

o/075/18

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3152642
BY HERTZ HAGAI
TO REGISTER THE TRADE MARK**

Cerock

IN CLASSES 25 AND 41

AND

**THE OPPOSITION THERETO UNDER NO. 406746
BY CEROC ENTERPRISES LIMITED**

BACKGROUND AND PLEADINGS

1. Hertz Hagai ("the Applicant") applied on 2 March 2016 to register the word "Cerock" as a UK Trade Mark for the following goods and services:

Class 25 goods: Dance shoes; dance costumes; dance clothing

Class 41 services:

Dance hall services; dance halls (operation of-); dance instruction; dance events; dance club services; dance schools; dance studios.

2. The application was published for opposition purposes in the Trade Marks Journal on 18 March 2016. It is opposed by Ceroc Enterprises Limited ("the Opponent"), which owns a European trade mark (EUTM) for the word "CEROC" under the registration number 013308085. The Opponent's trade mark has a filing date of 29 September 2014 and the mark became registered on 26 February 2015.
3. The opposition is based on sections 5(1) and 5(2)(b) of the Trade Marks Act 1994 ("the Act"), each ground opposing the entirety of the application.
4. The Opponent organises dance events and teaches dance classes, and sells related goods. It relies on a selection of the goods and services for which it is registered, as set out later in this decision where I compare the goods and services at issue.
5. Under section 5(1) the Opponent claims that the parties' marks are identical and that so too are their contested goods and services. It claims in the alternative under section 5(2)(b) that the marks are identical or similar, and that the goods and services are identical or similar, such as to give rise to a likelihood of confusion on the part of the average consumer as to the origin of the goods and services, including a likelihood of association.
6. The Applicant filed a notice of defence on Form TM8, including a counterstatement that contends, among other things, that the marks are not substantially similar.

7. The Opponent filed evidence in support of its notice of opposition and detailed statement of grounds, and filed written submissions in lieu of a hearing. The Applicant also filed evidence, which has been admitted into proceedings despite flaws and subject to the proviso I mention below. Evidence from the parties is summarised below and I mention in this decision points made by the parties to the extent I consider appropriate.
8. The Opponent is represented in these proceedings by Brand Protect Limited; the Applicant represents himself without professional legal representation. Neither party requested a hearing and I take this decision based on the papers filed and taking into account relevant jurisprudence.

THE OPPONENT'S EVIDENCE

9. The Opponent's evidence takes the form of a 6-page witness statement dated 9 May 2017 in the name of Mike Ellard, along with 17 supporting exhibits **ME1 – ME17**. Mr Ellard owns Ceroc Enterprises Ltd (the Opponent company). I note the following points from the Opponent's evidence.
10. The witness states that the name CEROC was created by the original founders of the "CEROC" organisation and derives from an amalgamation and shortening of the phrase "*c'est rock*", which it says is French for "*it is rock*". It explains that to get to "CEROC" from "c'est rock", the apostrophe, "st", space and "k" were removed and that "c'est rock" is pronounced in French as "cer-rok".
11. In addition to the EUTM relied on, **Exhibit ME2** shows that the Opponent has trade mark registrations for CEROC in various countries, including the USA, Canada, Australia, Hong Kong, Germany, Russia and the UK.
12. The witness states that the Opponent provides education and entertainment by organising dance events and dance classes throughout the United Kingdom and other jurisdictions. Its dance events take place in venues such as village and town halls, where a variety of dance music from the 1970's to the present day is played and where dance styles include, but are not limited to, jive, ballroom, tango and salsa. The witness states that Ceroc has sometimes rented the same dance venues for decades.

