

O/0190/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003970548

BY WINGEAGLE PTE. LTD.

TO REGISTER THE FOLLOWING TRADE MARK:

Triumphkey

IN CLASSES 6, 11, 12, 18, 22 AND 28

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. 446985

BY TRIUMPH DESIGNS LIMITED

Background and Pleadings

1. On 23 October 2023, Hangzhou Zi Yu Technology CO., LTD. ('the Previously Registered Applicant') filed an application to register the following trade mark ('the Contested Mark'):

Triumphkey
(Word mark)

2. The application was published for opposition purposes in the Trade Marks Journal on 19 January 2024. Registration is sought in respect of goods in classes 6, 11, 12, 18, 22 and 28. The full specification applied for is set out at Annexe 1 to this decision. The goods which are opposed are as follows:

Class 12:

Self-balancing electric unicycles; Self-balancing boards; Self-balancing scooters; Fishing trolleys; Camping cars; Bicycle frames; Mopeds; Delivery tricycles; Safety seats for children, for vehicles; Handcars; Handling carts; Two-wheeled trolleys; Bicycles.

Class 18:

Hiking sticks; Valises; Trunks [luggage]; Suitcases; Umbrella handles; Parasols; Umbrella covers; Umbrellas; Travelling trunks; Frames for umbrellas or parasols; Umbrella sticks; Umbrella or parasol ribs; Umbrella rings; Mountaineering sticks; Trekking sticks; Trimmings of leather for furniture; Leather trimmings for furniture; Alpenstocks.

Class 28:

Baby gyms; Paddleboards; Trampolines; Snowboards; Bodyboards; Starting blocks for sports; Surfboard leashes; Bags especially designed for skis; Sailboards; Surf skis; Skis; Surfboards; Swimming pools [play articles]; Rollers for stationary exercise bicycles; Chest expanders [exercisers]; Body-building apparatus; Machines for physical exercises; Stationary exercise bicycles; Swings; Body-training apparatus.

3. On 18 April 2024, the application was opposed by Triumph Designs Limited ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ('the Act'). This is a partial opposition directed against some of the applied-for goods.¹ The Opponent relies upon the following earlier registration:

UK910481257²

TRIUMPH

(Word mark)

Filing date: 9 December 2011

Date of entry in the register: 7 January 2020

4. This earlier mark stands registered for a variety of goods and services in classes 3, 4, 6, 9, 11, 12, 14, 17, 18, 22, 28, 32, 33, 34, 35, 36, 37, 39, 41, 42 and 43. The full registered specification is set out at Annexe 2 to this decision. The terms upon which the Opponent seeks to rely are as follows:

Class 12:

Motorcycles; mopeds; scooters; powered 2-wheeled vehicles; stands for motorcycles; electrical heated hand grips for motorcycles; parts, accessories and fittings for all of the aforesaid goods.

Class 18:

Luggage; trunks; umbrellas; belts, bands and straps; briefcases; key cases; back packs; rucksacks; bags; boxes; wallets and purses; parts and fittings for all of the aforesaid goods.

Class 28:

Games and playthings; playing cards; parts and fittings for all of the aforesaid goods.

¹ The opposed terms are at paragraph [2] of this decision.

² This earlier right is a comparable mark pursuant to Article 54 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01) ('the Withdrawal Agreement'), based on EUTM 010481257, which was registered prior to the withdrawal of the UK from the European Union.

