

**O/363/19**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3090336 BY  
WHITE OUTLINE LIMITED  
TO REGISTER:**



**AND**



**AS A SERIES OF TRADE MARKS IN CLASS 41**

**AND**

**IN THE MATTER OF THE OPPOSITION THERETO  
UNDER NO. 404286 BY  
DHP FAMILY LTD**

## Background and pleadings

1. White Outline Limited (“the applicant”) applied to register the following trade marks as a series in the United Kingdom on 21 January 2015:



They were accepted and published in the Trade Marks Journal on 6 February 2015 in respect of the following services:

Class 41

*Provision of sporting activities; provision of rock climbing facilities and training; BMX park hire; skateboard park hire.*

2. The application was opposed by DHP Family Ltd (“the opponent”). The opposition is based upon sections 5(1), 5(2), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). The opposition concerns all services in respect of which registration has been sought.
3. With regards to its claim based upon sections 5(1), 5(2) and 5(3) of the Act, the opponent is relying upon UK Trade Mark 2623177:

ROCK CITY

The mark was applied for on 1 June 2012 and registered on 2 November 2012 in respect of the following services, all of which the opponent states it is relying on under sections 5(1), 5(2) and 5(3) of the Act:

Class 41

*Nightclub services; discothèque services; organisation, promotion and presentation of live performances; concerts; entertainment services;*

*entertainment services in the nature of music performances and events, videos, theatre, live performances, circus acts, shows, concerts; sporting and cultural activities; festival services; organisation, promotion, production, management and conducting of festivals; organisation of events for fund raising.*

Class 43

*Catering services for the provision of food and drink; restaurant and cafeteria services and bar services; catering services.*

4. The opponent claims that the marks are identical or very similar and that the services covered by the applicant's specification are the same as, or similar to, services covered by the earlier mark, leading to a likelihood of confusion on the part of the public. Therefore, registration of the contested mark should be refused under sections 5(1) and/or 5(2) of the Act.
5. Additionally, or alternatively, the opponent claims that use of the applicant's mark without due cause for all the applied-for services would take unfair advantage of the reputation of the earlier mark and cause detriment to the reputation or distinctive character of that mark. It claims that:
  - it has built up a significant reputation in the earlier mark for all the services covered by it;
  - the applicant would gain attention for its services by feeding off the fame of the earlier mark;
  - use of the applicant's mark is calculated to take advantage of the reputation of the earlier mark by "appropriating the intrinsic concepts and the concepts acquired through careful promotion of the mark";
  - use of the applicant's mark in relation to services which are not considered similar "would damage the consumer's perception of the Opponent's mark by causing it to be associated with services which are adverse or negative to the

reputation which the Opponent has created and invested in its trade mark”;  
and that

- the applicant’s use of the mark in relation to the services applied for would lead to a dilution of the distinctive character of the earlier mark, so that it is no longer capable of arousing immediate association with the services for which it is registered and used by the opponent.

Therefore, the opponent pleads, registration of the contested mark should be refused under section 5(3) of the Act.

6. Under section 5(4)(a) of the Act, the opponent claims that use of the applicant’s mark for all the applied-for services is liable to be prevented under the law of passing off, owing to its goodwill attached to the sign **ROCK CITY**, which it claims to have used in the UK (specifically, Nottingham) since December 1980, in respect of the following services, which are also covered by the earlier marks:

*Nightclub services; discoteque services; organisation, promotion and presentation of live performances; concerts; entertainment services; entertainment services in the nature of music performances and events, videos, theatre, live performances, circus acts, shows, concerts; sporting and cultural activities; festival services; organisation, promotion, production, management and conducting of festivals; organisation of events for fund raising*

*Catering services for the provision of food and drink; restaurant and cafeteria services and bar services; catering services.*

7. The applicant filed a defence and counterstatement, denying that the marks are identical and, while acknowledging an aural similarity, claiming that the marks are visually and conceptually different, such that the consumer will not be confused. The applicant also denies that the earlier mark has a reputation in the UK and that use of its mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark, and that the

opponent has earlier rights such that the registration of the contested mark could be prevented by the law of passing-off.

8. Further, the applicant claims that it, and its predecessor in title, have been trading as Rock City since 1994 and that at no time has the applicant or its predecessor been made aware of any confusion on the part of the public. It says that there has been honest concurrent use of the marks for more than 22 years.
9. The opponent and the applicant filed evidence in these proceedings. This will be summarised to the extent that is considered necessary.
10. The opponent and applicant also filed written submissions, including written submissions in lieu of a hearing, on 28 March 2019. These will not be summarised but will be referred to as and where appropriate during this decision.
11. No hearing was requested and so this decision is taken following a careful perusal of the papers.
12. In these proceedings, the opponent is represented by Potter Clarkson LLP and the applicant by James Legal Limited.

