O/004/21

TRADE MARKS ACT 1994

IN THE MATTER OF
UK TRADE MARK APPLICATION No. 3350961
IN THE NAME OF EXORO DESIGN LIMITED

AND IN THE MATTER OF
OPPOSITION No. 415485 THERETO
BY UNDER ARMOUR INC

AND IN THE MATTER OF
APPEALS TO THE APPOINTED PERSON
BY THE APPLICANT AND THE OPPONENT
AGAINST A DECISION OF MS CLARE BOUCHER
DATED 29 JUNE 2020

DECISION

The Appeals

1. These proceedings concern two appeals to the Appointed Person under Section 76 of the Trade Marks Act 1994 against a decision of Ms Clare Boucher, acting for the Registrar, dated 29 June 2020, BL O/339/20:

    1) an appeal by Exoro Design Limited ("the Applicant") against Ms Boucher's refusal of Application number 3350961 standing in the name of the Applicant in its entirety under Section 5(3) of the Act following an opposition brought by Under Armour, Inc. ("the Opponent"); and

    2) an appeal by the Opponent against Ms Boucher's rejection of the Opponent's opposition to Application number 3350961 under Section 5(2)(b) of the Act.

2. The Applicant's Form TM55P Notice of appeal to the Appointed Person was filed on 27 July 2020.

3. The Opponent's Form TM55P Notice of appeal to the Appointed Person was accepted into the proceedings on or around 9 September 2020, retrospective extension of time having been granted by the Registrar to the Opponent for the late filing of the Opponent's appeal.

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

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

5. Under Section 5(2)(b) of the Act:

> "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."

6. The hearing of the appeals took place before me by videoconference on 18 December 2020. The Applicant was represented by Mr Aaron Wood of Blaser Mills LLP. Mr Jonathan Moss of Counsel instructed by Gill Jennings & Every LLP appeared for the Opponent.

7. I had previously refused the Opponent's request for referral of the appeals to the High Court under Section 76(3) of the Act for reasons given in my decision issued on 16 November 2020 under reference number BL O/567/20 https://www.ipo.gov.uk/t-challenge-decision-results/o56720.pdf.

8. There was no disagreement between the parties regarding the nature of the appellate function and the standard of review. I was referred to my own decision in *SOUL TRAIN RECORDS Trade Mark*, BL O/131/20 at paragraph 25, and the decisions of Mr Iain Purvis QC sitting as the Appointed Person in *ROCHESTER Trade Mark*, BL O/049/17, paragraph 34 and *GREYBOX Trade Mark*, BL O/106/20, paragraphs 7 – 14 and 23 – 26.

9. I was usefully provided by the parties with an agreed full electronic appeal bundle for which I was grateful.

10. On the morning of the appeals hearing, I was sent copies of exchanges of email correspondence between the parties regarding allegations of misconduct on the part of the Opponent's legal team before the Hearing Officer supposedly made in the Applicant's grounds of appeal.

11. I declined Mr Wood's invitation to consider/comment on any such allegations: first, the Applicant had asserted in the Applicant's written submissions on the Opponent's request for referral, dated 15 September 2020, that the Applicant intended to make no such allegations in its statement of grounds of appeal; second, in my view any such allegations had nothing to do with the appeals that were concerned only with whether

the Hearing Officer correctly applied the law under Section 5(3) and 5(2)(b) respectively in the particular circumstances of the case.

Background

12. On 5 November 2018, the Applicant applied to register under number 3350961 for use as a trade mark in the UK the figurative and word mark represented below:

13. The goods in respect of which registration was sought were:

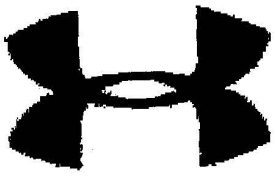
Class 25
Articles of sports clothing; Athletic footwear; Anti-sweat underclothing; Articles of clothing; Athletic clothing; Athletic footwear; Athletics footwear; Athletics vests; Baseball hats; Board shorts; Bomber jackets; Bottoms [clothing]; Boxer shorts; Casual clothing; Casual footwear; Casual wear; Clothes for sports; Footwear [excluding orthopaedic footwear]; Footwear for men and women; Footwear for sports; Footwear not for sports; Girls' clothing; Gymwear; Jogging bottoms [clothing]; Leisure clothing; Menswear; Polo shirts.