5. The Opponent claims that the Contested Mark 'is highly similar to the [...] earlier trade mark, and is seeking protection for goods which are identical and/or highly similar or related to some of the goods covered by the earlier trade mark, such that there exists a likelihood of confusion [...]'.³
6. The Previously Registered Applicant argues that there are only minimal degrees of visual, aural and conceptual similarity between the competing marks and that the opposition pursuant to section 5(2)(b) of the Act should be refused.⁴

Transfer of ownership of the application

7. On 27 December 2024, the Registry was informed of a transfer of ownership of the application, by assignment, from the Previously Registered Applicant to WINEAGLE PTE. LTD. ('the Applicant') by way of Form TM16.⁵ 12 December 2024 was provided as the date of the transfer of ownership. Recordal of the change of ownership was confirmed by the Registry on 29 January 2025.
8. On 12 February 2025, the Applicant confirmed the following undertakings in respect of the instant proceedings:

That the Applicant:

- i. has had sight of all previously-submitted forms and evidence;
- ii. stands by the statements made in the counterstatement, confirming that where the name of the Previously Registered Applicant appears, this should be read as though it is made in the Applicant's name;

and

³ Opponent's Statement of Grounds, [2].

⁴ Counterstatement of the Previously Registered Applicant, paragraphs [2.1] - [2.3].

⁵ Application to record a change of ownership.

iii. is aware of and accepts liability for costs of the whole proceedings in the event that the opposition is successful.

9. The Opponent is represented by Potter Clarkson LLP. The Applicant is represented by Monyin Lin Chien.⁶

10. Only the Applicant filed evidence. The Opponent filed written submissions in reply. A hearing was neither requested, nor considered necessary; and neither party filed written submissions in lieu thereof. The following decision has been made after careful consideration of the case papers available to me.

RELEVANCE OF EU LAW

11. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE AND SUBMISSIONS

12. The Applicant's evidence comes in the form of two Witness Statements. The first is from Daiwei Weng, Director of the Previously Registered Applicant, and is dated 13 December 2024. There are two exhibits. The second is from Eichmann Denis, who describes himself as legal representative of a company named Triumphkey International Trading GmbH, and is dated 26 February 2025. Mr Eichmann has stated that he is in partnership with the Applicant. There are nine exhibits: ED1 to ED9.

⁶ The Previously Registered Applicant was represented by AXIS PROFESSIONAL LTD.

13. The Applicant's evidence appears to have been adduced to demonstrate that the Contested Mark has been used. For reasons that I will explain at [18], the matter of use of the Contested Mark is immaterial to the instant proceedings.

DECISION

Earlier mark

14. In accordance with section 6A of the Act, the Opponent's mark is an earlier mark by virtue of its filing date, which precedes the filing date of the application.

The proof of use provisions

15. Section 6A of the Act provides that, in opposition proceedings, where the date on which the registration procedure of the earlier mark was completed more than 5 years prior to the filing date (or priority date) of the Contested Mark, the Opponent may be required to prove use of the earlier mark. In the instant case, section 6A is not engaged, because the earlier mark has been registered for less than 5 years at the date on which the application was filed. The Opponent is, therefore, entitled to rely on the full breadth of its registered specification.

Section 5(2)(b) opposition

Relevant legislation

16. Section 5(2)(b) of the Act reads as follows:

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

(a)...

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

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

I also note Section 5A:

‘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.’

Relevant case law

17. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25:

(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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; and

(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.

A note on fair and notional use

18. I am required to make the assessment of the likelihood of confusion notionally and objectively based on the Opponent's goods, as registered, and the Applicant's goods, in respect of which registration is sought, in accordance with the relevant case law. That assessment requires that I must not take into account the actual way that either party might have used their marks in the marketplace or aspects of their goods which cannot be determined upon inspection of the Register. Further,

I must consider all of the circumstances in which the mark for which registration is sought might be used should it become registered.⁷

Comparison of goods

19. The goods to be compared are set out below this paragraph. The Opponent has indicated the goods that it claims to be identical using bold text and those that it considers to be ‘highly similar’ in underline.⁸ However, it has not indicated where the particular points of identity/similarity lie by way of identifying within its own specification the most appropriate comparators to be used against each contested term.