13. The witness explains the CEROC brand business model as one of mainly selling through franchisees, where a third party purchases the right to run one or several dance venues in a particular geographical territory for a number of years (usually 5 years). The person or legal entity gains an exclusive licence to run any type of dance venue or give any type of dance class in their territory, using the CEROC brand. The Opponent has a small staff base at its head office in London who provide various forms of practical business support to its franchisees. **Exhibit ME12** shows a copy of the index and first chapter of the claimant's brand manual, including information on venue selection criteria, purchasing music, staffing profiles, dance event formats, merchandising and intellectual property rights.
14. The witness claims that it provides dance lessons ranging from novice to advanced. **Exhibit ME3** appears to be a printout (28 March 2017) from a website called www.cerocoxford.com. The printout explains what Ceroc is and that its own dance style, developed since the early 1980's, is fun and easy-to-learn. It states that across 2017, and over 200 locations, 320,000 people in the United Kingdom learn to dance with "the fastest growing dance organisation in the UK". It includes positive sound-bite quotes (such as "possibly the most fun you can have mid-week") attributed to FHM magazine, Time Out magazine, The Times newspaper and to Channel 4.
15. **Exhibit ME4** appears to be a printout from a website called www.ceroclondon.com, which is not dated but where copyright is referenced 2010- 2017. The printout indicates classes available in at least 11 areas across London and gives answers to various questions as to cost, age range, what to wear and so on. **Exhibit ME5** is a printout from www.ceroc.com that gives details of some the venues used weekly by Ceroc, including numerous counties in England and in Scotland, South Wales and Northern Ireland. The exhibit also refers to a CEROC offer via Time Out magazine. Other exhibits show the Opponent's mark and business model at work in other settings and locations, including France, on holidays to Malta and Spain, on Caribbean cruises and an example of a weekend event at a UK hotel, attracting 300 attendees in 2016.
16. The witness statement gives information on various fees it receives from franchisees and from members making use of its services. The witness states that the Opponent operates an online shop selling CEROC branded merchandise. **Exhibit ME11** are pages from its online shop showing items for sale, including instructional dance DVDs

and CEROC-branded items of clothing such as t-shirts and halter neck tops, but no footwear. The witness statement includes the following table showing the Opponent's turnover figures for the years indicated.

Year	Turnover
2015	£3,743,550
2014	£3,938,157
2013	£4,039,084
2012	£4,305,523
2011	£4,738,867

17. The witness states that on behalf of its franchisees, the Opponent spends between approximately £50,000 and £100,000 on advertising the CEROC brand per year. **Exhibit ME13** shows examples of CEROC's advertising. The exhibit comprises 37 pages and it is not clear in what form, where, when or whether the adverts it highlights were placed. The exhibit may show copies of fliers, but it is not clear. So far as the content of the exhibit, there are clear promotional references to various CEROC-branded events at different places and times, including holidays and cruises. **Exhibit ME14** is stated to be "advertising literature" from franchisees, and shows what may be copies of promotional fliers (it is again not clear) but the content does clearly refer to a range of different locations in London providing Ceroc-branded dance instruction evenings.

18. The witness states that it also advertises past and future events by publishing videos on its YouTube channel showing people enjoying at it dance venues. **Exhibit ME15** is said to be the landing page of the YouTube channel, which shows the CEROC brand and seems to show that the videos have been viewed over 320, 000 times in the six years from the creation of the channel. **Exhibit ME16** is said to show stills of professional videos with high quality sound from individual events, where viewing figures are in the tens of thousands. **Exhibit ME17** shows simply pages from the www.ceroc.com website, which advertises its clients' services and products under the CEROC brand.

THE APPLICANT'S EVIDENCE

19. The Applicant filed a signed witness statement in the name of Hertz Hagai, along with a reiteration of the counterstatement that it gave in its Form TM8, marked as "HH1". Despite correspondence on the point from the Registry, the witness statement remains undated, although HH1 bears the date 1 July 2017. Mr Hagai contends in his witness statement that the Opponent's witness statement and its exhibits ME10 –12 show "no real opposition facts" and that that evidence is "completely irrelevant and does not prove any points of opposition or objection."
20. Mr Hagai also states that although the Opponent's evidence refers to its Ceroc dance services involving various dance styles, including salsa, jive and tango, its descriptions make no mention of rock or rock 'n' roll, which Mr Hagai emphatically contends is an entirely different kind of dance. The witness states that his own market research among 24 participants in Ceroc dance classes across London, Hampshire and Dorset, supports such a disconnection between Rock and Roll dance and Ceroc. He states that other market research he carried out found 49 of 50 "non Ceroc dancers ... did not have a clue what Ceroc is about" whereas, by contrast, "42 said that Cerock is to do with Rock and Roll."
21. The Registry highlighted to the Applicant the legal formalities required for a witness statement, and although the Registry noted the missing date, it still admitted the Applicant's evidence into these proceedings. The Registry had also highlighted the provisions of Tribunal Practice Notice (TPN) 2/2012¹ which sets out the circumstances in which the tribunal may allow survey evidence into proceedings. The stipulations in that TPN were not achieved in the present case and the Registry had asked the Applicant to remove from its evidence the references to market research. The Applicant did not do so, and the Registry advised the parties that although it would admit the evidence as filed, "the weight afforded to it will be determined by the Hearing Officer."
22. I find that the evidence does not satisfy all requirements of TPN 2/2012 and may fairly be disregarded. However, since the evidence has come before me, much as I have

