TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2474083

BY LIFE HOTELS LIMITED

TO REGISTER IN CLASS 43 THE TRADE MARK:

LIFE

AND

IN THE MATTER OF OPPOSITION NO 97571 BY

TANGRAM LEISURE LIMITED

TRADE MARKS ACT 1994

In the matter of application No 2474083
By Life Hotels Limited
to register in class 42 the trade mark LIFE

and

In the matter of opposition No 97571 by
Tangram Leisure Limited

Background

1. Life Hotels Limited ("Life") applied for the trade mark LIFE on 5 December 2007. Registration is sought for:

> Class 43**:** Temporary accommodation services; hotel, motel, guest house, and boarding house services; arranging, booking and reservation services in hotels, motels, guest houses, and boarding houses.

2. On 15 July 2008 opposition to the registration of Life's application was made by Tangram Leisure Limited ("Tangram") under section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). Tangram relies on its UK trade mark registration number 2384319C for the words "The Life House", which is registered for:

> Class 03**:** Soaps, perfumery, essential oils, cosmetics, hair lotions, dentifrices.
>
> Class 05**:** Foods and beverages which are adapted for medical purposes.
>
> Class 10**:** Massage apparatus.
>
> Class 25**:** Clothing, footwear, headgear.
>
> Class 28**:** Gymnastic and sporting articles not included in other classes.
>
> Class 29**:** Meat, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces, milk and milk products; edible oils and fats.
>
> Class 32**:** Beers; mineral and aerated waters and non-alcoholic drinks and fruit juices; syrups and other preparations for making beverages, Shandy, de-alcoholised drinks, non-alcoholic beers and wines.

Class 33**:** Alcoholic beverages (except beers).

Class 43**:** Services providing food and drink; temporary accommodation.

Class 44**:** Medical services; hygienic and beauty care for human beings or animals.

3. Tangram's trade mark was filed before Life's application. Life's application does not benefit from an international priority date. Tangram's mark, therefore, counts as an earlier trade mark as defined in section 6(1)(a) of the Act. Tangram's mark did not complete its registration procedure until 23 December 2005 which is less than five years before Life's application was published in the Trade Marks Journal, on 18 April 2008. The consequence of this is that the proof of use provisions contained in section 6A[1] of the Act do not apply. Tangram's earlier trade mark must therefore be considered for its registered specification, as set out above.

4. Life filed a counterstatement, which I will refer to later. Both sides filed evidence, but Tangram's evidence was only filed in reply to that of Life. The evidence is summarised below. Neither side requested a hearing; both sides filed written submissions instead of attending a hearing. I will, of course, also take into account what has been said by the parties in the statement of case and counterstatement.

The evidence

Life's evidence – statutory declaration of Mr Stephen Anthony Jone*s*

5. Mr Jones works for Adamson Jones, Life's representatives in this matter. His evidence describes the results of his investigations into the use in the UK (prior to the filing date of Life's application) of trade marks containing the word LIFE in relation to hotel services, catering services and the like.

6. Mr Jones refers to the "citations" that were raised against Life's application when it was examined for the purposes of acceptance for registration by the Intellectual Property Office and that several marks exist in class 43 (including in relation to hotel and related services) which contain the word LIFE. A copy of the examination report is provided in exhibit SAJO1. He then lists in a table the marks he considers to be most relevant. The table is reproduced below:

[1] Section 6A of the Act was added to the Act by virtue of the Trade Marks (Proof of Use, etc.) Regulations) 2004 (SI 2004/946) which came into force on 5th May 2004.

Number(s)	Mark(s)	Proprietor	Services (summarised)
2259519 E2877108 E4136826	LIFE LIFE (stylized) The pub at life	Luminar Leisure Ltd	Café and restaurant services; catering services; conference and exhibition facilities
2294449	THE LIFE CENTRE	Awareness Ltd	Reservation of holiday accommodation; catering
2385894	MAL LIFE	Malmaison Ltd	Hotel services
2441459	LIFE (stylized)	Camps International Ltd	Travel arrangement
E3472685	MAGIC LIFE	Magic Life der Club International Hotelbetriebs GmbH	Hotel services
E4589875 E4589776	Life Resort LIFE RESORT SANTA POLA (device)	Sanyres Mediterraneo S.L.	Temporary accommodation
U874385	TUI Life	TUI AG	Temporary accommodation; hotel services

7. Mr Jones also refers to a mark FREELIFE (M790772) which he says is also relevant. He states that some of these marks were also in use and provides evidence in support, namely:

> Exhibit SAJO2 in relation to THE LIFE CENTRE. The evidence provided shows that the mark is in use as the name of a yoga and natural health centre. The centre is in London and was established in 1993.
>
> Exhibit SAJO3 in relation to MAGIC LIFE. The evidence provided shows that this is the name of a holiday club which offers accommodation and entertainment etc. The clubs are located overseas. Page A of this exhibit refers to a 'salescenter' with a phone number of '+ 43-1-878 02-777', which is suggestive of the United States. Page B is a screen shot of Thomson Holidays hits for the website 'thomson.co.uk'. Pages C and D appear to be results from a website called 'tripadvisor' regarding Magic

Life Seven Seas Imperial (Turkey). The locations of the reviewers are identified as London, Warrington, Belgium, France, England, Oxford, Northants, Notts and South East.

Exhibit SAJO4 in relation to MAL LIFE. The evidence shows use of MAL LIFE as the name of a magazine which is placed in the bedrooms of Malmaison hotels. The hotels are located throughout the UK.

Exhibit SAJO5 in relation to LIFE RESORT. The evidence is an extract from the Independent (dated 19 July 2006) which discusses overseas retirement communities. One is Santa Pola Life Resort. Mr Jones highlights that some of these properties are rented out.

