O/0731/24

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NO. UK00003757352
BY VERONICA CEBOTARI TO REGISTER:

FRAME UP

AS A TRADE MARK IN CLASSES 25 & 41

AND

IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 434102 BY ANASTASIA VLASOVA

AND

IN THE MATTER OF APPLICATION NO. UK00003784989
BY ANASTASIA VLASOVA TO REGISTER:

FRAME UP

AS A TRADE MARK IN CLASS 41

AND

IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 436554 BY
VERONICA CEBOTARI

BACKGROUND AND PLEADINGS

1. These proceedings involve cross-oppositions brought by Anastasia Vlasova ("AV") and Veronica Cebotari ("VC"). I will summarise the relevant proceedings below, beginning with AV's opposition on the basis that it was brought first.

AV's opposition

2. On 21 February 2022, VC applied to register the trade mark 'FRAME UP' in the UK ("VC's mark") for the goods and services set out in the **Annex** of this decision. VC's mark was published for opposition purposes on 11 March 2022 and, on 10 June 2022, it was opposed by AV. The opposition is aimed at all goods and services for which VC seeks to register her mark and is based on sections 5(4)(a) and 3(6) of the Trade Marks Act 1994 ("the Act").

3. Under the section 5(4)(a) ground, AV relies on the unregistered sign 'FRAME UP' that she claims to have been using in London and throughout the UK since December 2020. In respect of the services relied upon, AV sets out that she has been using the sign in relation to the following:

> "Dance events; dance instruction; live dance exhibitions; organising dancing events and competitions; pole dancing instruction; exotic dancing services; provision of dance classes; organisation of dancing displays; presentation of live dance performances; performance of dance; dance choreography services; conducting dance classes; provision of online training in the field of dance; entertainment in the nature of dance and live dance performances."

4. The opposition in respect of the section 5(4)(a) ground is aimed only at those services in class 41 of VC's mark. Under this ground, AV claims that she has attracted considerable goodwill and recognition in the UK dance world through her use of the sign. As a result, AV claims that use of an identical mark by VC would take advantage of the goodwill in the mark generated by AV and, due to the identical nature of the services offered, consumers are likely to be misled. This, AV

claims, would result in damage both in terms of monetary damage for lost earnings and, potentially, also damage to AV's reputation.

5. Under her section 3(6) ground (which, unlike the section 5(4)(a) ground, is targeted at all of VC's goods and services), AV claims that VC was aware of AV's brand 'FRAME UP' by early September 2022 at the latest. AV claims that VC approached her in September 2022 to ask if she would teach her 'FRAME UP' classes at VC's dance studio. As AV's brand accrued more goodwill and recognition, she claims that she was commissioned in December 2021 to choreograph and exhibit a public dance under the brand 'FRAME UP'. In doing so, AV claims to have recruited dancers, at least one of which taught classes at VC's studio. AV claims that the dance performance took place on 23 February 2022 and that VC was in attendance at the show. As such, AV claims that VC was well aware of her commercial activities under the brand FRAME UP in the UK, but applied for the mark nonetheless. AV submits that VC's application was, therefore, filed in bad faith.

6. VC filed a counterstatement wherein she denied AV's claim to have accrued goodwill in her sign and, even so, denied that any damage would occur. As for the section 3(6) ground, it is noted that VC accepts that she and AV knew of each other prior to the filing date of her mark. However, she denies the section 3(6) ground in full.

VC's opposition

7. On 6 May 2022, AV applied to register the mark 'FRAME UP' in the UK ("AV's mark") for the following services:

Class 41: Dance events; dance studios; dance instruction; dance schools; live dance exhibitions; organising dancing events and competitions; pole dancing instruction; exotic dancing services; male dance exhibitions; provision of dance classes; organisation of dancing displays; presentation of live dance performances; performance of dance; dance choreography services; educational

services relating to dancing; conducting dance classes; provision of online training in the field of dance; providing dance facilities; providing dance studio facilities; production of entertainment shows featuring dancers; entertainment in the nature of dance and live dance performances

8. AV's mark was published for opposition purposes on 29 July 2022 and, on 29 September 2022, it was opposed in its entirety by VC. VC's opposition is brought under sections 5(1), 5(2)(a) and 5(4)(a) of the Act. Under the section 5(1) and 5(2)(a) grounds, VC relies upon its earlier filed mark (being that under number 3757352) which is the same as the one being opposed under AV's opposition, the details of which are provided at paragraph two above.

9. Under the section 5(1) ground, VC claims that AV's mark should be refused registration because it is to be registered for an identical mark and for identical services. As for the section 5(2)(a) ground, VC claims that there exists a likelihood of confusion on the basis that (1) the marks are identical and (2) the services at issue are similar.

10. Under her section 5(4)(a) ground, VC claims that she has used the 'FRAME UP' sign since at least as early as 2021 in London in respect of the following services:

"Dance events; Dance schools; Dance studios; Dance instruction; Dance club services; Live dance exhibitions; Providing dance halls; Dance hall services; Pole dancing instruction; Dance instruction for children; Instruction in dancing; Exotic dancing services; Organising dancing events; Male dance exhibitions; Organisation of dancing competitions; Dancing competitions (Organising of -); Providing dance studio facilities; Presentation of dancing displays; Dance halls (Operation of -); Aerobic and dance facilities; Provision of dancing facilities; Organization of dancing events; Dance instruction for adults; Providing dance hall facilities; Organisation of dancing displays; Dancing displays (Organising of -); Organising of dancing competitions; Provision of dance classes; Dancing facilities (Provision of -); Educational services relating to dancing; Provision of

facilities for dancing; Presentation of live dance performances; Performance of dance, music and drama; Providing instruction in the field of dance; Entertainment in the nature of dance performances; Entertainment in the nature of live dance performances; Shows (Production of -); Production of entertainment shows featuring dancers; Production of entertainment shows featuring dancers and singers."