14. The Application was published in the Trade Marks Journal on 16 November 2018.

15. On 18 February 2019, the Opponent filed Notice of opposition and statement of grounds against the Application under Section 5(2)(b), 5(3) and 5(4)(a) of the Act.

16. The oppositions under Section 5(2)(b) and 5(3) were based on the Applicant's EUTM Registration number 2853927, which was applied for on 18 September 2002 with a US priority date of 21 August 2002 and registered on 9 December 2003 in Class 25 for clothing.

17. The Opponent's earlier trade mark relied on was represented as follows:



18. The Opponent also claimed UK unregistered rights protected by the law of passing off in the earlier sign represented above in relation to clothing, footwear, and headgear for the purposes of Section 5(4)(a).

19. The Applicant took issue with the grounds of opposition in a Notice of defence and counterstatement dated 29 April 2019 and put the Opponent to proof of use of the Opponent's earlier trade mark.

20. Both parties filed evidence. A telephone hearing was held by the Hearing Officer on 8 April 2020, which was attended only by the Opponent represented by Mr Moss[1]. The Applicant provided written submissions in lieu of attendance in the form of a skeleton argument.

The Hearing Officer's decision

21. Having reviewed in detail the parties' evidence (decision paras. 11 – 28; no challenge is made to her description) the Hearing Officer made the following findings, in brief:

Proof of use

1) The Opponent had established genuine use of its earlier trade mark in the EU for *Clothing for sports* (decision, paras. 29 – 48).

Section 5(2)(b)

2) The respective goods were identical and similar (decision, paras. 58 – 63).

3) The average consumer was the general public. The goods would physically be bought from shops or selected from websites or catalogues. Accordingly the visual element was important, although since advice of sales assistants might be sought, the aural aspect could not be ignored. An average degree of attention would be paid to the purchase of the goods (decision, para. 65):

> "… The applicant submits that the average consumer is meticulous and unlikely to be confused. In my view, this overstates the degree of attention being paid. The goods vary in price but will be regular purchases. The consumer will want to ensure that the goods fit and are suitable for the activities the consumer will be taking part in while wearing them. They are also likely to be interested in the appearance of the products. I find that they will pay an average degree of attention."

4) The marks were similar to a low degree. The device elements were similar to a medium degree, but the marks had to be compared as wholes and the presence of the word "exoro" in the contested mark created a significant point of difference between them (decision, paras. 69 – 72).

5) The marks were aurally different; the average consumer would say the word "exoro" (decision, para. 73).

6) No conceptual comparison could be made between the marks (decision, para. 75).

[1] Decision, para. 10.

7) The earlier trade mark was possessed of a medium level of inherent distinctiveness, which had been enhanced to some extent through use in the UK. However, weaknesses identified by the Hearing Officer in the Opponent's evidence meant that she was unable to find that the earlier trade mark's distinctiveness had been enhanced to such a high level as submitted by the Opponent (decision, paras. 76 – 79)

8) The device element played an independent distinctive role within the contested mark and, on its own, was visually similar to a medium degree to the earlier trade mark. Nevertheless, when the marks were compared overall there was no likelihood of confusion either direct or indirect. The Hearing Officer was prepared to accept that the Applicant's device would bring the Opponent's mark to mind but that was mere association:

> "85. While the contested mark, taken as a whole, has a low degree of visual similarity, the device on its own is visually similar, in my view, to at least a medium degree to the earlier mark. The outline shapes are very similar and the details are less likely to be visible when the mark is seen on clothing. I cannot see that the average consumer would perceive that the composite mark as a whole has a different meaning to the meanings of the separate elements. I consider that the applicant's device plays an independent distinctive role in its mark, but the judge [Arnold J. in *Whyte and Mackay Ltd v. Origin Wine UK Ltd* [2015] EWHC 1271 at para. 21] was clear that the global assessment of confusion must take into account a comparison of the marks based on their overall impressions.
>
> 86. It is my view that the marks are not sufficiently similar for the average consumer to mistake them, even taking account of imperfect recollection. The verbal element of the contested mark is far from negligible: indeed I found that it played an equal role in the overall impression of that mark.
>
> 87. Mr Moss laid great emphasis on how the marks would be seen when in use, including from a distance where the outline would be what is most noticeable to the consumer. Nevertheless, the consumer will have the opportunity to see the mark more closely when they are choosing which products to buy. These are not the kind of goods that are quick impulse purchases. Even in the case of identical goods, there is no likelihood of direct confusion.
>
> 88. Indirect confusion, as Mr Purvis said, relies on a different kind of mistake. The average consumer must assume that the applicant's mark indicates a sub-brand or other connection to the opponent. Mr Moss said that the consumer might be under this impression, thinking that EXORO could refer to "a new range of clothing". While I found that there was a medium degree of similarity between the devices, it seems to me that they are still sufficiently different for the average consumer not to assume that they belong to the same undertaking. I

accept that the applicant's device is likely to bring the opponent's mark to mind, but that is mere association. I find that there is no likelihood of indirect confusion."

9) The Section 5(2)(b) ground failed (decision, para. 89).

Section 5(3)

10) The Opponent had established a reasonably high EU reputation in its earlier trade mark in respect of *Clothing for sports* (footnotes omitted):

> "96. In the light of the case law I have just cited, the United Kingdom could be regarded as a substantial part of the EU at the relevant date. A consideration of the sales figures and promotional activity together with the evidence referring to items of sports clothing and descriptions of the business of the opponent in national media lead me to find that the mark would be known to a significant proportion of the sports clothing-buying public. Furthermore, some of the athletes sponsored by the opponent (for example, Andy Murray) are very well known in the UK and sports such as football and international rugby attract sizeable audiences.
>
> 97. The applicant also submits that the information on the appearance of the mark in TV programmes and films is not relevant to the UK market. In my view, the applicant makes too much of this. It may well be the case that these were made in the US, but I believe I may take judicial notice of the widespread availability of US films and TV shows in the UK.
>
> 98. I will not repeat my analysis of the market share information, but merely note that this is just one of the relevant factors to be taken into account.
>
> 99. I remind myself that I found that the opponent had not demonstrated use for *Clothing* as a general category, but for *Clothing for sports* in particular. It seems to me that this is where the opponent's reputation lies too. A wide range of different sportswear items is shown in the evidence, and the focus is on high-performance, innovative products. The Daily Telegraph article of 16 August 2016 that I have cited earlier states:
>
> > "… in the noughties it [Under Armour] launched its answer to cotton, dubbed UA Tech, a compression and wicking fabric that's gone on to dominate many of the tonier gyms and championship-winning locker rooms of the world, inevitably at the expense of more established players such as Nike and Adidas, and perhaps its nearest rival in terms of elevating the business end of 'athleisure' style, Lululemon."
> >
> > In my view, the opponent has shown a reasonably high (if not the highest) reputation for *Clothing for sports*."

