

O-556-17

**TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION NO. 3143542
BY SOCIEDADE DE GESTÃO FINANCEIRA CENTRAL DA OURA, LDA.
TO REGISTER THE TRADE MARK:**



IN CLASS 43

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 406918
BY MGM RESORTS INTERNATIONAL**

Background and pleadings

1. On 8 January 2016, Sociedade de Gestão Financeira Central da Oura, Lda. (“the applicant”) applied to register the trade mark:



The application was published for opposition purposes on 1 April 2016 for the following services:

Class 43 Temporary accommodation and hotels; hotel and temporary accommodation reservations; organisation and providing of holiday accommodation and reservation of accommodation; restaurants, snack bars, self-service restaurants, cafeterias, bars and catering services; provision of food and drink.

2. The application is opposed by MGM Resorts International (“the opponent”). The opposition was filed on 30 June 2016 and is brought under sections 5(2)(b), 5(3), 5(4)(a) and 56(1) of the Trade Marks Act 1994 (“the Act”). Under each of these grounds, the opposition is directed against all of the services in the application.

3. Under ss. 5(2)(b) and 5(3), the opponent relies upon the following trade marks:

- i) European Union trade mark (“EUTM”) 10355691 for the trade mark **MGM**. The mark has a filing date of 20 October 2011 and was entered in the register on 14 July 2017. The mark is registered for a range of services in classes 35, 41 and 43 (full details of which are set out at appendix 1 to this decision), all of which are relied upon under both grounds.
- ii) International trade mark (EC) registration 1118128 for the trade mark:



The trade mark has an international registration date of 1 December 2011 and the EU was designated on the same date. The trade mark was granted protection in the EU on 2 May 2013. It is registered for various goods and services in classes 25, 35, 41, 43 and 44 (see appendix 1, attached). Under both of the above grounds, the opponent relies upon all of the goods and services for which the mark is registered.

4. Given their dates of filing, both of the above marks qualify as earlier marks in accordance with s. 6 of the Act. As neither mark had completed its registration process more than 5 years before the publication date of the application in suit, they are not subject to proof of use, as per s. 6A of the Act. The opponent can, as a consequence, rely upon all of the goods and services it has identified.

5. Under s. 5(2)(b), the opponent claims that the goods and services are identical or similar and that the marks are visually, aurally and conceptually highly similar or very similar. The opponent also claims that its marks have an enhanced level of distinctive character, due to the use which has been made of them. Further, the opponent claims that it has “a series or family of marks containing MGM and as such a mark (on identical and/or similar services) would be deemed as originating from or associated with the Opponent”.¹ It claims that there is a likelihood of confusion, including a likelihood of association.

6. Under s. 5(3), the opponent claims that its marks have a reputation in the UK such that use of the mark applied for would cause the relevant public to believe that there is an economic connection between the applicant and the opponent, where no such

¹ §21.

connection exists. It claims that there would be unfair advantage to the applicant as a result of its riding on the coat tails of the reputation of the opponent's marks. The opponent also claims that use of the mark applied for would cause detriment to the distinctive character of its marks through dilution of the marks' distinctive character. It claims that the opponent would have no control over the services offered by the applicant and that, if those services were of "inferior or different quality", the reputation of the opponent's marks would be tarnished.

7. The opponent further claims under s. 5(4)(a) of the Act that the signs **MGM** and



have been used throughout the UK since December 1996 in respect of a very wide range of goods and services, which it indicates correspond to goods and services in classes 25, 35, 36, 41, 42, 43 and 44. The goods and services are detailed in full at appendix 2 and although the list looks long, there is a good degree of duplication. The opponent claims that it has acquired goodwill under the signs and that use of the application would constitute a misrepresentation to the public resulting in damage to the opponent's goodwill.



8. The opponent further claims that **MGM** and **MGM GRAND** are entitled to protection as well-known marks under article 6*bis* of the Paris Convention (s. 56(1) of the Act). The marks therefore qualify as earlier marks under s. 6 of the Act. The opponent's claim under this ground relates to the same goods and services for which the claim under s. 5(4)(a) is made (see appendix 2). Given that these claims relate to the same signs and goods/services, it is not clear how the claim under s. 56(1) would improve upon the protection to which the opponent is entitled under s. 5 of the Act, whether or not the signs qualify as earlier marks by virtue of the Paris Convention.

9. The applicant filed a counterstatement denying the grounds of opposition and putting the opponent to proof of its claims. It denies that the marks are visually, aurally or conceptually similar, and submits that there is no likelihood of confusion. The applicant disputes the opponent's claims to a reputation and goodwill, and that the marks are well known. It submits that, in any event, use of the contested mark would not lead to any of the consequences identified by the opponent.

10. Both parties filed evidence. Both parties also filed written submissions during the evidence rounds. A hearing took place before me on 25 September 2017, at which the opponent was represented by Daniele Selmi of counsel, instructed by Joshi Worldwide IP Limited, and the applicant by James St Ville of counsel, instructed by Marks & Clerk LLP.

11. Whilst the grounds under ss. 5(3), 5(4)(a) and 56(1) were not formally dropped, both in his skeleton argument and at the hearing Mr Selmi focused upon the opponent's case under s. 5(2)(b). He conceded at the hearing that, if the opposition under s. 5(2)(b) fails in respect of the word-only mark, it will also fail in respect of the device mark. That is a sensible approach and one I will adopt in considering the various grounds, namely that I will begin by considering the opponent's case under s. 5(2)(b) regarding the word-only mark (EUTM 10355691). If the opposition fails under s. 5(2)(b), I will then go on to consider the remaining grounds.