11. As a result of said use, VC claims to have obtained a protectable level of goodwill in the sign and, as such, use of the same sign by AV constitutes a misrepresentation that would lead to actual or likely damage to its reputation and goodwill and, further, there exists a risk of trade diversion.

12. AV filed a counterstatement wherein it accepted that the marks are identical. As for the services at issue, AV accepts that all of the services are similar except for "dance choreography" services. AV also argued that while the class 41 services may be similar, the class 25 goods of VC are not. In respect of AV's defence of the section 5(4)(a) ground, she denies that VC has been using the sign 'FRAME UP' in respect of the services relied on and that there exists no goodwill in VC's sign.

13. Under the power given to the Tribunal under Rule 62(1)(g) of the Trade Mark Rules 2008, these proceedings were consolidated upon the filing of the counterstatements. This was communicated to the parties by way of written correspondence dated 26 January 2023.

14. AV is represented by Hoffmann Eitle PartmdB and VC is represented by Stobbs. Only AV filed evidence in chief. VC filed evidence in reply but it was determined that this gave rise to a right for AV to file her own evidence in reply, which she did. No hearing was requested but both parties filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

15. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the

Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE

16. AV's evidence in chief came in the form of a witness statement in her own name dated 11 January 2023. AV's witness statement was accompanied by eight exhibits, being AV1 to AV8, and was filed in support of her claimed use of the sign as well as her claim of bad faith.

17. VC's evidence in reply came in the form of two witness statements, the first being that of VC herself dated 29 May 2023 and the second being that of Harriet Sophia Berridge dated 30 May 2023. VC's statement was accompanied by nine exhibits, being those labelled VC1 to VC9, and was filed in support of both her claim to have goodwill in her sign and in defence of the bad faith claim made against her. It is noted that one of VC's exhibits (VC7) was filed in the Russian language and I note that an additional statement regarding its translation was filed in relation to the same, being that of Ms Keti Kaleja dated 29 June 2023. Ms Kaleja's statement confirms that she is employed by VC's legal representative and is a native Russian speaker living the UK. Her statement is accompanied by one exhibit, being KK1, which Ms Kaleja's statement confirms as being a faithful and accurate translation from Russian into English.

18. Ms Berridge is a Chartered Trade Mark Attorney at VC's legal representative and is, therefore, duly authorised to file evidence on VC's behalf. Her statement is accompanied by five exhibits, being those labelled HB1 to HB5, and provides copies of AV's website and data relating to the same. In addition, there is evidence in respect of information regarding a Ms Nastya Yurasova.

19. As above, AV was permitted to file evidence in reply. This came in the form of the second witness statement of AV dated 11 January 2023. This is accompanied by eight further exhibits, being those labelled AV9 to AV16. In addition, AV filed the

witness statement of Debra Louise Lewis dated 7 November 2023. Ms Lewis is a UK registered Trade Mark Attorney. She does not specify whether she is employed by AV's legal representative or not. However, on balance, I am willing to accept that she is duly authorised to filed evidence on AV's behalf. Ms Lewis's statement was accompanied by six exhibits, being those labelled DLL1 to DLL6, and was filed with the purpose introducing printouts of VC's website as well as correspondence surrounding discussions with respect of the FRAME UP sign/mark.

20. I do not intend to summarise the parties' evidence in full here. However, I confirm that I have taken all evidence and filed submissions into account and will summarise them to the extent that I deem necessary below.

MY APPROACH

21. Given that AV's opposition is aimed at the mark that VC relies upon under her own opposition, I will consider AV's opposition first. If AV's opposition succeeds, then VC's mark will be refused registration meaning that she will not be able to rely on the same as the basis for her own opposition, leaving only the section 5(4)(a) ground. Alternatively, if AV's opposition fails then I will proceed to consider VC's opposition.

DECISION

AV's opposition

Section 5(4)(a)

22. Section 5(4)(a) of the Act reads as follows:

> "(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(a) […]

(b) […]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an "earlier right" in relation to the trade mark."

23. Subsection (4A) of Section 5 states:

"(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application."

24. In *Discount Outlet v Feel Good UK,* [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

"55. The elements necessary to reach a finding of passing off are the 'classical trinity' of that tort as described by Lord Oliver in the Jif Lemon case (Reckitt & Colman Product v Borden [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether *"a substantial number"* of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per

Interflora Inc v Marks and Spencer Plc [2012] EWCA Civ 1501, [2013] FSR 21)."

25. Halsbury's Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

"Establishing a likelihood of deception generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation[1] among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source[2] or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

(a) the nature and extent of the reputation relied upon,

(b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;

(c) the similarity of the mark, name etc used by the defendant to that of the claimant;

(d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action."

Relevant Date

26. In Advanced *Perimeter Systems Limited v Multisys Computers Limited,* BL O-410-11, Mr Daniel Alexander QC, as the Appointed Person, endorsed the registrar's assessment of the relevant date for the purposes of section 5(4)(a) of the Act, as follows:

"43. In *SWORDERS TM* O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

'Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.'"

27. VC's mark does not have a priority date. I appreciate that VC's evidence does talk of her intention to use her mark prior to the filing date, however, there is nothing

sufficiently solid before me pointing to actual or public facing use of the same. As a result, there is no evidence of use prior to the filing date of the mark that is capable of being considered as the start of the behaviour complained about. Therefore, the relevant date for the assessment of AV's claim under section 5(4)(a) of the Act is the filing date of VC's mark, being 21 February 2022.

Goodwill

28. The first hurdle for AV is that it needs to show that it had the necessary goodwill in the sign relied upon at the relevant date. Goodwill was described in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL), in the following terms:

> "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start."

