

O/0927/23

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3748423
BY EASYGROUP LIMITED**

TO REGISTER THE TRADE MARK:



IN CLASSES 35 AND 39

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 435044
BY LKQ CZ S.R.O**

Background and pleadings

1. On 27 January 2022, easyGroup Limited (“the **Applicant**”) applied to register the trade mark displayed on the front cover of this decision in the UK, under number 3748423 (“the **Contested Application**”). The Contested Application was published in the Trade Marks Journal for opposition purposes on 15 April 2022. Registration is sought for the following goods:

Class 35: Business management; brand consultancy services; business advice relating to franchising; consumer market information services; providing provision of an online marketplace for buyers and sellers of goods and services; advertising services, namely, promoting and marketing the goods and services of others via electronic communication networks; providing consumer product and service information via the Internet; compilation of information into computer databases; advertisement for others on the Internet; advertising of business web sites; online advertisements; online advertising via a computer communications network; promotional services; provision of an on-line commercial information directory on the internet; advertising of the goods and services of other vendors, enabling customers to conveniently view and compare the goods and services of those vendors; promoting the goods and services of others over the Internet; provision of an online marketplace for buyers and sellers of goods and services; retail services and online retail services relating to pedal bicycles, electric bicycles, hoverboards, hoverkarts, electric scooters, and parts, components, accessories therefor; provision of websites relating to any of the aforesaid services.

Class 39: Transport; transportation of goods, passengers, travellers by land; chauffeur services; taxi services; provision of car parking facilities; arranging, operating and providing facilities for cruises, tours, excursions and vacations; travel reservation and travel

booking services; information services concerning travel, including information services enabling customers to compare prices of different companies; travel agency services; advisory and information services relating to the aforesaid services.

2. On 15 July 2022, LKQ CZ s.r.o (“**the Opponent**”) filed a notice of opposition. The partial opposition is brought under Section 5(2)(b) of the Trade Marks Act 1994 (“**the Act**”) and is directed against “*retail services and online retail services relating to pedal bicycles, electric bicycles, [...] electric scooters, and parts, components, accessories therefor*” in class 35 of the application only (“**the Contested Services**”).
3. The opponent relies upon its UK trade mark number 3438411,



(“the earlier mark”).

4. The earlier mark was registered on 24 January 2020. For the purposes of the opposition under section 5(2)(b), the opponent relies upon all of the goods and services for which it is registered, which are as follows:

Class 11: Lighting apparatus for electric bicycles.

Class 12: Electric bicycles, parts, components, accessories and spare parts thereof included in this class.

Class 35: Intermediary services in the field of business, import-export, wholesale trade and specialized retail trade relating to electric bicycles, parts, components, accessories and spare parts.

Class 37: Electric bicycle repair, including guarantee repairs.

5. Given the respective filing dates, the opponent's mark is an earlier mark, in accordance with section 6 of the Act. However, as it had not been registered for more than five years at the filing date of the application, it is not subject to the use requirements specified within section 6A of the Act. Consequently, the opponent may rely upon all of the goods and services identified without having to demonstrate genuine use.
6. In its notice of opposition, the opponent contends that the competing signs are conceptually and phonetically identical. It is further argued that although the signs contain different colours, the word "EASYBIKE" remains the most dominant component of both signs, and therefore they share a high level of similarity. It argues that the competing services are identical, whilst its goods are similar to the contested services, giving rise to a likelihood of confusion between the signs.
7. The applicant filed a counterstatement denying the ground of opposition. It initially disputes that the competing goods and services are similar or identical and denies that there is a likelihood of confusion. The applicant's position on similarity of the goods and services is amplified in its later submissions.
8. The opponent is professionally represented by Marks and Clerk LLP; the applicant is professionally represented by Kilburn and Strobe LLP. Only the applicant chose to file evidence. Neither party asked to be heard at an oral hearing, though both parties chose to file written submissions in lieu of a hearing. This decision is taken following careful consideration of the papers before me.
9. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive and, therefore, this decision continues to refer to the trade mark case law of the EU courts.

Evidence

10. The applicant has provided evidence which comprises of the witness statement of Ryan Edward Pixton, dated 23 March 2023, with Exhibits REP1 to REP11, all of which I have considered and will refer to below as and where necessary. Mr Pixton is the trade mark attorney representing the applicant. The evidence appears to be for the purpose, inter alia, of establishing the nature and any difference in the goods at the centre of the class 35 retail services, as well as demonstrating the applicant's family of marks.

