

O-025-18

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 3170757

BY

AIRBLUE LIMITED

TO REGISTER AS A TRADE MARK

air**blue**

IN CLASS 39

AND

THE OPPOSITION THERETO

UNDER NO 407345

BY

JETBLUE AIRWAYS CORPORATION

BACKGROUND

1. On 21 June 2016, Airblue Limited (the applicant) applied to register the above trade mark. The mark stands as follows:¹

Class 39

Airline

2. The application was published on 8 July 2016, following which JetBlue Airways Corporation (the opponent) filed notice of opposition.

3. The opponent bases its case on section 5(2)(b), 5(3), 5(4)(a) and 3(6) of the Trade Marks Act 1994 (the Act). For the purposes of the 5(2)(b) and 5(3) grounds the opponent relies upon the following trade marks:

Mark details and relevant dates	Goods and services relied upon
<p>EUTM: 1440288</p> <p style="text-align: center;">JETBLUE</p> <p>Filed: 24 December 1999 Registered: 23 February 2001 Priority date: 09 July 1999 (US)</p>	<p>Class 39 Transport, but not including the transport of oils, greases, fuels, lubricants and petrols; packaging and storage of goods except oils, greases, fuels, lubricants and petrols; travel arrangements; transportation of passengers, parcels, freight and cargo by air; providing information about air transportation via a website on a global computer network, not including any such information relating to the refuelling of aircraft; travel agency services, namely, making reservations and bookings for transportation; airline passenger services in the nature of a frequent flyer program.</p>
<p>EUTM: 3828671</p>  <p>Colours claimed: grey and blue Filed: 21 May 2004 Registered: 29 August 2005</p>	<p>Class 12 Vehicles but not including vehicles for the purpose of transporting fuels and petrols; apparatus for locomotion by land, air or water.</p> <p>Class 39 Transport, but not including the transport of oils, greases, fuels, lubricants and petrol; packaging and storage of goods except oils, greases, fuels, lubricants and petrol; organization of travels; transport of passengers, parcels, freight and cargo by air.</p>

¹ *International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).*

<p>EUTM: 488381</p> <p style="text-align: center;">JETBLUE</p> <p>Filed: 6 February 2006 Registered: 1 February 2007</p>	<p>Class 12 Vehicles; apparatus for locomotion by land, air or water.</p> <p>Class 35 Advertising; business management; business administration; office functions; organisation, operation and supervision of sales incentive schemes; administration of a frequent flyer program; information, advice and business assistance all relating to the aforesaid services.</p> <p>Class 39 Transport, but not including the transport of oils, greases, fuels, lubricants and petrols; packaging and storage of goods except oils, greases, fuels, lubricants and petrols; travel arrangements; transportation of passengers, parcels, freight and cargo by air; providing information about air transportation via a website on a global computer network, not including any such information relating to the refuelling of aircraft; travel agency services, namely, making reservations and bookings for transportation; airline passenger services in the nature of a frequent flyer program.</p>
<p>EUTM: 15274418</p> <p style="text-align: center;">jetBlue</p> <p>Filed: 23 March 2016 Registered: 21 June 2017</p>	<p>Class 35 Advertising services, namely, promoting the goods and services of others, including travel services, credit card use, car rentals, and hotel accommodations; retail and online retail store services in relation to clothing, apparel, headwear bags, stationery, printed matter, mugs, luggage, luggage tags, sporting apparatus, pet clothing, pet carriers, pet toys, blankets, towels, digital storage media, toiletry cases, sunglasses, sunglasses holders, jewellery, leashes, collars, umbrellas, footwear, household containers, drinks containers, coasters, stickers, cosmetics, skincare products, phone cases, phone wallets, sunscreen, tanning lotions, chargers for electronic apparatus, lanyards, mirrors, key chains, keyrings, notepads, journals, mouse pads, ear protectors, speakers, headphones, cases and covers for tablet computers, toys, wipes, tissues, non-alcoholic beverages, alcoholic beverages, foodstuffs, snack foods, pre-prepared meals, fragrances and watches.</p> <p>Class 39 Air transportation services, namely, transportation of passengers, parcels, freight and cargo by air; providing travel information services featuring travel offers and vacation travel tour activities; transportation services featuring a frequent flyer bonus program; providing</p>