Preliminary issue

12. Mr St Ville noted in his skeleton argument a technical defect in the opponent's evidence, namely that the witness statement of Thomas J. Reich did not include a statement of truth. At the hearing, Mr St Ville argued that it would not be fair on the applicant if I allowed the statement to be corrected, as the applicant had prepared its case on the basis of the statement being inadmissible as evidence. Mr Selmi confirmed that the omission of a statement of truth was an innocent oversight and maintained that the applicant would still be able to give its submissions regarding the weight to be

attached to the submissions and evidence in the statement if the opponent were allowed to correct the error. I allowed the opponent seven days to file a corrected witness statement containing the requisite statement of truth. I did so because the applicant has already responded to the opponent's evidence with evidence of its own, as well as written submissions. If it noticed during the evidence rounds that there was no statement of truth on Mr Reich's statement, it did not raise the matter. Having seen Mr St Ville's lengthy skeleton argument, which includes a number of criticisms of Mr Reich's evidence, I also agreed with Mr Selmi that, in this case, the arguments surrounding the weight to be attached to the various aspects of the statement would be unaffected if I allowed the statement to be amended.

13. The opponent filed an amended witness statement on 28 September 2017. The covering letter indicated that "the Witness Statement remains unchanged other than inclusion of the Statement of Truth and the correct year 2017". Clearly, it would have been better if the witness statement gave the date on which the re-executed statement was actually signed. However, given that the witness statement is otherwise identical and that it has been re-signed, I am prepared to admit the evidence as now filed.

The evidence

14. I have read all of the evidence carefully but, for reasons which will become apparent, I do not intend to record it in detail at this juncture. The key points are summarised below.

Opponent's evidence

15. This consists of two witness statements. The first is that of Mr Reich, who gives his title as Senior Vice President-Legal Counsel for the opponent.

16. Mr Reich describes the opponent as "one of the world's leading hospitality companies" and states that the company owns or has an interest in eighteen resorts or

hotels in the US and in Macau.² However, all of the evidence centres on the MGM Grand Hotel in Las Vegas. Mr Reich states that “the original MGM Grand Hotel and Casino” opened in 1973.³ He claims that the trade marks and signs relied upon have been used in the UK since 1996 and that a marketing office was established in the UK in 1997.⁴ He also states that:

“[...] several senior marketing executives from my company travel to the UK 4-6 times per year to further promote the brand as London is where we conduct most of our business in the UK. Our executives normally visit with other Casino Executives and CEO’s as well as invite existing and potential guests to lunch, dinner, drinks or a sporting events [sic] and arrange for their future trips to our properties in Las Vegas”.⁵

17. Global turnover figures are given as between \$7.8 US billion and \$10.1 US billion in each of the years 2011 to 2015.⁶ The turnover figures are not broken down (e.g. by territory or services) but Mr Reich asserts that the company records indicate over 50,000 unique visitors from the UK in the period 2011-2015, resulting in an approximate spend of over \$18 million.⁷ There is no documentary support for these figures. There is, however, evidence regarding the number of unique visitors for the opponent’s mgmgrand.com website.⁸ These show 309,009 unique visitors from the UK in 2014 and 402,655 in 2015. Mr Reich provides figures showing the number of followers for the opponent’s various social media sites.⁹ Most are not broken down by territory but exhibit 14 shows that in excess of 49,000 UK users have ‘liked’ or followed the “MGM Grand” Facebook page.

² § 8.

³ § 11.

⁴ § 26.

⁵ § 27.

⁶ Exhibit 2.

⁷ § 16.

⁸ § 42.

⁹ § 44.

18. Undated website and brochure images are provided which show holidays at the opponent's Las Vegas hotel being offered by companies such as Virgin Holidays, Thomas Cook and lastminute.com.¹⁰ The vast majority refer to the hotel as the "MGM Grand Hotel & Casino". However, the following mark features on what are said to be web banners which appeared on Expedia UK:



19. Mr Reich includes in his statement a list of newspaper and magazine articles which have included references to the opponent's hotel. The context is not given but the articles are dated between 1985 and 2015, and at least some of the publications (such as the Evening Standard (London)) are clearly UK-based. At exhibit 12, articles are provided which refer to "the MGM Grand" and "the MGM Grand Hotel". There are also references to "the MGM casino" (p. 31), "MGM's Monte Carlo" (p. 47) and "MGM Grand Arena" (p. 70). Most are UK-based but only fifteen of the articles are dated, showing dates between October 2012 and April 2015. Further articles from national and local UK publications are at exhibit 13, of which twelve are dated between January 1997 and December 2015. The majority of the articles refer to the "MGM Grand". Their focus varies: for example, some refer to the MGM Grand as a hotel, while others describe the different entertainment offerings (such as its restaurants, nightclubs and pool parties).

20. Mr Reich states that the opponent has organised and staged a number of boxing events "at MGM Grand properties". He provides a list of media companies (e.g. BBC Radio, Sunday Herald) which "would have provided" the international event coverage.¹¹ There is no evidence to show the actual coverage.

21. Mr Reich also indicates that there have been previous legal proceedings between the parties (in India) and supplies at exhibit 15 examples of the marks which the

¹⁰ Exhibit 11.