Opponent’s mark:	Contested Mark:
Class 12: <i>Motorcycles; mopeds; scooters; powered 2-wheeled vehicles; stands for motorcycles; electrical heated hand grips for motorcycles; parts, accessories and fittings for all of the aforesaid goods.</i>	Class 12: <u>Self-balancing electric unicycles; Self-balancing boards; Self-balancing scooters; Fishing trolleys; Camping cars; Bicycle frames; Mopeds; Delivery tricycles; Safety seats for children, for vehicles; Handcars; Handling carts; Two-wheeled trolleys; Bicycles.</u>
Class 18: <i>Luggage; trunks; umbrellas; belts, bands and straps; briefcases; key cases; back packs; rucksacks; bags; boxes; wallets and purses; parts and fittings for all of the aforesaid goods.</i>	Class 18: <u>Hiking sticks; Valises; Trunks [luggage]; Suitcases; Umbrella handles; Parasols; Umbrella covers; Umbrellas; Travelling trunks; Frames for umbrellas or parasols; Umbrella sticks; Umbrella or parasol ribs; Umbrella rings; Mountaineering sticks; Trekking sticks; Trimmings of leather for furniture; Leather trimmings for furniture; <u>Alpenstocks.</u></u>

⁷ As per *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C- 533/06, [66].

⁸ Opponent’s written submissions, [36].

<p>Class 28: Games and playthings; playing cards; parts and fittings for all of the aforesaid goods.</p>	<p>Class 28: Baby gyms; Paddleboards; Trampolines; Snowboards; Bodyboards; Starting blocks for sports; Surfboard leashes; Bags especially designed for skis; Sailboards; Surf skis; Skis; Surfboards; Swimming pools [play articles]; Rollers for stationary exercise bicycles; Chest expanders [exercisers]; Body-building apparatus; Machines for physical exercises; Stationary exercise bicycles; Swings; Body-training apparatus.</p>
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20. The Applicant, in its counterstatement, has stated that the opposition should be 'refused in its entirety', although it has not made any comment on the matter of the similarity/identity, or otherwise, of the parties' goods. In the light of the Applicant's overarching statement, I will proceed on the basis that the similarity/identity of the goods is denied.

21. Section 60A of the Act provides:

(1) 'For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the 'Nice Classification' means the system of classification under the Nice Agreement Concerning the International Classification of Goods

and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.’

22. I note the case of *Gérard Meric v Office for Harmonisation in the Internal Market*,⁹ in which the General Court (‘the GC’) held that:

‘29. ... 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’

23. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties’ goods and services must be taken into account:

‘[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’.

24. Goods or services will be found to be in a competitive relationship only where one is substitutable for the other.¹⁰ In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC described ‘complementary’ in the following terms: “[...] 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”.¹¹ 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.

⁹ Case T-133/05.

¹⁰ *Lidl Stiftung & Co KG v EUIPO*, Case T-549/14.

¹¹ Paragraph 82.

25. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281,¹² identified the following factors for assessing similarity of the respective goods and services:

- (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.

26. Goods (or services) may be grouped together for the purposes of assessment, as Geoffrey Hobbs Q. C. (as he then was), sitting as the Appointed Person, said in *Separode Trade Mark* BL O-399-10:

‘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.’

27. Case law establishes that ‘... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise’ but “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

¹² *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

language unnaturally so as to produce a narrow meaning which does not cover the goods in question.'

Class 12

28. I set the points of identity in the following table:

Opponent's mark:	Contested Mark:
<i>scooters</i>	<i>Self-balancing scooters</i> (identical according to the principle in <i>Meric</i>)
<i>mopeds</i>	<i>Mopeds</i>