	<p>automated check-in and ticketing services for air travelers; travel agency services, namely, making reservations and bookings for transportation, cruises and vehicle rentals; arranging of cruises; air and boat transportation services, featuring a frequent traveler incentive and award program for travelers in the nature of travel discounts; providing information about travel and transportation, vacation packages, cruises, vehicle rentals and special travel offers via a global computer network; the foregoing not in connection with providing temporary accommodation for guests.</p> <p>Class 43 Providing travel lodging information services and travel lodging booking agency services for travelers; providing catering of foods and drinks; the foregoing not in connection with providing temporary accommodation for guests.</p>
<p>EUTM: 3687381</p> <p style="text-align: center;">BLUE</p> <p>Filed: 1 March 2004 Registered: 27 July 2005</p>	<p>Class 12 Vehicles; apparatus for locomotion by land, air or water.</p> <p>Class 35 Advertising; business management; business administration; office functions; organisation, operation and supervision of sales incentive schemes; information, advice and business assistance all relating to the aforesaid services.</p> <p>Class 39 Transport, but not including the transport of oils, greases, fuels, lubricants and petrols; packaging and storage of goods except oils, greases, fuels, lubricants and petrols; travel arrangements; transportation of passengers, parcels, freight and cargo by air; providing information about air transportation via a website on a global computer network, not including any such information relating to the refuelling of aircraft; travel agency services, namely, making reservations and bookings for transportation; airline passenger services in the nature of a frequent flyer program.</p>

4. With regard to the opposition based on section 5(4)(a) of the Act, the opponent relies on JETBLUE, jetBlue and the following two signs:





5. It states all four of these signs have been used throughout the UK since 1 January 2000 in respect of the following services:

“Transportation; transportation by air; travel arrangements; transportation of passengers, parcels, freight and cargo by air; providing information about air transportation via a website on a global computer network, not including any such information relating to the refueling of aircraft; travel agency services, namely making reservations and bookings for transportation; airline passenger services in the nature of a frequent flyer program.”

6. The opponent’s claim under section 3(6) of the Act is as follows:

“3. Mr Chaudhary will have become aware of the Opponent via the airline industry or by his time spent in the US, and has adopted the mark of the application with a view to copying the Opponent's mark. This much is clear from the word elements of the mark itself; any doubt that this is the case is removed by the fact that it copies the colour and representation scheme of the JETBLUE Colour Logo...”

5. The deliberate and clear attempt to use and register a mark which so closely resembles the mark of the Opponent as detailed in paragraph 3 falls short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined, and as such the application would be deemed to be in bad faith in light of the case of Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd [1999] RPC 367.”

7. The applicant filed a counterstatement in which it denies the grounds on which the opposition is based.

“3.1. The mark and the earlier mark are not identical and the goods and services supplied by the Applicant and the Opponent are not identical or similar. The goods and services supplied respectively by the Applicant and the Opponent are supplied by reference to routes allocated to each party in completely different markets and locations. The test of similarity in goods and services must be made by reference to the markets. There is no similarity between the carriage of passengers across North and South America and the carriage of passengers between the Pakistan, the Middle East and the United Kingdom.

3.2. This is an application for a UK mark. The Applicant flies routes between the Indian sub continent and the UK whereas the Opponent flies routes across North and South America. The services supplied can only be identified by the routes flown and geographical areas covered by the respective parties and accordingly it should be determined that the passenger air carriage services supplied by the Applicant are not identical or similar to those supplied by the Opponent. There is no cross over in services purchased by customers of the Applicant with services purchased by customers of the Opponent.