DECISION

Legislation

Section 5(2)(b)

11. Sections 5(2)(b) and 5A of the Act read as follows:

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

[...]

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

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

“5A 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.”

Case law

12. I am guided by the following principles which are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a 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.

Comparison of goods and services

13. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the "Nice Classification" means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975."

14. All relevant factors relating to the goods should be taken into account, which include, inter alia:¹

- the physical nature of the goods or acts of service;
 - their intended purpose;
 - their method of use / uses;
 - who the users of the goods and services are;
 - the trade channels through which the goods or services reach the market;
 - in the case of self-serve consumer items, where in practice they are found or likely to be found in shops and in particular whether they are, or are likely to be, found on the same or different shelves; and
 - whether they are in competition with each other (taking into account how those in trade classify goods and services, for instance whether market research companies put them in the same or different sectors)
- or

¹ 1 See Canon, Case C-39/97, paragraph 23; and British Sugar PLC v James Robertson & Sons Ltd., [1996] R.P.C. 281 – the "Treat" case.

- whether they are complementary to each other. Complementary signifying that “there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.² Noting that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity.³

15. When interpreting the terms in a specification, I bear in mind that it is necessary to focus on the core of what is being described and that trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. Nevertheless, the principle should not be taken too far and where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.⁴

16. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Meric')*,⁵ the General Court (“GC”) held that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application and vice versa.

17. Furthermore, I bear in mind the approach in *Sky v Skykick*,⁶ where Lord Justice Arnold set out the correct approach to interpreting broad and/or vague terms.

18. With these factors in mind, the opponent’s goods and services set out in paragraph 3 above, are compared with the contested services in class 35, namely: “*retail services and online retail services relating to pedal bicycles, electric bicycles, [...] electric scooters, and parts, components, accessories therefor*”.

² *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82, see also *Sandra Amalia Mary Elliot v LRC Holdings Limited*, BL O/255/13

³ *Kurt Hesse v OHIM*, Case C-50/15 P, see also *Sanco SA v OHIM*, Case T-249/11

⁴ *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), paragraphs 11 - 12

⁵ Case T-133/05, paragraph 29

⁶ [2020] EWHC 990, (Ch),

Retail services and online retail services relating to [...], electric bicycles, [...], and parts, components, accessories therefor

19. Within its submissions the applicant states:

“As a first point, it should be stressed that there is only one potential point of identity, namely that specialised retail trade might be held to be a subset of the opposed retail and online retail services. That identity only extends to such services relating to electric bikes. For the remainder of the opposed services, the Opponent is forced to rely on claimed similarity.”⁷

I agree with the applicant that the above contested services are identical to the opponent’s services in class 35. It is my view that the correct interpretation of the opponent’s class 35 term “*Intermediary services in the field of business, import-export, wholesale trade and specialized retail trade relating to electric bicycles, parts, components, accessories and spare parts*” is that “intermediary services” and everything after “relating to” will apply to the whole term in class 35. With this in mind, I find that the applicant’s contested “*retail services and online retail services relating to [...], electric bicycles, [...], and parts, components, accessories therefor*” will incorporate and are therefore identical to the opponent’s services under the principle established in *Meric*. However, if I am wrong then I note that the applicant suggests that “specialised retail trade might be held to be a subset of the opposed retail and online retail services” (above), a point with which I would agree. Therefore, the competing services would be *Meric* identical either way.

Retail services and online retail services relating to pedal bicycles, [...] electric scooters, [...] and parts, components, accessories therefor

20. In relation to the above remaining contested services the applicant contends:

“The Opponent has not explained how or why the remainder of its class 35 services are similar to the opposed services, save for a vague assertion that the end user is the same. On the contrary, we submit that there is a great deal

⁷ Applicant’s submissions, paragraph 4

of difference between intermediary services, import-export and wholesale services, to retail and online retail services. To take the example of bicycles, the large bicycle retailer Halfords does not, to our knowledge, operate the Opponent's services under the same mark. The Opponent has produced no evidence to show that this is customary in the relevant trade. We submit that they are dissimilar".⁸

21. In relation to the applicant's above services (which are those relating to goods other than electric bicycles), I have given my view that retail services and online retail services are identical under the *Meric* principle to the opponent's "intermediary services in the field of [...] specialised retail trade". Consequently, similarity of these services is dependent on similarity of the goods provided by the services. The applicant's goods under these remaining contested services are pedal bicycles and electrical scooters, whereas the opponent's goods under its earlier services are electric bicycles. Turning first to pedal bicycles, the applicant asserts the following:

The Opponent has not proven any similarity between its specialised retail trade relating to electric bicycles, and the opposed services relating to pedal bicycles. The two products are different. They might have the same purpose, but it is noticeable that no evidence has been produced to show that the manufacturers of one manufacture the other under the same mark. Electric bicycles are likely to have a much higher price point than pedal bicycles.

