

O/0921/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3848362
IN THE NAME OF XINXU (SHANGHAI) INFORMATION TECHNOLOGY SERVICE
CO., LTD.
IN RESPECT OF THE TRADE MARK

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mala mala

IN CLASSES 30, 35 & 43

AND

THE OPPOSITION THERETO UNDER NO. 440437
BY MALAMALA GAME RESERVE (PROPRIETARY) LIMITED

Background and pleadings

1. Xinxu (Shanghai) Information Technology Service Co., Ltd. (“the applicant”) applied to register trade mark no. 3848362 for the mark shown on the cover page of this decision in the UK on 11 November 2022. It was accepted and published in the Trade Marks Journal on 3 February 2023 in respect of the following goods and services:

Class 30: Relish [condiment]; sauces [condiments]; noodle-based prepared meals; instant rice; seasonings; peppers [seasonings]; yeast; aromatic preparations for food; preparations for stiffening whipped cream; meat tenderizers, for household purposes; gluten prepared as foodstuff; coffee; tea; sugar; bread; flour-based dumplings; noodles; udon noodles; cereal-based snack food; potato flour.

Class 35: Advertising; business management of hotels; commercial administration of the licensing of the goods and services of others; marketing; personnel recruitment; administrative services for the relocation of businesses; updating and maintenance of information in registries; market studies; business research; accounting; rental of vending machines; sponsorship search; rental of sales stands; shop window dressing; administrative processing of purchase orders; business organization consultancy; business management consultancy; procurement services for others [purchasing goods and services for other businesses]; sales promotion for others; commercial or industrial management assistance.

Class 43: Restaurants; cafés; bar services; canteens; snack-bars; hotel accommodation services; rental of temporary accommodation; cafeteria services; information and advice in relation to the preparation of meals; take-away restaurant services; accommodation bureaux [hotels, boarding houses]; hookah lounge services; rental of cooking apparatus; rental of drinking water dispensers; decorating of food; motels; rental of transportable buildings; food reviewing services [provision of information about food and drinks]; boarding for animals; rental of chairs, tables, table linen, glassware.

2. On 26 April 2023, MALAMALA GAME RESERVE (PROPRIETARY) LIMITED (“the opponent”) partially opposed the trade mark on the basis of sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). The opponent’s 5(2)(b) ground is on the basis of its two registered trade marks below:

1. UK trade mark no. 2323317 (filing date: 11 February 2003, registration date: 16 July 2004 – “the earlier UK mark”)

MALA MALA

Relying on all services, those being:

Class 39: Operation of game reserves for sightseeing purposes.

Class 41: Operation of game reserves for recreational or entertainment purposes.

Class 43: Provision of accommodation and the provision of food and drink in guest lodges; not including the provision of Indian cuisine and beverages and Indian restaurant and wine bar services.

2. UK comparable trade mark no. 903324209¹ (filing date: 22 August 2003, registration date: 6 April 2005 – “the earlier comparable mark”)

MALA MALA

Relying on all services, those being:

Class 39: Operation of game reserves for sightseeing purposes; conducting game viewing drives; information and advisory services relating to any of the aforesaid.

¹ On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 54 of the Withdrawal Agreement, the Registry created comparable UK trade marks for all right holders with an existing EUTM. As a result of the opponent’s EUTM being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and retains its original filing date.

Class 41: Operation of game reserves for recreational or entertainment purposes; information and advisory services relating to any of the aforesaid.

Class 43: Provision of accommodation and provision of food and drink in guest lodges; information and advisory services relating to any of the aforesaid.

3. By virtue of their earlier filing dates (and their subsequent registration), the above marks constitute earlier marks in accordance with section 6 of the Act.

4. The opponent argues that the opposed services in classes 35 and 43 (which are identified in the comparison of the services section of this decision) are identical or similar to its own services and that the marks are similar. As such, the opponent argues that there exists a likelihood of confusion, and the contested application should be refused in accordance with section 5(2)(b) of the Act.

5. The opponent also submits that it owns goodwill for its services under the sign MALA MALA stemming from its use of the sign in the UK since at least 1963. It submits that the use of the contested mark for some of the services in classes 35 and 43 (as set out later in this decision) would result in a misrepresentation that the services offered are associated with or are provided by the opponent. The opponent argues this misrepresentation would inevitably result in damage to the opponent, and that the application should therefore be refused in accordance with section 5(4)(a) of the Act.

6. The applicant filed a counterstatement in response to the opposition. In respect of the claims under 5(2)(b) of the Act, the applicant denies any identity between the services but admits to varying degrees of similarity between some services in class 43. The applicant denies any similarity between the other class 43 services, and between the services in class 35. The applicant denies that the marks are confusingly similar. The applicant requested that the opponent provide proof of use of the trade marks it relies upon.

7. In respect of the opponent's claims under section 5(4)(a) of the Act, the applicant denies that the opponent holds goodwill under its sign, and submits that even if it does, that use of the applicant's mark would not result in misrepresentation or damage.

8. Only the opponent filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary. No hearing was requested, and only the opponent filed written submissions in lieu. These will not be summarised but will be referred to where appropriate. This decision is taken following a careful perusal of the papers.

9. Both parties are represented in these proceedings. The applicant is represented by Wilson Gunn. The opponent is represented by Abel & Imray LLP.

10. 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

11. The opponent filed five witness statements in evidence. The first two are in the name of Heather Smith, Marketing Manager for the opponent. The first is dated 25 August 2023 and introduces eight exhibits, namely Exhibit HS1 to Exhibit HS8. The second is dated 27 September 2023 and introduces a further four exhibits, namely Exhibit HS9 to Exhibit HS12. Both statements go to the use of the earlier marks/sign.