3.3. According to the case-law, the average consumer is considered to be reasonably observant and circumspect. It is submitted that the common use of the word "blue" in connection with aviation in two entirely different parts of the world will not serve to confuse reasonably observant and circumspect consumers. The customers and suppliers and potential customers and suppliers carried by airblue will not have heard of JetBlue nor will the customers and suppliers and potential customers and suppliers of JetBlue have heard of airblue. Neither set of consumers will be likely to be confused by the use of the two marks.

3.4. The Opponent has brought no evidence of any of their customers or suppliers or potential customers or suppliers being confused by the applicant's name. The applicant has no evidence of its own customers or suppliers or potential customers or suppliers being confused by the

existence of JetBlue. It should be noted that the Applicant has received no notice of any of its customers, prospective customers, suppliers or prospective suppliers confusing airblue with JetBlue.”

8. The applicant’s defence regarding the claim under section 3(6) is as follows:

“1.1. The Applicant started its business in 2003. Tariq Chaudhury the CEO of the Applicant is referred to by the Opponent in paragraph 3 of the grounds of opposition. The Opponent states that Mr Chaudhury ‘will have become aware of the Opponent via the airline industry or by his time spent in the US’. The Opponent contends that the Applicant has adopted the airBlue mark with a view to copying the Opponent’s mark EUTM003828671. It will be seen below that the two marks are in different fonts and colours. The allegation that the word elements make it clear that there has been copying of the Opponent’s mark is denied. There are 10 other registered airlines with the word ‘Blue’ in the name and 53 other registered airlines with the word ‘Jet’ in the name. As is argued below the words ‘blue’ and ‘Jet’ are words which are not distinctive.

1.2. The airblue logo was designed by Shahid Abbasi, a colleague of Mr Chaudhury, who was based in Pakistan at the relevant time. He had no knowledge of JetBlue which is unsurprising given that JetBlue had no operations in or out of the Indian subcontinent or the Middle East at that time or, indeed, thereafter. Mr Chaudhury also had no knowledge of JetBlue at that time. This can be accounted for by the fact that JetBlue only commenced operations in 2000 and Mr Chaudhury only became aware of them in or about 2006/2007. It is understood that JetBlue only commenced its service in and out of California on 4 January 2007 some 3 years after the Applicant adopted its airblue logo. It was in 2007 that Mr Chaudhury first became aware of JetBlue during discussion about low cost carriers in a social context.”

9. Both sides filed evidence and skeleton arguments. A hearing subsequently took place before me, at which the applicant was represented by Ms Victoria Jones of

Counsel, instructed by NML Corporate. The opponent was represented by Mr Aaron Wood of Wood IP Limited.

EVIDENCE

Opponent's evidence

Witness statement of Ms Elizabeth Windram and exhibits EW1-EW13

10. Ms Windram is the opponent's Director of Brand and Advertising, a position she has held since 2015. Her statement is dated 10 March 2017. Her evidence relates to the nature and extent of the opponent's business.

Witness statement of Ms Anna Perry and exhibits AP1-AP10

11. Ms Perry is a consultant employed by the opponent's representative. Her statement is dated 9 March 2017. Her evidence relates to the use of blue on the tail fins of aircraft and online references to the parties.

Applicant's evidence

Witness statement of Mr Andrew Geoffrey Smithson and exhibits AGS1-AGS5

12. Mr Smithson is a solicitor employed by the applicant's representative. His statement is dated 15 May 2017. His statement refers to a number of airlines which use 'Jet' and 'Blue' in their names. The remainder of the evidence relates to the opponent's presence in the UK and Europe.

Opponent's evidence in reply

2nd witness statement of Ms Anna Perry and exhibits AP11-AP15

13. Ms Perry's second witness statement comprises a number of internet prints relating to the opponent's presence on websites and its flight routes and departure airports – this is in response to Mr Smithson's witness statement for the applicant.

14. Whilst I have listed all of the evidence filed by the parties, I do not intend to summarise it further but will refer to it and the respective submissions as necessary below.