¹¹ § 18.

opponent considered objectionable. There are also examples of signs used by the applicant in relation to a hotel in Cuba, which Mr Reich describes as an attempt “to pass off its services as being related to my company’s famous and well-known marks [...]”.¹²

22. The opponent’s remaining evidence is given by Manish Joshi, the opponent’s professional representative. Most of his statement describes the history of the current proceedings, which is repeated in submissions. The single exhibit consists of three pages printed from the website muthuhotels.com, said to be the applicant’s website. It does not add anything.

Applicant’s evidence

23. This consists of the evidence of Nuno Jorge, the Chief Financial Officer for the applicant. He states that his company is part of the MGM Muthu Group, to which it licenses its intellectual property rights. Mr Jorge describes the history of MGM Muthu Group, which was founded in 1963 as a logistics company. The company is said to own four hotels in the UK, the first of which it acquired in September 2014. Newspaper and website articles at NJ1-NJ3 describe the acquisition of the various UK hotels.

24. NJ4 consists of images from the applicant’s website, showing its UK hotels. The mark the subject of the application is visible at the top of the pages. The only dates visible are in 2017.

25. At NJ5 are images of the applicant’s stands at the National Wedding Show in 2014 and 2015 and the World Travel Market show in October 2014. The mark applied for is visible on the stands. Mr Jorge points out that the list of attendees for the World Travel Market exhibition (p. 23) shows both the applicant and opponent were represented. Two further stands, for the World Travel Market exhibition in November 2016 and the Wedding Journal fair in January 2017 are also provided but both are after the filing date of the application.

¹² § 47.

26. At NJ6 is an image from ATOM magazine (dated July 2014), along with what appear to be flyers or adverts, all featuring the applicant's mark. It is not clear what the circulation or distribution of the magazine is: the overriding impression is of a promotional magazine produced by the applicant.

27. NJ7 is an advertisement said to be from a publication in Southend, dated March 2017, for lunches and teas at the applicant's hotel. NJ8 shows an advertisement in the *Ipswich Star* dated January 2017 promoting the applicant's hotel.

28. Annual turnover figures are given for the UK for the years 2012-2013 (over £1.6m), 2014 (over £1.7m), 2015 (over £5.8m) and 2016 (over £5.6m). The applicant does not explain how it generated UK turnover prior to its acquisition of its first UK hotel in September 2014. Global advertising figures are provided but there is no indication of the expenditure in relation to the UK market.¹³

29. Trade mark registrations for other jurisdictions are included at NJ9 (they are not translated) and a translation of a Portuguese trade mark decision at NJ11. They are not relevant.

30. NJ10 consists of prints from www.muthuhotels.com. They show a range of services on offer and the application is visible but the images are not dated.

Decision

Section 5(2)(b)

31. The opposition is based upon s. 5(2)(b) of the Act, which reads as follows:

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

¹³ § 24.

[...]

(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”.

32. 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 are:

(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

33. When making the comparison, all relevant factors relating to the services in the specification should be taken into account. In *Canon*, the Court of Justice of the European Union (“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”.

34. Guidance on this issue has also come from Jacob J. (as he then was) in *British Sugar Plc v James Robertson & Sons Ltd* (the *Treat* case), [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- 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.

35. The General Court (“GC”) confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods/services are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“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 fur 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”.

36. For the purposes of considering the issue of similarity of the services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* BL O/399/10 and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs [30] to [38]).

37. In its written submissions, the applicant stated that:

“6. We submit that the Applicant’s services “*Temporary accommodation and hotels; hotel and temporary accommodation reservations; organisation and providing of holiday accommodation and reservation of accommodation*” in class 43 include the Opponent’s [...] class 43: “*Hotel and resort services*” (EU No. 010355691) and so these services are identical.

7. The Applicant’s services in class 43: “*restaurants, snack bars, self-service restaurants, cafeterias, bars and catering services; provision of food and*

drink” are identical [...] to the Opponent’s class 43: “*restaurant and bar services; cafes; cafeterias; lounge services; snack bars; catering*” (EU 010355691)”.

38. Notwithstanding the above, at the hearing Mr St Ville suggested that the applicant had never conceded that all of the services were identical, though he did accept that “hotels”, “restaurants”, “bars”, “cafeterias” and “catering” are identical. That is plainly right, as the earlier specification includes those terms. Mr St Ville did not explain why the remaining terms in the applicant’s specification would not be identical. Whilst I am not persuaded that there is any ambiguity in the statement quoted above, for completeness I will consider the terms in relation to which it is now said that there is no identity.

Snack bars

39. This term is included in the earlier specification and the services are self-evidently identical.

Temporary accommodation; providing of holiday accommodation

40. This term is encompassed by the earlier mark’s “hotel and resort services”, or vice versa. The services are identical based on the principle identified in *Meric*.

Hotel and temporary accommodation reservations; organisation of holiday accommodation and reservation of accommodation

41. These fall within the broad term “travel agency services, namely, making lodging, restaurant and meals reservation” in the earlier specification, or vice versa. They are identical under *Meric*.

Self-service restaurants; provision of food and drink

42. The first term is included in “restaurant services” in the earlier specification, whilst the second term includes “restaurant services”. They are identical under *Meric*.

The average consumer and the nature of the purchasing act

43. It is necessary for me to determine who the average consumer is for the respective parties’ services. I must then decide the manner in which these services are likely to be selected by the average consumer in the course of trade. 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 services in question: *Lloyd Schuhfabrik*.

44. 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”.

45. Given my findings, above, in relation to the similarity of the services at issue, the relevant consumer is the consumer of the identical services in class 43 and there is no need for me to consider the average consumer of the opponent’s other services.