29. I will compare the remaining contested terms in class 12 by applying the usual 'Treat' factors.

Contested terms: *fishing trolleys; two-wheeled trolleys*

30. I compare the contested goods to the Opponent's *powered 2-wheeled vehicles*. Both fishing trolleys and two-wheeled trolleys are used to convey physical objects over land from one place to another. Fishing trolleys are specifically for carrying fishing equipment, whereas two-wheeled trolleys are typically used to transport goods and other physical objects (typically heavy or bulky items). Both are propelled by the person wheeling them, rather than being 'powered' in the sense of having a motor. The Opponent's term, on the other hand, will cover motorised vehicles with two wheels, for example: motorbikes, mopeds and scooters. Whilst both parties' goods share the broad purpose of being means of transport, their specific purposes are different: one transports goods/physical objects and the other is a means of transport for the person riding the motorbike, scooter or moped etc. Users may overlap, but only to the fairly unremarkable extent that a motorcyclist, for example, might also happen to go fishing or use a two-wheeled trolley. Trade channels will be separate. The same outlet would unlikely sell both parties' goods. I do not find them to be competitive or complementary, neither being substitutable or necessary/important for the other. Methods of use are different: the Applicant's trolleys will be loaded with physical items and 'wheeled' by the user; the

Opponent's vehicles will be ridden. Whilst both parties' goods have two wheels, there are significant differences in their physical natures; both in terms of appearance and the fact that one is powered/motorised whereas the other is operated manually. All things considered, I do not find the respective goods to be similar. If I am wrong about that, then the level of similarity will be very low.

Contested term: *handling carts*

31. It is my understanding that a handling cart is type of flat-bed trolley used for moving goods; for example, in warehouses or retail/wholesale outlets where goods are heavy or bulky. I find the contested goods to be even further removed from the Opponent's goods than the two-wheeled trolleys considered above at [30]. I do not find any similarity between the contested goods and any of the Opponent's goods.

Contested term: *Handcars*

32. It is my understanding that 'handcars' are trolleys used on railway tracks which are operated manually by way of a pivoting arm which propels the vehicle. Their purpose is to enable inspection of railway tracks. For reasons analogous to those above at [31], I do not consider the contested goods to have any similarity with those of the Opponent.

Contested terms: *Self-balancing electric unicycles; Self-balancing boards*

33. I compare the contested goods to the Opponent's *scooters*. *Self-balancing electric unicycles* are, self-evidently, powered by an electric motor. It is my understanding that *self-balancing boards*, sometimes called hoverboards, are also powered in this way. The Opponent's *scooters* will encompass scooters of the self-balancing electric variety. The parties' goods will share a purpose, i.e. to transport the rider across land from one point to another. Users and trade channels will overlap. Methods of use will clearly overlap. I consider the parties' goods to be a competitive relationship; both the Applicant's unicycles and boards are clear substitutes for a self-balancing electric scooter. I do not find complementarity, neither party's goods being necessary or important for the other. I find the goods to be highly similar.

Contested term: *Bicycles*

34. I compare the Applicant's goods to the Opponent's *scooters*. The goods will overlap in purpose; both being intended to transport the rider from place to place. Both parties' terms will encompass electric and non-electric (i.e. self-propelled) versions. Trade channels will likely overlap; bicycles and scooters are often sold via the same outlets. Methods of use differ somewhat: the user sits astride a bicycle whereas scooters are generally ridden in a standing position (mobility scooters are an exception). The parties' goods may be in competition in some instances; a prospective purchaser seeking an ecological mode of transport to use in a city might deliberate over a scooter or a bicycle. The goods are not complementary; neither being necessary or useful for the other. In terms of their physical natures, both parties' goods will have two-wheels (although some scooters have four wheels) and will be composed of similar materials. On the other hand, they are significantly different in terms of appearance. In the light of the foregoing, I find a medium level of similarity.

Contested term: *Camping cars*

35. It is my understanding that 'camping cars' are synonymous with campervans. I compare these goods to the Opponent's *powered 2-wheeled vehicles*. Whilst both parties' goods are powered vehicles which transport people over land, the Applicant's *camping cars* are specifically designed for sleeping in. Users will overlap somewhat, albeit to the unremarkable extent that a user of, say, a motorbike, might happen to also use a *camping car*. I consider trade channel overlap unlikely; *camping cars* and *powered 2-wheeled vehicles* are not typically sold by the same undertaking. Whilst both goods are means of transport, *camping cars* have a dual purpose in that the user can cook and sleep in them. I do not find the respective goods to be either competitive or complementary; neither being substitutable or necessary/important for the other. As to their physical natures, the goods are very different in appearance. In the light of the foregoing, I find a very low level of similarity.