Exhibit SAJO6 in relation to LIFE/the pub of life. The evidence is an extract from an annual report dated 2006 for Luminar. It shows that one of its establishments is "the pub at life", it also says that "Life is a bar and club concept". There is no information as to how many of these establishments exist. The company runs a number of different branded establishment. Mr Jones adds that such establishments will supply food and drink to customers.

Exhibit SAJO7 in relation to LIFE (Camps International). The evidence shows that the service provide what Mr Jones calls "gap year" type travel. I note that the word LIFE is stylized and the whole logo says "LIFE by Camps International").

Exhibit SAJO8 in relation to FREELIFE. This relates to the name used in Netherlands and Germany as a subrand of Center Parcs holidays resorts. It is known as FREELIFE from Center Parcs.

8. Mr Jones concludes his evidence by stating that due to the use of the word LIFE by others, the essential particulars of Tangram's mark is the mark in totality and not the word LIFE. He states that it will be seen as a play on the word LIGHTHOUSE. He states that the word HOUSE is not suggestive of hotels. He states that HOUSE could in a more generic sense encompass a hotel as an establishment but this could equally be applied to other forms of establishment. He does not believe that THE LIFE HOUSE would be interpreted as 'the LIFE hotel'.

Tangram's evidence - witness statement of Sara Jane Leno

9. Ms Leno works for Wildbore & Gibbons, Tangram's representatives in this matter. Her evidence is in reply to that of Mr Jones, but it is fair to say that it is in the nature of a critique rather than presenting evidence of fact. I will summarise this very briefly.

10. Ms Leno begins by saying that that Mr Jones' evidence regarding marks on the register is irrelevant. She refers to British Sugar Plc v James Robertson & Sons Ltd [1996] RPC 281. In relation to the actual use put forward by Mr Jones she highlights that the services are not related (THE LIFE CENTRE), the clubs are overseas (MAGIC LIFE), there are material differences between the marks, MAL LIFE relates to a magazine, that the resort is overseas (LIFE RESORT), there are no details of actual use (LIFE/the pub at life), that the used mark has other matter and relates to volunteers (LIFE (Camps International)), and that the use of FREELIFE is overseas.

Decision

11. 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,
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

12. In my consideration of whether there is a likelihood of confusion, I take into account the guidance from the case-law of the European Court of Justice ("ECJ") in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117,*Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Matratzen Concord v OHIM* C-3/03 [2004] ECR I-3657, and *Shaker di L. Laudato & C. Sas v OHIM* C-334/05 P (LIMONCELLO). It is clear from these cases that:

> (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,
>
> (b) the matter must be judged through the eyes of the average consumer of the services in question; *Sabel BV v Puma AG,* 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.,*
>
> (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG,*

(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; *Sabel BV v Puma AG,* 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; *Shaker di L. Laudato & C. Sas v OHIM*

(e) nevertheless, the overall impression conveyed to the relevant public by a composite trade mark may, in certain circumstances, by dominated by one or more of its components; *Matratzen Concord v OHIM,*

(f) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the respective services, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*

,

(g) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either *per se* or because of the use that has been made of it; *Sabel BV v Puma AG,*

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of s.5(2); *Sabel BV v Puma AG*,

(i) if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*

The average consumer

13. The matter must be judged through the eyes of the average consumer for the goods or services in question (*Sabel*), so I have to assess the nature of the average consumer and how they are most likely to encounter and/or purchase the goods and services. There is nothing about the goods or services of either party which suggests that they are aimed at any particular group of people or any specialism. I consider the average, relevant consumer of the class 43 services to be the general public. In the context of Tangram's pleadings, the relevant public for class 44 is that for beauty care services, which is the general public. The average consumer is to be regarded as reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). This general presumption can, however, change depending on the particular goods or services in question (see, for example, the decision of the CFI in *Inter-Ikea Systems BV v OHIM* (Case T-112/06). The process of purchasing accommodation may be different in terms of the level of attention the consumer pays depending on the reason for the stay; for example, selection of a family

holiday site is likely to be a more considered purchase than an overnight stay near an airport or ferry terminal. Beauty care services are likely to be selected reasonably carefully; they may be frequent or infrequent purchases. Cosmetics, clothing, sporting goods, food and drink are all everyday consumer items which can vary in price and frequency of purchase; consequently, the level of attention of the consumer may vary within each category of goods. The potential for imperfect recollection may be increased in relation to low cost goods, but if frequently purchased, that potential may be reduced. If items of high cost are infrequently bought, the higher level of attention may decrease the risk of imperfect recollection, but conversely the infrequency of purchase may lead to a greater potential for imperfect recollection. Foods and beverages adapted for medical purposes could be purchased with some degree of care, such as food for diabetics or coeliacs, but this category of goods also includes foods which are likely to be subject to less scrutiny. Massage apparatus could include expensive or low cost equipment. I conclude that the potential for imperfect recollection is at a neither particularly high nor low level for any of the goods or services.

14. It is likely that exposure to the marks during the purchasing process will be primarily visual for both the goods and services. For example, the goods will be selected at point of sale, or on-line, by brochure, or via advertisements. Aural selection may play a part, for example in relation to food and drink and for the services providing them. I also consider the primary mode of purchase for accommodation services to be visual, but again there may be an element of aural reference, for example by recommendation via a booking service (such as a travel agent or local tourist information officer).

The pleaded case and comparison of goods and services

15. Tangram's opposition is founded upon the single earlier trade mark as detailed in paragraph two of this decision. On its Form TM7, the notice of opposition, Tangram states that it is relying upon all the goods and services covered by its earlier mark (question 3 on Form TM7). At question 4, Tangram also states that all the services in the application are identical or similar to the goods and services upon which it relies at question 3 ("all"). As part of question 4, the Form TM7 says:

> "Use this space to give any further information to explain why you consider that there is a likelihood of confusion e.g. why you consider the respective marks or goods and/or services to be similar?"