46. The parties are agreed, and I agree with them, that the average consumer of the services at issue is a member of the general public. The purchase of the services at issue is likely to be predominantly visual, with the consumer viewing websites, advertisements, brochures and, particularly in relation to the food provision services, signage on premises. There may also be an aural component to the selection of the services, for example, as a result of word-of-mouth recommendations.

47. Mr St Ville submitted that the average consumer will pay a high degree of attention when selecting the services, citing in support factors such as identifying the hotel, room prices and location. The opponent submits that the level of attention will vary.¹⁴

48. I agree that, when booking hotel rooms or making hotel and holiday reservations, the average consumer is likely to be attentive to the factors identified by Mr St Ville but I am not persuaded that these factors result in a high level of attention across the category. In general, the not insignificant expenditure and considerations such as location and amenities, which will play a part in the selection, point to at least an average, and in most cases a reasonably high level of attention in selecting the majority of the accommodation and hotel services.

49. As regards the food services at issue, there will, again, be some variation across the category: the consumer's level of attention is likely to be lower when purchasing snack bar services as compared to restaurant services. That said, I consider that, in general, an average level of attention will be paid, taking into account considerations such as the type of food and drink, the cost of the service and the nature of the establishment/event.

Comparison of trade marks

50. It is clear from *Sabel* (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

¹⁴ Submissions in reply, §25.

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 *Bimbo*, 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”.

51. 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. Due weight must be given 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:

Opponent’s mark	Applicant’s mark
MGM	

52. Mr Selmi submitted in his skeleton argument that “[the] overall visual impression of the Application rests on the letters MGM. The words MUTHA [sic] HOTELS are subordinate”.¹⁵ He argued that aurally “the marks share the same high degree of similarity” and that they are conceptually highly similar “comprising (as they do) the same three letters, in the same order, which will be seen as devoid of conceptual

¹⁵ § 9.

meaning to the majority of consumers. The addition of “MUTHA [sic] HOTELS” does little to change this analysis, since those elements are sub-ordinate and non-distinctive”.¹⁶ At the hearing, he submitted that “MGM” retains an independent distinctive role in the application.

53. In his skeleton argument, Mr St Ville submitted that “2 to 3 letter acronyms tend to be weakly distinctive” and that “to the extent that MGM may fulfil a separate distinctive role, that can only be through acquired distinctiveness by use”.¹⁷ At the hearing, he submitted that the application is “a modern looking font with bright colours, gold on red, the white line in the middle, and it says absolutely unmistakably MGM MUTHU HOTELS”. He argued that the opponent’s mark, from a visual perspective, “is different and quite noticeably different” from the application and that all three words in the application will be articulated, leading to the marks sounding “very different” because one is three syllables long and the other seven. Mr St Ville suggested that the earlier mark “might bring to mind the connotation of the movies”, whilst the application “is conceptual in visual appearance and the use of the Indian name MUTHU, and the use of the colours gold and red, and you would get the concept of a modern Indian feel with the name MUTHU HOTELS in it”.

54. The earlier mark consists of the letters “MGM”, presented in capital letters. None of the letters dominates the others and each of them makes an equal contribution to the overall impression.

55. The mark for which registration is sought comprises a number of different elements. By far the largest are the letters “MGM”, presented in capital letters in gold. Underneath the letters “MGM” is a horizontal line in white. Below the line are the words “MUTHU HOTELS”, again presented capital letters in a gold colour, but in a much smaller font. Mr St Ville characterised the typeface used in the application as a “thin modern script”. I am not persuaded that the typeface could properly be described as stylised in any

¹⁶ Ibid.

¹⁷ § 65.

meaningful sense: in my view, it is perfectly ordinary and is unlikely to be remarked by the average consumer. The words and horizontal line are presented centrally on a dark red background. I consider that the exaggerated size of the letters “MGM” leads to the letters “MGM” dominating the overall impression, in which they have an independent distinctive role. A lesser role is played by the word “MUTHU”. The word “HOTELS” is likely to be given little or no trade mark significance and will play only a weak role; the same can be said of the horizontal line and the background.

56. There is an obvious point of visual similarity between the trade marks, as both contain the letters “MGM”. There is also some difference because of the words “MUTHU HOTELS” in the application, as well as some stylisation, which are absent in the earlier mark. Bearing in mind my assessment of the overall impression, I consider that there is a medium degree of visual similarity.

57. The earlier mark is likely to be pronounced as it is written, namely the three letters “M-G-M”. As regards the application, it is, in my view, most likely that the average consumer will pronounce only the letters “M-G-M”. In that scenario, the marks would be aurally identical. If, however, and as Mr St Ville submitted, the average consumer also articulates the words “MUTHU HOTELS”, there would be a medium level of aural similarity.

58. In terms of the conceptual comparison, I do not agree with the applicant that, when used in relation to the services at issue, the earlier mark elicits the concept of films. There is nothing in the mark to suggest that meaning, nor any other meaning, to the average consumer. The same is, of course, applicable to the identical letters in the application: there is no immediate concept associated with them. As far as the element “MUTHU HOTELS” in the application is concerned, I think it unlikely that the average consumer will attribute any distinct conceptual meaning to the word “MUTHU”. My finding is therefore that the marks are conceptually neutral, neither having a clear concept. I accept that “MUTHU” may, as a matter of fact, be the name of the founder of the company. However, there is no evidence to show that it is a common Indian name

which would be recognised as such by the average UK consumer. I do not agree with the applicant that “the sense of a modern Indian hotel chain” is a relevant concept clearly conveyed to the average consumer.¹⁸

Distinctive character of the earlier trade mark

59. The distinctive character of a trade mark can be appraised only, first, by reference to the services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the services for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. In *Lloyd Schuhfabrik*, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been

¹⁸ For a conceptual message to be relevant, it must be capable of immediate grasp by the average consumer (see Case C-361/04 P *Ruiz-Picasso and Others v OHIM* [2006] ECR I-00643; [2006] E.T.M.R. 29).