12. The third witness statement filed by the opponent is in the name of Sally Hedley. Ms Hedley is a consultant technical translator, a member of the Chartered Institute of Linguists, and a Member of the Institute of Translation and Interpreting. The statement is dated 21 September 2023 and is for the purpose of providing English Translation of Exhibit HS4 to Ms Smith's statement. This is introduced at Exhibit SH1, the only exhibit provided with this statement.

13. The fourth statement filed is in the name of Valarie Maureen Conlon. The statement is dated 27 September 2023. Ms Conlon is of RWS IP Services, and she has an BA(Hons) in International Business Communication. She explains she is a native English speaker that is conversant with the Italian language. The purpose of

her statement is for providing an extract from an Italian website along with its English translation, both of which are provided at Exhibit VMC1.

14. The fifth statement provided is in the name of Peter McMullen, also of RWS IP Services. He is a qualified member of the Institute of Translation and Interpreting and of the Chartered Institute of Linguists. His statement is dated 27 September 2023. The purpose of the statement is to provide an extract from a Swedish website along with its English translation, both of which are provided at Exhibit PM1.

Proof of use

15. The relevant statutory provisions are as follows:

Section 6A:

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

16. As one of the earlier marks is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

“7.— (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the “five-year period”) has expired before IP completion day—

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM ; and

(b) the references in section 6A to the United Kingdom include the European Union”.

17. Section 100 of the Act states that:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

18. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark,

including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].


(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

19. In this instance it is for the opponent to prove its earlier marks have been used in the relevant territory in respect of the services relied upon, within the relevant period of 12 November 2017 until 11 November 2022. In accordance with schedule 2A of the Act as set out above, up until the end of the transition period, that being until 31 December 2020, the relevant territory for the UK comparable mark is the EU (including the UK). After that, and up until the end of the relevant period, the relevant territory for the earlier comparable mark is the UK only. In respect of the earlier UK mark, the relevant territory throughout the relevant period is the UK only.

Form of the mark

20. Before I proceed with my assessment of use, I will address the use of the marks in different forms within the evidence. The earlier marks are filed as word marks which protects the words contained in the mark, whatever form, colour or typeface are used: see *LA Superquimica v EUIPO*, Case T-24/17, paragraph 39. Where the evidence displays the word mark Mala Mala, including in a range of standard fonts or in upper- or lower-case letters, this is self-evidently be use of the mark as registered. In addition, I note the mark is also shown in the following variants:

1. MALAMALA or MalaMala (as a word mark but omitting the space between the two elements)
2.  (in stylised form, sometimes but not always shown next to a horned animal from the Bovidae family)

3.  (used in 2017)

21. In *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under s. 46(2). He said:

“13. [...] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO*, EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word “MEDIA” would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA were in combination weakly distinctive, and the word MOOD alone was less distinctive still.”

22. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’ within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35 Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term ‘genuine use’ within the meaning of Article 15(1).” (emphasis added)

22. The distinctiveness of the earlier marks resides in the words Mala Mala. It is my view that the omission of the space between Mala Mala does not alter the distinctive character of the mark, and I find the use of the word mark without the space as shown in variant 1 above to be acceptable variant use of the marks as registered in accordance with the case law. Further, I do not find that use of a slightly stylised font, or the addition of colour as is shown in the variants above alters the distinctive character of the earlier marks. I therefore find the use shown in variant 2 above to also be acceptable variant use of the mark as registered in accordance with the case law. Finally, I consider that the element Mala Mala continues to act as an indication of origin in variant 3 above, and in variant 2 where it is used alongside the device of a horned animal. I therefore also find variant 3 and variant 2 used alongside the device to be acceptable variants of the marks as registered.

Use of the mark

23. I will now go on to consider the use of the mark, either as registered or acceptable variants thereof, shown in evidence. In her witness statement, Ms Smith explains that the opponent operates a game reserve in South Africa under the trade mark Mala Mala, and has done since 1927.² Exhibit HS1 provides a 2020 information document showing the marks , MALAMALA, and MalaMala. Exhibit HS2 provides pages showing rates for services under the marks from 2017 to 2023. The rates include accommodation at the game reserve, food and drinks and game drives. Ms Smith explains in her statement that accommodation represents roughly 55% of the rate charged to guests, whilst food and drink represents round 25% of this.³ Ms Smith explains that bookings can be made directly via their website, but that the majority of their international guests book via a local travel agent in their home country.⁴ She states the UK is one of the opponent's most important markets, and that

² See paragraph 3 of the witness statement of Ms Smith.

³ See paragraph 4 of the witness statement of Ms Smith.

⁴ See paragraph 5 of the witness statement of Ms Smith.

the opponent undertakes consistent and concerted targeting in the UK and EU markets in order to generate business.⁵


24. Exhibit HS5 provides a marketing agreement between the opponent and a marketing agent for marketing services in the UK, as well as other documents providing information on the service provided by the marketing agent. The initial agreement itself is for the term of a year and is dated 2014 (before the relevant period), however, a UK sales and marketing plan covering the 5 year period of 2016 – 2020 is also provided. This includes details of the marketing activity completed during three set phases. The second phase from October 2017 to December 2018 details the hosting of media groups including journalists from several UK press outlets, in addition to referencing actions taken including running a series of television adverts, posters, creating a magazine and running adverts in the UK national press. It also includes details of the plan for increasing sales for 2019 onwards, although this plan does not appear to have been completed when the document was produced. A document detailing the 2022 post-COVID recovery plan is also provided. This includes a list of several trade shows earmarked as worth attending for a UK audience, as well as an overarching marketing plan for 2022. A number of invoices from the marketing partner to the opponent are also provided with this exhibit. Whilst some of these postdate the relevant period, 9 are provided from within the relevant period in 2022. These detail costs such as expenses and commission.

25. Exhibit HS3 provides the opponent's contact page showing contact details for sales and marketing agents in Germany, Italy and the United Kingdom, in addition to South Africa and the US, although the page provided dates from 2023 (after the relevant period). However, specific turnover from guests in the UK is provided as follows:

⁵ As above.