Tangram's response to this is "See attached statement of grounds". The parts of Tangram's statement of grounds which relate to the goods and services are as follows:

> "3. …….

The Opponent's trade mark is registered in class 43 in respect of 'Services providing food and drink; temporary accommodation'. The services of 'temporary accommodation' as covered by the class 43 specification of the Opponent's registration are identical to the 'temporary accommodation services sought to be protected by the Applicant. Hotels, motels, guesthouses, and boarding houses all provide food and drink and, accordingly, there is an overlap between the remaining services of interest to the Applicant in class 43 and 'services providing food and drink' in the Opponent's class 43 specification of services.

4. In view of the fact that hotels, motels, guesthouses and boarding houses provide food and drink, there is an overlap between the goods of interest to the Opponent in classes 5, 29, 32 and 33 and the services of interest to the Applicant in class 43.

5. It is not uncommon for hotels to provide, in addition to temporary accommodation services, access to internal gym facilities or a spa. In addition, nearly all hotels and many guesthouses provide toiletries and some hotels provide towelling robes for the convenience of their guests. Accordingly, there is an overlap between the hotel services of interest to the Applicant and the goods and services of interest to the Opponent in classes 3, 10, 25, 28 and 44."

16. Tangram's statement of case refers to services which are 'identical' and goods and services which 'overlap'. The term 'identical' is specified in the wording of section 5(2)(b); however 'overlap' is not. I have assumed that Tangram means that there are similar goods and services where it refers to an 'overlap', 'similar' being the term used in the aforementioned section of the Act in the alternative to 'identical'. The pleaded case is therefore defined as follows, with regard to identity or similarity of goods and services:

Tangram's	Identical or similar	Life's
Temporary accommodation	Identical	Temporary accommodation services
Services providing food and drink	Similar	Hotel, motel, guest house, and boarding house services; arranging, booking and reservation services in hotels, motels, guest houses, and boarding houses.
Foods and beverages which are adapted for medical purposes; meat,	Similar	Hotel, motel, guest house, and boarding house services;

poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces, milk and milk products; edible oils and fats; beers; mineral and aerated waters and non-alcoholic drinks and fruit juices; syrups and other preparations for making beverages, shandy, de-alcoholised drinks, non-alcoholic beers and wines; alcoholic beverages (except beers).		
Soaps, perfumery, essential oils, cosmetics, hair lotions, dentifrices; massage apparatus; clothing, footwear, headgear; gymnastic and sporting articles not included in other classes; medical services; hygienic and beauty care for human beings or animals.	Similar	Hotel services

17. The counterstatement from Life denies that there is any 'overlap' between Tangram's 'services providing food and drink' and its own 'temporary accommodation services', and further denies that there is any 'overlap' between its hotel services and Tangram's goods and services in classes 3, 10, 25, 28 and 44. I will make my comparison of goods and services as per Tangram's statement of grounds, as detailed above. The effect of Tangram's statement is to define its pleadings; even though it answered 'all' to the first part of question 4 on Form TM3, by making the above statement of grounds Tangram has set the parameters as to where it claims there is identity or similarity of goods and services. This is also an inter partes matter and my role is limited to the examination of the facts, evidence and arguments provided by the parties and to the relief sought, the legal principle of *iudex judicare debet secundum allegata et probate partibus*.

18. In comparing the respective specifications, all relevant factors should be considered, as per *Canon* where the ECJ stated at paragraph 23 of its judgment:

> "In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose[2] and their method of use and whether they are in competition with each other or are complementary."[3]

I also bear in mind that in *Avnet Incorporated v Isoact Limited* [1998] F.S.R. 16 Jacob J held that:

> "In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase."

Neither should specifications be given an unnaturally narrow meaning, as per *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000]. In *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32, although in the context of a non-use issue, the court considered interpretation of specifications:

> "In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under section 10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus, the court should inform itself of the nature of

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[2] The earlier incorrect translation of 'Verwendungszweck' in the English version of the judgment has now been corrected.

[3] The criteria identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281 for assessing similarity between goods and services were:

(a) the respective uses of the respective goods or services;
(b) the respective users of the respective goods or services;
(c) the physical nature of the goods or acts of service;
(d) the respective trade channels through which the goods or services reach the market;
(e) in the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
(f) the extent to which the respective goods or services are competitive, taking into account how goods/services are classified in trade.

trade and then decide how the notional consumer would describe such use".

19. Tangram has claimed that its 'temporary accommodation' is identical to Life's 'temporary accommodation services', a claim which Life has not denied. Notwithstanding the addition of 'services' in Life's mark, the two terms are plainly identical. Temporary accommodation is identical to temporary accommodation services.

20. The remaining services of the application are hotel, motel, guest house, and boarding house services; arranging, booking and reservation services in hotels, motels, guest houses, and boarding houses. Tangram has claimed that these services are similar to its 'services providing food and drink' (class 43) because "Hotels, motels, guesthouses, and boarding houses all provide food and drink." It is true that such establishments often provide food and drink, whether in a restaurant, a bar or room service. Hotels are more likely to provide a restaurant, bar and room service than a motel; guesthouses and boarding houses typically provide breakfast and may also provide an option for an evening meal, but one would not normally visit a guesthouse just to eat, whereas hotel restaurants are patronised by diners who are not staying at the hotel. The food and drink provided at motels (if any), guesthouses and boarding houses is an integral part of the accommodation service. It is useful to bear in mind what was said in *Avnet* about not giving services a wide construction beyond their core meaning. There is a reasonable degree of similarity between hotel services and services providing food and drink on account of the propensity to patronise only their restaurants without necessarily the accommodation, but a low degree of similarity between 'motel, guest house and boarding house services' and 'services providing food and drink'. With regard to 'arranging, booking and reservation services in hotels, motels, guest houses, and boarding houses', there does not appear to be any similarity with 'services providing food and drink'. There have been no submissions over and above the statement of grounds to explain where similarity lies. Again, having regard to *Avnet,* it would be a considerable stretch to say that providing food and drink at an establishment which may take table reservations is a similar service to arranging a stay at a hotel, even if a table is also booked in the hotel restaurant, bearing in mind "the core of the possible meanings attributable to the rather general phrase" of arranging, booking and reservation services in hotels, motels, guest houses, and boarding houses.