11) Taking into account her findings on the relevant factors including that a lesser degree of similarity between the marks may suffice for Section 5(3) in the Hearing Officer's view the necessary "link" was made out:

> "107. What is required is that the later mark should bring the earlier mark to mind. Given the similarity between the goods and the similarity between the devices and the strength of the earlier mark's reputation, it seems to me that the relevant public would make the link with the earlier mark on seeing the contested mark. In particular, if the relevant public sees the later mark on clothing worn by someone in a gym or in the street, at a degree of distance, it is the device that will be most noticeable. The earlier mark will have been seen in connection with prominent sportspeople and in my view the public will think that the later mark is sufficiently similar to the earlier mark for them to make a link between them."

12) Use/registration of the contested mark would enable the Applicant to take unfair advantage of the reputation of the earlier trade mark in circumstances where no due cause had been shown (footnotes omitted):

> "111. In *Lonsdale Sports Limited v Erol* [2013] EWHC 2956 (Ch), Norris J had rejected a claim that there was a likelihood of confusion between the appellant's mark and the respondent's mark. However, he found that:
>
> > "As I have said above, at a first glance the block of text in the Respondent's Mark looks like something that Lonsdale might be connected with (a first impression soon dispelled in the case of the average consumer). But that first glance is important. Those who look at the wearer of a product bearing the Respondent's Mark might not get more than a glance and might think the wearer was clad in a Lonsdale product. The creation of that illusion might be quite enough for the purchaser of a 'look-alike' product: indeed who but such a person would knowingly buy a 'pretend' product? Further, it undoubtedly dilutes the true 'Lonsdale' brand by putting into circulation products which do not proclaim distinctiveness but rather affinity with a reputable brand."
>
> 112. In my view, the contested mark when seen on clothing or footwear will at that first glance look like the earlier mark, or at least something that the opponent will be connected with, and so it is likely that someone who wished to give the impression that they were wearing clothes produced by the opponent would choose goods bearing the contested mark.
>
> 113. Even if I am wrong in this, I consider that there will be unfair advantage in the form of image transfer. The consumer is likely to see the applicant's goods and recall the athletes they have seen wearing the products and the events where the opponent has advertised. The

> applicant will benefit from the association with these sportspeople and events, and the opponent's reputation for high performance clothing, without having made the investment in creating that reputation. Even in the case of clothing and footwear not conceivable as sportswear, the overlap in terms of nature and use is, in my view, enough, for there to be a link and for image transfer to occur.
>
> 114. As the applicant has not shown due cause to use the contested mark, the section 5(3) ground succeeds."

Section 5(4)(a)

13) The Opponent had established UK goodwill in relation to sports clothing and footwear marketed under the earlier trade mark. However the public would not assume that the goods bearing the contested mark were connected with the Opponent (as opposed merely to wondering whether they were). The Opponent was not assisted by its argument on initial interest confusion. Moreover there was no evidence as to the Applicant's intention and the Hearing Officer would make no inferences in that regard. The Section 5(4)(a) ground failed (decision, paras. 122 – 129).

14) The Opponent did not appeal against the Hearing Officer's findings under Section 5(4)(a).

The Applicant's appeal – Section 5(3)

Ground 1

22. The Applicant's first ground of appeal against the Hearing Officer's decision under Section 5(3) was that she erred in finding that the Opponent's reputation in the earlier trade mark was based on the high performance and innovation of its sports products.

23. The Applicant said that this finding was not open to the Hearing Officer because it had not been specifically pleaded.

24. In my judgment, there was no justification in the Applicant's first ground of appeal.

25. As I pointed out at the hearing and the Hearing Officer noted in her decision (para. 12), Ms Dana Lynch, Senior Counsel, Trademarks in giving evidence for the Opponent opened her Witness Statement, dated 22 July 2019, by stating:

> "2. … My company is one of the world's most successful, popular, and well-known providers of performance apparel, sporting goods, accessories, and related goods and services. Through its innovative use of advanced engineering and technology, my Company and its products have revolutionized the performance apparel industry …"

26. Further Ms Lynch exhibited (DL4 – DL11) a number of the Opponent's advertisements showing sportspersons including rugby and football players wearing the Opponent's apparel bearing the earlier trade mark, which emphasised the high performance and innovation, and consequent "undeniable" advantage of the

Opponent's products shown in the advertisements. Indeed, the Hearing Officer incorporated two such example copy advertisements in the body of her decision.