Our turnover from guests from the UK was as follows in the last few years:

Year	Turnover in USD
2017	\$864368
2018	\$977066
2019	\$901277
2020	\$195294
2021	\$39996
2022	\$799667

26. A spreadsheet is also provided at Exhibit HS6 detailing UK and Irish bookings throughout the relevant period. There is a notable gap in these bookings from March 2020, although this is to be expected considering the pandemic. During the relevant period there appears to be over 250 individual bookings from these territories. A selection of invoices for bookings are provided at Exhibit HS8. Ms Smith explains these relate to invoices to UK and EU travel agents for bookings made to the resort. These date between November 2017 and October 2022. Exhibit HS9 to Ms Smith's second witness statement also provides invoices. Ms Smith explains these are sample invoices sent to UK client's covering accommodation and food and drink services at the opponent's game lodge during the relevant period. These invoices are dated between November 2017 and September 2022. All of the invoices provided display  on the same. EU invoices for this period are also provided at Exhibit HS10.

27. Exhibit HS11 provides webpages from web archiving site the Wayback Machine. Ms Smith explains in her statement that these are from UK travel agents African Pride, Knighton Reeve, Virgin Holidays, Hayes & Jarvis and Tribes.co.uk, advertising the opponent's game lodge. Ms Smith states the pages are dated. Whilst I note that included in the URLs are a string of numbers that seem likely to include the date (for example, one includes 20210615002301 which may indicate is the date 15th June 2021), this is not entirely clear.

28. I have not detailed all of the evidence filed in my above summary; however, this has been fully reviewed and considered. From the sum of the evidence, it is clear to me that the opponent runs a game reserve in South Africa and offers services at that reserve including the provision of accommodation, food and drink, and game drives. Clearly, South Africa is not the relevant territory in this instance. However, I note the

UK is a significant part of or the sole relevant territory throughout the entire relevant period for both marks relied upon. In that respect, I note Ms Smith's comment that the UK is one of their most important territories for bookings. I also note the turnover figures provided for sales to UK customers, and the number of sample invoices directed at UK customers displaying the mark during the relevant period. I note the promotion of the reserve on the UK travel agent sites, although the dates are not entirely clear. I also note Ms Smith's statements regarding the promotion of the reserve to UK consumers throughout the relevant period, and the "consistent and concerted targeting of the UK and the EU markets to generate business" as well as the marketing actions undertaken or planned by the opponent's marketing agent concerning the UK within the relevant period. It is clear from the sum of the evidence that the opponent has conducted consistent marketing and sales of its services to UK customers throughout the relevant period, although those services themselves are located outside of the UK.

29. In *Standard International Management LLC v EUIPO*, T-768/20, EU:T:2022:458, which was decided after the end of the transition period and is persuasive but not binding, the General Court ("GC") considered whether a trade mark had been used in the EU despite the fact that the services themselves (hotels and ancillary services) were provided in the USA. The evidence showed use directed at consumers in the EU, including but not limited to advertisements and promotional campaigns, a bookings portal accessible to EU customers via the applicant's website and figures issued by Google Analytics software concerning traffic on the applicant's website. There was also evidence of reservations made directly by customers and through travel agencies situated in the EU, and of invoices addressed to customers resident in the EU. The GC stated:

"33 In the present case, in the first instance, it is necessary to examine the assessment that, since the services covered by the contested mark are, in any event, provided outside the territory of the European Union, the evidence relating to those services cannot be relevant for the purposes of establishing genuine use of that mark.

34 In that regard, first, it must be held that the Board of Appeal erred in finding that the contested mark could not immediately be put to genuine

use in the European Union, because the applicant's hotel and ancillary services are provided in the United States. As the parties note, the Board of Appeal erred in not distinguishing between the place of those provisions of services and the place of use of the mark. Only the latter is relevant to examination of the genuine use of an EU trade mark.

35 As, in essence, the applicant is claiming, the use of a trade mark is demonstrated by multiple types of acts and those relevant for the purposes of establishing its genuine use cannot be limited solely to the acts of provision of the goods or services it covers. In particular, it is apparent from Article 9(3)(b) and (e) of Regulation 2017/1001 that, under the conditions set out in paragraph 2 thereof, the proprietor of an EU trade mark may prohibit a third party from using a sign in the course of trade in order to offer goods, put them on the market or stock them for those purposes under the sign, or from offering or supplying services under the sign, as well as from using the sign on business papers and in advertising. Taking account of the acts of use of a trade mark recognised by Regulation 2017/1001, such as the acts of advertising and of offering for sale, on which the applicant is relying in the present case, those acts are therefore relevant for the purposes of establishing genuine use of the contested mark in so far as they occur in the relevant territory.

[...]

37 However, it cannot be inferred from that case-law that, given the fact that the services at issue are provided outside the relevant territory of the European Union, the acts of use of the contested mark seeking to promote and to offer for sale such services are necessarily taking place outside that territory.

38 As is apparent from the case-law [...], it is sufficient to state that there is genuine use of a trade mark where that mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods and services for which it has been registered, in order to create or preserve an outlet for those goods or services. Even if the

applicant were to supply goods or services outside the European Union, it is conceivable that the applicant would make use of that mark in order to create or preserve an outlet for those goods and services in the European Union.

[...]

40 Therefore, as the parties submit, the Court must hold that the Board of Appeal's finding by which it excluded all the evidence concerning the applicant's hotel and ancillary services in the United States was based on a false premiss."