Preliminary issues

15. In its skeleton argument the opponent submits:

“[The opponent] has relied upon EU trade mark application (now registration) no 15274418 in respect of the stylised mark JETBLUE in black and white... This registration is less than five years old and so is not subject to proof of use. The level of stylisation on the Black and White Logo is low such we suggest that if similarity and a likelihood of confusion are not found in the case of this mark the same outcome would arise under the word mark... For this reason you may decide it is appropriate to treat the Black and White Logo as the ‘lead’ trade mark.”

16. I propose therefore to deal first with earlier trade mark EUTM 15274418 relied upon by the opponent, in respect of its 5(2)(b) ground:



17. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6.-(1) 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.

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

18. The opponent's earlier mark is not subject to proof of use because, at the date of publication of the application, it had not been registered for five years.²

19. There are a number of points I need to address before turning to the merits of this opposition. The first of these is the concept of ‘notional use’.

20. The applicant submitted throughout its pleadings and reiterated during the hearing that the parties’ services are provided to different consumers and there can be no likelihood of confusion ‘in the context of the actual and proposed use of the marks in question’. Much has been made of the particular routes which the parties’ airlines use and the fact that the opponent operates outside the UK.

21. Until a trade mark has been registered for five years (at which point the proof of use requirements (set out above) in s.6A of the Act may become relevant), it is entitled to protection in relation to all the goods/services for which it is registered. Consequently, the opponent’s earlier EU mark, shown above, must be protected for the services for which it is registered in classes 35, 39 and 43 without the opponent needing to prove any use of its mark in relation to those services. The opponent’s earlier mark is therefore entitled to protection against a likelihood of confusion with the applicant’s mark based on the ‘notional’ use of the earlier mark for all the services listed in the register. The concept of notional use was explained by Laddie J. in *Compass Publishing BV v Compass Logistics Ltd*³ as follows:

"22. ...It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used. Infringement in such a case must involve considering notional use of the registered mark.

² See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations 2004: SI 2004/946) which came into force on 5th May 2004.

³ [2004] RPC 41

In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with the sector of trade in which the mark is registered and the alleged infringer's use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place.”

22. So far as the applicant's use of its mark is concerned, in *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*⁴, the Court of Justice of the European Union (“CJEU”) stated at paragraph 66 of its judgment that when assessing the likelihood of confusion in the context of registering a new trade mark it is necessary to consider all the circumstances in which the mark applied for might be used if it were registered.

23. Furthermore, in *Devinlec Développement Innovation Leclerc SA v OHIM*,⁵ the CJEU stated that:

“59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks.”

24. In other words, the way in which the applicant is actually using its trade mark at this point is not a factor which is relevant to the decision. I must consider both marks for the services for which they are registered/applied.

⁴ Case C-533/06

⁵ Case C-171/06P

25. The second point I need to address is the applicant's claim in relation to other registered marks and airlines using 'Jet' and 'Blue' in their names.⁶ The applicant's witness states:

"3.a. I have also carried out searches myself and can state that the results of these searches shows that there are 10 other registered airlines with the word 'Blue' in the name and 53 other registered airlines with the word 'Jet' in the name."

26. It is not clear whether these searches were conducted on trade mark or company name registers, nor has the applicant provided any examples of the use of 'Jet' and 'Blue' by other airline businesses. It has not indicated the actual marks/names used or how they are used.

27. To the extent that the airlines referred to have trade marks on the Trade Mark register I bear in mind the guidance in *Zero Industry Srl v OHIM*,⁷ when the General Court stated that:

*"73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word 'zero', it should be pointed out that the Opposition Division found, in that regard, that '... there are no indications as to how many of such trade marks are effectively used in the market'. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 *GfK v OHIM – BUS(Online Bus)* [2005] ECR II-4865, paragraph 68, and Case T-29/04 *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)* [2005] ECR II-5309, paragraph 71)."*

⁶ See the witness statement of Mr Smithson, dated 15 May 2017.