29. In *South Cone* (cited above), Pumfrey J. stated:

> "27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent that the enquiry under s.11 of the 1938 Act (see Smith Hayden & Co. Ltd's Application (OVAX) (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur."

30. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J. (as he then was) stated that:

"[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application."

31. In *Hart v Relentless Records* [2002] EWHC 1984 (Ch), Jacob J. (as he then was) stated that:

"62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by *s.2(2) of the Trade Marks Act 1994*. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in *BALI Trade Mark [1969] R.P.C. 472*. The whole point of that case turned on the difference between what was needed to

establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used "but had not acquired any significant reputation" (the trial judge's finding). Again that shows one is looking for more than a minimal reputation."

AV's evidence

32. Goodwill arises as a result of trading activities. AV's evidence sets out that she began commercial activities in the UK using the sign FRAMED UP in 2020. AV is represented by an artist management agency, being 3RINGS Management Ltd. A copy of a letter from 3RINGS is provided in evidence that confirms that they have represented her since 28 January 2021, including for engagement carried out under the FRAME UP sign.[1] While the letter is noted, it is dated after the relevant date for these proceedings and while it mentions FRAME UP, this is done in the context of a style of dancing (being the Frame Up style) and not in relation to actual use of the sign FRAME UP as an indicator of origin.

33. The evidence includes a copy of a teacher's agreement dated 10 February 2022 regarding the provision of a dance class by AV at Base Studios.[2] In her narrative evidence, AV sets out that the classes under this agreement were taught under the mark, FRAME UP. However, there is nothing in the agreement that suggests that this was the case as no mention is made of 'FRAME UP' in the agreement and, in my view, having considered the evidence as a whole, it is entirely plausible that any classes related to the Frame Up style of dance, as opposed to being offered under that actual sign.[3] Further, I appreciate that the agreement is dated before the relevant date, however, it relates to dance classes that would be taught following the agreement, being 10 February 2022. The agreement relates to classes that were to be offered on a Friday. If it was the case that the classes

[1] AV1
[2] AV2
[3] I will discuss further evidence below that, in my view, supports this finding.

subject to the agreement took place immediately, then there would have been only two Fridays between the agreement date and the relevant date. In addition, there is nothing to suggest any attendance numbers.

34. An invoice from August 2021 is provided from a studio referred to as Studio 68 which, again, is claimed to relate to dance classes taught under the mark FRAME UP.[4] While noted, the invoice itself appears in the name of AV but also makes reference to 'Fusion Heels Sundays'. I have no evidence to suggest what 'Fusion Heels Sundays' is but I consider it reasonable to infer that it relates to a class that took place on a Sunday that taught the Fusion Heels style of dancing. Even if this were not the case, there is no mention in the invoice of FRAME UP as a brand. In any event, it only covers four classes provided to a total of 11 students for a total balance of £110.

35. There are printouts taken from various social media accounts that are attempts by AV to advertise her classes. It is stated in the narrative evidence that the adverts all relate to the period of August 2021 to April 2022. Having considered these printouts, they were all posted under AV's personal account. Further, the images shown include a stylised logo under AV's own name. An example of this is reproduced below:

[4] AV4

36. In addition, I also note that repeatedly throughout this evidence, the classes are advertised as being those that teach students the Frame Up Heels style of dance. I note that after the relevant date, there are references to FRAME UP in the title of the adverts, seemingly as an attempt to demonstrate use of services under this actual branding. However, given that these are all after the relevant date, they are of no assistance here.

37. In addition to the videos discussed above, the same exhibit also introduces a number of Instagram posts from prior to the relevant date. While FRAME UP HEELS is mentioned in the adverts, I am of the view that, as was the case with the evidence discussed in the preceding paragraphs, the adverts appear to relate to the offering of services under AV's own name with 'FRAME UP' referring to the style of dance involved. Further, additional branding of BASE STUDIOS and THREE THINGS /3RINGS are noted throughout this evidence.

38. A number of undated letters are provided in evidence from various people regarding AV. These letters are all hearsay evidence from various third parties attesting to their attendance at AV's classes. I am of the view that, even at their best, such evidence is of very little evidential value due to their nature as hearsay evidence. However, even ignoring this issue, the evidence refers to AV's classes under the context of them being classes wherein she taught the frame up dance style, as opposed to being evidence of use of the actual relied upon FRAME UP sign as an indicator of origin. I do not intend to discuss all of these letters but note that one refers to one user's attendance at a 'frame-up heels' class in December 2020. While noted, the evidence appears to confirm the writer's understanding as to the fact that 'frame up' is a style of dance. For example, she mentioned that the class highlighted a focus on abdominal muscles which she thought was important due to the style of dance. Another letter is from someone identified as Cheryl So. Again, this letter refers to the Frame Up style of dance, as opposed to its use as an indicator of the provider of the services. This letter makes reference to AV herself and even makes reference to an undertaking called 'AV Creative' that appears to be the entity that was the name of the professional dance group that AV was planning to debut in 2022.

39. On the point of the undertaking called AV Creative, I note that the narrative evidence sets out that this was formed in 2021. In Autumn of that year, AV brought in a group of dancers to create a dance group in order to perform under the FRAME UP name. AV was then contracted by Dream Bags Jaguar Shoes to choreograph and perform, alongside her dance company, a dance under the FRAME UP name. AV choreographed the dance and commenced rehearsals for the same in early December 2021. The event took place on 23 February 2022 and the narrative evidence confirms that the performance was under the FRAME UP name. I note that a letter from an Aida Corredera is provided in evidence.[5] This letter confirms that she is the curator of the exhibition in which this dance took place. While noted, the letter seems to suggest that the dance was in the Frame Up style of dance, under the name 'Body Nectar' and was represented by AV Creative, and seemingly not by AV herself. In respect of this show, I appreciate that preparations would have likely taken place prior to the relevant date, however, the event took place after it. In respect of this event, I note that there is evidence regarding promotional activity for the same. This is in the form of one Instagram post (which consists of two images).[6] Firstly, the post appears to suggest that the branding under which the performance was offered was AV CREATIVE. Secondly, there is no engagement information (by way of likes, for example) provided.