## **Evidence**

### ***Opponent's Evidence-in Chief***

13. The opponent's evidence comes from Mr George Henry Akins, Managing Director of DHP Family Ltd, a position he has held since 1994. His witness statement is dated 11 April 2017. There is also a witness statement, dated 27 March 2017, from Ms Alexandra Richards, Administrative Manager at ROCK CITY Office, a position she has held since 24 August 2016.
14. ROCK CITY is a nightclub and live music venue in Nottingham, with a capacity of 2450. It opened in 1980 and the first band to play there was The Undertones. Since then, Mr Akins states, the venue has hosted artists such as David Bowie,

Nirvana, Oasis and Ed Sheeran. Brochures produced for the 25<sup>th</sup> and 30<sup>th</sup> anniversaries of ROCK CITY and supplied as Exhibit GHA2 contain full gig listings, stories and quotes from musicians who have played there.

15. Mr Akins states that ROCK CITY has built up considerable reputation and goodwill over the years it has been trading. In support of this statement, he adduces a selection of articles from *The Guardian* and the BBC News website. In an article entitled “The gig venue guide: Rock City, Nottingham” and dated 7 January 2014, *The Guardian* says:

“Rock City’s reputation as one of the best venues in the country is long held, and well deserved. It’s a favourite stop-off for many acts, and the atmosphere on a big night can’t be beaten.”<sup>1</sup>

In an article on the BBC News website dated 25 October 2015, and entitled “When the breakdancing craze swept Britain”, drum and bass DJ Goldie is quoted as saying:

“Nottingham Rock City – you heard about the infamy of it all before you actually went there.”<sup>2</sup>

16. Mr Akins also draws my attention to awards won by the venue. He states that “ROCK CITY has been awarded the best club by Kerrang magazine for a record 10 years in a row.”<sup>3</sup> It is not clear to which years this refers, but Exhibit GHA6 contains evidence that Distortion at Nottingham Rock City topped the readers’ poll for best club in 2007.<sup>4</sup> The venue was runner-up in the “Best Venue Teamwork: Major Club (cap. 800+)” in the LiveUK Music Business Awards from 2011 to 2013, before winning this award in 2014.<sup>5</sup>

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<sup>1</sup> Exhibit GHA3, page 2.

<sup>2</sup> Exhibit GHA3, page 5.

<sup>3</sup> Paragraph 13.

<sup>4</sup> Exhibit GHA6, pages 5-6.

<sup>5</sup> Exhibit GHA6, page 31.

17. Exhibit GHA4 contains figures for turnover, marketing spend, number of gigs and club nights held. I reproduce them below:

<b>Date</b>	<b>Turnover (£)</b>
2012	4,925,251
2013	5,056,837
2014	4,980,929
2015	5,664,880
2016 (to end October)	4,600,153

<b>Date</b>	<b>Marketing spend (£)</b>
2012	71,000
2013	58,000
2014	54,000
2015	72,000
2016 (to end October)	56,000

<b>Date</b>	<b>Number of gigs</b>	<b>Number of club nights</b>
2012	144	199
2013	152	198
2014	143	212
2015	133	216
2016 (to end October)	98	184

18. Mr Akins states that a number of sporting events have been held at the venue over the years. From the evidence in Exhibit GHA8, there appear to have been two skate festivals in 1997 and 1998,<sup>6</sup> a Mixed Martial Arts (MMA) event in 2009, darts events in 2016, a wrestling event on 1 November 2015, and a boxing and MMA event in 2017.

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<sup>6</sup> A third skate festival was also planned for 1999, but the venue was changed to Nottingham Ice Rink.

19. In her witness statement, Ms Richards says that between August 2016 and December 2016 she received three telephone calls from members of the public “asking to book climbing walls or purchase climbing equipment, in the mistaken belief that they are speaking to the ROCK CITY establishment in Hull.”

### ***Applicant’s evidence***

20. The applicant’s evidence comes from Mr Mark English, Managing Director of White Outline Limited trading as Rockcity. It is dated 28 July 2017. In this witness statement, Mr English provides an account of the development of his business. I shall summarise the key facts that are presented therein.

21. Mr English states that in 1992 he began work on a project to build an indoor climbing centre in Kingston-upon-Hull. Hull Indoor Climbing Centre Limited trading as Rock City (“Hull Indoor”) opened for business in 1994. Mr English explains that:

“...for a ‘rock climbing’ centre to be built and located in a city, ‘Rock City’ seemed to be an obvious reference and a choice of name which explains fully and concisely what we do.”<sup>7</sup>

22. Shortly after its opening, a member of staff suggested constructing skateboard ramps in the half of the building that was not used for indoor climbing. The skate park opened in 1996 and was known as “Rock City, the Skate Park”.

23. In March 1997, Hull Indoor received a letter from the opponent’s solicitors threatening trade mark infringement action unless Hull Indoor changed its name to “a name which bears no relation to the words ‘Rock City’” and gave undertakings to make no further use of ‘Rock City’ or a similar name in connection with its business.<sup>8</sup> What appears to have prompted this letter was a forthcoming skateboarding event taking place at Rock City Nottingham and a concern about confusion for potential participants.

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<sup>7</sup> First Witness Statement of Mr Mark English, paragraph 5.

<sup>8</sup> Exhibit ME1, pages 9-10.



24. Hull Indoor responded to this letter via its solicitors on 7 March 1997.<sup>9</sup> In this letter, it was explained that:

“The name ‘Rock City’ was decided upon as a description for the activity in that they had brought rocks to the City, rather than the public having to go out into the countryside.”