21. The statement of grounds has also claimed that there is similarity, or overlap, between Life's 'hotel, motel, guest house, and boarding house services' and Tangram's foods and beverages which are adapted for medical purposes; meat, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces, milk and milk products; edible oils and fats; beers; mineral and aerated waters and non-alcoholic drinks and fruit juices; syrups and other preparations for making beverages, shandy, de-alcoholised drinks, non-alcoholic beers and wines; alcoholic beverages (except beers)'

(classes 5, 29, 32 and 33). There have been no submissions to support this argument beyond the statement which says that there is an overlap because "hotels, motels, guesthouses and boarding houses provide food and drink". It is one thing to consider whether there is similarity between prepared meals and restaurant services, which may incorporate a takeaway service, but I note that Tangram's mark does not cover prepared meals. Life's mark is not registered for services for providing food; that food may be provided within a hotel is a further step away from similarity with the actual food, as opposed to the provision of it, bearing in mind the legal tests. The nature, purpose and channels of trade are different and the goods and services are not in competition. 'Hotel, motel, guest house, and boarding house services' are not similar to the goods of the earlier mark in classes 5 and 29.

22. I have said above that hotels can be patronised for their food and drink (restaurant and bar) services separately from their accommodation services; that is to say, consumers use their restaurants and bars although they may not be staying on the premises. In relation to drinks, both alcoholic and non-alcoholic, there is some similarity of nature and purpose with bar services; bars are visited to purchase drinks, and the drinks and bars used to quench a thirst or to socialise. They are in competition in the sense that drinks may be purchased from retail establishments, rather than from bars. There is no similarity between hotels and syrups and other preparations for making beverages; there are too many steps between hotels containing bars which sell drinks made from syrups. I bear in mind that Life's specification does not cover bars per se, but I do not consider that it would be stretching 'hotel services' beyond the natural construction of the general phrase to say that hotels provide bar services, considering that hotels may be patronised for their bars but not their accommodation. There is a reasonable degree of similarity between Life's 'hotel services' and Tangram's earlier mark in classes 32 and 33 (with the exception of syrups and other preparations for making beverages). There is a low degree of similarity with motel, guest house, and boarding house services in relation to drinks, both alcoholic and non-alcoholic because motels etc provide accommodation and may contain bars, but I put it no higher than this.

23. Tangram claims "there is an overlap between the hotel services of interest to the Applicant and the goods and services of interest to the Opponent in classes 3, 10, 25, 28 and 44." It bases this claim on the statement that "It is not uncommon for hotels to provide, in addition to temporary accommodation services, access to internal gym facilities or a spa…nearly all hotels and many guesthouses provide toiletries and some hotels provide towelling robes for the convenience of their guests."

24. Hotel guests may well use complementary (in the sense of provided for free) bath robes, but that would be to distort the core meaning of Life's services in the extreme to suggest that the specifications could stretch to similarity with those goods. There are no submissions and no evidence to suggest that the average

consumer would expect the same undertaking to be responsible for hotel services and as an outlet for bath robes, e.g. as souvenirs. The nature, purpose and channels of trade are different; the goods and services are not in competition and they are not complementary[4]. There is no similarity between 'clothing footwear, headgear' and hotel services, as pleaded by Tangram.

25. The claimed similarity with class 3 seems to be on the basis of complementary (free) toiletries. Their nature and purpose are different; hotels and toiletries are not indispensible for each other and they are not in competition. Taking a generous view of the pleadings, perhaps Tangram includes spa facilities in its claim to similarity with its class 3 goods. Applying the *Avnet* principle, both scenarios – complementary toiletries and goods sold in the hotel spa – seem to go some way beyond the core meaning or substance of 'hotel services'. There is no evidence to demonstrate whether hotels are a channel of trade for their own toiletries. Allowing for the possibility that complementary toiletries could be 'hotel-branded', I conclude that there is a low degree of similarity between hotel services and the class 3 goods of the earlier mark.

26. Tangram's goods in class 10 are 'massage apparatus'. There is no explanation as to how these goods are similar to hotel services. In-hotel spas may use massage apparatus, but they will also use treatment beds, carpets and curtains; this does not mean that there is any similarity between the core meaning of hotel services and massage apparatus. Consequently, I find that there is no similarity between massage apparatus and hotel services.

27. With regard to the class 28 goods of the earlier mark, there is no explanation to support Tangram's claim. It says that it is not uncommon for hotels to provide internal gym facilities or a spa. The inference from this statement is that the internal gym facilities are similar to gymnastic and sporting articles. In my experience, consumers may be members of a local hotel gym without being guests at the hotel itself (in a similar way to patronising a hotel bar or restaurant, as above). Gyms are not in class 43, the class which has been applied for. However, there may be an expectation on the part of the public that hotels provide gym facilities/services. There is similarity of nature and purpose in that the equipment and the service are used in the pursuit of fitness. There is no evidence that sporting articles are purchased from gyms. They are in competition in the sense that gymnastic and sporting articles may be purchased from retail establishments, and a fitness regime undertaken at home instead of

[4] *Oakley, Inc v OHIM*, Case T-116/06 (CFI): "52 Regarding, third, the complementary nature of the services and goods in question, found to exist by the Board of Appeal in paragraph 23 of the contested decision, it should be pointed out that, according to settled caselaw, complementary goods are those which are closely connected in the sense that one is indispensable or important for the use of the other, so that consumers may think that the same undertaking is responsible for both (see, to that effect, *SISSI ROSSI*, paragraph 49 above, paragraph 60; *PAM PLUVIAL*, paragraph 49 above, paragraph 94; and *PiraÑAM diseño original Juan Bolaños*, paragraph 49 above, paragraph 48)."

visiting a gym. I find that there is a modest level of similarity between 'gymnastic and sporting articles' and 'hotel services' .