⁷ Case T-400/06

28. As I have already indicated, I will consider the opponent's case under the 5(2) ground on the basis of its jetBlue mark which is not subject to proof of use and for the full extent of the services for which it is registered. It is on that basis that this decision must be made. Consequently, I will say no more about this submission.

DECISION

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

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

(a)...

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

Section 5(2)(b) case law

30. 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.

(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 services

31. The applicant submits in its skeleton argument that it probably suffices to compare only the opponent's services in class 39 as the application is filed in respect of an airline in class 39. I agree, the services to be compared are as follows:

The opponent's services:	The applicant's services:
<p>Class 39 Air transportation services, namely, transportation of passengers, parcels, freight and cargo by air; providing travel information services featuring travel offers and vacation travel tour activities; transportation services featuring a frequent flyer bonus program; providing automated check-in and ticketing services for air travelers; travel agency services, namely, making reservations and bookings for transportation, cruises and vehicle rentals; arranging of cruises; air and boat transportation services, featuring a frequent traveler incentive and award program for travelers in the nature of travel discounts; providing information about travel and transportation, vacation packages, cruises, vehicle rentals and special travel offers via a global computer network; the foregoing not in connection with providing temporary accommodation for guests.</p>	<p>Class 39 Airline</p>

32. In *Gérard Meric v Office for Harmonisation in the Internal Market*,⁸ which relates to goods but is analogous to services, 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,

⁸ Case T- 133/05

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”.

33. The applicant’s assessment of the similarity of services finds no similarity based on its views of actual use by both parties. As I have outlined above, this is not the correct approach. The opponent identifies the most relevant services in its earlier registration as:

“Air transportation services, namely, the transportation of passengers, parcels, freight and cargo by air; transportation services featuring a frequent flyer bonus program.”

34. It concludes that the list of services in its registration and the applicant’s class 9 specification are two ways of describing the key services of an airline.

35. The services listed by the opponent are clearly included within the broad term ‘airline’. In my view, ‘providing automated check-in and ticketing services for air travelers’ is also a service that one would expect to be provided by an airline as are information and travel advice services to the extent that they relate to the operation of an airline and exist to give passengers necessary information.

36. In accordance with Meric, I find the applicant’s services to be identical to, at least, ‘Air transportation services, namely, the transportation of passengers, parcels, freight and cargo by air’, ‘transportation services featuring a frequent flyer bonus program’ and ‘providing automated check-in and ticketing services for air travelers’ .

The average consumer and the nature of the purchasing act

37. In accordance with the above cited case law, I must determine who the average consumer is for the goods and services at issue and also identify the manner in which they will be selected in the course of trade.

38. 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*,⁹ 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.”

39. The opponent submits that the level of attention paid by the average consumer of airlines is neither particularly high nor particularly low. It concludes:

*“Airline services may be high cost or low cost, and use of them may be frequent or infrequent depending on the consumer, but there is no evidence from the Applicant to support a higher level of attention.”*¹⁰

40. The applicant draws my attention to a decision of another Hearing Officer in this tribunal, in which he stated that the level of attention paid by the average consumer to ‘jet travel’ would be higher than the level of attention paid to some of the other services before him for consideration, due primarily to the costs involved.¹¹ The range of goods and services before the Hearing Office in that case were considerable and I do not see how this generalised finding is helpful here.

41. The applicant concludes that given the cost and nature of the services, the fact that care needs to be taken to ensure the correct times and that the service requires a degree of trust to be put in the airline by the customer, the degree of attention paid to the purchase is high.

⁹ [2014] EWHC 439 (Ch)

¹⁰ See paragraph 17.i. of the opponent’s skeleton argument.

¹¹ See paragraph 52 of UBERJET, BL O/475/16

42. With regard to airline services, a customer may choose to book their own flights or may use the services of a third party travel booking company, travel agent or travel website. The selection process for the services is likely to be primarily visual, being made from a website or brochure, though I do not discount the fact that there may be an aural element given that some of these services may be purchased as a result of recommendation or in the course of discussion with a travel advisor or arranger. Airline services may be used very regularly by some consumers, such as business travellers, or may be used very infrequently, for the annual holiday or 'once in a lifetime' trip. A number of factors may need to be considered when making a purchase, such as flight times, departure airports, luggage requirements, seat and meal choices.