30. Having considered the findings above, and the evidence I have been provided with in this instance, it is my view that the use of the trade mark by the opponent or on its behalf in the UK, and the subsequent bookings and payments taken from UK consumers, constitutes use in the UK in accordance with the essential function of a trade mark, that is to guarantee the origin of its services, in the UK. I therefore consider that the opponent has used its mark in respect of the services I have mentioned within the relevant territory throughout the relevant period. I note that in this instance, the number of bookings is not particularly high. However, I note the game reserve offers a limited amount of accommodation, and that the services on offer are relatively high value, luxury services. With the exception of the time period aligning with the global pandemic, where it is widely accepted that the booking of luxury travel by customers in the UK (and the EU) will have been considerably reduced, the bookings appear fairly consistent, and the turnover itself is relatively high for what appears from the evidence to be a fairly small operation. It is my view that considering the evidence as a whole, the use made is genuine use for the purpose of preserving an outlet for the services in the UK throughout the relevant period. As mentioned, I find the UK to be a significant territory within the EU during the relevant period. As such I find genuine use in respect of the services outlined under both the earlier UK and comparable marks.

Fair specification

31. Within its final written submissions, the opponent submits:

“The evidence of use submitted by MALAMALA is found in the two statements submitted by Heather Smith (supplemented by various translations of materials not in the English language). For reasons of procedural economy, we concentrate below on the Opponent’s evidence of use of its mark for Class 43 services.

[...]

The evidence demonstrates use of the mark of the Registrations during the Relevant Periods for all of the services in Class 43 covered by the Registrations. The Class 43 services of the Registrations represent a fair specification in the light of the evidence provided.”

32. I have already accepted there has been genuine use in respect of the provision of accommodation and food and drink. As the opponent has chosen to focus on its class 43 services only and has submitted that class 43 constitutes a fair specification, I will also focus on these services when considering a fair specification.

33. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

34. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows (at [47]):

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair

specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

35. The class 43 services covered by the opponent's specification are already, to my mind, fairly narrow. It is my view that these would accord with the perceptions of the

average consumer and fairly reflect the services shown in evidence. Of course, the limitations previously added to the specification prior to this opposition must also remain, so as not to broaden the opponent's protection outside of what is registered. I therefore find genuine use to have been shown in relation to the services below:

The earlier UK mark:

Class 43: Provision of accommodation and the provision of food and drink in guest lodges; not including the provision of Indian cuisine and beverages and Indian restaurant and wine bar services.

The earlier comparable mark:

Class 43: Provision of accommodation and provision of food and drink in guest lodges.

Decision

Section 5(2)(b)

36. Section 5(2)(b) of the Act is as follows:

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

37. Section 5A of the Act is as follows:

“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.”

The Principles

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

The principles

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

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

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

Comparison of the services

39. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

41. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Each involved a straining of the relevant language, which is incorrect. 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."

42. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC stated that there is complementarity where:

“...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”.

43. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the GC stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut fur Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

44. With the above in mind, the services for comparison are as follows:

Earlier services	Contested services
<p>The earlier UK mark</p> <p>Class 43: <i>Provision of accommodation and the provision of food and drink in guest lodges; not including the provision of Indian cuisine and beverages and Indian restaurant and wine bar services.</i></p>	<p>Class 35: <i>Business management of hotels.</i></p> <p>Class 43: <i>Restaurants; cafés; bar services; canteens; snack-bars; hotel accommodation services; rental of temporary accommodation; cafeteria services; information and advice in relation to the preparation of meals; take-away restaurant services;</i></p>

<p>The earlier comparable mark:</p> <p><i>Class 43: Provision of accommodation and provision of food and drink in guest lodges.</i></p>	<p><i>accommodation bureaux [hotels, boarding houses]; hookah lounge services; rental of cooking apparatus; rental of drinking water dispensers; decorating of food; motels; rental of transportable buildings; food reviewing services [provision of information about food and drinks]; boarding for animals; rental of chairs, tables, table linen, glassware.</i></p>
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Class 35

Business management of hotels.

45. The closest services in the opponent’s specification to those covered by the applicant above are *Provision of accommodation [...] in guest lodges*. The nature and intended purpose of the services differs, with the applicant’s being management services for the purpose of taking on the role of ensuring the smooth running and overall success of a hotel as a business, whereas the opponent’s services are to provide rooms for people to stay in guest lodges. The consumer group will differ, with business management of hotels *as a service* being a specialist professional service targeted at business and property owners, whereas the applicant’s services are targeted primarily at the general public, although there may be consumers who stay in guest lodges for business purposes. There is no competition between the services. The opponent argues that these services are complementary on the basis that they are “...close enough for each to be important for the use of the other, so that complementarity can be found. They coincide in providers, distribution channels or relevant public.” It is my view that business management of hotels is important to the functioning of hotels. Arguably, a guest lodge falls within the definition of a hotel. However, I do not agree that it will be considered that the services are offered by the same entities, with the business management of hotels *as a service* more likely, in my view, and without further evidence on this point, to be viewed as being offered by a specialist provider, rather than the provider of the hotel services, and I do not find the

services to be complementary. I do not believe they will coincide in providers, distribution channels or relevant public as also submitted by the opponent. Overall, I find the contested *Business management of hotels* to be dissimilar to the opponent's earlier services.

Class 43

46. Within its TM8, the applicant concedes there the following services in class 43 share similarity with the opponent's services to varying degrees:

Restaurants; cafés; bar services; canteens; snack-bars; hotel accommodation services; rental of temporary accommodation; cafeteria services; information and advice in relation to the preparation of meals; take-away restaurant services; accommodation bureaux [hotels, boarding houses]; hookah lounge services; decorating of food; motels; food reviewing services [provision of information about food and drinks].

47. The applicant argues that the remaining services in class 43 (in addition to those in class 35) are dissimilar. Keeping in mind the concession from the applicant that some of the services are similar to varying degrees, I will consider the applicant's class 43 below.