28. Tangram claims an overlap between its class 44 services 'medical services; hygienic and beauty care for human beings or animals' and Life's 'hotel services'. There is no indication as to why medical services are similar to hotel services. The nature, purpose and channels of trade are different, they are not in competition or complementary. There is no similarity between 'medical services' and 'hotel services'. In relation to 'hygienic care for human beings or animals', again I do not know on what the claim to similarity is based. The term 'hygienic care' is not one which I would imagine is used by hotel spas to describe a service offered to customers. If it means cleaning, then this is beyond the scope of hotel services, applying the *Avnet* principle. There is no similarity between 'hygienic care for human beings or animals' and 'hotel services'. I am not sure that Tangram's pleadings can be said to extend to medical and hygienic services, in any event.

29. This leaves 'beauty care for human beings or animals' of the earlier mark and 'hotel services'. To my knowledge, hotel gyms and spas do not provide beauty care for animals, so I take it that Tangram means the comparison to be made between these services as provided to humans. Spas are, like bars, restaurants and gyms, patronised by consumers who are not necessarily guests at the hotel. Spas and beauty care are not in class 43, the class which has been applied for. However, there may be an expectation on the part of the public that hotels provide spa facilities/services. The primary nature and purpose of a spa is beauty care, users of hotel spas and beauty care services will be the same and hotel spa services and beauty care services are both in competition (consumers have a choice whether to use a beauty care provider in a hotel or elsewhere). I conclude that there is a reasonable degree of similarity between 'beauty care services for human beings' and 'hotel services'.

30. I will give a summary of my findings in relation to the comparison of goods and services in my conclusion on the likelihood of confusion.

Comparison of the marks

31. The authorities direct that, in making a comparison between the marks, I must have regard to each mark's visual, aural and conceptual characteristics. I have to decide which, if any, of their components I consider to be distinctive and dominant. The average consumer is considered to be someone who is reasonably well informed, circumspect and observant, who perceives trade marks as a whole and who does not pause to analyse their various details. The average consumer rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them which has been remembered.

32. The marks to be compared are:

Tangram's mark: The Life House

Life's mark: LIFE

33. Life's mark consists entirely of the single word LIFE, which also appears in Tangram's mark. This is the single point of visual convergence between the marks. Tangram's mark consists of three words, of which the word LIFE is the middle word. None of the words are long or complex so as to overshadow LIFE. I find there is a good deal of similarity between the marks when compared visually.

34. LIFE is also the single point of aural convergence between the marks. It is a common word in the English language and will not be prone to differing possibilities as to pronunciation in the way that invented or foreign words might be. When spoken, the natural stress of the mark will not fall upon the definite article 'THE', it will fall firstly upon the word LIFE.

35. Life argues that THE LIFE HOUSE is "immediately reminiscent" of the word LIGHTHOUSE. Life's 'lighthouse' argument is shaped by aural considerations; 'lighthouse' is a familiar word and the ear has a tendency to interpret sound according to what is familiar. I do not think this submission stands up visually: the words 'life' and 'house' are clearly different and separated, whereas 'lighthouse' has long been a word in its own right (originally a 'light house', in the same way that a 'greenhouse' was originally a 'green house'; linguistically its sum is greater than its parts). Nobody would interpret the word 'lighthouse' separated into its two constituent elements as an alternative spelling. For this reason, Life's contention that the earlier mark's meaning is reminiscent of LIGHTHOUSE can only work aurally. Taking all this into account, I consider that there is a reasonable degree of aural similarity, but lower than the level of visual similarity.

36. Tangram states in its grounds of opposition that:

> "The word "the" is a definite article and the word "house" arguably is suggestive of accommodation. Accordingly the "essential particular" of both trade marks is LIFE."

Life submits that this analysis is "overly simplistic" and that the mark must be considered as a whole. In addition to the 'lighthouse' argument, Life says:

> "We do not believe that the word 'house' is, on any normal meaning of that word, suggestive of hotel accommodation. The normal meaning of "house" is a private, personal property."

37. Dealing with this point first, the word 'house' actually appears within Life's specification of services: 'guest house, and boarding house services'. I am aware of the provision of hotel accommodation in 'country house hotels'. So I think it is arguable that the significance of house could be as an establishment providing accommodation. However, that would be dependent upon the context in which the word in met.

38. Tangram's mark is comprised of the definite article THE, followed by two common English words, both of which could be a noun or an adjective, depending on their context and position relative to THE. House could be an adjective as in 'house call'. Life could be a noun as in 'simple life' and 'high life'. In the English language, the grammatical convention is for the adjective to come before the noun. Hence, it is my impression that 'life' is the adjective which describes 'house' in THE LIFE HOUSE. The Court of First Instance (CFI), in *Citigroup, Inc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-325/04* considered the weight and conceptual effect of the two elements of WORLDLINK, one of which was an adjective to describe the other element, a noun:

> "82 Visually and phonetically, the weight of the two elements cited above in the perception of the relevant public is comparable, since the impact of the element 'world' is slightly more pronounced on account of its position at the beginning of the mark applied for. Conceptually, however, in accordance with the rules of English grammar, the element 'world' will be perceived by the relevant consumers, on account of its position at the beginning, as an adjective meaning 'global' and qualifying that element 'link'. Thus, the conceptual weight of the element 'world' will be less than that of the element 'link', since the first element is subordinate to the second one. Moreover, on account of its meaning, the element 'world' will be perceived as being descriptive of one aspect of the services covered, since financial services are often provided at a global level, whilst the element 'link' is at most allusive in relation to those services, as was found at paragraph 68 above. It follows that, conceptually, the element 'link' is significantly more important in the overall impression given by the mark applied for. However, its distinctive character is not sufficient to render the other element negligible, which means that it cannot be regarded as the dominant element of that mark."

