

BL O-213-20

TRADE MARKS ACT 1994

**IN THE MATTER OF AN INTERNATIONAL REGISTRATION DESIGNATING THE
UNITED KINGDOM NO. 1369975 BY PEGAS TOURISTIK UK LIMITED**

TO REGISTER:



AS A TRADE MARK IN CLASS 39

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 411377 BY
PEGASUS HAVA TAŞIMACILIĞI ANONİM ŞİRKETİ**

Background and pleadings

1. On 18 July 2017, Pegas Touristik UK Limited (“the applicant”), designated the United Kingdom seeking protection of the trade mark shown on the cover page of this decision for the services in class 39 shown in paragraph 10. The designation was published for opposition purposes on 17 November 2017. The designation contains the following clauses:

“Mark Description

The mark consists of the fantasy phrase executed by original English font "Pegas fly.com"; the words "fly.com" is placed inside a green oval.

Disclaimer

Registration of this mark shall give no rights to the exclusive use of the word 'com'.

Colours claimed

The mark contains the colours blue, white, green

Colour indication

Dsign part of the mark is red green, word parts of the mark are blue and white.”

2. On 15 January 2018, the application was opposed in full by Pegasus Hava Taşımacılığı Anonim Şirketi (“the opponent”). The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), in relation to which the opponent relies upon the services shown in the following International Registrations designating the United Kingdom (“IRUK”) and UK registration:

(1) IRUK no. 1101732 for the trade mark shown below which designated the UK on 4 April 2012 and which was granted protection in the UK on 22 November 2012:



Registered in respect of:

Class 39 - Transport, in particular airline and air transport services; travel arrangement, in particular reservation services (air travel), travel reservation and booking services, arranging of travel and tours.

(2) IRUK no. 1159201 for the trade mark shown below which designated the UK on 26 March 2013 and which was granted protection in the UK on 31 October 2013:

PEGASUS CARGO

Registered in respect of:

Class 39 - Land, sea and air transport services, rental services for land, sea and air vehicles, arranging of travel and tours, travel reservation and booking services, courier services.

(3) UK no. 3039068 for the trade mark Pegasus Airlines which was applied for on 23 January 2014 and which was entered in the register on 27 June 2014.

Registered in respect of:

Class 39 - Land, sea and air transport services, rental services for land, sea and air vehicles, arranging of travel and tours, travel reservation and booking services, courier services.

3. In its notice of opposition, the opponent states:

“The applied for mark and the earlier mark are highly similar to one another from a visual, aural and conceptual perspective. The services claimed in class 39 of the application are identical and highly similar to the goods (sic) claimed in the earlier registration. Due to the high similarity of the marks and the identity and high similarity of the services there exists a likelihood of confusion on behalf of the average consumer.”

4. The applicant filed a counterstatement in which it denies there will be a likelihood of confusion. It does, however, state:

“23. The Holder's transport services and travel reservations services are identical to those of the Opponents. However, the remainder of the Holder's services are dissimilar.”

5. In these proceedings, the opponent is represented by WP Thompson and the applicant by Murgitroyd & Company. Although neither party filed evidence, both filed written submissions during the evidence rounds. Neither party requested a hearing or filed written submissions in lieu of attendance. I have reviewed all of the submissions filed and will, to the extent I consider it necessary, refer to them later in this decision.

DECISION

6. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

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

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

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

5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

7. The trade marks relied upon by the opponent qualify as earlier trade marks under the provisions of section 6 of the Act. Given the interplay between the dates on which the opponent’s trade marks were granted protection/entered in the register and the publication date of the designation, the earlier trade marks relied upon are not subject to the proof of use provisions.

Case law

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

The principles:

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

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

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

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

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

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

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

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

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

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

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

My approach to the comparison

9. In these proceedings, the opponent is relying on the three earlier trade marks shown in paragraph 2 above. The specifications of trade marks nos. (2) and (3) are identical and include all the services in trade mark no. (1). As the designation includes the word “fly” and trade mark no. (3) the word “Airlines”, it is that trade mark upon which I will conduct the comparison, only returning to trade marks (1) and (2) if I consider it necessary to do so.