Contested term: *Bicycle frames*

36. I compare the Applicant's goods to the Opponent's *parts for [powered 2-wheeled vehicles]*. The Opponent has claimed that the contested goods are 'highly similar' to those of the Opponent, as indicated by its table reproduced above at [19]. In my view, to the extent that Opponent's 'powered 2-wheeled vehicles' covers electric bicycles, the contested *bicycle frames* will be encompassed by the Opponent's *parts for [powered 2-wheeled vehicles]*. However, to make such a finding would amount to improving the Opponent's case as pleaded. I therefore find the parties' goods to be highly similar.

Contested term: *Safety seats for children, for vehicles*

37. I compare the contested goods to fittings [...] *for [powered 2-wheeled vehicles]*. In my view, the Applicant's term will include, *inter alia*, child safety seats to be fitted to the backs of bicycles. Therefore, to the extent that the Opponent's term 'powered 2-wheeled vehicles' covers electric bicycles, the contested *Safety seats for children, for vehicles* will be encompassed by the Opponent's broader term. However, the Opponent's pleading that the parties' goods are only 'highly similar' prevents me from finding that they are identical based on the principle in *Meric*. For the reason set out above in [36], I find the goods to be highly similar.

Contested term: *Delivery tricycles*

38. I compare the Applicant's goods to the Opponent's *mopeds*. It is my understanding as an ordinary member of the public that mopeds are also used as delivery vehicles. Users and methods of use will, therefore, overlap. Trade channels may overlap somewhat. I consider the respective goods to be in a competitive relationship; for example, a city centre pizza business might deliberate over whether to purchase mopeds or electric delivery tricycles for its delivery drivers. I do not find complementarity, neither party's goods being necessary/important for the other. In terms of their physical natures, there are some similarities in terms of their appearance (i.e. both are 'ridden' and have handlebars), albeit mopeds are

two-wheeled as compared to tricycles being three-wheeled. All things considered, I find at least a medium level of similarity.

Class 18

39. I set out the points of identity in the following table:

Opponent's mark:	Contested Mark:
<i>Luggage</i>	<i>Valises; Trunks [luggage];¹³ Suitcases; Travelling trunks¹⁴</i>
<i>umbrellas</i>	<i>Umbrellas</i>
<i>[Parts and fittings] for umbrellas</i>	<i>Umbrella handles; Frames for umbrellas [...]; Umbrella sticks; Umbrella [...] ribs; Umbrella rings</i>

40. I will compare the remaining contested terms in class 18 by applying the usual 'Treat' factors.

Contested terms: *Hiking sticks; Mountaineering sticks; Trekking sticks; Alpenstocks¹⁵*

41. I compare the contested goods to the Opponent's *umbrellas*. The primary purpose of an umbrella is to shelter the user from rain. I understand that some umbrellas have a dual purpose in that they can be used as walking-sticks. The contested goods are all types of stick specifically designed for traversing challenging terrain over extended distances. However, I do not consider 'walking-stick' umbrellas to have this functionality; rather, they are intended to support someone who might be unsteady on their feet while walking about generally. I find user overlap unlikely given that someone who is generally unsteady on their feet would unlikely go

¹³ *Trunks [luggage]* are also, self-evidently, identical with the Opponent's *Trunks*.

¹⁴ *Travelling trunks* are also, self-evidently, identical with the Opponent's *Trunks*.

¹⁵ *Alpenstocks* are wooden poles with a metal spike tip for walking on glacial or snowy terrain.

trekking or hiking. I consider trade channel overlap to be unlikely; it is not typical for the same undertaking to sell both 'walking-stick' umbrellas and the types of stick offered by the Applicant. I do not find the respective goods to be competitive or complementary; neither being substitutable or necessary/important for the other. All things considered, I do not find the parties' goods to be similar. If I am wrong about that, then the level of similarity will be no more than very low.