Restaurants; cafés; bar services; canteens; snack-bars; cafeteria services; take-away restaurant services

48. The above services are all those for the provision of food and drink. It is my view that they are all be identical to the services *provision of food and drink in guest lodges* as covered by the opponent's specification, in accordance with the principle set out in *Meric*.

hotel accommodation services; rental of temporary accommodation;

49. It is my view above services will incorporate the opponent's *provision of accommodation in guest lodges* and are therefore identical in accordance with the principle set out in *Meric*. However, if I am wrong, I consider that the services share at least an intended purpose, consumers, channels of trade, method of use and will be

similar in nature. They will also be in competition. If not identical, I find these services similar to a high degree.

motels;

50. A motel is guest accommodation provided at the side of or very near the road, in which drivers and passengers may seek rest or an overnight stay during longer road trips. It is my view that a guest lodge may also be located near the road for this purpose, and the provision of motels and the provision of accommodation in guest lodges are arguably identical. However, if I am wrong in finding identity between the services, I nonetheless consider that they both share the purpose of providing accommodation, they may be similar in nature (with guest lodges ranging from very basic to luxury, and from single storey to multiple storey) they will share consumers, including those members of the general public who may stay in a motel on route to a guest lodge, and they may in some cases be in competition. If I am wrong to find these services identical, I find them to be similar to a high degree.

hookah lounge services;

51. It is my understanding that the provision of a hookah lounge is the provision of a comfortable establishment within which a consumer can choose from a range of flavoured tobacco to smoke. To my knowledge, these establishments often also offer food and drink alongside the flavoured tobacco. They also often provide menus and waiter service, and I consider the nature and method of use to be similar to that of an establishment for solely providing food and drink. The intended purpose will differ to an extent, although there may be an overlap in that both are for the purpose of providing a comfortable place for consumers to socialise as well as enjoy refreshments. Consumers may be shared, to the extent that they will both be engaged with by the general public. There may be a small element of competition, in that consumers may choose to eat and drink in a hookah lounge over another location, but this will not be particularly pronounced. I do not find the services to be complementary. Overall, I find these services to be similar to the opponent's services for the *provision of food and drink in guest lodges* to between a low and medium degree.

accommodation bureaux [hotels, boarding houses];

52. The applicant has conceded some similarity between these services and the opponent's earlier services. The above services will be offered by a business for the purpose of finding accommodation for consumers, namely hotels or boarding houses. They will differ in nature to the *provision of accommodation in guest lodges* as provided by the opponent. The purpose will also differ to an extent, with one being for the purpose of finding and securing the most appropriate accommodation, and the other being for the purpose of providing that accommodation. However, there is a general overlap in that they are both for the purpose of ensuring the consumer has somewhere to stay. The consumers will also be shared, those primarily being members of the general public seeking accommodation. The services will not be in competition, but I consider they will be at least important, if not essential for one another. Further, I note accommodation bureaux services are in my experience, often offered by those parties also providing accommodation, helping consumers find accommodation for the next stage of their travels for example, in addition to being offered by impartial and largely distinct third parties. I therefore find that trade channels may be shared to an extent and there is a level of complementarity between the services. Overall, I find these services similar to the opponent's services to between a low degree.

rental of transportable buildings

53. The applicant has not conceded any level of similarity between the services above and the opponent's earlier services. It is my view that the rental of transportable buildings will be services for the rental of a building itself rather than of accommodation within a building. This may be the rental of a furnished or an unfurnished transportable structure, generally to businesses for a specific purpose. It is my view that the nature of these services differ to the opponent's services, as does the intended purpose. I do not find the trade channels or consumers will generally be shared, and I do not find the services are likely to share a method of use, nor do I consider that they will be complementary or in competition. Overall, I find the above services dissimilar to the opponent's services.

information and advice in relation to the preparation of meals; decorating of food; food reviewing services [provision of information about food and drinks].

54. The applicant has conceded some similarity between the opponent's services and the services above. I consider these to be closest to the opponent's services for the *provision of food and drink in guest lodges*. I do not find the nature or purpose of the above services to overlap with the opponent's services, nor do I consider these to be in competition. Further, I do not consider the services to be strictly complementary. Consumers will be shared to the extent all of the services are targeted at the general public. In respect of *decorating of food* and the *information and advice in relation to the preparation of meals* I find these may share channels of trade with the opponent's services for the *provision of food in guest lodges*, although I do not find this to be the case in respect of *food reviewing services [provision of information about food and drinks]*. Overall, I find the services *information and advice in relation to the preparation of meals* and *decorating of food* similar to low degree to the opponent's *provision of food and drink in guest lodges*, whereas I find *food reviewing services [provision of information about food and drinks]* similar only to a very low degree.

boarding for animals

55. The opponent argues that these services are identical to its services in accordance with the principles set out in *Meric*, on the basis that they are all accommodation services. I disagree. The opponent's services include *provision of temporary accommodation in guest lodges*. I note here that if there is any doubt that the wording of the specification itself limits the opponent's accommodation services in this way (i.e. to the provision of accommodation for humans in guest lodges), this is in any case how I have interpreted the services when considering the fair specification for the opponent. If it were my view that they were not to be considered limited in this way within the opponent's original specification, then when coming to a fair specification I would have in any case limited these to services that do not include accommodation for animals. It is my view that the nature, intended purpose, and method of use of these services differs. Further, I consider that the services are not in competition and are not complementary. There will likely be an overlap in users, in the sense that pet owners may well book their pets in to board prior to going to stay in a guest lodge, and there may be an occasional overlap in trade channels, with some guest lodges possibly also offering animal boarding, although I am not aware that this is the norm.

However, it is my view that overall, the applicant's services *boarding for animals* are dissimilar to the opponent's *provision of accommodation in guest lodges*.

rental of cooking apparatus; rental of drinking water dispensers; rental of chairs, tables, table linen, glassware

56. In respect of the services above, (and also in respect of the applicant's *rental of transportable buildings*) the opponent argues:

The Applicant's "rental of cooking apparatus; rental of drinking water dispensers", "rental of transportable buildings" and "rental of chairs, tables, table linen, glassware" in Class 43 are similar to all of the services of the earlier registrations. They could all be provided to customers (either businesses or the general public) in conjunction with the provision of food and drink, for example by way of external catering services.