Indeed, exhibits REP1 and 2 show that electric bicycles are considered very different products from pedal bikes, from a regulatory perspective, in terms of pricing, and how retailers categorise them. Pedal bikes have no lower age limit, and they do not require government advice relating to road tax. They are lower value items generally (REP1), and sold as a different category of good (REP1)."⁹

⁸ Applicant's submissions, paragraph 5

⁹ Applicant's submissions, paragraphs 6 and 7

22. Addressing firstly the applicant's evidence at exhibit REP1 on which the above submissions are based. Exhibit REP1 is an extract from the government website, www.gov.uk/electric-bike-rules. This helpfully sets out the different types of electric bikes and any licencing, tax and insurance rules for electric bikes. The passage discusses, inter alia, electrically assisted pedal cycles ("EAPC's"), it states "You do not need a licence to ride one and it does not need to be registered, taxed or insured".¹⁰ The information goes on to discuss the criteria for EAPCs, such as, it must have pedals that can be used to propel it. The article also states "If a bike meets the EAPC requirements its classed as a normal pedal bike. This means you can ride it on cycle paths and anywhere else pedal bikes are allowed."¹¹

23. From this evidence it appears that electric bikes include electrically assisted pedal cycles which have pedals to assist propelling the bike, unlike a motorbike. As a type of pedal bike could include an electrically assisted pedal bike and vice versa, it would appear that they are *Meric* identical. However, if I am wrong, I consider the nature of the end retail products to overlap since both are a type of bicycle with pedals. The method of use and intended purpose will be the same as both types of bicycles will require the user to pedal to propel the bicycle for travel, albeit that an electric bike has the capacity for electrical assistance. The trade channels will overlap as both types of bicycles, whether solely pedal or electrically assisted pedal will be sold in the same outlets by the same retailers; users are also likely to overlap. In relation to the applicant's submission that the price points differ, I do not consider this to have a bearing on my assessment of similarity. Nevertheless, I note from the evidence provided that there is not a significant difference in the price of the competing goods.¹² Many of the electric bikes for sale within the evidence are on sale for less than £1000. Indeed, listed under "Best sellers" on the Evans Cycles webpage, is a non-electric bike, i.e. the "TREK Marlin 8 Mountain bike" on sale for £849, whereas a "MUDDYFOX Electric Avenue Hybrid Bike" is on sale for £629.¹³ Further, the products provided through the competing services are competitive in nature, as users will choose to purchase either a pedal

¹⁰ Exhibit REP1, page 2

¹¹ Ibid

¹² Exhibit REP 2

¹³ Exhibit REP 2, (bottom of) page 51

bike or an electrically assisted bike; however, they are not complementary as one is not needed for the other to function. Overall, I find the end products of these services to be similar to a high degree, as such, it follows that the competing retail services (which I have found to be identical), are also similar to a high degree.

24. Next, to the applicant's same services relating to electric scooters, for which I will follow the same approach as I adopted for considering the applicant's services connected to pedal bikes. The nature and intended purpose overlap insofar as they are both typically two-wheeled vehicles used by individuals to travel from one point to another, but I acknowledge that their specific nature differs. The method of use differs since an electric scooter has no pedals and the user stands on the scooter platform, whereas users of electric bicycles usually sit and pedal to propel it. The trade channels are likely to overlap as they will be sold by the same retailers. Users will also overlap. These products are competitive in nature as users may choose between an electric scooter or an electric bike to travel. They are not complementary, as one is not important for the use of the other. I am also aware that an electric scooter could capture a vehicle more akin to a low powered moped, but even allowing for this term, it does not materialistically affect the analysis of similarity. Overall, I find that there is a medium degree of similarity between these end products of these retail services and accordingly I consider there to be a medium degree of similarity between the competing services.

The average consumer and the nature of the purchasing act

25. As indicated in the caselaw cited above, it is necessary to decide who the average consumer is for the parties' goods and services and how they purchase them. "Average consumer" in the context of trade mark law means the "typical consumer."¹⁴ 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

¹⁴ *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).

of attention is likely to vary according to the category of goods or services in question.¹⁵

26. Due to the nature of the services at issue, I find that the average consumer will consist of both the general public and professional/business users.