The letter further notes that Hull Indoor had already been trading for two and a half years without comment, and that the skate park had been open for around eleven months. It denied that the parties were engaged in similar activities and that there would be any confusion. Following this letter, the matter does not appear to have been taken forward, although Mr English states that “as a gesture of goodwill and in order also to avoid any negative association with a heavy metal venue, as such venues were known in 1997 (some climbers and skateboarders might like heavy metal music but this would not be the case with the great majority of our users who would find such music off-putting)”, Hull Indoor changed its trading name to “Rockcity”.<sup>10</sup>

25. At some point in the 1990s, Mr English opened a shop selling a range of mountain sport products and trading as “We Love Mountains”. He states that he traded successfully under this name for more than ten years.

26. In 2006, the business of Hull Indoor was purchased by the applicant. Mr English states that both the applicant, and its predecessor in title, have used the trading name “Rockcity” in respect of the applied-for services and that the opponent has had knowledge of such use.

27. Mr English explains what prompted the application for a trade mark:

“29. As the ‘credit crunch’ finally ‘kicked in’ and took effect, I decided to move away from the retail sale of luxury goods and so I started to wind it

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<sup>9</sup> Exhibit ME1, pages 11-12

<sup>10</sup> First Witness Statement of Mark English, paragraph 16.

down. A person who had prior knowledge of my shop and its name decide to 'clone' (i.e. copy exactly) my business in an attempt to take my reputation and goodwill from me. He actually set up his identical business in North Yorkshire and he used my logo and my trade name in order to sell the same products as I was selling. He rode completely and absolutely on the back of my reputation and he took business away from me as a result of this.

30. I was unable to take any formal action against this person since I had no registered mark or trade name but, since this was an aspect of my business which I wanted to end, I was not too concerned about it. However I was worried about the fact that this could happen to me again and so I set out to protect 'Rockcity', since this was my main business, and it had been so for 20 years, by making this application."

28. Mr English challenges the opponent's evidence of confusion in the market, noting that Ms Richards received only three enquiries about rock climbing and none relating to skate parks. He goes on:

"I am able to confirm categorically, firstly, that we have received, during the last 15 years which precede this witness statement, no emails which are in error or which are incorrect, i.e. which were intended for the nightclub and, secondly, that nor have we ever been 'tagged in' on any of our social media platforms."<sup>11</sup>

### ***Opponent's evidence-in-reply***

29. The opponent's evidence-in-reply comes in the form of a second witness statement from Mr Akins, dated 9 October 2017.

30. The applicant had put the opponent to strict proof of the existence of any trade mark relating to sporting and cultural activities which predates either 1997 or the

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<sup>11</sup> First Witness Statement of Mark English, paragraph 43.

start of the applicant's operations in 1994.<sup>12</sup> Mr Akins refers to UKTM 1439558, which is now dead. It was filed on 13 September 1990 and registered on 23 October 1992 for *Concerts; discotheque and night-club services; all included in Class 41*.<sup>13</sup>

31. Exhibits GHA10 to GHA12 are directed towards demonstrating a strong association between skateboarding and music. Mr Akins notes that his venue has hosted performers from a variety of genres, not just heavy metal and rejects the assertion that skateboarders would be put off by the music played there.
32. Mr Akins' final exhibit, GHA13, contains three witness statements. The first is from Ms Emma Bowley, Ticket Administrator of DHP Family Ltd and previously working in the Box Office at Rock City, and is dated 5 October 2017. She states that:

“Between August 2014 and October 2014 I took a general enquiry call and after asking the caller which event they wished to buy tickets for, it became obvious from their response that they had intended to speak to the ROCK CITY venue in Hull. I said that they had come through to the wrong number and suggested that they call the White Outline business in Hull.”

33. The second witness statement is from Mr Tom Sokolyk, the Marketing & Data Developer of DHP Family Ltd and previously working in the Box Office at Rock City, and is dated 5 October 2017. In identical terms to those used by Ms Bowley, he states that he took one such call between October 2013 and October 2014.
34. The final witness statement is from Ms Laura Clayton, who was employed by the DHP Family Ltd, from 26 September 2012 to 8 December 2015. Her witness statement is dated 4 October 2017. She states that as part of her role she took general enquiries and that “on multiple occasions” she took a general enquiry call in which the caller requested climbing facilities information. She does not say precisely or approximately how many times this occurred. She also states that the

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<sup>12</sup> First Witness Statement of Mark English, paragraph 15.

<sup>13</sup> Exhibit GHA9.

venue received catalogues for rock climbing equipment that were intended for the applicant's operations in Hull. It is not clear how many times this happened.

35. There is also a supplemental witness statement from Mr Akins, dated 9 October 2017, and which corrects an error in his first witness statement.

### ***Applicant's further evidence***

36. The applicant sought permission to file further evidence, submitting that the opponent's evidence-in-reply was an attempt to file new evidence. It also wished to reply to Mr Akins's corrected witness statement. This request was granted on 22 November 2018, and the applicant given until 24 December 2018 to file evidence strictly in reply to its specific points of issue. The applicant's further evidence is dated 19 December 2018. I shall not produce a detailed summary of this statement, but merely say that it takes issue with the evidence adduced by Mr Akins to support his assertion that there is a strong association between music and skateboarding, and challenges the value of the witness statements in Exhibit GHA13 as evidence of actual confusion among the public.