I find the nature and intended purpose of the opponent's *provision of food and drink in guest lodges* to differ to these services. I also find the method of use to differ. I consider the user may be shared in respect of the rental of cooking apparatus or chairs, tables, table linens and glassware, to the extent that all of these services may be used by the general public. However, whilst I note the opponent's suggestion that these services may be offered in conjunction with the provision of external catering services, the opponent's specification does not cover external catering services. I do not consider the services to be complementary or in competition. I do note the services may occasionally share trade channels, with places such as guest lodges possibly hiring this sort of equipment out to guests for an additional fee for events. However, I find this unlikely to be the case for transportable buildings or drinking water dispensers. Overall, I find *rental of cooking apparatus* and *rental of chairs, tables, table linen, glassware* to be similar to the opponent's services at best to a very low degree. I find the *rental of drinking water dispensers* to be dissimilar, and I stand by my earlier finding that the *rental of transportable buildings* is dissimilar to the opponent's services.

Comparison of marks

57. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

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

59. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
MALA MALA	

60. The earlier marks comprise the two words MALA MALA. This is where the overall impression lies.

61. The contested mark includes the heavily stylised words ‘mala mala’ in addition to what appears to be a stylised foreign script. In my view this may be considered to be a foreign translation of the words ‘mala mala’. Considering the consumer is likely to

pay more attention to word elements than to stylisation, or to a script they are not familiar with, it is my view that the words 'mala mala' are the most dominant in the mark. However, the foreign script also plays a significant role in the overall impression of the mark, and the heavy stylisation also contributes to a lesser extent to the same.

Visual comparison

62. Visually, the marks coincide on the basis that they all include the wording MALA MALA/mala mala. I note again here that the earlier marks are filed as word marks which protects the words contained in the marks, whatever form, colour or typeface are used. The earlier marks may therefore be used in all lower-case letters like the contested mark. However, it is my view that the heavy stylisation of the contested mark falls outside of what would be considered as fair and notional use of the word mark, and as such this, as well as the large stylised foreign script, both act as points of visual difference between the marks. Overall, I find the marks to be visually similar to a medium degree.

Aural comparison

63. It is my view that the only elements of each mark that will be pronounced are the two words MALA MALA. I therefore consider the marks to be aurally identical.

Conceptual comparison

64. Within its final written submissions, the opponent submits that neither mark will convey any meaning to the UK consumer. I agree. I find some consumers will consider Mala Mala to be the repetition of an entirely made-up word. Others may consider it to be an unknown foreign word combination or expression. Outside of the fact that some consumers may believe all the marks derive from foreign origins, I find no conceptual meaning and therefore the position is effectively neutral.

Average consumer and the purchasing act

65. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

66. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

67. The average relevant consumer of the services will, for the most part, primarily comprise members of the general public. In respect of the provision of food and drink, consumers will likely pay attention to factors such as quality, variety and suitability for their personal tastes, preferences, or dietary requirements. I find a medium level of attention will be paid in respect of these services. In respect of hotels and guest lodge services, I note the level of attention will likely be slightly higher, due to these likely being a slightly less frequent purchase and considering these services concern a place for the consumer to sleep overnight. Factors such as reviews, comfort, facilities, and security might all be considered when engaging the services, and a slightly above medium level attention will likely be paid in respect of the same. Whilst I note that motels are generally for short stays during a long journey and factors such as facilities will not be as much of a consideration, factors such as security, comfort, parking and location will still be considered, and as such a medium level of attention will likely be paid.

68. In respect of services such as the rental of glassware and cookery equipment and decorating of food, members of the general public will likely engage these for an occasion and seek to ensure they hire the right equipment or service for their needs or preferences, and I consider that a medium level of attention will be paid in respect of the same. Where these services are sought by professional consumers, the level of attention is likely to be slightly higher due to the impact getting the right equipment or look might have on their business.

69. When seeking services such as information and advice in relation to the preparation of meals and food reviewing services, the general public is likely to consider the reputation of the source of the information and the subject matter according to their own tastes or requirements. Consumers may be members of the general public, particularly in relation to information and advice in relation to the preparation of meals, or they may include professional consumers, for example restaurant owners or professionals in the media seeking the services of a food reviewer. The general public is likely to pay a medium level of attention to the services, whereas the level of attention paid by professionals again might be slightly higher due to their own reputation being on the line.

70. Generally, the services will be engaged with visually, with consumers viewing the marks on websites or on the outside of the establishments offering the services. However, I cannot discount the possibility for word-of-mouth recommendations or telephone bookings, in addition to the possibility for verbal assistance in the booking process provided by travel agents for example, and as such I do not completely discount the aural comparison.

Distinctive character of the earlier trade mark

71. 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).”

72. The earlier marks are neither descriptive nor allusive of the services offered. For those consumers to whom the marks appear to be the repetition of a made-up word, I find the earlier marks hold a high degree of distinctive character inherently. For those who consider the mark to comprise an unknown foreign language word combination or expression, the distinctiveness will be slightly lower, although it will remain relatively high. I consider both groups will represent a significant proportion of average consumers.

73. As the opponent has filed use of its earlier marks, I will consider whether the distinctiveness of the marks has been enhanced further by way of that use. When considering whether the distinctive character of a mark has been enhanced, it is the perception of the UK consumer at the relevant date, that being the filing date of the contested mark, that is key.