¹ Available at: <http://webarchive.nationalarchives.gov.uk/20140714074009/http://www.ipo.gov.uk/pro-types/pro-patent/p-law/p-tpn/p-tpn-2012/p-tpn-22012.htm>

summarised above, it is worth my stating that it carries no weight in my decision, which is taken on the basis of whether the notional average consumer would consider the marks at issue to be identical or similar to one another, and whether there is either similarity or identity between the parties' goods and services. Any purported difference in dance forms can have no relevance since the comparison of services is here based only on the wording of the parties' specifications in class 41.

DECISION

Section 5(1) claim

23. I deal first with the Opponent's claim based on section 5(1). Section 5(1) of the Act provides that "*a trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.*"
24. Section 6(1)(a) of the Act defines an "*earlier trade mark*", as including "*a European Union trade mark ... which has a date of application for registration earlier than that of the trade mark in question ...*". The mark relied on by the Opponent's is therefore an earlier trade mark under the Act, and since it had not been registered for five years or more when the Applicant's mark was published for opposition, is not subject to the proof of use provisions under section 6A of the Act. The Opponent is therefore able to rely in this opposition on all goods and services in its registration without having to prove use.
25. It is a requirement of section 5(1) of the Act that the marks at issue be identical. In *S.A. Societe LTJ Diffusion v. Sadas Vertbaudet SA*², the Court of Justice of the European Union ("the CJEU") held that:

"54 ... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer."

² Case C-291 /00

26. The Applicant has applied to register as a trade mark the word “Cerock”; the Opponent’s earlier mark is the word “CEROC”. The difference between uppercase and title case is not significant, since ordinary usage of a word mark would certainly permit such changes in case. However, I find that the additional letter at the end of the Applicant’s mark is not so insignificant as to go unnoticed by an average consumer. The marks are therefore not identical; consequently **the opposition on the basis of section 5(1) of the Act must fail**. I turn therefore to consider the alternative ground of opposition under section 5(2)(b) of the Act.

Section 5(2)(b) claim

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

“... 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.”

28. The following decisions of the EU courts provide the principles to be borne in mind when considering section 5(2)(b) of the Act:

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 are that:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

The average consumer and the purchasing process

29. It is necessary to determine who is the average consumer for the respective goods and services and how those goods and services are likely to be selected. According to case law³:

“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 relevant person is a legal construct and ... 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....”

30. The average consumer of the goods at issue will be the general public at large. I find that the average consumer of the services in question will also be members of the general public at large, since they will wish to access the services on offer for their own fun and instruction. It is also possible that at least some of the services in the terms specified – for example ticket agency services – could be attractive to other businesses, so the notional consumer in this case may also include business users.
31. I would expect the average consumer to pay no more than a normal level of attention when selecting the goods and services at issue. The purchasing act will be visual as

³ *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. at paragraph 60.

the goods and services are likely to be offered and branded through a range of visual communications, including on websites and in hard copy publicity literature or on the goods themselves. However, I do not discount aural considerations which may also play a part, including as part of advertisements or word-of-mouth recommendations, so the way the marks sound will also be relevant.