43. Prices for these services vary greatly depending on, inter alia, choice of destination, whether flights were booked in advance or as a result of a discount or promotion.

44. Overall, for all of the reasons provided above, the average consumer for these services will pay a higher than average level of attention to the purchase, though not the highest level.

Comparison of marks

45. The marks to be compared are as follows:

The opponent's mark	The applicant's mark
 The logo for jetBlue, featuring the word "jet" in a dark grey sans-serif font and "Blue" in a dark blue sans-serif font.	 The logo for airblue, featuring the word "air" in a light grey sans-serif font and "blue" in a dark blue sans-serif font.

46. In making a comparison between the marks, I must consider the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created by them, bearing in mind their distinctive and dominant components,¹² but without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.

47. In its skeleton argument the applicant states:

"21. a...given that the words comprising the marks 'Jet' and/or 'Blue' are descriptive of the nature, kind, geographical position or other characteristic of the goods and/or services for which they are registered with 'Jet' describing the type of transport or the engine of such transport and 'Blue' describing or alluding to the sky...

b. Any inherent distinctive character would have to lie in the combination of words but as they are both descriptive and although presented without any break between the words, they are nevertheless readily legible and retain the same meaning."

48. The applicant further submits that in marks with low distinctiveness (in this case, it submits that both parties' marks comprise non-distinctive word elements) the colour is a material factor.

49. The Court of Appeal has stated on two occasions following the CJEU's judgment in *Specsavers*, that registration of a trade mark in black and white covers use of the mark in colour. This is because colour is an implicit component of a trade mark registered in black and white (as opposed to extraneous matter).¹³ Thus a black and white version of a mark should normally be considered on the basis that it could be used in any colour. However, it is not appropriate to notionally apply complex colour arrangements to a mark registered in black and white. This is because it is necessary to evaluate the likelihood of confusion on the basis of normal and fair use of the marks,

¹² *Sabel v Puma AG*, para.23

¹³ See paragraph 5 of the judgment of the Court of Appeal in *Specsavers* [2014] EWCA Civ 1294 and *J.W. Spear & Sons Ltd v Zynga, Inc.* [2015] EWCA Civ 290, at paragraph 47

and applying complex colour arrangements to a mark registered, or proposed to be registered, without colour would not represent normal and fair use of the mark.

50. I do not find the presentation of the word blue in the colour blue to be a particularly complex colour arrangement of the type referred to above and I do not find the word 'blue' in the respective marks to be as low in distinctiveness as the applicant suggests. Neither party has made a colour claim for their respective marks. I will make the comparison based on the marks as wholes, in accordance with paragraph 43 above.

51. The opponent submits that the stylisation of both parties' marks is minimal and makes the following submissions regarding the overall impression of the parties' respective marks:

"11. The words JET and AIR in relation to the services of the Application, namely "airline", have a clear meaning. The element BLUE, by contrast, has no such meaning and there is no evidence that it is anything but fanciful for the relevant services.

12. The respective marks are neologisms consisting of a three-letter word of low distinctive content immediately followed by the word BLUE. We say the element BLUE is the dominant and distinctive element of each mark. There must be visual and phonetic similarity, and there is obvious conceptual similarity."

52. The opponent's mark is made up of the words 'jet' and 'Blue' which have been joined. The joining of the words does not prevent either from being identified by the average consumer, something emphasised by the fact that the mark is in lower case, other than the letter B of blue, which is a capital letter and enables the two words to be clearly separated and identified. I agree with the opponent that the stylisation of the mark is minimal. It is presented in a standard typeface in black, with no additional elements. I accept that the word 'jet' is non-distinctive for airline and similar services, but its combination with 'Blue' is not an obvious one. I do not accept, as the applicant suggests, that 'Blue' is descriptive of the services. It may be seen as alluding to the sky, a point I will discuss in more detail below, but it is not directly descriptive in the way that the applicant suggests. Neither word in the opponent's mark is so lacking in

distinctiveness as to be ignored by the average consumer, particularly as the words are joined to create a new whole. The overall impression rests in the mark as a whole.