74. I have outlined the bulk of the opponent’s evidence concerning their UK use of the marks within the proof of use section above. I note again the opponent’s healthy UK turnover and its booking numbers, in addition to its marketing arrangements, showing its marketing efforts in the UK. Whilst I have previously found that the opponent has made reasonable use of its mark within the UK, it is my view that the use made of the

marks will not have raised the distinctive character above the already relatively high inherent level in this instance.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion

75. Prior to reaching a decision under section 5(2)(b), I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 18 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, 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 they have kept in their mind. I must consider the level of attention paid by the average consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. I must consider that the level of distinctive character held by the earlier mark will have an impact on the likelihood of confusion. I must remember that the distinctiveness of the common elements is key.⁶ I must keep in mind that a lesser degree of similarity between the services may be offset by a greater degree of similarity between the marks, and vice versa. I must also consider that both the degree of attention paid by the average consumer and how the services are obtained will have a bearing on how likely the consumer is to be confused.

76. There are two types of confusion that I may find. The first type of confusion is direct confusion. This occurs where the average consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the average consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.⁷

77. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), as the Appointed Person, stressed that a finding of indirect confusion

⁶ See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, in which Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar.

⁷ *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10

should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

78. I note at this stage that where I found the services to be dissimilar, there can be no likelihood of confusion between the marks.⁸ There will therefore be no likelihood of confusion in respect of the following contested services:

Class 35: Business management of hotels.

Class 43: Rental of transportable buildings; rental of drinking water dispensers; boarding for animals.

79. In respect of the remaining services, I consider firstly the likelihood of direct confusion between the marks. I note that I found the marks similar visually to a medium degree, conceptually neutral and aurally identical. I found the mark to hold a high or relatively high degree of inherent distinctiveness, and I noted that the services would generally be purchased visually, although I did not completely discount the aural comparison. I also found the level of attention paid to the services by the general public would mostly be medium to above medium, with the professional consumers attention being slightly higher. I found the services to range from similar to a very low level to identical.

80. Considering all of the factors, and particularly noting the considerable visual differences between the marks in this instance, it is my view that there is no likelihood of direct confusion between the marks. It is my view that even where the services are identical, the consumer will still notice the differences present in the marks and not be confused on that basis. Whilst I note the aural identity and the possibility for verbal recommendations, in the global assessment of likelihood of confusion, visual and aural considerations may not hold the same weight⁹ and I consider that generally, particularly where the services are identical or highly similar, they would be subject to

⁸ See *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

⁹ See *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03

a visual inspection prior to their engagement, helping to mitigate the likelihood of direct confusion in this instance.

81. I therefore go on to consider the likelihood of indirect confusion. In *L.A. Sugar* (cited above) Mr Iain Purvis Q.C. (as he then was), as the Appointed Person set out three examples of when indirect confusion may occur as below:

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

82. I note that the examples above were intended to be illustrative and are not exhaustive. I also keep in mind *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, in which Arnold LJ referred to the comments of James Mellor Q.C. (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

83. I consider again all of the factors of this case. Whilst I note the high level or relatively high level of inherent distinctiveness in the earlier mark, I do not consider these marks to fit exactly into one of the categories set out in *L.A. Sugar* above. However, I remind myself that these are not exhaustive, and that in this case the two marks share an identical distinctive and dominant component. This element comprises the whole earlier mark, and the additional matter featured in the contested mark appears to be a foreign translation of the earlier wording. It is my view that considering these factors, where the services are at least similar to a low degree, the consumer is likely to assume that the contested mark is simply a stylised version of the earlier mark that may be used as a brand variant, or alternatively that the earlier mark may be a simplified version of the earlier mark for use within text or simplified marketing material. I therefore find a likelihood of indirect confusion in respect of services which are similar to at least a low degree, those being:

Class 43: Restaurants; cafés; bar services; canteens; snack-bars; hotel accommodation services; rental of temporary accommodation; cafeteria services; information and advice in relation to the preparation of meals; take-away restaurant services; accommodation bureaux [hotels, boarding houses]; hookah lounge services; decorating of food; motels.

84. Where I found only a very low level of similarity between the services, it is my view that the consumer is more likely to put the similarities in the mark down to coincidence, and not be indirectly confused. I therefore find no likelihood of indirect confusion in respect of the following services:

Class 43: Food reviewing services [provision of information about food and drinks]; rental of cooking apparatus; rental of chairs, tables, table linen, glassware.

Section 5(4)(a)

85. Section 5(4)(a) states:

“(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,

(aa) [...]

(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.”

86. 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.”

87. 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)."

88. 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 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 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.”

89. 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.’ ”

90. The applicant having filed no evidence, the relevant date for assessing whether there is goodwill in the sign will be the filing date of the contested application, that being 11 November 2022.

Goodwill

91. Goodwill is described in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 233 as below:

“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.”

92. In *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*, [2015] UKSC 31, Lord Neuberger (with whom the rest of Supreme Court agreed) stated (at paragraph 47 of the judgment) that:

“I consider that we should reaffirm that the law is that a claimant in a passing off claim must establish that it has actual goodwill in this jurisdiction, and that such goodwill involves the presence of clients or customers in the jurisdiction for the products or services in question. And, where the claimant's business is abroad, people who are in the jurisdiction, but who are not customers of the claimant in the jurisdiction, will not do, even if they are customers of the claimant when they go abroad.”

And later said, at paragraph 52:

“As to what amounts to a sufficient business to amount to goodwill, it seems clear that mere reputation is not enough, as the cases cited in paras 21-26 and 32-36 above establish. The claimant must show that it has a significant goodwill, in the form of customers, in the jurisdiction, but it is not necessary that the claimant actually has an establishment or office in this country. In order to establish goodwill, the claimant must have customers within the jurisdiction, as opposed to people in the jurisdiction who happen to be

customers elsewhere. Thus, where the claimant's business is carried on abroad, it is not enough for a claimant to show that there are people in this jurisdiction who happen to be its customers when they are abroad. However, it could be enough if the claimant could show that there were people in this jurisdiction who, by booking with, or purchasing from, an entity in this country, obtained the right to receive the claimant's service abroad. And, in such a case, the entity need not be a part or branch of the claimant: it can be someone acting for or on behalf of the claimant.”