Applying the logic of *WORLDLINK*, 'life' would be subordinate to 'house'. However, THE LIFE HOUSE is an unusual combination of words; in the context of HOUSE, LIFE is not a natural or easily understood adjective. Life's mark is LIFE, the vital sign of something's existence. It needs more to convey a specific conceptual message beyond this rather general meaning. THE LIFE HOUSE could be suggestive of vitality, a house full of life. I consider that LIFE has the edge on HOUSE as the dominant element because the unexpected combination of words does not have an obvious meaning; although it is an adjective in this

context, it is an unnatural one and not subordinate to the noun 'house'. It is the filling in the sandwich. Owing to the somewhat impenetrable meaning of both marks, in particular the earlier mark, but allowing for a general meaning of 'life' as vital sign or vitality, I find the level of conceptual similarity of the marks to be at a modest level.

Distinctive character of the earlier trade mark

39. The distinctiveness of the earlier mark is another factor to consider because the more distinctive it is (based either on inherent qualities or because of the use made of it), the greater the likelihood of confusion. No use of the earlier mark has been filed so I have only its inherent qualities to consider. The words THE LIFE HOUSE have no meaning that relates to the goods and services provided under the mark. I conclude that the mark is fanciful and therefore distinctive to a high degree.

Likelihood of confusion

40. Tangram has sought to rely upon the preliminary indication issued in these proceedings as demonstrating a likelihood of confusion. Far from being a relevant factor, it would be remiss of me to give any consideration to the preliminary indication, as per the comments of Lindsay J in *esure Insurance Limited v Direct Line Insurance plc* [2007] EWHC 1557 (Ch):

> "The Registrar's view was arrived at before there was any evidence on either side, before there was any argument on either side and in a context in which it could not be regarded as a decision against the interests of either side without the prospective loser being given an opportunity to be heard, an opportunity which was not given. So far from it being an error of principle to fail to take the Registrar's preliminary view into account, it would, in my judgment, have been a serious error of principle for it to have been taken into account."

I have not taken cognisance of the preliminary indication in reaching my decision.

41. Life submits that I should take into account the "commercial context of the earlier mark, and in particular the extent to which it differs from other marks in use at its registration date". This is legally wrong; under section 5(2) (b) I am not determining a likelihood of confusion between the earlier mark and any number of other marks, but between the earlier mark and the application. Life submits that the marks in its evidence are in use and co-exist in the market-place. Absence of confusion has been the subject of judicial comment and a registry tribunal practice notice, TPN 4/2009[5]; it seldom has an effect on the outcome of a

5 "7. In Compass Publishing BV v Compass Logistics Ltd [2004] RPC 41 Laddie J held:
"22. It is frequently said by trade mark lawyers that when the proprietor's mark and the defendant's sign have been used in the market place but no confusion has been caused, then

case brought under section 5(2)(b) of the Act. I do not know whether there are co-existence agreements, licensing arrangements or what the circumstances are which have led to the marks co-existing in the market-place, or even whether there are intellectual property disputes between any of the proprietors[6]. The evidence raises more questions than it answers.

42. Life submits:

> "It appears to us that the matter turns on the assessment of two, connected issues:

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there cannot exist a likelihood of confusion under Article 9.1(b) or the equivalent provision in the Trade Marks Act 1994 ("the 1994 Act"), that is to say s. 10(2). So, no confusion in the market place means no infringement of the registered trade mark. This is, however, no more than a rule of thumb. 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. 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."

8. (In Rousselon Freres et Cie v Horwood Homewares Limited [2008] EWHC 881 (Ch) Warren J commented:
"99. There is a dispute between Mr Arnold and Mr Vanhegan whether the question of a likelihood of confusion is an abstract question rather than whether anyone has been confused in practice. Mr Vanhegan relies on what was said by Laddie J in Compass Publishing BV v Compass Logistics Ltd [2004] RPC 41 at paragraphs 22 to 26, especially paragraph 23. Mr Arnold says that that cannot any longer be regarded as a correct statement of the law in the light of O2 Holdings Ltd v Hutchison 3G Ltd [2007] RPC 16. For my part, I do not see any reason to doubt what Laddie J says...")

9. In The European Limited v The Economist Newspaper Ltd [1998] FSR 283 Millett LJ stated:
"Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark."

[6] *Aceites del Sur-Coosur SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case C-498/07 P: "82 First, although the possibility cannot be ruled out that the coexistence of two marks on a particular market might, together with other elements, contribute to diminishing the likelihood of confusion between those marks on the part of the relevant public, certain conditions must be met. Thus, as the Advocate General suggests at points 28 and 29 of his Opinion, the absence of a likelihood of confusion may, in particular, be inferred from the 'peaceful' nature of the coexistence of the marks at issue on the market concerned.

83 It is apparent from the file, however, that in this case the coexistence of the La Española and Carbonell marks has by no means been 'peaceful' and the matter of the similarity of those marks has been at issue between the two undertakings concerned before the national courts for a number of years."

a) whether the marks are truly 'similar'; and
b) whether the degree of similarity between the marks is such as to give rise to a 'likelihood of confusion'."