37. The opponent was given the opportunity to respond to this further evidence and concluded that it did not wish to do so.

## **Decision**

### **Section 5(1) and 5(2)(a) grounds**

38. Section 5 of the Act states that:

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

2. A trade mark shall not be registered if because –

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

...

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

39. An “earlier trade mark” is defined in section 6(1) of the Act:

“In this Act an ‘earlier trade mark’ means –

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.”

40. The registration upon which the opponent relies qualifies as an earlier trade mark under the above provision. In this opposition, the opponent is relying upon all the services for which this earlier mark is registered. As the mark was registered within the five years before the date on which the applicant’s mark was published, it is not subject to proof of use and the opponent is therefore entitled to rely on all the services for which the mark stands registered.

41. The opponent submits that the marks are identical and that therefore the contested mark is prevented from being registered by section 5(1) or section 5(2)(a). The Court of Justice of the European Union (CJEU) held in *S.A. Société LTJ Diffusion v Sadas Verbaudet SA*, Case C-291/00, that:

“... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark

or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by the average consumer.”<sup>14</sup>

42. I consider that the marks are not identical. The applicant’s series of marks contain a device, which the average consumer would notice. Consequently, I dismiss the claims based upon sections 5(1) and 5(2)(a) and turn my attention to the section 5(2)(b) ground.

### **Section 5(2)(b) ground**

43. Section 5(2)(b) of the Act states that:

“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.”

44. In considering the opposition under this section, I am guided by the following principles, gleaned from the decisions of the courts of the European Union in *SABEL BV v Puma AG* (Case C-251/95), *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* (Case C-39/97), *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (Case C-3/03), *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*

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<sup>14</sup> Paragraph 54.

(Case C-120/04), *Shaker di L. Laudato & C. Sas v OHIM* (Case C-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P):

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them 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 greater degree of similarity between the marks and vice versa;

- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### **Comparison of services**

45. As I have already noted, the opponent may rely on all the services in respect of which the earlier mark is registered. This includes *sporting and cultural activities*. The opponent submits that this is a broad term that includes the applicant's *Provision of sporting activities; provision of rock climbing facilities and training; BMX park hire; skateboard park hire*, and that the services are therefore identical.

46. In *Gérard Meric v OHIM*, Case T-133/05, the General Court stated that:

“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 für 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.”<sup>15</sup>

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<sup>15</sup> Paragraph 29.



47. All the applied for terms are types of sporting activity. Consequently, I agree with the opponent that the services are identical.

### **Average consumer and the purchasing act**

48. 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:

“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 word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”<sup>16</sup>

49. The average consumer of the services at issue is a member of the general public, who purchases tickets to take part in, or watch, these activities or use the facilities, either for themselves or for others, for example as a gift. They will make the selection using primarily visual means, seeing adverts or other promotional material in the press, using websites, seeing adverts for events as they walk down streets, or seeing signage on the premises themselves. I must also take account of the aural element, as word-of-mouth recommendations and hearing future events discussed, for example, on the radio will play a part. The cost of these services will vary greatly. In those cases where the average consumer will be a member of the audience, the cost is likely to reflect the relative fame and success of the artist, athlete or sports team. In those cases where the average consumer will be taking part in the activity, the cost is likely to reflect the facilities available at the venue. This range will go from small amounts of money that make the experience an everyday purchase to the large sums of money that make the

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<sup>16</sup> Paragraph 60.

activities more of a special occasion. Particularly in the case of sporting activities, the customer may have the option to pay an annual or part-annual subscription to allow them to access the services when they want. In my view, the average consumer will pay an average level of attention when making their decision.

### **Comparison of marks**

50. It is clear from *SABEL* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo* that:

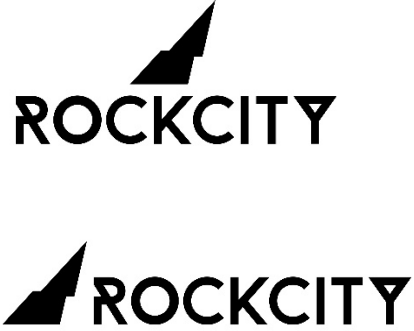
“... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”<sup>17</sup>

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

52. The respective marks are shown below:

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<sup>17</sup> Paragraph 34.

Earlier mark	Contested marks
ROCK CITY	

53. The opponent’s mark consists of two words: ROCK and CITY, presented in a standard font with no stylisation and in capital letters.<sup>18</sup> In my view, the average consumer will see these words as a single phrase, with neither word being dominant over the other. The overall impression lies in the phrase as a whole.

54. The applicant’s marks consist of a slightly stylised word “ROCKCITY” with a device in black. In one mark in the series, the device appears above the word; in the other, it sits to the left. I consider that nothing turns on this difference, so I shall treat them as a single mark. The device consists of two blocks, the lower being a trapezium, and the upper a triangle. The triangle is offset, so that it overhangs the lower shape to the right. The applicant describes this in its counterstatement as “a mountain or wall device”.<sup>19</sup>

55. I turn now to the word element. The first and last letters of the word are stylised: the diagonal line of the R starts higher up the letter than is the norm, the upper part of the standard vertical line is missing, and there is a horizontal line across the top of the Y. The stylisation would not affect the ability of the average consumer to understand the word. Where a mark has both word and figurative elements, the word(s) are generally more distinctive than the figurative elements: see *Migros-Genossenschafts-Bund v European Union Intellectual Property Office (EUIPO)*

<sup>18</sup> Registration of a trade mark in capital letters covers use in lower case, as stated by Professor Ruth Annand, sitting as the Appointed Person, in *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17.