53. The applicant's mark comprises the words 'air' and 'blue' which have been joined. The word 'air' is in grey text and is presented in a thinner font than the word 'blue' which is presented in a bold text and in a dark blue colour. That said, the stylisation is minimal and does not play a significant role in the mark. The joining of the words does not prevent either from being identified by the average consumer, something which is made more apparent by the differences in weight and colour of the presentation of the two words. The first word 'air' is evidently low in distinctiveness for airline services. However, its use with 'blue' to form a conjoined word is not an obvious combination. Taking these factors into account, and for the reasons given above, the overall impression of this mark rests in its totality.

54. Visually, the marks are the same length. The last four letters of both are 'B-L-U-E'. 'Blue' is noticeable within both marks. Differences rest in the first three letters (or first word) of the marks which are 'air' in the application and 'jet' in the earlier mark. In addition there are some stylistic differences such as the 'grey/blue combination in the application and a very small difference in the typefaces used. The stylistic differences are minimal and will not be given any great significance by the average consumer. Overall, the marks are visually similar to a medium degree.

55. Aurally, the marks are both two syllables in length, the second syllable in both being the known English word, BLUE. Differences rest in the first syllables of both marks, which in each case are common English words with which the average consumer will be familiar, namely, 'air' and 'jet'. I find the marks to be aurally similar to a medium degree.

56. The applicant submits:

"Conceptually the marks share the use of the word blue and in the context of the services, this is likely to have a conceptually similar meaning by reference to sky. However, there is no conceptual similarity between 'jet' and 'air'."

57. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.¹⁴ The assessment must be made from the point of view of the average consumer who cannot be assumed to know the meaning of everything.¹⁵

58. Neither side disputes that both 'jet' and 'air' are low in distinctiveness for what are essentially airline services. Both refer to the type and/or means of travel to which the services relate. In each case the marks as wholes include the second conjoined element which is the word blue. Neither mark would be seen as creating a particular colour, as would be the case with, for example 'jet black'. Both are combinations which are not obvious.

59. Both marks comprise a word which relates to the services, followed by the word blue, which, in my view, will be seen as alluding to the sky. Whatever meaning the average consumer gives to the BLUE part of each of the parties' marks, it will be the same in both cases, since neither create a new whole with a different meaning when combined with the first three letters.

60. I find the marks to be conceptually similar to a medium degree.

Distinctive character of the earlier mark

61. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods and services for which it has been used as coming from a particular undertaking and thus to distinguish those goods and services from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger*.¹⁶

62. I have carried out the assessment under the 5(2) ground based on a mark which is not subject to proof of use. However, the opponent has filed evidence of use which

¹⁴ This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] *e.c.r.-I-643*; [2006] *E.T.M.R.* 29.

¹⁵ *BL O-048-08*

¹⁶ *Joined Cases C-108/97 and C-109/97* [1999] *ETMR* 585.

it submits applies to all of its marks relied upon. The evidence includes turnover figures showing a net income of \$677 million for 2015. While this is certainly not insubstantial, a large part of the opponent's business relates to the US. No turnover has been provided specifically for the UK and EU markets. UK and EU figures which are included relate to the number of journeys and bookings made by passengers, many of which have been made through partner airlines, with the totals for direct bookings with the opponents business being considerably lower. I have no indication of the size of the market in the relevant territories, which I suppose is considerable, nor do I have any indication of the opponent's share of that market. In addition, the opponent is relying on a number of marks, including the registration for BLUE, solus and I cannot determine which sales relate to which marks nor what the average consumer has been exposed to. Accordingly, I cannot identify the extent of the opponent's reach in the UK or EU, nor the average consumer's knowledge of the opponent's business. Consequently, I am unable to conclude that the opponent's mark benefits from an enhanced distinctiveness as a result of the use which has been made of its mark in relation to the services on which it relies.