Comparison of the respective goods and services

Applicant's goods and services
<p><i>Class 25 goods:</i> Dance shoes; dance costumes; dance clothing</p> <p><i>Class 41 services:</i> Dance hall services; dance halls (operation of-); dance instruction; dance events; dance club services; dance schools; dance studios</p>
Goods and services relied on by the Opponent
<p><i>Class 25 goods:</i> Dance shoes; Dance costumes; Dance clothing</p> <p><i>Class 41 services:</i> Education, not in the field of dentistry; providing of training, not in the field of dentistry; entertainment; sporting and cultural activities; Adult education; Arranging of competitions for education or entertainment; Education, not in the field of dentistry; Educational information, not in the field of dentistry; Educational or instruction services relating to music or dance; Educational services, not in the field of dentistry; Instructional services relating to dance or to physical exercise; Musical or dance performances; Organisation of competitions or award ceremonies, not in the field of dentistry; Organisation of dance events or discos; Organisation of sports competitions; Providing digital music from the Internet, not downloadable; Providing online music, not downloadable; Provision of non-downloadable films and television programmes via a video-on-demand service; Teaching of dance; Ticket agency services; Ticket reservation or booking services for entertainment, sporting or cultural events.</p>

Class 25 Goods

32. The parties' goods in class 25 are clearly identical.

Class 41 Services

33. In considering whether the services contested between the parties are identical or similar, I bear in mind various principles from case law, which similarly apply in respect of services as they do for goods.
34. In *Gérard Meric v Office for Harmonisation in the Internal Market (OHIM)*, the General Court stated⁴ that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category designated by the trade mark application, or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark.
35. In *YouView TV Ltd v Total Ltd*,⁵ 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 Nevertheless the principle should not be taken too far 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."

36. I also take account of the factors identified by the Court of Justice of the European Union ("the CJEU") in *Canon*⁶ where it states that:

"In assessing the similarity of the goods all the relevant factors relating to those goods .. 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".

⁴ Case T- 133/05 at paragraph 29 of that judgment.

⁵ [2012] EWHC 3158 (Ch)

⁶ Case C-39/97, at paragraph 23.

37. The applicable relevant factors identified by Jacob J. (as he then was) in the *Treat* case⁷ for assessing similarity were:
- a) The respective users of the respective goods or services;
 - b) The physical nature of the goods or acts of services;
 - c) The respective trade channels through which the goods or services reach the market;
 - d) [...]
 - e) 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.
38. In *Boston Scientific*⁸, the General Court described goods as “complementary” in circumstances where “... *there is a close connection between [the goods], 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*”. I also take note that in *Kurt Hesse v OHIM*⁹, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods.
39. The Opponent makes numerous points to contextualise and support its contention that the services in question are identical or similar. The Opponent submits “the services in class 41 are provided to people who pursue dancing as a form of entertainment, exercise or education, or a combination of the three. When a person decides to partake in dance lessons, the general format is that they attend an event organised in a place

⁷ British Sugar PLC v James Robertson & Sons Ltd [1996] R.P.C. 281

⁸ *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

⁹ *Case C-50/15 P*

allowing them to learn in a sufficiently spacious and safe environment. Such services are generally provided in designated dance halls, sports halls or village or town halls. When the consumer purchases those services, s/he is actually purchasing two interlinked services: a) s/he purchases the expertise of the instructor, whose experience and ability in dancing s/he wishes to emulate; and b) s/he purchases the licence to attend that premises at which the event is taking place. If s/he did not purchase such a licence, s/he would be trespassing.”

40. Noting all of the above, I consider below the services applied for, in the order in which they appear in the Applicant’s specification.

Dance hall services

41. The Opponent highlights that the term "dance hall services" is ambiguous. It submits that the term could logically refer to services that are usually offered by a dance hall, such as: acting as a venue, including for education, physical exercise or sport; ticketing services; provision of dance events or discos; provision of music; provision of a venue for the purposes of instructing dance; booking services for entertainment (particularly dance). It submits that such services are identical to services for which the Opponent has trade mark protection, namely: entertainment; sporting cultural activities; organisation of dance events or discos; organisation of sports competition; educational instruction services relating to dance or to physical exercise; teaching of dance; music or dance performances; ticket agency services.
42. The Opponent also addresses an alternative conception of what the term "dance hall services" may include. It suggests that if the term were intended to mean the 'ownership of the land on which a large structure has been erected and rental of that facility for dancing', then the more appropriate descriptor may be "dance hall (operations of -)" - which term also appears in the Applicant’s specification and which is considered separately below.
43. I find that the Applicant’s “dance hall services” could include the Opponent’s “organisation of dance events or discos”. On the basis of the principle in *Gérard Meric* those services are therefore identical. Alternatively, I find that there is similarity between the Applicant’s “dance hall services” and the Opponent’s “teaching of dance;

musical or dance performances” and “organisation of dance events or discos” which are services commonly offered by a dance hall. As such, I find that there is similarity between those services and “dance hall services” to at least a medium degree, based on their shared nature, intended purpose, method of use and respective users.