Comparison of services

10. Proceeding on the basis indicated above, the competing services are as follows:

The opponent’s services	The applicant’s services
Class 39 - Land, sea and air transport services, rental services for land, sea and air vehicles, arranging of travel and tours, travel reservation and booking services, courier services.	Class 39 - Air transport; motor coach rental; boat rental; garage rental; rental of vehicle roof racks; aircraft rental; parking place rental; rental of warehouses; booking of seats for travel; travel reservation; transport reservation; parcel delivery; delivery of goods; traffic information; transportation information; storage information; transportation logistics; arranging of cruises; arranging of travel tours; armored-car transport; transport of travellers; bus transport; car

	transport; barge transport; boat transport; railway transport; marine transport; passenger transport; river transport; shipbrokerage; transport brokerage; freight brokerage; providing driving directions for travel purposes; car rental; rental of motor racing cars; rental of aircraft engines; railway coach rental; vehicle rental; escorting of travellers; wrapping of goods; car parking; chauffeur services; pleasure boat transport; taxi transport; transport; freight [shipping of goods]; freighting; physical storage of electronically stored data or documents; storage of goods; storage; freight forwarding.
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11. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the Court stated at paragraph 23:

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

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;

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

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

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

14. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

15. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated:

“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.”

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

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

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

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut 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”.

18. As I mentioned above, in its counterstatement, the applicant stated:

“23. The Holder's transport services and travel reservations services are identical to those of the Opponents. However, the remainder of the Holder's services are dissimilar.”

19. In *Separode Trade Mark* BL O-399-10, the Appointed Person stated:

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

20. In its written submissions, the opponent identifies those services in the application it considers to be either literally identical, or if not literally identical, are to be regarded as such on the inclusion principle outlined in *Meric*. Where it does not consider that to be the case, it provides an explanation as to why it considers the competing services to be “highly similar”. Having made the admission mentioned above, in its submissions, the applicant identifies a range of services it specifically does not consider to be similar to those upon which the opponent relies. Although I do not need to record the detailed competing submissions here, for the avoidance of doubt, I have borne them all in mind in reaching the conclusions which follow.

21. The applicant's specification includes the following services:

Air transport; armored-car transport; transport of travellers; bus transport; car transport; barge transport; boat transport; railway transport; marine transport; passenger transport; river transport; chauffeur services; pleasure boat transport; taxi transport; transport.

22. As the opponent's specification includes "Land, sea and air transport services", the above services in the application are to be regarded as identical on the principles outlined in *Meric*.

traffic information; transportation information; transportation logistics; shipbrokerage; transport brokerage.

23. Given the similarity in the users, intended purpose and the complementary nature of the competing services, the above services are, in my view, similar to the opponent's named services to at least a medium degree.

Motor coach rental; boat rental; rental of vehicle roof racks; aircraft rental; car rental; rental of motor racing cars; rental of aircraft engines; railway coach rental; vehicle rental.

24. As the opponent's specification includes "rental services for land, sea and air vehicles" which is, in my view, broad enough to also include the rental of parts for such vehicles, the competing services are to be regarded as identical on *Meric*.

Booking of seats for travel; travel reservation; transport reservation; arranging of cruises; arranging of travel tours; providing driving directions for travel purposes; escorting of travellers.

25. As the opponent's specification includes "arranging of travel and tours, travel reservation and booking services", the competing services are either literally identical or to be regarded as such on *Meric*.

Garage rental; parking place rental; car parking.

26. As the opponent's above named services are broad enough to include, for example, the booking of garages, parking places and car parking for those on holiday, the applicant's services shown above are also to be regarded as identical on the *Meric* principle.

Rental of warehouses; Parcel delivery; delivery of goods; storage information; freight brokerage; wrapping of goods; freight [shipping of goods]; freighting; Physical storage of electronically stored data or documents; storage of goods; storage; freight forwarding.

27. The opponent's specification includes "courier services". Collinsdictionary.com defines "courier" as, inter alia, "a person who is paid to take letters and parcels direct from one place to another." That is my understanding of the word and, I am satisfied, will be how it is understood by the average consumer. Some of the applicant's services, for example, "parcel delivery" and "delivery of goods" would be encompassed by the term "courier services" and are, as a consequence, to be regarded as identical on the *Meric* principle. However, as all the remaining terms in the applicant's specification I have listed above are services associated with the delivery and storage of goods, they are, in my view, similar to the opponent's services to at least a medium degree.

The average consumer and the nature of the purchasing act

28. As the case law above indicates, it is necessary for me to determine who the average consumer is for the services at issue. I must then determine the manner in which these services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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


29. The average consumer of the services at issue is either a member of the general public or a business user. Although such services are most likely to be selected by visual means having reviewed relevant information, reviews etc. in both hard copy and on-line, aural considerations in the form of, for example, word of mouth recommendations must be kept in mind. Given the not insignificant cost associated with the selection of many of the services at issue, I would expect both a member of the general public and a business user to pay at least a medium degree of attention during the selection process and, for many of the services at issue, a fairly high degree of attention.