<sup>19</sup> Paragraph 1.

(CReMESPRESSO), Case T-68/17, paragraph 52. As I have found earlier in this decision, the device will not go unnoticed, but in my view the average consumer will see the word “ROCKCITY” as the more dominant element of the mark, with the device playing a more secondary role.

#### *Visual comparison*

56. The opponent submits that the marks are identical, or at least highly similar:

“... it should be kept in mind that the marks are for the same words, i.e. ROCK CITY, and the minimal stylisation will not have a material impact on the Applicant’s mark.”

The applicant, on the other hand, submits that the marks are visually different.

57. The opponent’s mark and the most dominant element of the applicant’s mark consist of the same letters, in the same order. The differences are whether these letters appear as one word or two, and the stylisation of the applicant’s mark, which, in my view, are small differences. The marks also differ in that the applied for mark has an additional device element not shared by the earlier mark, although I bear in mind my finding that this had less impact in the overall impressions. On the whole, I find the marks to be highly similar.

#### *Aural comparison*

58. As the verbal elements of the marks consist of the same letters, in the same order, they will be articulated in the same way. To my mind, the average consumer will not insert a significant pause between the two words of the opponent’s mark. The device in the applicant’s mark cannot be pronounced. I find the marks to be aurally identical.

### *Conceptual comparison*

59. Whether the word “rock” brings to the mind of the average consumer the idea of a mineral or a form of music, the words will convey the same conceptual message. I have already noted the applicant’s description of the device as “a mountain or wall”. Consumers who see the device in this way are more likely to interpret “rock” as a mineral. There is nothing to persuade me that, if they have done this, they would interpret the opponent’s mark in any other way based on a simple comparison of the marks. The “city” element of the mark could allude to the size and importance of the place where the services covered by the mark are performed: it is a centre for those activities, in the same way as a city is the centre of a larger area. Alternatively, it may convey the message that the services are supplied in the city. If the marks are encountered into the context of music-related services, it seems to me that the former interpretation is more likely; if encountered in the context of rock climbing, the latter. Either way, I find the marks to be conceptually identical to the extent that when they are used in relation to the same services, they will be interpreted in the same way.

### **Distinctiveness of the earlier mark**

60. There is, as has already been noted, a greater likelihood of confusion if the earlier mark is highly distinctive. The CJEU provided guidance on assessing a mark’s distinctive character in *Lloyd Schuhfabrik Meyer*:

“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).”

61. The applicant submits that:

“The Earlier TM has a low level of inherent distinctiveness. It is descriptive. The Opponent is in business as a music venue putting on rock bands, hence ‘Rock’, in the city of Nottingham; ‘City’ signifying the location and being slang for a trendy location.”<sup>20</sup>

62. I must, however, assess the distinctiveness of the mark in relation to the services at issue, particularly where I have found identity to exist. These are *Sporting and cultural activities*. The word “rock” is descriptive of a form of music or rock climbing, but not of any other activities covered by the specified term. The “city” element, as I have already set out in paragraph 59, may be descriptive of the location or allude to the importance of the venue. With both these elements combined, I find that the mark has at most a medium level of inherent distinctiveness.

63. The applicant also submits that:

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<sup>20</sup> Applicant’s counterstatement, paragraph 9.

“The Earlier TM has not acquired any enhanced distinctiveness through its use. The market share of the Opponent is very small and the use of the Earlier TM has been limited to Nottingham.”<sup>21</sup>

It is not clear on what basis the applicant infers that the market share of the opponent is very small. I have been provided with no information on the size of the overall market for any of the relevant activities.

64. The opponent has provided evidence that the name “ROCK CITY” has been in use since 1980 in relation to live popular music events and nightclub services and that some of the biggest names in the music industry have played there. This evidence indicates that knowledge of the venue extends outside Nottingham, as only 53% of tickets were sold to customers with NG postcodes.<sup>22</sup> However, it is not clear to which time period these figures relate. Between 1 January 2005 and 30 November 2016, Nottingham accounted for just under half (49.83%) of UK-based visits to the venue’s website. For the last month of this period, the proportion from Nottingham was 27.83%. A comparison between a one-month and a 143-period does not tell me much that it is useful. Certainly it is not enough to allow me to accept the applicant’s assertion that the opponent’s website experienced a loss of traffic.<sup>23</sup> In any case, the period extends beyond the relevant date. What can be said is that the opponent has attracted internet traffic from outside its home city.
65. The opponent has also invested between £54k and £72k a year on marketing in 2012-2015. As I have already noted, the opponent’s club has won awards and featured in the national media as a music venue. I accept that in the case of popular music events and nightclub services, the distinctiveness of the earlier mark has been enhanced to some extent, although not to the highest level.

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<sup>21</sup> Applicant’s counterstatement, paragraph 10.