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)”.

60. The opponent’s position is that there would be a likelihood of confusion even if the earlier mark’s distinctiveness has not been enhanced through use (though it maintains that the use made of the mark has enhanced its distinctiveness). I will therefore consider the earlier mark’s inherent distinctive character, returning to consider whether there is enhanced distinctiveness only if necessary.

61. Mr St Ville relied upon *Alfa-Beta Vissilopoulos AE v Agro de Bazan*, which is a decision of the Fourth Board of Appeal of OHIM (now EUIPO) (case R82/2011-4), where the Board stated:

“16. [...] it should be noted that letters or letter combinations of two or three letters are inherently weak, given the limited number of letters in the alphabet, the great number of meanings that acronyms and abbreviations may have and the fact that consumers frequently encounter abbreviations and letter combinations of all kinds in everyday life and business as generic abbreviations but not as marks. In view of this, the graphical design in which the letter combinations appear strongly influences the consumer’s perception. The distinctive character of the conflicting marks to a large extent rests in their specific graphic elements”.

62. The above passage was considered by Mr Iain Purvis Q.C., sitting as the Appointed Person, in *Kartell UK Ltd v Kunze Folien GmbH* (BL O/085/14). He said:

“I believe that this is an important point, well expressed by the Board, and directly applicable to the present case. Ultimately the only similarity between these two device marks is that they both include the letter K”.

63. However, in neither of these cases was a three-letter mark in issue: the Board was considering stylised two-letter marks, while Mr Purvis had before him an earlier mark consisting of a single letter. In those circumstances, I do not consider that Mr Purvis can be said to have approved the proposition that all three-letter marks have a low level of inherent distinctive character; indeed, it would be unusual if that were the case. The Board’s decision is, of course, not binding upon me.

64. The earlier mark is a series of three letters which are neither allusive nor descriptive in relation to the services at issue. That being the case, I consider that the average consumer will perceive the earlier mark simply as a sequence of letters. Taking into account all of the above, I consider that the earlier mark has an average degree of inherent distinctive character.

Likelihood of confusion

65. There is no simple formula for determining whether there is a likelihood of confusion. The factors considered above have a degree of interdependency (*Canon* at [17]). I must make a global assessment of the competing factors (*Sabel* at [22]), considering the various factors from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

66. Confusion can be direct (where 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). The concept of indirect confusion was explained by Mr Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10 as follows:

“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”).

67. The above are, of course, only examples. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. considered the impact of the CJEU’s judgment in *Bimbo* on the court’s earlier judgment in *Medion v Thomson*. The judge said:

“18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate

components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors”.

68. The services at issue are identical. The level of attention with which they are purchased will vary from average to reasonably high. The earlier mark has an average degree of inherent distinctive character. The marks are visually similar to a medium degree and conceptually neutral. The level of aural similarity may be medium, if the whole of the later mark is pronounced, or identical, if only the “MGM” element is articulated. I indicated, at paragraph 55, that the letters “MGM” are independently distinctive in the mark applied for but, as the case law above makes clear, a likelihood of confusion is not an automatic consequence of that finding. In reaching a conclusion, I will proceed on the basis most favourable to the applicant, i.e. that the average consumer’s level of attention is reasonably high and that the marks are aurally similar to a medium degree, both of which decrease the likelihood of confusion. Nevertheless, even in those circumstances, I consider that the similarity between the marks, which are dominated by the identical letters “MGM”, will result in a likelihood of direct confusion. Even if the average consumer does recall the differences between the marks (in particular the words “MUTHU HOTELS” in the application), s/he is likely to perceive the application as a variant brand originating from the opponent, leading to indirect confusion.

69. In reaching the above conclusion, I have not overlooked Mr St Ville’s comments that:

“there has been an entry on the market in the UK and promotional activity at shows, and so on, in one case listed directly alongside MGM Resorts, and not only do we have no examples of confusion, we have no examples of complaint or any other attempts to interfere in the activity”.

70. In *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchen L.J. stated that:

“80. [...] the likelihood of confusion must be assessed globally taking into account all relevant factors and having regard to the matters set out in *Specsavers* at paragraph [52] and repeated above. If the mark and the sign have both been used and there has been actual confusion between them, this may be powerful evidence that their similarity is such that there exists a likelihood of confusion. But conversely, the absence of actual confusion despite side by side use may be powerful evidence that they are not sufficiently similar to give rise to a likelihood of confusion. This may not always be so, however. The reason for the absence of confusion may be that the mark has only been used to a limited extent or in relation to only some of the goods or services for which it is registered, or in such a way that there has been no possibility of the one being taken for the other. So there may, in truth, have been limited opportunity for real confusion to occur”.

71. In *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283 Millett L.J. stated that:

“Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark”.

72. There is evidence from the opponent of the use it has made of its mark. However, there is only limited evidence before me of the use made by the applicant of the mark

applied for. Only the exhibition evidence is dated before the application date, its website prints being dated 2017 (to the extent that a date is visible) and there being no clear indication of when its UK hotels were renamed to include the term “Muthu Hotel”.¹⁹ The absence of actual confusion does not assist the applicant in this case, there being no way for me to determine whether there has been a real opportunity for confusion to occur or whether any absence of actual confusion is due to differences extraneous to the marks themselves.