Assessment of the evidence

40. While AV's evidence is noted, I am of the view that it falls far short of demonstrating that there existed a protectable level of goodwill in her business at the relevant date and that the sign FRAME UP was distinctive of and/or associated with the same. I have reached this finding for primarily two reasons, being those discussed below.

41. The first issue is that the level of trading activities demonstrated is extremely low. For example, of dance classes actually provided, there is just one invoice showing

[5] See page 5 of AV7
[6] AV14

11 students attended a class over a one-month period in August 2021. While it may be that these students were repeat customers,[7] this would suggest less than 11 students. Either way, this evidence is of very little assistance as, at its best, demonstrates a very low level of use. The second dance class that the evidence demonstrates as being offered was one in relation to agreement that was reached in February 2022. As above, the nature of the agreement suggests that, at best, only two classes could have taken place before the relevant date. There is nothing before me to demonstrate that, even if these classes took place, how many dancers attended them.

42. My second issue, and perhaps the one that is most important here, is that the evidence clearly points to the dance classes being provided under AV's name and not under the FRAME UP branding. I say this because the advertising materials provided in respect of these classes prior to the relevant date all appear to clearly be the offering of AV herself. In these adverts, any mention of FRAME UP is in relation to the fact that the classes being offered to train dancers are in the 'frame up heels' style of dancing. Such use is descriptive of the type of class being offered meaning that 'FRAME UP' will not be the sign that customers would associate with any goodwill. This same issue carries through to the dance performance that took place on 23 February 2022. Firstly, this was after the relevant date and, secondly, there is nothing sufficiently solid to point to the fact that it was offered under the FRAME UP branding. Instead, it appears as though the branding used was either 'Body Nectar' or it was a service provided under the 'AV Creative' banner. On this point, I remind myself that the advertising material in relation to this event appears to be under the banner of 'AV CREATIVE'. Lastly, even if such an event was to have taken place before the relevant date, there are no attendance numbers provided.

43. In summary, and at AV's very best case, the evidence is only sufficiently solid enough to demonstrate the offering of dance training to 11 students over a one-month period, the further offering of just two classes in February 2022 (without any

[7] I note that the first class was attended by four people. The second, third and fourth classes may all have been attended by the same students, meaning that the total students actually stands at four.

attendance figures) and the provision of just one dance performance/choreography service, which took place just after the relevant date. Taking the limited evidence of trading activities into account together with the fact that it does not appear as though any services were offered under the FRAME UP brand, I am of the view that AV's evidence fails to demonstrate the existence of a protectable level of goodwill. Further, in the event any goodwill did exist, I do not consider that the FRAME UP sign would be considered distinctive of and/or associated with said goodwill. AV's section 5(4)(a) ground, therefore, fails at the first hurdle.

Section 3(6)

44. Section 3(6) of the Act states:

> "(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith."

45. In *Sky Limited & Ors v Skykick, UK Ltd & Ors*, [2021] EWCA Civ 1121 the Court of Appeal considered the case law from *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07 EU:C:2009:361, *Malaysia Dairy Industries Pte. Ltd v Ankenævnetfor Patenter Varemærker* Case C-320/12, EU:C:2013:435, *Koton Mağazacilik Tekstil Sanayi ve Ticaret AŞ*, Case C-104/18 P, EU:C:2019:724, *Hasbro, Inc. v EUIPO, Kreativni Dogaaji d.o.o. intervening*, Case T-663/19, EU:2021:211, *pelicantravel.com s.r.o. v OHIM, Pelikan Vertriebsgesellschaft mbH & Co KG (intervening)*, Case T-136/11, EU:T:2012:689, and *Psytech International Ltd v OHIM, Institute for Personality & Ability Testing, Inc (intervening)*, Case T-507/08, EU:T:2011:46. It summarised the law as follows:

> "68. The following points of relevance to this case can be gleaned from these CJEU authorities:
>
> 1. The allegation that a trade mark has been applied for in bad faith is one of the absolute grounds for invalidity of an EU trade mark which can

be relied on before the EUIPO or by means of a counterclaim in infringement proceedings: *Lindt* at [34].

2. Bad faith is an autonomous concept of EU trade mark law which must be given a uniform interpretation in the EU: *Malaysia Dairy Industries* at [29].

3. The concept of bad faith presupposes the existence of a dishonest state of mind or intention, but dishonesty is to be understood in the context of trade mark law, i.e. the course of trade and having regard to the objectives of the law namely the establishment and functioning of the internal market, contributing to the system of undistorted competition in the Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin: *Lindt* at [45]; *Koton Mağazacilik* at [45].

4. The concept of bad faith, so understood, relates to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other sinister motive. It involves conduct which departs from accepted standards of ethical behaviour or honest commercial and business practices: *Hasbro* at [41].

5. The date for assessment of bad faith is the time of filing the application: *Lindt* at [35].

6. It is for the party alleging bad faith to prove it: good faith is presumed until the contrary is proved: *Pelikan* at [21] and [40].

7. Where the court or tribunal finds that the objective circumstances of a particular case raise a rebuttable presumption of lack of good faith, it is

for the applicant to provide a plausible explanation of the objectives and commercial logic pursued by the application: *Hasbro* at [42].

8. Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all the factors relevant to the particular case: *Lindt* at [37].

9. For that purpose it is necessary to examine the applicant's intention at the time the mark was filed, which is a subjective factor which must be determined by reference to the objective circumstances of the particular case: *Lindt* at [41] – [42].

10. Even where there exist objective indicia pointing towards bad faith, however, it cannot be excluded that the applicant's objective was in pursuit of a legitimate objective, such as excluding copyists: *Lindt* at [49].

11. Bad faith can be established even in cases where no third party is specifically targeted, if the applicant's intention was to obtain the mark for purposes other than those falling within the functions of a trade mark: *Koton Mağazacilik* at [46].

12. It is relevant to consider the extent of the reputation enjoyed by the sign at the time when the application was filed: the extent of that reputation may justify the applicant's interest in seeking wider legal protection for its sign: *Lindt* at [51] to [52].

13. Bad faith cannot be established solely on the basis of the size of the list of goods and services in the application for registration: *Psytech* at [88], *Pelikan* at [54]".

46. An allegation of bad faith is a serious allegation which must be distinctly proved, but in deciding whether it has been proved, the usual civil evidence standard

applies (i.e. balance of probability). This means that it is not enough to establish facts which are as consistent with good faith as bad faith: *Red Bull*.

47. The pleaded case under AV's section 3(6) ground is as follows:

> "The Applicant was well aware of Opponent and her brand "FRAME UP" by early September 2021 at the latest. Opponent and her brand were sufficiently well known in the UK that the Opponent was approached by Applicant via Instagram on September 1, 2022. Applicant asked Opponent if she would teach her "FRAME UP" classes at Applicant's dance studio but later retracted the offer as Opponent's rates were too expensive. Opponent's brand subsequently continued to attract more goodwill and recognition through her publicity and classes. In December 2021 Opponent was commissioned to choreograph and exhibit a dance publicly under her brand "FRAME UP", for which she recruited dancers including at least one who taught classes at Applicant's studio. Applicant attended the dance performance on February 23, 2022. Applicant was clearly well aware of Opponent's commercial activities under Opponent's brand "FRAME UP" in the UK, but applied for the mark nonetheless."[8]

48. I reproduce the entirety of AV's pleaded case here because it can be boiled down to a claim that VC's application was made in bad faith because she was "clearly well aware" of AV's commercial activities. In respect of such a claim, I remind myself of the case of *Lindt* (cited above) wherein the Court of Justice of the European Union ("CJEU") set out at paragraph 40 that:

> "The fact that an applicant knows or must know that a third party has long been using […] an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought is not sufficient, in itself, to permit the conclusion that the applicant was acting in bad faith."

[8] I have reproduced these pleadings exactly as set out in the notice of opposition. For the sake of the definitions used in this decision, the reference to 'the Applicant' is to be read as VC whereas the reference to 'the Opponent' is to be read as AV.

49. Considering the above, it is not enough to simply suggest that because VC was aware of AV's use of 'FRAME UP', she was acting in bad faith by filing her mark. As AV's pleadings do not cite any further reasons as to why the VC's application was made in bad faith, it follows that in light of the comments of the CJEU in *Lindt*, AV's case must fail. I note that in her written submissions in lieu of a hearing, AV introduced a claim that VC applied for her mark as a blocking strategy to prevent her from applying for her mark. While such a claim, if proven, is capable of supporting a finding of bad faith,[9] it is one that is required to be pleaded at the outset of proceedings. This was not the case here and because such an argument was not raised until a very late stage in these proceedings, VC had no opportunity to respond to the same. As a result, I do not consider that it would be appropriate to allow such an argument to proceed. Therefore, in light of the comments in *Lindt* that I have produced above, AV's claim of bad faith must fail.

50. Having said the above, even if such an argument was permitted or raised at the appropriate stage, the evidence before me falls far short of demonstrating that VC's intention in filing her mark was without any intention to use it herself and that it was filed solely to block AV's application.

51. Firstly, I will say that the evidence and written submissions in respect of the present ground are unfocused in their scope and relate to evidence/arguments that are of no relevance whatsoever. I do not intend to discuss the evidence or submissions in full as they cover a range of unsupported or irrelevant arguments. To discuss such evidence/arguments in full would result in an overly complicated and convoluted decision relating to points that, ultimately, have no bearing on my decision. While I will focus only on the evidence that is of potential relevance, I will briefly discuss a limited range of examples. On this point, I note that AV's evidence as to her bad faith claim mostly relates to a range of hearsay evidence from third parties, such as a reference to a letter from an Angelina Gorgaeva regarding a meeting between her and AV in Moscow in the 2017.[10] In addition, I note that there

[9] See *Copernicus-Trademarks v EUIPO (LUCEO)* Case T-82/14 which sets out that not only does there need to be an intention to block third parties' applications but there needs to be proof that the mark was applied for without any intention to use.
[10] See AV9 and paragraph three of AV's second witness statement.

is confirmation from a Katerina Yakuba wherein she confirms that when she spoke to VC in 2021, she did not hear anything from VC about her wanting to trade mark FRAME UP.[11] In respect of the latter point, I will say that VC was in no way obliged to discuss her intentions to apply for a trade mark with any third-party (or AV directly for that matter). There is also a range of hearsay evidence that is from long after the relevant date seemingly from disgruntled employees of VC that in no way speak to her intentions in filing the mark.[12]

52. As for the submissions, I note that there is reference to irrelevant arguments such as a claim that VC has sought to abuse the trade mark system with reference to previous trade marks that VC applied for without legal representation. None of these trade marks relate to 'FRAME UP' so I am not convinced that they have any application here and, further, they do not speak to any intention with respect of the mark at issue. Also, the submissions make reference to alleged discrepancies, untruths and statements in the evidence which point to VC acting in a less than honest manner. However, none of these claims are supported by the evidence before me.[13]

