted at the hearing before me that restaurant services were a type of recreational facility – in fact, anything involving dancing, music, wining and dining - which I agree with. Franchising is a well-known business model, so I take judicial notice of the fact that certain fast food restaurant owners, for example, will have third-party franchisees operating restaurants for them, McDonald’s Restaurants being perhaps one of the most well known. These franchised restaurants will be offering restaurant services to the general public while also providing their services to the franchisor. They will be in competition with the providers of other “restaurants”, “cafes” and “take-away services” from the Earlier Services, and the services would be provided by the same undertakings.

40. The same reasoning applies to the other types of services referred to in the Class 35 specification, namely *“Management and operation of ... clubs, bars, recreational facilities for others”* when compared with the Earlier Services. For example, *“bar services”* could be provided by a third-party contractor on behalf of the bar owner. *“Recreational facilities”* includes *“night clubs; beach clubs”* in Class 41 and *“hotels, temporary accommodation, cafes”* and *“wine bars”* in Class 43 of the Earlier Services. *“Entertainment services including parties, special events, dance and music events”* are likely to be provided by third parties for the owners of clubs and other recreational facilities. When provided by third parties to the owners of the clubs, bars and other recreational facilities, such services would be complementary to the services of those owners within the guidance laid down in *Boston Scientific*

41. I therefore find that the Hearing Officer erred in finding *“management and operation of ... clubs, bars, recreational facilities for others”* not to be provided by the same undertakings, nor in competition, nor complementary and therefore similar to the Earlier Services.

“ Information, consultancy and advisory services in relation to all the aforesaid services”

42. The words *“information, consultancy and advisory services in relation to all the aforesaid services”* form part of the Appealed Services.

43. *“Entertainment services including parties, special events, dance and music events”, “bar services; cocktail lounge services”, “catering services; public house services”, “take-away services; booking and reservation services for restaurants”* are all services which could include or are at least similar to a low degree to information, consultancy and advisory services for the management and operation of the corresponding facilities.

44. Accordingly, for the reasons given above I find that the Hearing Officer also erred in finding *“information, consultancy and advisory services in relation to the management and operation of*

restaurants, clubs, bars, recreational facilities for others” not to be provided by the same undertakings, nor in competition, nor complementary and therefore similar at least to a low degree to the Earlier Services.

45. As I have been able to reach these conclusions without the need for any evidence, it is not necessary for me to decide whether or not it was appropriate for the Appellant to seek to rely on the evidence of Mr Jupp, which has had no bearing on my decision.

Likelihood of confusion

46. Having found that the Appealed Services are similar to the Earlier Services to at least a low degree, I will now go on to decide whether there is a likelihood of confusion between the Trade Mark and the Earlier Mark in respect of the Appealed Services.

47. In paragraph 19 of the Decision the Hearing Officer set out the applicable law as follows:

“In considering the opposition under this section, I am guided by the following principles, gleaned from the decisions of the CJEU 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 BV (Case C-342/97), Marca Mode CV v Adidas AG & Adidas Benelux BV (Case C-425/98), Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (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-334/05 P) and Bimbo SA v OHIM (Case C-519/12 P):

- 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. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their 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; and

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.”

48. In paragraph 11 I explained that the Hearing Officer found the marks to be highly visually similar, and aurally and conceptually identical. She found the Earlier Mark was inherently distinctive at a medium level, but lower in relation to *“entertainment services including parties, special events, dance and music events and catering services”*. She concluded that there was a likelihood of direct confusion in relation to all of the contested services which she had not found to be dissimilar. This included in particular various services which she had found only to have a low degree of similarity, which she explained in paragraph 71 as follows:

“The interdependency principle comes into play here. Even where the goods and services are similar only to a low degree, the high degree of similarity between the marks leads me to find that the average consumer is likely to be directly confused and mistake one mark for the other.”

49. Applying these conclusions to the comparison of the respective marks in respect of the Appealed Services, I find that there is also a likelihood of direct confusion between the Appealed Services and the Earlier Services. In relation to *“entertainment services including parties, special events, dance and music events and catering services”*, in respect of which the Hearing Officer found the Earlier Mark to be inherently distinctive to a lower than medium level, I still consider that there is

a likelihood of direct confusion on a global assessment, taking into account in particular that the marks are highly similar and the interdependency principle.

50. The appeal therefore succeeds in relation to the Appealed Services and the Trade Mark will proceed to registration in respect of the goods and services set out in paragraph 73 of the Decision with the exception of the Appealed Services.

Costs

51. As the Appellant has been successful it is entitled to a contribution to its costs of the appeal. I do not propose to award any costs to the Appellant in relation to the preparation of the evidence which, ultimately, I did not need to consider. Ms Newnes did accept at the hearing that the evidence did not specifically demonstrate evidence of any use in relation to some of the services in issue, and I noted that some of the evidence was confined to activities undertaken in the USA.

52. The Hearing Officer found that both parties had had a degree of success, with the greater part going to the Opponent, as so ordered the Respondent to pay the Appellant £540. To reflect the fact that the Opponent has now succeeded in more of its opposition I will increase that order to £640 and order the Respondent to pay the Appellant £900 in respect of the appeal, making a total of £1,540 to be paid within 21 days of the date of this decision.

Simon Clark
The Appointed Person
18 March 2022

Representation:

Appellant: Alaina Newnes, instructed by Taylor Wessing LLP

Respondent: Did not appear