A vital ingredient is missing from this submission and that is the comparison of goods and services, as established by settled European caselaw cited in paragraph 12 which must form part of the global appreciation of all relevant factors. In considering the likelihood of confusion, I have to bear in mind the nature of the goods and services, the purchasing process and the relevant consumer. I have to weigh the proximity of the goods and services against the relative distance between the marks - the interdependency principle – whereby a lesser degree of similarity between the goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa (*Canon*). I have found that the goods and services range from identical to not similar. I have grouped below, bearing in mind the pleadings limitations, my findings in relation to the comparison of goods and services:

Tangram's		**Life's**
Temporary accommodation	**identical**	temporary accommodation services
services for providing food and drink beers; mineral and aerated waters and non-alcoholic drinks and fruit juices; shandy, de-alcoholised drinks, non-alcoholic beers and wines; alcoholic beverages (except beers) beauty care for human beings	**reasonably similar**	hotel services
gymnastic and sporting articles not included in other classes;	**modest degree of similarity**	hotel services
soaps, perfumery, essential oils, cosmetics, hair lotions, dentifrices; beers; mineral and aerated waters and non-alcoholic drinks and fruit	**low degree of similarity**	hotel services; motel, guest house, and boarding house services

juices; shandy, de-alcoholised drinks, non-alcoholic beers and wines; alcoholic beverages (except beers). services providing food and drink		
services providing food and drink	**no similarity**	arranging, booking and reservation services in hotels, motels, guest houses, and boarding houses.
Foods and beverages which are adapted for medical purposes; meat, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces, milk and milk products; edible oils and fats		hotel, motel, guest house, and boarding house services
syrups and other preparations for making beverages		motel, guest house, and boarding house services
massage apparatus; clothing, footwear, headgear; medical services hygienic care for human beings or animals beauty care for animals		hotel services

43. From this it can be seen that, having regard to what has been pleaded, Life's temporary accommodation services are subject to identity of services; hotel services are the subject of a reasonable degree of similarity; motel, guest house and boarding house services are subject to a low degree of similarity; and there is no similarity in relation to arranging, booking and reservation services in hotels, motels, guest houses, and boarding houses. Where there is no similarity of good or service, there can be no likelihood of confusion, as per the judgment of the ECJ in *Waterford Wedgwood plc v OHIM* Case C-398/07:

> "30 According to established case-law, the likelihood of confusion on the part of the public must be assessed globally, taking into account all the relevant factors of the case in hand (see, to that effect, *SABEL*, paragraphs 22, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 18).
>
> 31 That global assessment of the likelihood of confusion implies some interdependence between the factors taken into account and, in particular, between the similarity of the trade marks and that of the goods or services concerned. Accordingly, a low degree of similarity between the goods or services covered may be offset by a high degree of similarity between the marks, and vice versa. The interdependence of those factors is expressly referred to in the 7th recital of Regulation No 40/94, according to which the concept of similarity is to be interpreted in relation to the likelihood of confusion, the assessment of which depends, in particular, on the recognition of the trade mark on the market and the degree of similarity between the mark and the sign and between the goods or services designated (see, by way of analogy, *Canon*, paragraph 17, and *Lloyd Schuhfabrik Meyer*, paragraph 19).
>
> 32 Moreover, given that the more distinctive the earlier mark, the greater will be the likelihood of confusion (*Sabel*, paragraph 24), marks with a highly distinctive character, either per se or because of the recognition of them on the market, enjoy broader protection than marks with a less distinctive character (see *Canon*, paragraph 18, and *Lloyd Schuhfabrik Meyer*, paragraph 20).
>
> 33 It follows that there may be a likelihood of confusion, notwithstanding a low degree of similarity between the trade marks, where the goods or services covered by them are very similar and the earlier mark is highly distinctive (see, to that effect, *Canon*, paragraph 19, and *Lloyd Schuhfabrik Meyer*, paragraph 21).
>
> 34 However, the interdependence of those different factors does not mean that the complete lack of similarity can be fully offset by the strong distinctive character of the earlier trade mark. For the purposes of applying Article 8(1)(b) of Regulation No 40/94, even where one trade mark is identical to another with a particularly high distinctive character, it is still

necessary to adduce evidence of similarity between the goods or services covered. In contrast to Article 8(5) of Regulation No 40/94, which expressly refers to the situation in which the goods or services are not similar, Article 8(1)(b) of Regulation No 40/94 provides that the likelihood of confusion presupposes that the goods or services covered are identical or similar (see, by way of analogy, *Canon*, paragraph 22).

35 It must be noted that the Court of First Instance, in paragraphs 30 to 35 of the judgment under appeal, carried out a detailed assessment of the similarity of the goods in question on the basis of the factors mentioned in paragraph 23 of the judgment in *Canon*. However, it cannot be alleged that the Court of First Instance did not did not take into account the distinctiveness of the earlier trade mark when carrying out that assessment, since the strong reputation of that trade mark relied on by Waterford Wedgwood can only offset a low degree of similarity of goods for the purpose of assessing the likelihood of confusion, and cannot make up for the total absence of similarity. Since the Court of First Instance found, in paragraph 35 of the judgment under appeal, that the goods in question were not similar, one of the conditions necessary in order to establish a likelihood of confusion was lacking (see, to that effect, *Canon*, paragraph 22) and therefore, the Court of First Instance was right to hold that there was no such likelihood."

Consequently, I will make my assessment of a likelihood of confusion in relation only to the "temporary accommodation services; hotel, motel, guest house, and boarding house services." There is no likelihood of confusion in relation to "arranging, booking and reservation services in hotels, motels, guest houses, and boarding houses" because there is no similarity between these services and any of the goods or services of the earlier mark which have been relied upon to support the opposition.