Contested terms: *Trimmings of leather for furniture; Leather trimmings for furniture*

42. In the absence of a comparator being identified by the Opponent, I find that the contested goods bear no obvious similarity to any of the Opponent's goods. Bearing in mind the purposes, users, trade channels, methods of use, physical natures of the parties' goods, as well as the matters of competition and complementarity, I do not find the goods to be similar. Whilst I acknowledge that the Opponent's bags and purses are often fashioned from leather, this, without more, is insufficient to support a finding of similarity between the parties' goods.

Contested term: *Parasols*

43. I compare the Applicant's goods to the Opponent's *umbrellas*. The respective goods have different purposes: parasols are intended to shield the user from the sun, whereas umbrellas are intended shelter the user from rain. Users will inevitably overlap given that most members of the UK general public use an umbrella. Trade channel overlap is possible. Methods of use will coincide insofar as the user seeks shelter under the canopy of the parasol/umbrella. That said, the former is used in the sunny weather whereas the latter is used when it rains. The goods are similar in shape, although parasols are often larger than most umbrellas. I acknowledge that there are handheld parasols that are similar in size to umbrellas. The goods will be fashioned from different materials: parasols are typically made from light-weight fabrics; whereas umbrellas are made from waterproof materials. Given the different specific purposes of the goods, I do not consider them to be in competition. Whilst, in practice, an umbrella could be used to shield oneself from the sun, I do not consider the goods to be commercially realistic substitutes for one another. I do not find complementarity, either; neither good being necessary or

important for the other. In the light of the foregoing, I find a low level of similarity between the goods.

Contested term: *umbrella covers*

44. I compare the contested goods to the Opponent's broad term *bags*. To my mind, a cover for an umbrella is, essentially, a bag; it is a receptacle that protects the umbrella. The Applicant's goods will be encompassed by the Opponent's broader term. I, therefore, find the goods to be identical based on the principle in *Meric*. In case I am wrong about this, the parties' goods will be highly similar.

Contested terms: *Frames for [...] parasols; [...] parasol ribs*

45. I compare these goods to the Opponent's *parts for [umbrellas]*. The goods will differ as to their specific purposes; one being a component in the making of a parasol, the other for an umbrella. Methods of use will, therefore, overlap. Users will be the professional public, i.e. those in the business of manufacturing or repairing parasols and umbrellas. Trade channel overlap is possible – the same supplier might provide parts for both goods. I do not find either a competitive or complementary relationship; neither goods being substitutable or necessary/important for the other. The goods will be similar in terms of their physical appearance by reason of being very similarly shaped (albeit parasols are typically much larger than umbrellas – golfing umbrellas, aside). All things considered, I find a low level of similarity between the parties' goods.

Class 28

Contested term: *Baby gyms*

46. The Applicant's *Baby gyms* will be encompassed by the Opponent's broad term *Games and playthings*. The goods are, therefore, identical based on the principle in *Meric*.

Contested terms: *Swimming pools [play articles]; Swings*

47. I consider the contested goods to be play articles encompassed by the Opponent's broad term [...] *playthings* and, therefore, identical based on the principle in *Meric*. However, given that the Opponent has pleaded that the contested goods are merely 'highly similar', I am unable to improve its case. I find the goods to be highly similar.

Contested terms: *Chest expanders [exercisers]; Body-building apparatus*

48. In the absence of a comparator being identified by the Opponent, I do not find any obvious points of similarity between the contested goods and those of the Opponent. Bearing in mind the purposes, users, trade channels, methods of use, physical natures of the parties' goods, as well as the matters of competition and complementarity, I do not find the goods to be similar.