27. The Hearing Officer also noted:

> "18. The same exhibits also contain press coverage from 2010 to 2018 from sources such as the BBC News website, the Daily Telegraph and Sports Illustrated. Many of these articles focus on the opponent's partnerships with sporting events and teams, including Welsh Rugby Internationals and several Welsh rugby players, Tottenham Hotspur FC, Sir Andy Murray and swimmer and multiple Olympic champion Michael Phelps …"

28. I would add that the high performance and technical innovation aspects of the Opponent's products bearing the earlier trade mark were highlighted in some of the sample press coverage including in a Daily Telegraph article dated 16 August 2016 which was cited by the Hearing Officer (decision, para. 99) and stated:

> "… in the noughties it [Under Armour] launched its answer to cotton, dubbed UA Tech, a compression and wicking fabric that's gone on to dominate many of the tonier gyms and championship-winning locker rooms of the world, inevitably at the expense of more established players such as Nike and Adidas, and perhaps its nearest rival in terms of elevating the business end of 'athleisure' style, Lululemon."

29. It seems to me that there was in the Opponent's evidence ample justification for the Hearing Officer's conclusion that the focus of the Opponent's reputation under and by reference to the earlier trade mark was in high performance innovative products.

30. This was not, as suggested by the Applicant, a case of the Hearing Officer going off "on a frolic of her own". I dismiss the Applicant's first ground of appeal.

Ground 2

31. The Applicant's second ground of appeal was that the Hearing Officer wrongly decided Section 5(3) solely on the basis of the device element of the contested trade mark.

32. The Applicant asserted that this was obvious in particular from paragraphs 101 and 107 of the decision.

33. Further the Applicant contended that the error occurred because of the Opponent's allegation made in Ms Lynch's Witness Statement and pursued in argument before the Hearing Officer that the Applicant used only the device element of the contested trade mark, which provided the paradigm example of notional and fair use of the contested trade mark.

34. I reject these criticisms which in my judgment were unfounded.

35. It is trite law that the comparison for the purposes of Section 5(2)(b) and 5(3) must be between the earlier trade mark as registered and the trade mark as applied for (see

e.g., *REACT Trade Mark*, BL O/474/99, p. 5, *SGG APPAREL Trade Mark*, BL O/006/20, para. 36, Case T-114/19, *Dan-Gabriel Pavel v. EUIPO* EU:T:2020:286, para. 70 and the cases cited therein).

36. It is quite clear from (and I did not understand either side to dispute) the Hearing Officer's detailed comparison of the marks albeit for the purposes of Section 5(2)(b) that the Hearing Officer was intent on comparing the marks as wholes.

37. She quite properly identified that the contested trade mark comprised both device and word elements that made equal contributions to its overall impression. Thus, whilst on the one hand the devices in the earlier and contested trade marks were visually similar to a medium degree, the presence of the word in the contested trade mark rendered the respective marks overall visually similar to a low degree.

38. The Hearing Officer went on to find in connection with Section 5(2)(b) that even though in her view the device played an independent distinctive role within the contested trade mark, when globally assessed taking into account the overall impressions of the marks, there was no likelihood of confusion.

39. That said, the Hearing Officer was prepared to accept that the device element in the Applicant's mark was likely to bring to mind the Opponent's mark which was mere association.

40. At paragraphs 101 and 107 complained of it seems to me that the Hearing Officer was relevantly carrying forward her previous findings in connection with Section 5(2)(b) to her separate determination of the ground of opposition under Section 5(3).

41. Thus, at paragraph 101 the Hearing Officer was dealing with the first of the *Intel* factors[2] for determining the existence of a "link" for Section 5(3) – the degree of similarity in the conflicting marks:

> "101. I found that the marks had a low degree of similarity, although the similarity between the devices was higher".