53. Even ignoring these issues, I remind myself that the evidence as to AV's activities (being that discussed under the section 5(4)(a) ground above) were all under the banner of either her own name, AV Creative or Body Nectar. While all of these activities may have covered dances relating to the 'frame up' style of dancing, there is nothing before me demonstrating that AV actually used 'FRAME UP' in a trade mark sense. From this, it follows that there is also nothing in the evidence to suggest that VC could be said to have reasonably considered that AV's services were actually provided under the 'FRAME UP' branding as opposed to AV's own name, AV Creative or Body Nectar. On this point, I appreciate that the evidence is clear that VC knew that AV taught classes in the frame up style of dance.[14] However, this was knowledge of the style of dance AV taught which is not the same

[11] See, for example, AV13 and paragraph 13 of AV's second witness statement.
[12] See, for example DLL5 and DLL6 which are comments from dancers/employees of VC from November 2023
[13] I say this because the allegations are based on hearsay evidence that is of very little evidential weight and in light of the fact that bad faith allegations are serious and need to be distinctly proved.
[14] Evidence has been provided that sets out that VC sought AV's services to teach a class in the frame up style of dance at VC's studio.

as knowledge of use by AV of 'FRAME UP' as a trade mark. I also note that evidence has been adduced to demonstrate that AV is the only UK certified teacher of the frame up style and that VC is not.[15] For the avoidance of doubt, this has no impact of VC's ability to apply for a trade mark with the words 'FRAME UP'.

54. In summary, the pleaded case of AV under the present ground is something that, even if proven, is not sufficient to give rise to a finding of bad faith. Even if AV had pleaded that VC's intention was to block AV's use of her mark, the evidence before me does not suggest that VC acted with this intention in mind. On this point, I remind myself that an allegation of bad faith is a serious allegation that must be distinctly proven. AV's section 3(6) ground, therefore, fails.

Conclusion of AV's opposition

55. AV's opposition has failed in its entirety. As a result, VC's mark remains an earlier mark capable of being relied upon for the purpose of her own opposition.

VC's opposition

Section 5(1) and 5(2)(a): legislation and case law

56. Section 5(1) of the Act reads as follows:

> "(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.

57. Section 5(2)(a) of the Act reads as follows:

> "(2) A trade mark shall not be registered if because –

[15] See AV3 and paragraph 15 of AV's first witness statement.

(a) it is identical with an earlier trade mark and is to be registered for goods or services 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 or association with the earlier trade mark."

58. Section 5A of the Act states as follows:

"Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

59. While the opposition against VC's mark failed, meaning that it may proceed to registration, it is still technically a pending mark. Regardless, it still qualifies as an "earlier trade mark" for the purposes of this decision since it was applied for at an earlier date than the filing date of the AV's mark.[16] In the circumstances, clearly it had not completed its registration process more than five years prior to the filing date for the AV's mark, meaning that it is not subject to proof of use pursuant to section 6A of the Act. This means that VC can rely upon all of the services for which her mark is protected.

60. While the following principles are not relevant to section 5(1) grounds, they are relevant to section 5(2)(a) grounds. These 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) ("OHIM")*, Case

[16] See Section 6(1)(a) of the Act.

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 and are as follows:

(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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Identity of the marks

61. It is a pre-requisite of both section 5(1) and 5(2)(a) of the Act that the trade marks are identical. Plainly they are and I note that at paragraph three of her counterstatement, VA admits this. As a result, the opposition in reliance upon both the section 5(1) and 5(2)(a) grounds may proceed.

Comparison of the goods and services

62. In her counterstatement, AV accepted that there exists similarity between all of the class 41 services of both parties' marks, save for "dance choreography services". I appreciate that AV disagreed that there was any similarity between VC's class 25 goods and her own class 41 services. However, this has no bearing on the present comparison because it is the class 41 services of AV that require similarity in order for the opposition to proceed.

63. While AV did not specify what level it considered the class 41 services similar, I am of the view that it is sufficient to proceed on the basis that there exists a low degree

of similarity between them. As for “dance choreography services”, I will consider these below.

64. It is my understanding that AV’s “dance choreography services” is where the service provider creates a choreographed dance for its customer and, in turn, teaches this dance to said customer. My primary view is that this is no different than “dance instruction” or “organising dance events” in VC’s mark’s specification. I say this because both services, as far as I am aware, will involve the creating of a dance and teaching it to the dancer. For example, dance instruction will commonly involve the creation/design of a choreographed dance to teach to students. Further, organising a dance event will commonly require the organiser to create a choreographed dance for exhibiting at the event. VC’s services, therefore, encompass AV’s service meaning that they identical under the principle outlined in *Gérard Meric v Office for Harmonisation in the Internal Market,* Case T- 133/05.[17]

65. However, if I am wrong to find that AV’s term falls within VC’s terms, then they are still similar. I make this finding in consideration of the factors set out in the *Treat* case, [1996] R.P.C. 281. Firstly, the services will differ in nature and method of use. Further, their purposes will also differ as AV’s service will aim to create a dance whereas VC’s will aim to teach a dance or display it at an event. All of this being said, I am of the view that the services will overlap in trade channels on the basis that a dance instructor is likely to also offer dance choreography services. Further, the user is likely to overlap as upon seeking the choreography service, that same user is likely to require the provider of the choreography to teach said dance. In respect of complementarity, I consider that the teaching of a dance is important to its choreography, and vice versa, and consumers are likely to consider them to be the responsibility of the same undertaking.[18] Taking all of this into account, I consider that these services are similar to at least a low degree.