<sup>22</sup> Exhibit GHA4, page 9.

<sup>23</sup> The figures in Exhibit GHA7 show a total number of website sessions of 4,813,502 between 1 January 2005 and 30 November 2016. This works out as an average of 33,660 sessions per month. There were 84,373 sessions between 31 October 2016 and 30 November 2016.

## Conclusions on likelihood of confusion

66. In assessing the likelihood of confusion, I must adopt the global approach set out in the case law to which I have already referred in paragraph 44. I must also have regard to the interdependency principle, that a lesser degree of similarity between the services may be offset by a greater degree of similarity between the marks, and vice versa.<sup>24</sup> The distinctiveness of the earlier mark must also be taken into account.
67. Such a global assessment does not imply an arithmetical exercise, where the factors are given a score and the result of a calculation reveals whether or not there is a likelihood of confusion. I must keep in mind the average consumer of the services and the nature of the purchasing process. I note that it is generally accepted that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture he has kept in his mind.<sup>25</sup>
68. There are two types of confusion: direct and indirect. These were explained by Mr Iain Purvis QC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10:

“Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common

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<sup>24</sup> *Canon Kabushiki Kaisa*, paragraph 17.

<sup>25</sup> *Lloyd Schuhfabrik Meyer*, paragraph 27.



element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”<sup>26</sup>

69. It is important to recall that, as the proof of use provisions do not apply here, I am required to consider the fair and notional use of each mark, and not confine myself to the use shown in the evidence. I must keep in mind that the context is one of sporting activities, rather than music services against rockclimbing and skateparks. Given the identity of the services and the high level of similarity, or identity, between the marks, it seems to me that, bearing in mind imperfect recollection, the average consumer is likely to be directly confused. They may well not remember the device or the stylisation in the applicant’s mark.
70. Even if I am wrong in this, I consider that there is also a likelihood of indirect confusion. The average consumer is, I recall, unlikely to have the opportunity to see the marks side-by-side, so I cannot discount the effects of imperfect recollection. The average consumer is unlikely to remember correctly whether the words of the mark are presented separately or joined into one. Given the identity of the services, it seems to me that the average consumer would attribute the differences to a rebranding exercise, and so I find there is also a likelihood of indirect confusion.

### **Honest concurrent use**

71. I have qualified my finding as the applicant relies on honest concurrent use and I must make an assessment of this defence. In its counterstatement, it submits that:

“There has been honest concurrent use for more than 22 years of the Opponent’s mark Rock City and the Applicant’s mark Rockcity, and so, in effect, of the Earlier TM and the Later TM. ... it is the case that use of the Later TM is not liable to have an adverse effect on the essential

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<sup>26</sup> Paragraph 16.

function of the Earlier TM; on account of the parties' past concurrent use there is no danger of the functionality of the Earlier TM being affected."<sup>27</sup>

72. In *Victoria Plum Ltd (t/a Victoria Plumb) v Victorian Plumbing Ltd and others* [2016] EWHC 2911 (Ch), Carr J reviewed the state of the law on honest concurrent use:

"The case law to which I have referred establishes the following principles:

i) Where two separate entities have co-existed for a long period, honestly using the same or closely similar names, the inevitable confusion that arises may have to be tolerated;

ii) This will be the case where the trade mark serves to indicate the goods or services of either of those entities, as opposed to one of them alone. In those circumstances, the guarantee of origin of the claimant's trade mark is not impaired by the defendant's use, because the trade mark does not denote the claimant alone.

iii) However, the defendant must not take steps which exacerbate the level of confusion beyond that which is inevitable and so encroach upon the claimant's goodwill."<sup>28</sup>

73. The CJEU held in *Budějovický Budvar, národní podnik v Anheuser-Busch Inc.*, Case C-482/09, that honest concurrent use may be relevant in opposition and invalidity, as well as infringement, proceedings, although the CJEU stressed that "... the circumstances which gave rise to the dispute in the main proceedings are exceptional".<sup>29</sup>

74. In order to find that there has been honest concurrent use, I would need to be satisfied that at the relevant date the parties have been trading in circumstances

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<sup>27</sup> Paragraph 17.

<sup>28</sup> Paragraph 74

<sup>29</sup> Paragraph 70.

such that the relevant public has been exposed to both marks and has been able to differentiate between them without confusion as to trade origin, or that the circumstances are sufficiently exceptional that some confusion ought to be tolerated. The applicant has provided no evidence of turnover or how much it advertises its services. There is a single screenshot from the applicant's website which shows the contested mark in use both on the site and at the premises, but this is all.<sup>30</sup> In his witness statement, Mr English notes that his business has qualified for a brown tourist road sign, which requires 20,000 unique "out-of-town" visitors per year.<sup>31</sup> However, he does not say when this sign was acquired. All that being said, there is a further problem. The clash upon which I have made my findings under section 5(2)(b) relate to identical services, as the applicant's services are encompassed within the opponent's *sporting activities*. There has been no real concurrent use in relation to such services. This means that there are no exceptional circumstances as per *Budějovický Budvar*. It would have been open for the applicant to challenge the opponent's earlier mark (at least partially) on the basis of its prior use, but it has chosen not to do so. In the circumstances, the defence of honest concurrent use is not applicable.