Honest concurrent use/ acquiescence

73. In the applicant’s written submissions, the applicant’s representatives state that the joint presence of the parties at the World Travel Market in November 2014 suggests that “the Opponent was perfectly aware and has acquiesced to the Applicant’s honest use of the application in the UK for at least two years”.

74. It is not entirely clear whether the applicant is raising a defence of honest concurrent use as well as acquiescence. Neither has been distinctly pleaded in its counterstatement. In my view, if either defence is to be relied upon, it should be pleaded up front, so that the opponent knows the applicant’s position before it files its primary evidence. For that reason alone, I would dismiss the defences of honest concurrent use and acquiescence. However, for the sake of completeness, and in case of appeal on the point, I will nevertheless give my views.

75. In terms of co-existence in the marketplace, in *Budejovicky Budvar NP v Anheuser-Busch Inc*, Case C-482/09, the CJEU held that:

“74. In that context, it follows from the foregoing that Article 4(1)(a) of Directive 89/104 must be interpreted as meaning that a later registered trade mark is liable to be declared invalid where it is identical with an earlier trade mark, where the goods for which the trade mark was registered are identical

¹⁹ Jorge §§14, 17.

with those for which the earlier trade mark is protected and where the use of the later trade mark has or is liable to have an adverse effect on the essential function of the trade mark which is to guarantee to consumers the origin of the goods.

75. In the present case, it is to be noted that the use by Budvar of the Budweiser trade mark in the United Kingdom neither has nor is liable to have an adverse effect on the essential function of the Budweiser trade mark owned by Anheuser-Busch.

76. In that regard, it should be stressed that the circumstances which gave rise to the dispute in the main proceedings are exceptional.

77. First, the referring court states that Anheuser-Busch and Budvar have each been marketing their beers in the United Kingdom under the word sign 'Budweiser' or under a trade mark including that sign for almost 30 years prior to the registration of the marks concerned.

78. Second, Anheuser-Busch and Budvar were authorised to register jointly and concurrently their Budweiser trade marks following a judgment delivered by the Court of Appeal (England & Wales) (Civil Division) in February 2000.

79. Third, the order for reference also states that, while Anheuser-Busch submitted an application for registration of the word 'Budweiser' as a trade mark in the United Kingdom earlier than Budvar, both of those companies have from the beginning used their Budweiser trade marks in good faith.

80. Fourth, as was stated in paragraph 10 of this judgment, the referring court found that, although the names are identical, United Kingdom consumers are well aware of the difference between the beers of Budvar and

those of Anheuser-Busch, since their tastes, prices and get-ups have always been different.

81. Fifth, it follows from the coexistence of those two trade marks on the United Kingdom market that, even though the trade marks were identical, the beers of Anheuser-Busch and Budvar were clearly identifiable as being produced by different companies.

82. Consequently, as correctly stated by the Commission in its written observations, Article 4(1)(a) of Directive 89/104 must be interpreted as meaning that, in circumstances such as those of the main proceedings, a long period of honest concurrent use of two identical trade marks designating identical products neither has nor is liable to have an adverse effect on the essential function of the trade mark which is to guarantee to consumers the origin of the goods or services”.²⁰

76. The main thrust here is that the longstanding concurrent use has led to a situation in which there will no longer be any (or at least a reduced) adverse impact upon the essential distinguishing function of the trade mark. I note first of all that the CJEU describes the circumstances which led to its finding in that case as “exceptional” and that the case before the CJEU involved use over a period of thirty years. In the instant proceedings, the applicant has only shown use of its mark in the UK over a period of three years (at best). Moreover, the level of use which has been shown by the applicant will have had little, if any, impact on the likelihood of confusion. It would not, in my view, remove or reduce the potential adverse effect on the essential distinguishing function.

77. The provisions of statutory acquiescence are:

“**48.** - (1) Where the proprietor of an earlier trade mark or other earlier right has acquiesced for continuous period of five years in the use of a registered

²⁰ See also *Budejovicky Budvar NP v Anheuser-Busch Inc*, [2012] EWHC Civ 880 (CoA).

trade mark in the United Kingdom, being aware of that use, there shall cease to be any entitlement on the basis of that earlier trade mark or other right-

(a) to apply for a declaration that the registration of the later trade mark is invalid, or

(b) to oppose the use of the later trade mark in relation to the goods or services in relation to which it has been so used, unless the registration of the later trade mark was applied for in bad faith”.

78. Statutory acquiescence does not apply here because such provisions relate to the owner of an earlier trade mark or right acquiescing (for more than five years) to the use of a later registered trade mark. The opposed mark is not registered.

79. However, there is also what is known as common law acquiescence, or estoppel by acquiescence. Halsbury’s Laws of England defines acquiescence as follows:

“The term ‘acquiescence’ is [...] properly used where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as quiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct [...]”.

80. In *Ramsden v Dyson* HOL (1866) it was stated:

“Whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial...[it] requires a very much

broader approach which is directed rather at ascertaining where, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which [...] he has allowed or encouraged another to assume to his detriment”.

81. In *Dyson v Qualtex* [2004] Mann J stated:

“It is hard to see why, as a matter of principle, mere acquiescence or inaction on the part of a right owner (even if with knowledge of rights) should make it inequitable to insist on enforcement of rights in the future. However, if encouragement or the creation of expectation is added, then the picture changes”.