42. Contrary to the Applicant's submission, I do not think any more can be read into paragraph 101 other than a repetition (in summary) by the Hearing Officer of her previous findings in relation to the similarity of the marks as wholes. In particular, I do not think that paragraph 101 signified that the Hearing Officer treated the Applicant's mark for the purposes of Section 5(3) as comprising the device element only.

43. Likewise, in my view, at paragraph 107 (reproduced at para. 21, sub para. 11) above) the Hearing Officer was effectively restating her previous findings that the device element in the overall impression of the Applicant's trade mark was enough to bring to mind (i.e., cause the public to make a link with) the Opponent's trade mark but not to cause confusion.

[2] Case C-252/07, *Intel Corporation Inc. v CPM United Kingdom Ltd* [2008] ECR I-8823, para. 42.

44. In my judgment, those represented findings that the Hearing Officer was relevantly and consistently entitled to make. The second ground of appeal fails.

45. I will mention that before me the Applicant sought to raise a point on the Opponent's argument below regarding the Applicant's choice of trade mark, which was not covered in the grounds of appeal. Suffice it to say that the Hearing Officer noted that there was no evidence as to the Applicant's intention and accordingly made no inferences on that subject.

Ground 3

46. The Applicant's third ground of appeal concerned the costs order.

47. The Opponent argued for costs off the scale because *inter alia* the Applicant's professional representative at the time had made an allegation that Ms Lynch had only "presumably" signed her witness statement which was maintained without explanation.

48. The Hearing Officer refused to order other than scale costs but said:

> "134. This leaves the allegation that Ms Lynch "presumably" signed the opponent's witness statement. It seems to me that this allegation is likely to be interpreted as a slur on the conduct of either Ms Lynch or the opponent's representatives. The applicant's witness statement was not made by a litigant-in-person who may not have understood the implications of the wording, but by a legal representative. When challenged, the allegation was neither withdrawn nor explained. My award to cover the portion of the costs relating to the preparation for, and attendance at, the hearing is at the upper end of the scale to reflect the applicant's behaviour on this point."

49. The objection was to the Hearing Officer's award of £1,600 towards the Opponent's costs of preparation for, and attendance at the hearing (the scale specified up to £1,600 per day of hearing).

50. It is well recognised that a hearing officer has wide discretion as to the costs he or she awards, and I did not see (nor was I persuaded that there was) any reason to interfere in Ms Boucher's scale award for this item.

51. The Applicant's third ground of appeal fails.

Opponent's appeal – Section 5(2)(b)

Ground 1

52. The Opponent's first ground of appeal against the Hearing Officer's decision under Section 5(2)(b) was a criticism that the Hearing Officer failed to find direct or indirect confusion.

53. The Opponent alleged that this conflicted with the Hearing Officer's finding under Section 5(3) that (decision, para. 112):

> "… the contested mark when seen on clothing or footwear will at that first glance look like the earlier mark …".

54. I have already stated my judgment that there was no inconsistency between the Hearing Officer's reasoning under Section 5(2)(b) and Section 5(3).

55. Furthermore the statement relied on was taken out of context by the Opponent. The context was that the Hearing Officer considered the present case analogous to *Lonsdale Sports*. I set out the context for her statement at paragraph 21, sub paragraph 12 above and will not repeat it here. It is clear that the Hearing Officer was considering a situation where likelihood of confusion was dispelled.

Ground 2

56. The Opponent's second ground of appeal was that the Hearing Officer failed to apply the principle of interdependency in her global assessment of likelihood of confusion, although the Opponent acknowledged that the Hearing Officer instructed herself by reference to its applicability at paragraph 51 of her decision (there was also a cross reference to it at paragraph 80 of the decision).