Dance halls (operation of-)

44. The applicant has also applied for "dance hall (operations of-)", which the Opponent distinguishes from "dance hall services" on the basis that the former implies ownership of the freehold or leasehold of the land on which the dance hall is located, or the rental of the land or venue either permanently, or perhaps more usually at the same time each week.
45. That submission may accord with the business model and practice of the Opponent as set out in its evidence, but I find such a stipulation as to ownership or rental to be an unnecessarily restrictive assumption. I find that the term "dance hall (operations of-)" refers to services of an operational nature arising in relation to dance halls. Such services may be offered by a provider with no ownership or rental stake in the dance hall. I take operational services to include management and administrative functions that may cover, for example, licensing considerations, oversight of health and safety issues, as well as lease and rental matters.
46. On that operational / administrative conception, I find that the Opponent’s protection for “ticket reservation or booking services for entertainment, sporting or cultural events” could be an activity that falls within the "dance hall (operations of-)", leading to identical services on the basis of the principle in *Gérard Meric*. Likewise, the term “organisation of dance events or discos” may embrace "dance hall (operations of-)", so may also be considered identical services.
47. The Opponent also submits that a person attending a dance lesson is purchasing both education services, and the consent of the organiser to enter the premises. Since "dance halls (operation of-)" include the hiring of dance halls, those services are complementary to the Opponent’s services such as “instructional services relating to dance or to physical exercise; musical or dance performances”. If I am wrong in my

finding of identity between the services in the above paragraph, I find, in the alternative, that there is an at least low degree of similarity between those respective services on the basis of complementarity and their having shared users and channels of trade.

Dance instruction

48. I find that the Opponent's protection for "educational or instruction services relating to music or dance; teaching of dance" covers the Applicant's "dance instruction" services – those respective services are identical.

Dance events

49. "Dance events", as applied for by the Applicant are services covered by the Opponent's protection for "organisation of dance events or discos". Those services are identical.

Dance club services

50. The Opponent submits that the Applicant's specification of "dance club services" is a vague term, but that since a club may be defined as an organisation of people with a common purpose or interest, who meet regularly and take part in shared activities, then a "dance club" is such an organisation dedicated to dancing. I agree. The services that one may expect to be provided at such a dance club would include "teaching of dance; music or dance performances; organisation of dance events or discos". Those respective services may therefore be considered identical on the basis of the principle in *Gérard Meric*.

Dance schools

51. People attend dance schools to learn to dance and to learn about dancing. Those services are identical to the Opponent's specifications for "educational or instruction services relating to music or dance; instructional services relating to dance or to physical exercise; teaching of dance".

Dance studios

52. Dance studios are places – often with music and mirrored walls - where people practise dancing and improve their skills. Services under that term are therefore similar to at least a medium degree to the Opponent’s “educational or instruction services relating to music or dance; instructional services relating to dance or to physical exercise; musical or dance performances” on the basis of shared purpose, users, methods of use, channels of trade and complementarity.

Comparison of the marks

53. It is clear from *Sabel* that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo* that: “.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which 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.”
54. It would therefore be wrong to dissect the trade marks artificially, but it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features that are not negligible and therefore contribute to the overall impressions created by the marks.
55. The Applicant’s contested trade mark is “Cerock”.
The Opponent’s earlier trade mark is CEROC.
56. The overall (and inevitably whole) impression of the Applicant’s mark derives from the single word “Cerock”. It is not a word that appears in an English language dictionary and it would strike the average consumer as an invented word. Although it contains within it the letters “r-o-c-k”, which spell the word “rock”, I find that the average

consumer would read no obvious meaning into the word “Cerock” and that the word would not be seen as descriptive of its goods and services.

57. Likewise, as to the Opponent’s mark, its overall (and inevitably whole) impression derives from the single word “CEROC”. It would strike the average consumer as an invented word carrying no obvious meaning.