27. The cost of these services is unlikely to be at the highest end of the scale, but will range depending on the type, quality and whether they are to serve members of the public or businesses. The frequency with which the services are purchased will also vary. Both groups of relevant consumers will consider factors such as the quality and convenience of the service and the goods offered through these services. Consequently, I find at least a medium level of attention, will be paid during the selection process. The services are most likely to be purchased from the service provider's physical premises or online equivalent. The purchasing process will be predominantly visual, with users selecting from a brochure, internet pages or after encountering the frontage of the provider's premises. However, it may also include word-of-mouth recommendations and, as such, I do not discount that there may be an aural component involved in the selection and purchase of these services.

Distinctive character of the earlier mark

28. The distinctive character of a trade mark can be measured only, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. 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

¹⁵ *Lloyd Schuhfabrik Meyer*, Case C-342/97.

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).”

29. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services to those with high inherent distinctive character, such as invented words which have no allusive qualities. Dictionary words which do not allude to the goods or services will be somewhere in between. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion, since the more distinctive the earlier mark, the greater may be the likelihood of confusion.

30. Although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use (nor was it required to do so). Consequently, I have only the inherent position to consider.

31. I pause here to note that the applicant has provided evidence of other company websites using the words “easy” (or some variant spelling that consumers will

readily identify as such) and “bike”. However, the applicant has not explained why it believes these other registrations are relevant to these proceedings, neither in the accompanying witness statement, nor in its submissions. The existence of other earlier marks will not have any bearing on whether there exists a likelihood of confusion between the contested mark and the opponent’s earlier mark. This is because there is no evidence that consumers have become accustomed to differentiating between them in use in the relevant market. Even if the marks are registered trade marks protected in the UK (which is not clear from the evidence), the mere fact that the register may contain a number of trade marks relating to the goods and services at issue which contain the words “easy” and “bike” is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned.¹⁶

32. The earlier mark is a figurative mark that consists of two conflated words “Easy” and “Bike”, that create “EasyBike”. The words are presented in fairly standardised black font in mixed case, with the first letter of each word capitalised. In front of the words is a device element that comprises two shaded squares overlapping at the corner, one in yellow, the other in grey. In addition, the dot over the letter “i” in the word “Bike” is also represented by a small yellow square. The word “easy” will be readily understood by its dictionary definition “without difficulty or effort”,¹⁷ consequently, it is not particularly distinctive in itself due to its descriptive nature. The word “Bike” is descriptive of the goods to which the services at issue relate. A registered trade mark must be assumed to have at least some distinctive character.¹⁸ What affords the earlier mark distinctive character is the combination of the conjoined words alongside the device element; the yellow dot over the “i” will be seen as decorative and may well be overlooked as it is tiny and pale. I remind myself, that where a mark is composed of a word and a figurative element, generally, the word element is more distinctive; I find that to be the case here.

¹⁶ *Zero Industry Srl v OHIM*, Case T-400/06, paragraph 70

¹⁷ <https://www.collinsdictionary.com/dictionary/english/easy>

¹⁸ *Formula One Licensing BV v OHIM*, Case C-196/11P

Comparison of the marks

33. It is clear from *Sabel BV v. Puma AG* that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM*, Case C-591/12P, that:

“34. [...] 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.”

34. It would therefore be wrong to artificially dissect the trade marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create.

35. The respective trade marks are shown below:

Earlier mark	Contested mark
	

Overall impressions

36. The earlier mark is a figurative mark that consists of two conjoined words "Easy" and "Bike" in black font. In front of the word element is a device element comprising two shaded squares overlapping at the corner, one in yellow, the other in grey. The overall impression lies predominantly in the word element where the attention of consumers will first be drawn, with the device element playing a lesser role. I acknowledge that the dot over the letter "i" in the word "Bike" is yellow, but it is so pale and small that it is in my view negligible and likely to be overlooked in the overall impression. Alternatively, if noticed it will be seen as decorative.
37. The contested mark is also a figurative mark which contains two conjoined words "easy" and "Bike". The words are presented in white font on an orange rectangular background. The word element plays a greater role in the overall impression, with the orange background providing a lesser contribution.

Visual comparison

38. The competing marks are visually similar as they both contain the conflated words "Easy" and "Bike". In the earlier mark, the first letter of each of those words is in upper case, whereas in the contested mark only the first letter of the word "Bike" appears in upper case, albeit this is a minor difference. The competing marks also use different stylisation in font and colour scheme. The contested mark contains an orange rectangular background, whilst the earlier mark includes a device at the beginning of the mark and a subtle decorative yellow dot over the "i". Taking into account the overall impressions, I find that the competing marks are visually similar to a degree somewhere between low and medium.