82. Taking the case law in the round, I must be satisfied that the opponent encouraged or allowed what it now complains of and that the applicant acted upon that encouragement. It is, essentially, a question of whether the opponent’s conduct makes the complaint now made unconscionable.

83. In addition to the presence of both parties at the same wedding exhibition, at the hearing Mr St Ville drew my attention to the applicant’s use of the mark in Spain and Portugal, as well as its apparently unopposed trade mark applications in Portugal, France and Spain.²¹ I do not find these to be convincing bases for the applicant’s claim of acquiescence. Irrespective of the scant evidence of the applicant’s use of the mark in the UK, there is no evidence that the opponent was aware of the applicant’s UK hotels, let alone that its conduct could properly be construed as encouraging the applicant’s use of the mark in the UK. For the opponent’s part, acquiescence is strongly denied and Mr Reich states that there have been previous proceedings between the parties in India (the outcome being a change in name of the applicant’s hotel); he also indicates a

²¹ The details are at NJ9 but are not translated.

potential objection to the applicant's use of a sign in Cuba, though it is not clear whether any action has been taken.²² The defence is not made out.

Final remarks

84. This decision has been made on the basis of the inherent distinctive character of the opponent's earlier mark. That was the primary case put by the opponent. In the circumstances, I see no need to consider the opponent's claim of enhanced distinctive character. As the opposition is successful in its entirety based upon the earlier word-only trade mark and s. 5(2)(b), there is also no need to consider the remaining mark or grounds as they do not materially improve the opponent's position.

Conclusion

85. The opposition has succeeded in full. The application will be refused.

Costs

86. The opponent has been successful and is entitled to a contribution towards its costs. Mr Selmi indicated that the opponent sought costs on the usual scale. Given the date on which these proceedings were launched, the award of costs is governed by Tribunal Practice Notice ("TPN") 4 of 2007. Using that TPN as a guide, I award costs to the opponent on the following basis:

Official fees	£200
Preparing the Notice of Opposition and considering the counterstatement:	£200

²² Reich, §§ 46-47.

Considering the other side's evidence and filing submissions:	£500
Preparing for and attending a hearing	£600
Total:	£1500

87. I order Sociedade de Gestão Financeira Central da Oura, Lda to pay MGM Resorts International the sum of **£1500**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 2nd day of November 2017

**Heather Harrison
For the Registrar
The Comptroller-General**

Appendix 1

EUTM 010355691

Class 35: Issuing gift certificates which may then be redeemed for goods or services; providing facilities for business meetings and conventions; providing information in the field of shopping via the internet; customer club services for casino players in the nature of a casino customer loyalty reward program; incentive award programs directed to casino players to promote the sale of products and services of others; management of casino incentive programs for others.

Class 41: Casino services; operation of casinos; photography services; conducting and providing facilities for special events featuring casino and gaming contests and tournaments; botanical gardens; health club services; booking of theatre tickets; special event planning; cabarets; night clubs; amusement arcades; beach and pool clubs, namely, providing fitness and exercise facilities featuring pools and bathing and showering facilities; providing information in the field of gaming and entertainment via the internet; providing facilities for sports, concerts, shows, conventions and exhibitions; art galleries.

Class 43: Hotel and resort services; restaurant and bar services; cafes; cafeterias; lounge services; snack bars; catering; providing banquet and social function facilities for special occasions; providing convention facilities; providing facilities for exhibitions; providing information in the fields of lodging, restaurants and special events via the Internet; travel agency services, namely, making lodging, restaurant and meals reservation.

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Class 25: Wearing apparel, namely, polo-shirts, t-shirts, tank tops, shirts, jackets, jogging suits, sweat shirts, sweat pants, jeans, pants, robes, sleepwear, rompers, scarves, socks, slippers, hats and caps.

Class 35: Retail store services in the field of clothing, accessories, belts, handbags, footwear, swimwear, underwear, leather goods, wallets, umbrellas, perfumes, cosmetics, beauty and skin care products, hair products, bath products, jewelry, watches, sunglasses, cigarette lighters, home and garden decor and accessories, glassware, mugs, plates, key chains, coasters, candles, flowers, cigars, candies, wines, snacks, wine accessories, magazines, newspapers, glass sculptures, gifts and souvenirs, artwork, books, video recordings and convenience store items; providing information in the field of shopping via the Internet.

Class 41: Casino, golf course, sporting events and entertainment services, namely, live performances featuring musicians music and singers, prerecorded music and video, dancers, magicians, actors, acrobats and comedians.

Class 43: Resort hotel, restaurant, bar, lounge and providing rental of rooms for business meetings and conventions.

Class 44: Spa services.

Appendix 2

[As written]

Class 25 Clothing, headgear, footwear; golf shirts; namely, hats and caps; jackets; polo shirts; robes; shirts; sweat pants; sweat shirts; t-shirts; tank tops; visors; warm up suits; wind resistant jackets; wearing apparel, namely polo-shirts, t-shirts, tank tops, shirts, jackets, jogging suits, sweat shirts, sweat pants, jeans, pants, robes, sleepwear, rompers, scarves, socks, slippers, hats and caps.