57. I found no justification for the Opponent's second ground of appeal. In my view the criticism signified discontent in the outcome rather than error in the Hearing Officer's balancing exercise of the relevant factors.

Ground 3

58. Ground three was that the Hearing Officer failed to find enhanced distinctiveness, which is of course incorrect because the Hearing Officer accepted that the medium level of inherent distinctiveness of the Opponent's trade mark had been enhanced through use to some extent. The Hearing Officer's reasoning was:

> "79. … the evidential weaknesses I have already discussed mean that I am unable to find that this distinctiveness has been enhanced to such a high level as submitted by the opponent."

59. The Opponent contended that that finding on enhanced distinctiveness was in contradiction to the Hearing Officer's following findings on reputation for the purposes of Section 5(3):

> "96. … A consideration of the sales figures and promotional activity together with the evidence referring to items of sports clothing and descriptions of the business of the opponent in national media lead me to find that the mark would be known to a significant proportion of the sports clothing-buying public. Furthermore, some of the athletes sponsored by the opponent (for example, Andy Murray) are very well known in the UK and sports such as football and international rugby attract sizeable audiences."

and

> 99. … In my view, the opponent has shown a reasonably high (if not the highest) reputation for *Clothing for sports*."

60. I agree that there appears to be in the present circumstances at least a semantic discrepancy between the Hearing Officer's findings on the one hand, that the Opponent's earlier trade mark possessed a medium degree of distinctiveness that had been enhanced through use to some extent and on the other hand, that the earlier trade mark enjoyed a reasonably high reputation – both in relation to sports clothing.

61. The tests for distinctiveness and reputation are not the same but they do share similar relevant factors to be taken into account (Joined Cases C-109/97, C-108/97 and C-109/97, *Windsurfing Chiemsee Produktions- und Vertriebs GmbH v. Boots- und Segelzubehör Walter Huber* [1999] ECR I-2779, para. 51, Case C-*PAGO International GmbH v Tirolmilch registrierte Genossenschaft mbH* [2009] ECR I-9429, para. 25).

62. I have carefully considered whether the outcome under Section 5(2)(b) would have been different were the Hearing Officer to have factored into her global assessment of likelihood of confusion that the earlier trade mark's enhanced distinctiveness through use in relation to sports clothing was reasonably high[3], and have concluded likely not. That is because of the low degree of similarity she had found in the marks together with the nature of the goods and the purchasing act.

63. For the sake of completeness, I reject the Opponent's refutation of the Hearing Officer's observation that (decision, para. 87):

> "These are not the kind of goods that are quick impulse purchases."

64. On the Opponent's third ground of appeal, I see no reason to interfere.

Ground 4

65. The Opponent's fourth ground of appeal was a "catch-all", essentially that if Grounds 1 – 3 did not individually justify my interference, collectively they did. I have dismissed Grounds 1 – 3 so Ground 4 is also dismissed.

Costs

66. Since neither party has been successful in its respective appeal, I make no order as to the costs of the appeals.

67. The question of the costs of the Opponent's unsuccessful request to refer the appeals to the High Court (BL O/567/20) remains outstanding. I will order that the Opponent pay to the Applicant the sum of £500 towards the Applicant's costs of resisting the Opponent's request.

[3] This was to give the Opponent the benefit of its own acknowledged squeeze on the Opponent's contention that there existed a tension between the Hearing Officer's findings in these respects under Section 5(2)(b) and Section 5(3).

68. The Hearing Officer ordered the Applicant to pay to the Opponent costs in the sum of £3,400. The outstanding balance of £2,900 (£3,400 minus £500) is to be paid by the Applicant to the Opponent within 21 days of the date of this decision.

Professor Ruth Annand, 5 January 2021

Mr Aaron Wood of Blaser Mills LLP appeared for the Applicant/Appellant/Respondent

Mr Jonathan Moss of Counsel instructed by Gill Jennings & Every LLP appeared for the Opponent/Respondent/Appellant