93. Within its pleadings, the opponent claims to own goodwill under its sign MALA MALA in the UK in respect of the following services:

Operation of game reserves for sightseeing purposes; conducting game viewing drives; information and advisory services relating to any of the aforesaid.

Operation of game reserves for recreational or entertainment purposes; information and advisory services relating to any of the aforesaid.

Provision of accommodation and provision of food and drink in guest lodges; information and advisory services relating to any of the aforesaid.

94. Within its final written submissions, the opponent states:

“The Opponent has a well-established presence and reputation among UK consumers for its Class 43 services, namely the provision of food and drink and the provision of accommodation through its game lodge.”

95. The opponent makes no mention of the additional services relied upon in its pleadings within its final submissions, and as such I too will focus on these services. I have previously set out the bulk evidence filed by the opponent in relation to the use of its sign in the UK for these services when considering proof of use at paragraphs 23-27. I will not repeat this summary at this stage, but I note the consistent use of the sign over a number of years prior to the relevant date and the relatively healthy turnover derived from these services engaged with by the UK consumer. I note again that the services themselves are located abroad and not in the UK in this instance.

However, I note that the services were marketed and purchased by consumers in the UK, with bookings made either directly with the opponent or via a UK travel representative. With consideration to the case law set out above, it is my view that the opponent will have accrued a moderate level of goodwill in relation to its trade of *provision of accommodation and provision of food and drink in guest lodges* in the UK. I am also satisfied that the sign MALA MALA was distinctive of that goodwill at the relevant date.

Misrepresentation

96. In my assessment under section 5(2)(b) I found there would be a likelihood of confusion between a mark identical to the sign relied upon under this ground and the contested mark in relation to some of the contested services, based upon the same services in which the opponent has accrued goodwill.

97. In *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, Kitchin LJ considered the role of the average consumer in the assessment of a likelihood of confusion. Kitchen L.J. concluded:

“... if, having regard to the perceptions and expectations of the average consumer, the court concludes that a significant proportion of the relevant public is likely to be confused such as to warrant the intervention of the court then it may properly find infringement.”

98. Although this was an infringement case, the principles apply equally under 5(2): see *Soulcycle Inc v Matalan Ltd*, [2017] EWHC 496 (Ch). In *Marks and Spencer PLC v Interflora*, [2012] EWCA (Civ) 1501, Lewison L.J. had previously cast doubt on whether the test for misrepresentation for passing off purposes came to the same thing as the test for a likelihood of confusion under trade mark law. He pointed out that it is sufficient for passing off purposes that “a substantial number” of the relevant public are deceived, which might not mean that the average consumer is confused. However, in the light of the Court of Appeal’s later judgment in *Comic Enterprises*, it seems doubtful whether the difference between the legal tests will (all other factors being equal) produce different outcomes. This is because they are both normative tests

intended to exclude the particularly careless or careful, rather than quantitative assessments.

99. It is my view that in this instance, the test for misrepresentation under section 5(4)(a) will not produce a different result to my assessment under section 5(2)(b). I therefore find a misrepresentation in respect of the following services:

Class 43: Restaurants; cafés; bar services; canteens; snack-bars; hotel accommodation services; rental of temporary accommodation; cafeteria services; information and advice in relation to the preparation of meals; take-away restaurant services; accommodation bureaux [hotels, boarding houses]; hookah lounge services; decorating of food; motels;

100. For the same reasons I have identified under section 5(2)(b), namely due to the distance between the services, I find there will be no misrepresentation in respect of the following remaining services:

Class 35: *Business management of hotels.*

Class 43: *Rental of transportable buildings; rental of drinking water dispensers; boarding for animals; food reviewing services [provision of information about food and drinks]; rental of cooking apparatus; rental of chairs, tables, table linen, glassware.*

Damage

101. In *Harrods Limited V Harroddian School Limited* [1996] RPC 697, Millett L.J. described the requirements for damage in passing off cases like this:

“In the classic case of passing off, where the defendant represents his goods or business as the goods or business of the plaintiff, there is an obvious risk of damage to the plaintiff's business by substitution. Customers and potential customers will be lost to the plaintiff if they transfer their custom to the defendant in the belief that they are dealing with the plaintiff. But this is not the only kind of damage which may be caused to the plaintiff's goodwill by the deception of the public. Where the parties are not in competition with each other, the

plaintiff's reputation and goodwill may be damaged without any corresponding gain to the defendant. In the *Lego* case, for example, a customer who was dissatisfied with the defendant's plastic irrigation equipment might be dissuaded from buying one of the plaintiff's plastic toy construction kits for his children if he believed that it was made by the defendant. The danger in such a case is that the plaintiff loses control over his own reputation.

102. In this instance, I find the misrepresentation that the applicant's goods are those of, or are economically connected to the opponent, would inevitably lead to damage, likely by way of loss of custom for the opponent, or by way of damage to the opponent's goodwill as described above.

Final Remarks

103. Both parties have achieved partial success within these proceedings. Subject to any successful appeal, the application will be refused for the following services:

Class 43: Restaurants; cafés; bar services; canteens; snack-bars; hotel accommodation services; rental of temporary accommodation; cafeteria services; information and advice in relation to the preparation of meals; take-away restaurant services; accommodation bureaux [hotels, boarding houses]; hookah lounge services; decorating of food; motels.

104. Subject to any successful appeal, the application will proceed to registration in respect of the following services, in addition to all of the goods and services not subject to this opposition:

Class 35: Business management of hotels.

Class 43: Rental of transportable buildings; rental of drinking water dispensers; boarding for animals; food reviewing services [provision of information about food and drinks]; rental of cooking apparatus; rental of chairs, tables, table linen, glassware.

COSTS

105. Both parties have achieved a partial success in these proceedings, and in the circumstances and subject to any successful appeal, I order that both parties bear their own costs.

Dated this 20th day of September 2024

Rosie Le Breton

For the Registrar