Visual similarity

58. Both marks comprise words only. The words are presented in different cases (upper versus title case), but anyway both use standard characters and their reasonable normal use would include use in upper and lower case. The marks differ in the additional presence in the Applicant’s mark of the terminal letter “k”. I find the marks to be visually similar to at least a reasonably high degree.

Aural similarity

59. Both marks comprises the same two syllables. The “ce” part would most likely be pronounced as it is in words such as “cell” or “ceremony” – or possibly as “see” as in the name “Celia”. The terminal letter “k” has no impact on the pronunciation of the second syllable in each mark. The average consumer would pronounce the respective words exactly alike in each case, so I find the marks to be aurally identical.

Conceptual similarity

60. I note the points filed as to the reasons behind the formulations of the marks at issue. However, the comparison between the marks is to be made from the perspective of the notional average consumer, who will not know the particular considerations at play in the minds of the parties. The Opponent submits that the notional average consumer in the UK does not have the linguistic skills to undertake an etymological dissection of a neologism based on a foreign language. Notwithstanding that the Applicant’s mark contains the word “rock”, I have found that neither mark has an obvious meaning, so I therefore find neutrality in terms of their conceptual similarity.

Distinctive character of earlier trade mark

61. The distinctive character of the earlier mark (CEROC) must be considered. The more distinctive it is, either by its inherent nature or by use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

*“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).*

*23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”*

62. The word CEROC does not directly describe the Opponent’s goods or services. The allusion resulting from the derivation of the word from the French phrase for “It’s rock” is not readily apparent to the average consumer. I find the word CEROC to have a reasonably high degree of inherent of distinctiveness for the goods and services in question.

63. The Opponent’s evidence, which I summarised earlier in this decision, strongly indicates the notable reach and success of the CEROC business model in the UK, sufficient to enhance the distinctiveness of the earlier trade mark in relation to dance classes and

events, covering numerous of its services in class 41. I found a certain lack of clarity in the evidence relating to the nature, distribution and cost of its advertising activities. I also found the evidence to be limited in relation to the Opponent's goods, and that it showed no use in relation to footwear. Taking account of the inherent distinctiveness of the earlier mark, together with the evidence of use, I find the Opponent's mark to have a at least a reasonably high level of distinctiveness overall.

Conclusion as to likelihood of confusion

64. I now turn to make a global assessment as to the likelihood of confusion between the marks if they were used in relation to the goods and services specified. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of weighing up the combined effect of all relevant factors in accordance with the principles and authorities I have set out in this decision. Earlier in this decision I concluded that:

- the goods and most of the services are identical and that where services are not identical they are similar to some degree;
- the average consumer of the goods at issue is a member of the public; the average consumer of the services is a member of the public (including business customers);
- the average consumer will pay no more than a normal degree of attention when purchasing the goods and services, which will be selected by predominantly visual means, but where aural considerations will also play a part;
- the Opponent's trade mark is an invented word and is at least reasonably highly distinctive; the overall impression conveyed by the Applicant's trade mark rests solely on the invented word Cerock;
- the competing trade marks are visually similar to at least a reasonably high degree, are aurally identical and there is neutrality in terms of their conceptual similarity.

65. The average consumer is not generally able to compare the marks side by side, but must instead trust in the imperfect recollection of them it has kept in its mind.

66. Weighing in the balance all of the above factors, I find in this case that there would be a likelihood of confusion on the part of the relevant UK public as to the origin of the contested goods and services. **Consequently, the opposition succeeds in full on the basis of s5(2)(b).**

Costs

67. The Opponent has been successful and is entitled to a contribution towards its costs. In awarding costs I take account of the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the Opponent the sum of £1100 (one thousand, one hundred pounds) as a contribution towards the cost of the proceedings, calculated as follows:

Reimbursement of official fee for Notice of Opposition / Statement of Grounds:	£100
Preparing a statement of grounds and considering the other side's statement:	£200
Preparation of evidence and considering the other side's evidence	£500
Preparing submissions	£300
Total:	£1100

68. I therefore order Hertz Hagai to pay Ceroc Enterprises Limited the sum of £1100 (one thousand, one hundred pounds) to be paid within fourteen days of the expiry of the appeal period, or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 1st day of February 2018

Matthew Williams

For the Registrar, the Comptroller-General