### **Outcome of section 5(2)(b) ground**

75. The opposition succeeds under section 5(2)(b).

### **Section 5(3) ground**

76. Although the opposition has succeeded under the section 5(2)(b) ground, I shall for the sake of completeness briefly consider the other grounds raised by the opponent.

77. Section 5(3) of the Act states that a trade mark which is identical with or similar to an earlier trade mark:

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<sup>30</sup> Exhibit ME1, page 30.

<sup>31</sup> Paragraph 25

“shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark or international trade mark (EC), in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark”.

78. The conditions of section 5(3) are cumulative:

- 1) The opponent must show that the earlier mark has a reputation
- 2) The level of reputation and the similarities between the marks must be such as to cause the public to make a link between the marks.
- 3) One or more of three types of damage (unfair advantage, detriment to distinctive character or repute) will occur.

79. The factors that must be considered when assessing whether a mark has a reputation include the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it: see *General Motors Corp v Yplon SA*, Case C-375/97, paragraph 27. These are the same factors that were relevant to my earlier assessment of enhanced distinctiveness in paragraphs 63-65. There, I found that the opponent had enhanced the distinctiveness of its mark through use in respect of popular music events and nightclub services and I shall not repeat my analysis here. I consider that the opponent’s mark also has a reputation for these particular services.

80. An assessment of whether the public will make the required mental link between the marks must take account of all relevant factors. The factors identified by the CJEU in *Intel Corporation Inc v CPM United Kingdom Limited* (Case C-252/07) are:

- the degree of similarity between the conflicting marks;

- the nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public;
- the strength of the earlier mark's reputation;
- the degree of the earlier mark's distinctive character, whether inherent or acquired through use; and
- the existence of the likelihood of confusion on the part of the public.<sup>32</sup>

81. While I found there to be likelihood of confusion under section 5(2)(b), it must be remembered that different services are in play under section 5(3). Here I am required to consider the services in which the opponent has a reputation (popular music events and nightclub services) alongside the applied-for services (provision of sporting activities; provision of rock climbing facilities and training; BMX park hire; skateboard park hire). I found that that the distinctiveness of the opponent's mark was enhanced, although not to the highest level. Despite the high degree of similarity between the marks, I do not see that the relevant public would make the required link between the marks. The services are, to my mind, sufficiently different. While both will require reasonably large physical premises, the layout and equipment used will be different. In the absence of a link, the section 5(3) ground fails.

### **Section 5(4)(a) ground**

82. Section 5(4)(a) of the Act states that:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

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<sup>32</sup> Paragraph 42.

(a) by virtue of any rule or law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(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'.

83. It is settled law that for a successful finding of passing off, three factors must be present: goodwill, misrepresentation and damage. Her Honour Judge Melissa Clarke, sitting as deputy Judge of the High Court, conveniently summarised the essential requirements of the law in *Jadebay Limited, Noa and Nani Limited Trading as the Discount Outlet v Clarke-Coles Limited Trading as Feel Good UK* [2017] EWHC 1400 IPEC:

“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 these 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).”

84. I now consider whether the opponent had protectable goodwill and, if so, when such goodwill was in existence. The concept of goodwill was considered by the

House of Lords in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantages 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. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has the power of attraction sufficient to bring customers home to the source from which it emanates.”

85. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O/410/11, Mr Daniel Alexander QC, sitting as the Appointed Person, considered the relevant date for the purposes of section 5(4)(a) of the Act and concluded as follows:

“39. In *Last Minute*, the General Court ... said:

’50. First, there was goodwill or reputation attached to the services offered by LMN in the mind of the relevant public by association with their get-up. In an action for passing off, that reputation must be established at the date on which the defendant began to offer his goods or services (*Cadbury Schweppes v Pub Squash* (1981) RPC 429).

51. However, according to Article 8(4) of Regulation No 40/94 the relevant date is not that date, but the date on which the application for a Community trade mark was filed, since it requires that an applicant seeking a declaration of invalidity has acquired rights over its non-registered national mark before the date of filing, in this case 11 March 2000.’

40. Paragraph 51 of that judgment and the context in which the decision was made on the facts could therefore be interpreted as saying that events prior to the filing date were irrelevant to whether, at that date, the use of the mark applied for was liable to be prevented for the purpose of Article 8(4) of the CTM Regulation. Indeed, in a recent case before the Registrar, *J Sainsbury plc v Active: 4Life Ltd* O-393-10 [2011] ETMR 36 it was argued that *Last Minute* had effected a fundamental change in the approach required before the Registrar to the date for assessment in a s.5(4)(a) case. In my view, that would be to read too much into paragraph [51] of *Last Minute* and neither party has advanced that radical argument in this case. If the General Court had meant to say that the relevant authority should take no account of well-established principles of English law in deciding whether use of a mark could be prevented at the application date, it would have said so in clear terms. It is unlikely that this is what the General Court can have meant in the light of its observation a few paragraphs earlier at [49] that account had to be taken of national case law and judicial authorities. In my judgment, the better interpretation of *Last Minute*, is that the General Court was doing no more than emphasising that, in an Article 8(4) case, the *prima facie* date for determination of the opponent's goodwill was the date of the application. Thus interpreted, the approach of the General Court is no different from that of Floyd J in *Minimax*. However, given the consensus between the parties in this case, which I believe to be correct, that a date prior to the application date is relevant, it is not necessary to express a concluded view on that issue here.