Comparison of the trade marks

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

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

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

Opponent's trade mark	Applicant's trade mark
Pegasus Airlines	

32. Once again, I have borne in mind all the competing submissions on this aspect of the case in the conclusions which follow. The opponent's trade mark consists of the words "Pegasus" and "Airlines" presented in title case. Even in relation to those services for which the word "Airlines" is not directly descriptive, the word is likely to be regarded by the average consumer as non-distinctive. As a consequence, it is the word "Pegasus" that is likely to dominate the overall impression the opponent's trade mark conveys and it is in that word the distinctiveness lies.

33. The applicant's trade mark consists of a number of components. The first, is the word "pegas" presented in blue in lower case letters in a slightly stylised script. The second component is a green device in which appears the third component i.e. the words "fly" and ".com" presented in lower case in white and in which the word "fly" is significantly larger than the letters ".com" which follow it. Although the word "fly" is significant in the context of the trade mark as a whole, in relation to many of the applicant's services it performs a descriptive function. However, even where that may not be the case, like the word "Airlines" in the opponent's trade mark, it will be regarded as non-distinctive in nature. In addition, when combined with the combination ".com" it will be construed as part of a domain name. Although the colours in which the applicant's trade mark is presented will make a visual impact, as notional and fair use of the opponent's trade mark would include its use in a similar combination of colours, that point does not, at least to any material extent, assist the applicant. Rather, given its size, positioning and distinctive credentials, it is the word "pegas" which is likely to be construed by the average consumer as the primary indicator of origin in the applicant's trade mark, the totality of which will, in my view, be construed as the domain name "pegasfly.com". I will bear the above conclusions in mind when conducting the comparison that follows.

Visual similarity

34. The opponent's trade mark consists of two words consisting of seven and eight letters respectively, whereas the applicant's trade mark consists of two word components consisting of five and six letters respectively. The first five letters in the applicant's trade mark are identical to the first five letters in the first word in the opponent's trade mark. The second word components are, however, different as is the fact that the applicant's trade mark is presented in a combination of colours. Weighing the similarities and differences including the significance and positioning of the various components, results in what I regard as a medium degree of visual similarity.

Aural similarity

35. The opponent's trade mark is most likely to be pronounced by the average consumer as the five syllable combination "Peg-a-sus-Air-lines". As it is well established that when a trade mark consists of a combination of words and figurative components it is by the word(s) that the trade mark is most likely to be referred to, the applicant's trade mark is most likely to be pronounced as the five syllable combination "peg-as fly-dot-com". Although the endings of the competing trade marks are different, the fact that the first word in the competing trade marks begin with the same first syllable and have highly similar second syllables, results in a medium degree of aural similarity between them.

Conceptual similarity

36. In its written submissions, the opponent states:

"22. Conceptually, the dominant elements of both marks, PEGASUS and PEGAS, clearly recall the mythological figure of Pegasus, the flying horse..."

37. The opponent goes on to refer me to a decision of the Hearing Officer in BL-O-290-15, in which the opponent in these proceedings was also the opponent in the earlier proceedings. In those earlier proceedings, the applicant sought to register a

trade mark which included, inter alia, a device of a winged horse accompanied by the word “PEGAS” and it was opposed on the basis of a EUTM consisting of, inter alia, a device of a winged horse accompanied by the word “PEGASUS”. The fact that the Hearing Officer found that the competing trade marks were conceptually identical even though the opposed trade mark did not contain the full word “PEGASUS” is unsurprising given that both trade marks contained the devices of winged horses. That is not, however, the case here, as the applicant’s trade mark contains no such device that would point to the same conclusion. In its submissions, the applicant states:

“29...Furthermore, PEGAS is not a known abbreviation for PEGASUS and as such it will not be seen as a nickname for the mythological Greek horse. Indeed, PEGAS has no meaning within the English language...”

38. In my view, some average consumers will be aware that Pegasus is the winged horse from Greek mythology. For those average consumers, that word in the opponent’s trade mark will evoke that concept. For those who do not, the word is unlikely to convey any conceptual message. For both sets of average consumers the word “Airlines” will be accorded its ordinary meaning.

39. As to the word “Pegas” in the applicant’s trade mark, as the opponent appears to suggest, the average consumer may, in effect, see what they expect to see and construe the word as “Pegasus”. Equally, they may not. If they do not, the word “Pegas” is, as the applicant suggests, unlikely to convey any concrete conceptual message. Like the word “Airlines” in the opponent’s trade mark, the combination “fly.com” will be accorded its ordinary significance i.e. a website address associated with air travel.