63. In terms of inherent distinctiveness of the earlier mark I take account of the fact that the first part of the mark, 'jet' is low in distinctiveness for the most of the services for which it is registered and particularly for the airline services which are the crux of this case.¹⁷ The second part of the mark, the word 'Blue' is not descriptive of the services but alludes to the sky. In combination, the earlier mark 'jetBlue', in its totality, is inherently distinctive to a lower than average degree.

Likelihood of confusion

64. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them he has kept in his mind.¹⁸ I must also keep in mind the average consumer for the goods and services, the nature of the purchasing process and have regard to the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by

¹⁷ Accepted by both sides in submissions and at the hearing.

¹⁸ *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

a greater degree of similarity between the respective goods and services and vice versa.

65. I have found the parties' services to be identical. The average consumer may be a member of the public or a professional booking on behalf of a third party. I have concluded that the level of attention paid to the purchase will be higher than average, though not at the highest level and that the purchasing process is primarily a visual one, though I do not rule out an aural element.

66. The respective marks are visually and aurally and conceptually similar to a medium degree.

67. The applicant draws my attention to the general rule that the average consumer pays more attention to the beginnings of marks submitting that although 'blue' is present in both marks, they begin with 'air' and 'jet'. This principle has been established in a number of cases, including, *El Corte Inglés, SA v OHIM*¹⁹ and is a general rule which does not replace the principle that each case must be decided on its merits taking each mark as a whole. In this case, given the low distinctiveness of the first three letters of both parties' marks, I am not persuaded that this is a significant factor which dominates the global assessment I must make.

68. In this case, taking into account the nature of the average consumer, the nature of the purchase and the level of attention to be paid to these services, I do not find that the marks would be directly confused with one another resulting in a likelihood of confusion. However, I do find that the average consumer would confuse the marks indirectly. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10, Mr Iain Purvis Q.C. as the Appointed Person defined indirect confusion in the following terms:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of

¹⁹ Cases T-183/02 and T-184/02. See also: GC cases: *Castellani SpA v OHIM, Spa Monopole, compagnie fermière de Spa SA/NV v OHIM*,¹⁹ (similar beginnings important or decisive), *CureVac GmbH v OHIM*,¹⁹(similar beginnings not necessarily important or decisive) and *Enercon GmbH v OHIM*,¹⁹ (the latter for the application of the principle to a two word mark).

reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

69. I have taken into account the lower than average degree of distinctiveness in the earlier mark and the attention that will be paid to the purchase, but, given the fact that the services are identical and the nature of the purchase being made, I find that an average consumer, familiar with one of the parties’ marks, subsequently encountering the other mark would believe that the services originated from the same or linked undertakings. Both begin with a three letter term which relates to the means or nature of the service being provided, followed by the word ‘blue’. An average consumer familiar with jetBlue as a provider of airline services would simply think that the same services provided by ‘airblue’ were services provided by the same undertaking or one that was economically linked to it and vice versa.

CONCLUSION

70. The opposition succeeds under section 5(2)(b) of the Act in respect of all of the services applied for.

71. The opponent having succeeded in full under this ground, I need not go on to consider the remaining grounds.

COSTS

72. The opponent is entitled to costs which I award on the following basis:²⁰

Official fees:	£100 ²¹
Preparing a statement and considering the other side's statement:	£200
Commenting on the other side's evidence and filing evidence:	£400
Preparation and attendance at a hearing:	£600
Total:	£1400

73. I order Airblue Limited to pay Jetblue Airways Corporation the sum of £1400. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 10th day of January 2018

**Ms AI Skilton
For the Registrar,
The Comptroller-General**

²⁰ See Tribunal Practice Notice 2/2016 for the appropriate scale of costs.

²¹ Reduced to take account of the fact that the case was determined on the 5(2) ground.