Class 35 Retail store services, featuring clothing and souvenir items; customer loyalty services, namely, customer loyalty programs featuring loyalty coupons and loyalty points that provide casino benefits to reward repeat customers; Retail services including on-line retail services; mail order catalogue services; Issuing gift certificates which may then be redeemed for goods or services; providing facilities for business meetings and conventions; providing information in the field of shopping via the internet; customer club services for casino players in the nature of a casino customer loyalty reward program; incentive award programs directed to casino players to promote the sale of products and services of others; management of casino incentive programs for others; Retail store services in the field of clothing, accessories, belts, handbags, footwear, swimwear, underwear, leather goods, wallets, umbrellas, perfumes, cosmetics, beauty and skin care products, hair products, bath products, jewelry, watches, sunglasses, cigarette lighters, home and garden décor and accessories, glassware, mugs, plates, key chains, coasters, candles, flowers, cigars, candies, wines, snacks, wine accessories, magazines, newspapers, glass sculptures, gifts and souvenirs, artwork, books, video recordings and convenience store items; providing information in the field of shopping via the Internet; Issuing gift certificates which may then be redeemed for goods or services; providing facilities for business meetings and conventions; providing information in the field of shopping via the internet; customer club services for casino players in the nature of a casino customer loyalty reward program; incentive award

programs directed to casino players to promote the sale of products and services of others; management of casino incentive programs for others.

Class 36 Real estate investment; real estate management; leasing of shopping mall space to others; vacation real estate time-sharing; real estate services, namely, rental of condominiums; building leasing; leasing of office space.

Class 41 Entertainment in the nature of casino services; providing casino services featuring a casino players rewards program; entertainment services, namely, live performances featuring musicians, music and singers, prerecorded music and video, dancers, magicians, actors, acrobats and comedians; amusement arcades provided in connection with a resort hotel or casino; golf courses; arranging for ticket reservations for shows and other entertainment events provided in connection with a resort hotel or casino; conducting and providing facilities for special events featuring casino and gaming contests and tournaments; night clubs; providing facilities for recreation activities; special event planning; health club services, namely, providing equipment in the field of physical exercise; operation and management of theme parks; operation and management of beach and pool clubs, sports instruction services, arranging and conducting athletic events and competitions, promoting sports events; conducting horse races, arranging and conducting of seminars, providing convention facilities, entertainment featuring music, dancing, comedy and drama, country clubs providing sporting facilities; cabarets, art galleries; Casinos and casino services; operation and management of casinos; provision of sporting, entertainment, cultural and training facilities; exhibitions; entertainment in the nature of theatre productions, live music concerts, boxing contests, visual and audio performances, variety shows and live comedy shows; booking agency services for shows and other entertainment events; amusement parks and arcades; animal exhibitions; organising of competitions for entertainment purposes; provision of cinema facilities; production and distribution of motion pictures; production of radio and television programmes; production of video and audiovisual recordings with educational, cultural, entertainment and sports content; television entertainment services; audio and video recording services; audio and video

production services; provision of audio, audiovisual and radio studios; radio entertainment; night-club services; rental and leasing of cinematographic apparatus and instruments, radio and television sets, video cassette recorders, audio equipment, video cameras, camcorders and CDs, DVDs and video tapes; rental and leasing of sound recordings, music recordings, rental and leasing of sports equipment; rental and leasing of musical instruments; rental and leasing of books; provision of training; organising and arranging banquets, social functions, conventions, trade shows and exhibitions; photography services; conducting and providing facilities for special events featuring casino and gaming contests and tournaments; botanical gardens; booking of theatre tickets; special event planning; cabarets; namely, providing fitness and exercise facilities featuring pools and bathing and showering facilities; providing information in the field of gaming and entertainment via the internet; Casino, golf course, sporting events and entertainment services, namely, live performances featuring musicians music and singers, prerecorded music and video, dancers, magicians, actors, acrobats and comedians; Casino services; operation of casinos; photography services; conducting and providing facilities for special events featuring casino and gaming contests and tournaments; botanical gardens; health club services; booking of theatre tickets; special event planning; cabarets; night clubs; amusement arcades; beach and pool clubs, namely, providing fitness and exercise facilities featuring pools and bathing and showering facilities; providing information in the field of gaming and entertainment via the internet; providing facilities for sports, concerts, shows, conventions and exhibitions; art galleries.

Class 42 Hotels, resort hotels, motels, guest houses, restaurants, bars, cafes, nightclubs, services of travel agents and brokers ensuring hotel accommodation for travellers, skin care salons, barber shops, beauty salons, health spa, babysitting services, provision of convention facilities, country clubs providing residential facilities.

Class 43 Resort, hotel, restaurant, bar and lounge services; providing facilities for banquets, social functions, conventions, trade shows and exhibitions; cafeterias; snack bars; catering; day care centers; providing campground facilities; temporary

accommodation; arranging of temporary accommodation; accommodation booking agency services; providing food and drinks; Cocktail lounge services; Hotel and resort services; cafes; providing banquet and social function facilities for special occasions; providing information in the fields of lodging, restaurants and special events via the Internet; travel agency services, namely, making lodging, restaurant and meals reservation; Resort hotel, restaurant, bar, lounge and providing rental of rooms for business meetings and conventions; Hotel and resort services; restaurant and bar services; cafes; cafeterias; lounge services; snack bars; catering; providing banquet and social function facilities for special occasions; providing convention facilities; providing facilities for exhibitions; providing information in the fields of lodging, restaurants and special events via the Internet; travel agency services, namely, making lodging, restaurant and meals reservation.

Class 44 Beauty salon services; cosmetician services; hair cutting; hair styling; hairdressing salons; hairdressing services; spa services; health spa services, namely, cosmetic body care services; manicuring; massage; skin care salons.