40. If the average consumer construes both trade marks as evoking the concept of a winged horse that, together with the fact that both parties’ trade marks contain references to air travel, results in the highest degree of conceptual similarity between them. If however, the average consumer does not know the meaning of the word “Pegasus” and accords the word “Pegas” no meaning, the competing trade marks are conceptually similar to the limited extent that they both evoke the descriptive

concept of air travel. Finally, if the average consumer who is familiar with the word “Pegasus” accords the word “Pegas” no meaning, other than the shared concept of air travel, one trade mark would evoke a concrete conceptual message whereas the other would not.

Distinctive character of the earlier trade mark – Pegasus Airlines

41. The distinctive character of a trade mark can be appraised only, first, by reference to the services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. 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 services for which it has been registered as coming from a particular undertaking and thus to distinguish those services from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

42. As the opponent has filed no evidence of any use it may have made of its earlier trade mark, I have only its inherent characteristics to consider. Even if the average consumer is aware of the meaning of the word “Pegasus”, when combined with the word “Airlines”, it may, at worst, be suggestive of, perhaps, speedy air travel. Absent use, the opponent’s trade mark is possessed of, at least, a medium degree of inherent distinctive character.

Likelihood of confusion

43. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa. I must also keep in mind the average consumer for the services, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct

comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind.

44. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and services down to the responsible undertakings being the same or related. Earlier in this decision I concluded that:

- Where not identical the competing services are similar to at least a medium degree;
- The average consumer is either a member of the general public or a business user who, whilst not forgetting aural considerations, is most likely to select the services at issue by visual means whilst paying at least a medium degree of attention during the selection process;
- The competing trade marks are visually and aurally similar to a medium degree and conceptually similar to varying degrees;
- The opponent's Pegasus Airlines trade mark is inherently distinctive to at least a medium degree.

45. Both parties trade marks begin with words in which the first five letters are identical and end with a descriptive word or combination which evokes the concept of air travel. However, the various differences between the competing trade marks together with the at least medium degree of attention the average consumer will display when selecting the services at issue points against them being mistaken for one another i.e. there is unlikely to be direct confusion.

46. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“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 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.”

47. In my view, a significant proportion of average consumers will be familiar with both the word “Pegasus” and its meaning. However, unlike the earlier proceedings I have mentioned above, there is no device in the applicant’s trade mark which would immediately prompt the average consumer to bring to mind the concept of the winged horse from Greek mythology. There is, however, the fairly unusual combination of letters “p-e-g-a-s” followed by the word “fly” which, given the concept of a winged horse, may lead an average consumer to construe the word “pegas” as, for example, an alternative way of referring to the winged horse known as Pegasus, possibly as a foreign language variant. While I have no evidence or submissions to assist me in gauging the extent to which that might be the case, as an average consumer familiar with the word “Pegasus” and its meaning, that was my initial reaction to the applicant’s trade mark and, more importantly, I am satisfied that is likely to be the reaction of a significant number of average consumers.

48. Approached on the basis suggested by Mr Purvis, in my view, having noticed the differences between the competing trade marks, a significant number of average consumers will notice that it also has something in common with it i.e. a word which looks like and may be construed as, for example, a foreign language spelling of the word “Pegasus”. That thought process is, in my view, likely to lead even a consumer paying a fairly high degree of attention during the selection process, to assume that the applicant’s trade mark is another brand being used by the opponent. Such an

error on the part of the average consumer is likely to result in indirect confusion and, as a consequence, the opposition succeeds accordingly.

Overall conclusion

49. The opposition has succeeded and, subject to any successful appeal, the request to designate the United Kingdom will be refused.

Costs

50. As the opponent has been successful, it is entitled to a contribution towards its costs. Awards of costs in proceedings are governed by Annex A of Tribunal Practice Notice (“TPN”) 2 of 2016. Applying the above guidance, I award costs to the opponent on the following basis:

Filing the Notice of opposition and reviewing the counterstatement:	£300
Written submissions:	£300
Official fee:	£100
Total:	£700

51. I order Pegas Touristik UK Limited to pay to Pegasus Hava Taşımacılığı Anonim Şirketi the sum of **£700**. This sum is to be paid within twenty one days of the expiry of the appeal period or within twenty one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 6th day of April 2020

C J BOWEN
For the Registrar