44. I have found that there is a good deal of similarity between the marks visually and aurally. I must consider the relative importance that the visual and aural similarities have in relation to the goods and services during the purchasing process. In *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Joined cases T-117/03 to T-119/03 and T-171/03 the CFI stated:

"49 However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the

mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs."

In *Phildar SA v OHIM* Case T-99/06, the CFI:

> "82 In that regard, it must be pointed out, first, that the importance of certain visual dissimilarities may be diminished by the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks at issue but must rely on the imperfect picture of them that he has retained in his mind. Secondly, the consumer may be prompted, as submitted by the applicant, to choose goods from the categories in question in response to a television advertisement, for example, or because he has heard them being spoken about, in which cases he might retain the aural impression of the mark in question as well as the visual aspect. It has already been held that mere aural similarity may, in certain cases, lead to a likelihood of confusion (see paragraph 58 above). It is possible that the consumer might let himself be guided in his choice by the imperfect aural impression that he has retained of the earlier mark which may, inter alia, remind him of something in common with a 'thread'. The importance of the aural aspect was mentioned only in respect of some of the goods concerned such as the 'strings' in Class 22, the various goods in Class 23 and those in Class 26, with regard to which the Board of Appeal accepted that they are generally sold over the counter, that is to say, orally (paragraphs 26 to 28 of the contested decision)."

45. It is likely that exposure to the marks during the purchasing process will be primarily visual for both the goods and services. For example, the goods will be selected at point of sale, or on-line, by brochure, or via advertisements. Aural selection may play a part, for example in relation to food and drink and for the services providing them, although a visual perception of trade marks of drinks sold over the counter at a bar is usual; see the judgment of the CFI in *Simonds Farsons Cisk plc v OHIM* Case T-3/04[7]. I also consider the primary mode of

[7] "56 As OHIM has wisely observed, the degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (see, to that effect, Case T-292/01 Phillips-Van Heusen v OHIM – Pash Textilvertrieb und Einzelhandel (BASS) [2003] ECR II-4335, paragraph 55).

57 However, contrary to what the applicant maintains, that is the case here. The applicant has not furnished the slightest proof to show that its goods are generally sold in such a way that the public does not perceive the mark visually. The applicant simply claims that bars and restaurants

purchase for accommodation services to be visual, but again there may be an element of aural reference where the mark may or may not be visible, for example by recommendation via a booking service (such as a travel agent or local tourist information officer, which could be over the counter or by telephone). However, having regard to the level of attention of the average consumer for Life's services, I think it more likely that a visual perception of the marks will play a greater part than aural. I consider this to be likely also for restaurants, beauty care and gym services within hotels, and for purchasing goods in classes 3 and 28.

46. I must also appraise the distinctive character of the earlier mark, because the more distinctive it is (either *per se* or by reputation), the greater will be the likelihood of confusion (*Sabel*). The distinctive character of a mark must be assessed by reference to the particular goods or services to which it is attached and by reference to the relevant consumer's perception of the mark. THE LIFE HOUSE has a high degree of inherent distinctive character; if it means anything, it alludes to vitality. This meaning would be more apparent in relation to health foods or a health club (provision of food and gymnasium services) than simply the provision of accommodation. Conceptual differences can counteract visual and aural similarities - I found that there is a modest degree of conceptual similarity between the marks, but a greater similarity visually and aurally – but this would depend upon at least one mark having a meaning which is immediately apparent[8]. Here both marks are somewhat impenetrable, but for different reasons (one is elliptical, the other an unusual combination of words).

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constitute one of the traditional sales channels, where the consumer will order the goods orally by speaking to a waiter, without being at any time called on to visualise the trade mark in question.

58 In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant's goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.

59 Moreover, and above all, it is not disputed that bars and restaurants are not the only sales channels for the goods concerned. They are also sold in supermarkets or other retail outlets (see paragraph 14 of the contested decision), and clearly when purchases are made there consumers can perceive the marks visually since the drinks are presented on shelves, although they may not find those marks side by side."

[8] In *Devinlec Développement Innovation Leclerc SA v OHIM*, Case T-147/03, the CFI stated: "It is true that, according to case-law, a conceptual difference between the marks at issue may be such as to counteract to a large extent the visual and aural similarities between those signs (*BASS*, cited in paragraph 60 above, paragraph 54). However, for there to be such a counteraction, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately."

The average consumer does not analyse trade marks and look for meanings, but confronted with the earlier mark in the context of accommodation and not being able to make immediate sense of 'life' as an adjective, he or she may interpret it as an hotel establishment belonging to a company called 'Life', (ie 'Life' plays an an independently distinctive rôle in the mark) especially if the applicant's mark had been encountered previously (confusion works both ways)[9].

47. I do not think that the marks will be directly confused. However, according to the jurisprudence cited above, I must also have regard to a scenario where, although the marks are not mistaken directly, there is a belief or an expectation upon the part of the average consumer that the goods or services bearing the individual marks emanate from a single undertaking because there are points of similarity which lead to association. If the association between the marks causes the relevant consumer, who is reasonably well informed and reasonably circumspect and observant, wrongly to believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion. Applying the interdependency principle and the various factors, I consider that there would be a likelihood of confusion in relation to temporary accommodation services and hotel services, but not for the remainder of the services. The application may proceed to registration for:

Motel, guest house, and boarding house services; arranging, booking and reservation services in hotels, motels, guest houses, and boarding houses.

Costs

48. Each party has achieved a measure of success. I direct that each party should bear its own costs.

Dated this 13th day of November 2009

Judi Pike
For the Registrar,
The Comptroller-General

[9] By analogy with *Medion* (although the fact that the trade mark in that case was also LIFE is coincidental to the analogy).