Aural comparison

39. In my view, consumers will not attempt to articulate the device element in the earlier mark, nor the orange background in the contested mark. Therefore, it follows that both marks contain the same three syllables and are aurally identical.

Conceptual comparison

40. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. The word “easy” conveys - in line with its dictionary definition outlined above – that something is not difficult and will not require effort. In reference to the services at issue, it is indicative that they will be easy to use. The word “Bike” will be perceived as descriptive of the goods to which the services at issue relate. This analysis applies equally to both marks as they contain identical word elements. Moreover, the device element in the earlier mark does not convey any particular meaning, neither does the orange rectangular background within the contested mark. The marks are therefore conceptually identical.

Likelihood of confusion

41. Whether there is a likelihood of confusion must be assessed globally, taking into account a number of factors. One such factor 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 goods and services, and vice versa. It is also necessary for me to keep in mind the distinctive character of the opponent’s trade mark, the average consumer for the goods and services and the nature of the purchasing process.

42. In relation to assessing the likelihood of confusion where the common element has no or low distinctiveness, I keep in mind that in *Face2FaceHR Partners Limited v Peninsula Business Services Limited*,¹⁹ Emma Himsworth K.C. as the Appointed Person, reviewed the case law in *Whyte and Mackay v Origin*²⁰ and *Nicoventures Holdings Limited v The London Vape Co Ltd*,²¹ as well as guidance in the Common Communication on the Common Practice of Relative Grounds of Refusal - Likelihood of Confusion (impact of non-distinctive/weak components) dated 2

¹⁹ O/0368/23

²⁰ [2015] EWHC 1271 (Ch)

²¹ [2017] EHC 3303 (Ch),

October 2014, which is referred to in the case law. Ms Himsworth summarised the correct approach as follows, at paragraph 44:

“(1) The distinctiveness of the mark as a whole must be assessed, taking into account that a minimum degree of distinctiveness must be acknowledged.

(2) The distinctiveness of each of the components of both marks must be assessed with priority being given to the coinciding elements.

(3) The focus of the assessment of the likelihood of confusion should be on the impact of the non-coinciding components on the overall impression of the mark.

(4) Account must be taken of the similarities/differences in the non-coinciding elements of the marks.

(5) A coincidence of an element with a low level of distinctiveness will not usually lead to a likelihood of confusion.

43. I note that in *General Ecology, Inc. v Wan Jou Lin & Great Ins Company Ltd*,²² Professor Phillip Johnson, as the Appointed Person, found that marks **NATURE**



PURE, and were confusingly similar, despite the common elements only having low distinctiveness. Furthermore, I remind myself that a low level of distinctiveness does not preclude a likelihood of confusion.²³

²² O/0331/23

²³ *L'Oréal SA v OHIM*, Case C-235/05 P

44. I have found that the applicant's services are either identical or similar to between a high and medium degree to the services of the earlier mark. I have found that the average consumer of the services at issue will be either the general public or businesses/professional users, both of whom will pay a medium level of attention. I have found that the purchasing process will be largely visual, however, I have not discounted aural considerations. The overall impression of the respective marks predominantly lies within the word element which plays a greater role, with the respective device or background elements playing a lesser role. I have found that the competing marks are visually similar to a degree somewhere between low and medium, and aurally and conceptually identical. I have also found that the earlier mark possesses a low level of inherent distinctive character.

45. In relation to the likelihood of confusion, the applicant states:

“easyGroup's evidence shows that the stylisation of the opposed mark uses the same 'house' style used by the easy family of brands, which includes easyJet, easyCar and easyBus. Consumers are educated to recognise easyJet in particular as denoting an airline associated with easyGroup and its reputation is acknowledged by the Opponent and in the previous proceedings between the parties referred to above.

In that context, we submit that the stylisation of the easyGroup mark is sufficient to take it beyond a likelihood that it would be confused with the Opponent's mark. Consumers would be likely to regard easyBike in this format, as denoting the Applicant, not the Opponent. Following easyJet, easyBus and easyCar, easyBike looks like an extension of the easyGroup business.”