[17] The principle stemming from this case sets out that goods and services are to be considered identical if it can be said that a more limited term of an applicant falls within a more general term of an earlier mark, or vice versa.
[18] *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)***,** Case T-325/06

66. In the event that I was correct to find identity for the services discussed in the preceding paragraph, then section 5(1) ground succeeds against that service in full. However, for the sake of completeness, I will proceed with this decision on the basis that this term is only similar to a low degree (in reliance upon the section 5(2)(a) ground). In respect of the other services of AV, I have proceeded on the basis that these are also similar to a low degree. This means that the section 5(1) ground fails against these services.

The average consumer and the nature of the purchasing act

67. As the case law set out above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then decide the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. 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. (as he then was) 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."

68. The present services are those that are likely to be selected by both members of the general public at large (being those looking for dance training or instruction, for example) and business users (being those looking to organise dance shows and events, for example). Regardless of the identity of the consumer, the services are likely to be sought from the provider directly, either at a dance studio or online. The services are likely to be displayed on pamphlets, signage at physical premises or via lists online. In any scenario, I consider that the goods will mainly be selected

visually. That being said, I do not discount an aural component in the form of discussions with sales persons or word of mouth recommendations. The cost and frequency of selection of the services are likely to vary somewhat. For the most part, dance lessons are likely to be sought frequently and at a relatively low cost. Having said that, some services, such as those relating to organising events, are likely to be more expensive and selected less frequently.

69. In respect of the level of attention paid, I am of the view that members of the general public looking for dance instruction are likely to consider ordinary factors such as the dance style being taught, accessibility (for example, is it a beginner course or an intermediate one), the length of the lesson and testimonials of previous customers. Such factors, in my view, will result in a medium degree of attention being paid. As for those services being sought by business users, I am of the view that a higher level of attention will be paid as the services are likely to be important to that user's business so they will wish to ensure that they are appropriate for their requirements. For example, a business user looking to organise a dance event will consider factors such as the scale of said event, health and safety precautions for both the attendees and the dancers and, finally, the expertise and ability of the performers being provided for said event. While I do not consider that the attention will extend to high, I do consider it will be above medium.

Distinctive character of VC's mark

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

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-

108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

71. Registered trade marks possess varying degrees of inherent distinctive character, perhaps lower where a mark may be suggestive or allusive of a characteristic of the goods, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it. In the present case, VC has relied on section 5(4)(a) grounds and was, therefore, required to file evidence of use of her earlier sign, being 'FRAME UP', which is identical to the mark relied upon under the present ground. While evidence of a claimed goodwill may be capable of also pointing to a finding of enhanced distinctive character under the present ground, this is not the case here. I say this because, having considered the evidence in full, I am of the view that it falls far short of the requirements for proving an enhanced distinctive character. I see no reason to discuss this evidence in any detail here but simply note that the evidence fails to demonstrate any actual use of the mark prior to the relevant date for VC's opposition.[19] Therefore, I only have the inherent position to consider.

[19] By VC's own admission as at paragraph 21 of her witness statement, she postponed the launch of 'FRAME UP' since Spring 2022. The relevant date for VC's opposition is 6 May 2022 which, as I understand it, is still in the Spring season so it is plausible to suggest that no launch took place prior to this, particularly given that there is nothing to suggest as such.

72. The evidence before me (from both parties) is clear in that 'frame up' is a style of dance. That being said, I am of the view that the majority of average consumers in the UK would not know this. For example, casual dancers looking for dance classes as a means of exercise would not identify 'FRAME UP' as a style of dance and would, instead, consider it a combination of two ordinary dictionary words. In the context of the services at issue, this will have no obvious meaning.[20] I appreciate that the mark is not descriptive or allusive to the services at issue, but neither is it particularly remarkable from a trade mark sense. As a result, I consider that VC's mark would enjoy a medium degree of inherent distinctive character.

73. The above being said, I appreciate that some consumers will be aware that 'FRAME UP' is a reference to a style of dance. My primary position is that these consumers will not form a significant proportion of the consumer base. However, if they do, I will need to consider the distinctiveness of the mark in this context. While 'FRAME UP' does not directly describe what the services are, it will strongly allude to the style of dance that the services relate to. As a result, I find that the distinctiveness of VC's mark will be on the lower end of the scale. I do not consider that this will drop to outright low but, in my view, will only be slightly above a low degree.

Likelihood of confusion

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

[20] I appreciate that the meaning may be construed as a reference to someone being framed for a crime they did not commit but, in the context of the services at issue here, I fail to see why consumers would make this connection.

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

75. As set out at paragraph 66 above, I have proceeded with this ground on the basis that the services at issue are similar to only a low degree. I have identified the average consumers for the goods at issue to be members of the general public at large and business users who will select the services after having mainly visual considerations. That being said, I do not discount an aural component. Members of the general public will select the services will a medium degree of attention, but I appreciate that business users are likely to pay a higher than medium degree of attention (though I do not consider that this extends to high). I have found the marks to be identical. Lastly, the inherent distinctiveness of VC's mark will depend on the consumer's understanding of 'FRAME UP' as a style of dance. If they are aware of this, VC's mark will only enjoy only a slightly above low degree of inherent distinctiveness. However, if they do not, it will enjoy a medium degree of inherent distinctiveness.

76. Taking all of the above factors into account, I am satisfied that the average consumer would likely mistake the parties' marks for each other, even bearing in mind that the marks will be viewed on services that are similar to a low degree and where the earlier mark is only viewed as having an above low degree of distinctiveness. This is particularly the case given the identity of the marks at issue and on the basis that the services at issues all relate to dance so are likely to be viewed in scenarios where the consumer has dancing in mind. [21] I am, therefore, satisfied that there will be a likelihood of direct confusion between the parties' marks. For the avoidance of doubt, I also consider that in light of the identity of the

[21] On this point, I also rely on the finding of the CJEU in *L'Oréal SA v OHIM*, Case C-235/05 P, wherein it set out that a weak distinctive character of an earlier mark does not preclude a likelihood of confusion. This is something I consider applies here due to the identity of the marks.

marks at issue, this same finding would be reached even if the services were only similar to a very low degree and even if the inherent distinctiveness of VC's mark was outright low.