41. There are at least three ways in which such use may have an impact. The underlying principles were summarised by Geoffrey Hobbs QC sitting as the Appointed Person in *Croom's TM* [2005] RPC 2 at [46] (omitting case references):

- (a) The right to protection conferred upon senior users at common law;



(b) The common law rule that the legitimacy of the junior user's mark in issue must normally be determined as of the date of its inception;

(c) The potential for co-existence to be permitted in accordance with equitable principles.

42. As to (b), it is well-established in English law in cases going back 30 years that the date for assessing whether a claimant has sufficient goodwill to maintain an action for passing off is the time of the first actual or threatened act of passing off: *J.C. Penney Inc. v Penneys Ltd* [1975] FSR 367; *Cadbury-Schweppes Pty Ltd v The Pub Squash Co. Ltd* [1981] RPC 429 (PC); *Barnsley Brewery Company Ltd v RBNB* [1997] FSR 462; *Inter Lotto (UK) Ltd v Camelot Group plc* [2003] EWCA Civ 1132 [2004] 1 WLR 955: 'date of commencement of the conduct complained of'. If there was no right to prevent passing off at that date, ordinarily there will be no right to do so at the later date of application.

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.'

86. As I have already noted, the application was made on 27 January 2015. The applicant, however, states that it (or its predecessor in title) has been using the sign "Rock City" since 1994 for an indoor climbing centre and since 1995 for an

indoor skate park. At some point in 1997 the sign was changed to “Rockcity”. These dates have not been challenged by the opponent and the applicant has supplied correspondence dating from 1997 between its legal representatives and those of the opponent to support its statements.<sup>33</sup> In the light of this, I find that 1994 is the appropriate date in relation to which I should make my assessment. The earliest evidence I have before me of any sports event taking place at the opponent’s venue is a skateboard festival in 1997. In 1994, the venue appears to me to have been used solely for live music performances and nightclub services and it is in relation to these services alone that I find there could be any protectable goodwill.

87. If I am wrong, and the applicant has not used the mark before the application date of 27 January 2015, I would still find that the opponent had not demonstrated protectable goodwill in connection with sporting activities. The evidence adduced by the opponent shows its association with skateboarding festivals in 1997-1999 and a martial arts event in 2009. The opponent also states that a darts event took place in 2013 and there may have been some boxing in 2003. Over a period of 18 years, that is, at most, six sporting events and the opponent provides no attendance figures. It seems to me that, in relation to sporting activities in a relatively large city, this level of activity is insufficient to show protectable goodwill, and that the opponent’s goodwill relates to live music events and nightclub services.

88. A finding of passing off does not require the parties to operate in a common field of activity: see *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA). However, where the fields are different, it may be harder to demonstrate misrepresentation, the test for which was set out by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341:

“is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the

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<sup>33</sup> Exhibit ME1, pages 9-12.

public will be misled into purchasing the defendants' [product] in the belief that it is the respondents' [product]."

89. It seems to me that in 1994 it is not likely that a substantial number of members of the public would have been misled into thinking that the indoor climbing centre was run by the same people as the music venue and nightclub. "Rock City" alludes to the services that the applicant's predecessor was providing. In *W.S. Foster & Son Limited v Brooks Brothers UK Limited* [2013] EWPC 18 (PCC), Mr Iain Purvis QC, sitting as a Recorder of the Court, said that:

"Mr Aikens stressed in his argument the difference between 'mere wondering' on the part of a consumer as to a trade connection and an actual assumption of such a connection. In *Phones 4U Ltd v Phone 4U.co.uk Internet Ltd* [2007] RPC 5 at 16-17 Jacob LJ stressed that the former was not sufficient for passing off. He concluded at 17:

'This of course is a question of degree – there will be some mere wonderers and some assumers – there will normally (see below) be passing off if there is a substantial number of the latter even if there is also a substantial number of the former.'"<sup>34</sup>

90. I recall my earlier finding that the phrase "Rock City" could allude to the different services provided by both parties. I have been provided with no evidence to persuade me that, in the light of this finding, there would be a substantial number of the public assuming there to be a trade connection between the two undertakings. The section 5(4)(a) ground fails. However, the failure of the sections 5(3) and 5(4)(a) grounds does not affect the outcome of my decision, as the opponent had fully succeeded under section 5(2)(b).

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<sup>34</sup> Paragraph 54.

## **Conclusion**

91. The opposition has been successful. The application by White Outline Limited will be rejected.

## **Costs**

92. The opponent has been successful. In the circumstances, I award the opponent the sum of £1800 as a contribution towards its costs. The sum is calculated as follows:

*Official fee for filing the notice of opposition: £200*

*Preparing a statement and considering the other side's statement: £300*

*Preparing evidence: £1000*

*Preparation of written submissions: £300*

***Total: £1800***

93. I therefore order White Outline Limited to pay DHP Family Ltd the sum of £1800. The above sum should be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated 1 July 2019**

**Clare Boucher  
For the Registrar,  
Comptroller-General**