46. I note firstly that insofar as an argument relating to a likelihood of confusion may be premised on a claimed family of marks, it typically arises in the context of an increased penumbra of protection afforded to earlier marks of an *opponent*. This is an extension of the consideration routinely given to whether or not the distinctive character has been enhanced through use. It is not typically invoked by an applicant, in argument *against* a likelihood of confusion, in order to justify an expansion of its portfolio of trade marks.

47. In any event, in order for a family of marks argument to be successful, the trade marks relied upon as constituting that family, must be present on the market to an extent that the average consumer has been educated to connect the aspects of that family of marks with the relevant party.²⁴
48. In reviewing the evidence, I accept that it establishes the presence on the market of the mark “easyJet”, including in the style and colour scheme of the contested mark.
49. However, the evidence of use provided in respect of the marks “easyBus” and “easyCar” is limited. I note it states in the evidence that “by February 2020, “easyBus.com” was selling more than one million low-cost bus seats per year on many hundreds of routes all over Europe and beyond in partnership with a variety of reputable operators [...] contributing about £1 million pa [per annum] in profits to easyGroup.”²⁵ Firstly, this is not use of the “easyBus” mark containing the same figurative characteristics as the applied for mark per se. Secondly, it is not entirely clear as to the contribution from within the UK, which is the relevant consumer territory for the purpose of assessing a likelihood of confusion.
50. Comparable points apply to the financial information relating to the “easyCar” mark, with the evidence explaining that “Today through the easyCar.com, easyRentacar.com and easyVan.com websites, customers can compare and book car hire from over 1,600 brands in over 45,000 locations worldwide. [...] It is a profitable company making a profit of about £1m pa [per annum].²⁶ Again, it is not made clear whether or how this figure relates to the UK market. Moreover, a breakdown relating solely to the mark “easyCar” rather than “easyVan” is not provided, and further this is not use on the market of the “easyCar” mark. I note the Wikipedia evidence relating to easyJet, however, as Wikipedia is crowdsourced, i.e. the information can be created and edited by anyone, I shall place little weight upon this evidence. In relation to press articles referring to “easyBus” of which there are just four (and only one appears to be a national

²⁴ *Il Ponte Finanziaria SpA v OHIM*, Case 234/06 at paragraph 64

²⁵ Exhibit REP5, page 97

²⁶ Exhibit REP5, page 106

publication), I note (contrary to Mr Pixton's witness statement) that the most recent article is dated 21 October 2016, which fails to demonstrate recent use on the market. As for the press articles relating to "easyCar" there are only two articles that have recent dates, both dated in January 2022. However, they do not present the "easyCar" mark in the same figurative way as the applied-for mark that would establish a family of marks argument that may, in some circumstances, be a factor in considering a likelihood of confusion. The evidence is limited at best and does not establish sufficient relevant use to sustain a family of marks argument.

51. The competing marks differ in the colour and style of the fonts used as well as the capitalisation of the first letter in the word easy. Furthermore, the earlier mark contains a device at the beginning of the mark (described above) and a decorative yellow dot over the "i", which is absent from the contested mark; and moreover, the contested mark features an orange rectangle background, which is not replicated within the earlier mark. However, the marks coincide in the two conflated words "EasyBike"/"easyBike" which I have found to be the dominant and more distinctive (albeit lowly distinctive) element in the earlier mark, and the dominant element in the contested mark. Taking into account the overall levels of similarity between the marks, the small differences, even in totality, are insufficient to distinguish between the competing marks. In my view, it is highly likely that consumers, even paying an above average level of attention during the purchasing process, would misremember the marks for one another and fail to recall the differences created by the additional device and decorative elements of the respective marks, especially given the identity/similarity of the services. 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 they have retained in their mind, which will be driven by the conceptual and aural identity. Consequently, I find there is a likelihood of direct confusion.

Conclusion

52. The opposition under section 5(2)(b) of the Act has succeeded in its entirety. Subject to any successful appeal, the application will be refused.

Costs

53. The opposition has been successful. The opponent is, therefore, entitled to a contribution towards its costs based on the relevant scale published in Annex A of Tribunal Practice Notice 2 of 2016. In the circumstances, I award the opponent the sum of £1100, which is calculated as follows:

Official fee:	£100
Preparing the notice of opposition and considering the applicant's counterstatement:	£200
Considering the applicant's evidence	£500
Preparing written submissions:	£300
Total:	£1100

54. Accordingly, I hereby order easyGroup Limited to pay **LKQ CZ s.r.o** the sum of **£1100**. This sum is to be paid within twenty-one days of the expiry of the appeal period, or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 29th day of September 2023

Sarah Wallace

For the Registrar