77. As a result of the above, VC's section 5(2)(a) ground succeeds in full.

Section 5(4)(a)

78. I note that at paragraph eight of her written submissions in lieu, VC confirms that she did not substantiate her case under section 5(4)(a) and that any success of her opposition rests solely on the section 5(1) and 5(2)(a) grounds. I take such a submission as the withdrawal of VC's section 5(4)(a) ground and will, therefore, give it no further consideration.

CONCLUSION

79. The outcome of these consolidated proceedings is that AV's opposition has failed in its entirety meaning that, subject to any appeal of my decision, VC's mark may proceed to registration for all of the goods and services for which protection is sought. As for VC's opposition, this has succeeded in full and, again, subject to any successful appeal of my decision, AV's mark is refused registration for all of the services for which she sought protection.

COSTS

80. As VC has succeed in her defence of AV's opposition and in bringing her own opposition, she is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award VC the sum of £1,300 as a contribution towards her costs. The sum is calculated as follows:

Filing a notice of opposition and considering the counterstatement of AV:	£250

Considering AV's notice of opposition and preparing a counterstatement:	£250
Costs associated with the evidence rounds:	£600
Official fees:	£200
Total:	**£1,300**

90. I hereby order Anastasia Vlasova to pay Veronica Cebotari the sum of £1,300. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 2nd day of August 2024

A COOPER
For the Registrar

ANNEX

Class 25

Dance shoes; Dance costumes.

Class 41

Dance events; Dance schools; Dance studios; Dance instruction; Dance club services; Live dance exhibitions; Providing dance halls; Dance hall services; Pole dancing instruction; Dance instruction for children; Instruction in dancing; Exotic dancing services; Organising dancing events; Male dance exhibitions; Organisation of dancing competitions; Dancing competitions (Organising of -); Providing dance studio facilities; Presentation of dancing displays; Dance halls (Operation of -); Aerobic and dance facilities; Provision of dancing facilities; Organization of dancing events; Dance instruction for adults; Providing dance hall facilities; Organisation of dancing displays; Dancing displays (Organising of -); Organising of dancing competitions; Provision of dance classes; Dancing facilities (Provision of -); Educational services relating to dancing; Provision of facilities for dancing; Presentation of live dance performances; Performance of dance, music and drama; Providing instruction in the field of dance; Entertainment in the nature of dance performances; Entertainment in the nature of live dance performances; Shows (Production of -); Production of entertainment shows featuring dancers; Production of entertainment shows featuring dancers and singers; Fitness club services; Physical fitness instruction; Keep-fit instruction; Aerial fitness instruction; Sports and fitness; Conducting fitness classes; Fitness training services; Physical fitness centres; Physical fitness consultation; Health and fitness training; Sports and fitness services; Physical fitness training services; Tuition in physical fitness; Exercise and fitness classes; Physical fitness centre services; Keep fit instruction services; Fitness and exercise instruction; Personal fitness training services; Provision of courses of instruction; Provision of gymnastic instruction; Provision of sporting competitions; Provision of physical education; Training courses (Provision of -); Provision of sporting events; Provision of online training; Provision of training courses; Sports activities; Sporting services; Organising of sports and sports events; Sporting activities; Sports training; Sports coaching; Sports camp services; Sports education services; Sports instruction services; Instruction in sports; Sports

entertainment services; Camp services (Sport -); Organisation of sporting competitions and sports events; Organising of sports competitions and sports events; e-sports services; Sporting results services; Training in sports; Sports coaching services; Sporting education services; E-sports services; Organising of sporting activities and of sporting competitions; Organising of sports events and of sports competitions; Organising of sporting events, competitions and sporting tournaments; Organization of sporting events; Organising community sporting events; Provision of online tutorials; Providing online courses of instruction; Providing information about online education; Distance learning services provided online; Conducting training sessions on physical fitness online; Conducting training courses relating to nutrition online; Providing dance facilities; Coaching; Coaching [training]; Esports coaching; Personal coaching [training]; Coaching services for sporting activities; Sports tuition, coaching and instruction; Coaching in the field of sports; Aerobics competitions; Organising competitions; Organization of competitions; Organisation of competitions; Organisation of recreational competitions; Organising of sports competitions; Arrangement of sports competitions; Competitions (Organization of sports -); Organisation of sports competitions; Sporting competitions (Organising of -); Competitions (Organising of sports -); Sporting competitions (Arranging of -); Conducting of sports competitions; Organising of esports competitions; Competitions (Organising of entertainment -); Sports competitions (Organising of -); Organisation of e-sports competitions; Arranging and conducting of sports competitions; Competitions (Organization of -) [education or entertainment]; Organization of sporting events and competitions; Organisation of sporting events and competitions; Organising of sporting activities or competitions; Organising of sports competitions and events; Services for the organisation of competitions; Organisation of competitions [education or entertainment]; Organizing and conducting college sport competitions; Arranging and conducting e-sports competitions ; Organisation of sporting activities and competitions; Organising of sporting activities and competitions; Entertainment services in the nature of competitions; Entertainment in the nature of esports competitions ; Providing facilities for sporting events, sports and athletic competitions and awards programmes; Physical fitness tuition; Providing online videos, not downloadable; Providing online newsletters in the fields of sports entertainment; Provision of information on fitness training via an online portal.