Contested terms: *Stationary exercise bicycles*

49. I compare the contested goods to the Opponent's Class 12 goods *powered 2-wheeled vehicles*, to the extent that the latter encompasses electric bicycles. In my view, an electric bicycle is sought primarily as a mode of transport, although I understand that it can also help maintain or improve fitness. The Applicant's goods are used exclusively for exercise. The respective goods will, therefore, overlap in purpose to some extent. Users will overlap somewhat given that both goods are purchased by the general public. Trade channels will unlikely overlap: it is not typical for the same outlet to sell both parties' goods. Methods of use will coincide to the extent that both are 'pedalled', albeit one is user to traverse land whilst the other remains stationary. As to their physical nature, they will have a similar general 'bicycle' form; albeit their mechanisms will differ. Whilst both goods help with fitness, I do not consider them to be commercially realistic alternatives in competitive relationship. I do not find complementarity, either – furthermore, neither being necessary or important for the other. All things considered, I find a low level of similarity between the parties' goods.

Contested terms: *Machines for physical exercises*

50. To the extent that the contested term encompasses stationary exercise bicycles, I find a low level of similarity for reasons analogous to those above at [49].

Contested terms: *Rollers for stationary exercise bicycles; Starting blocks for sports; Surfboard leashes*

51. In the absence of a comparator being identified by the Opponent, I do not find any obvious points of similarity between the contested goods and those of the Opponent. Bearing in mind the purposes, users, trade channels, methods of use, physical natures of the parties' goods, as well as the matters of competition and complementarity, I do not find the goods to be similar.

Contested term: *Body-training apparatus*

52. To my mind, 'body-training apparatus' will comprise various machines found in a gym, typically incorporating weights and pulleys. Examples will include, *inter alia*: cross-trainers and rowing machines. Their purpose is to strengthen the body and improve fitness. I compare these goods to the Opponent's goods *powered 2-wheeled vehicles*. As noted, whilst an electric bicycle can help improve fitness, *body-training apparatus* is used exclusively for that purpose. Users overlap to the fairly unremarkable extent that both will be used by the general public. Trade channel overlap is unlikely. Methods of use will differ. In terms of their physical nature, the respective goods will be quite different in appearance. There is neither a competitive nor complementary relationship between them; neither good being substitutable or necessary/important for the other. I do not find the goods to be similar. In case I am wrong about that, I find only a very low level of similarity between the goods.

Contested terms: *Paddleboards; Bodyboards; Surfboards; Surf skis; Sailboards*

53. The Applicant's goods are equipment for water sports. I compare them to the Opponent's *powered 2-wheeled vehicles* to the extent that the term includes two-wheeled self-balancing boards. Both goods will be purchased by the general public for recreational purposes, albeit one is for traversing land and the other to move across water. Trade channels will unlikely overlap. Whilst both parties' goods involve the user maintaining balance, their specific methods of use differ. The goods will be quite different in physical appearance. They are neither competitive nor complementary, neither being substitutable for the other. I do not find the goods to be similar. In case I am wrong about that, I find only a very low level of similarity between the goods.

Contested term: *Snowboards; Skis*

54. I compare the contested goods to the Opponent's *powered 2-wheeled vehicles* to the extent that the term includes two-wheeled self-balancing boards. For reasons analogous to those set out above at [53], I do not find the goods to be similar. In case I am wrong about that, I find only a very low level of similarity between the goods.

Contested term: *Bags especially designed for skis*

55. I compare the Applicant's goods to the Opponent's *bags* in Class 18. Both terms cover bags of some sort. However, the fact that the respective goods appear within different classes, in my view, precludes a finding of identity. I, therefore, find the goods to be highly similar.

Contested term: *Trampolines*

56. I consider 'trampolines' to encompass those of the toy variety, typically set up in gardens for children to play on. My view is that the Applicant's goods will be encompassed by the Opponent broad term [...] *playthings* and that they are, therefore, identical based on the principle in *Meric*. However, given that the Opponent has pleaded that the goods are 'highly similar', I am unable to improve its case. I, therefore, make a finding of 'highly similar'

57. Some similarity between the parties' goods and services is essential in order to find a likelihood of confusion between the parties' marks. In the case of *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

'49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover, I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity'.

58. Where I have found the contested goods to bear no similarity with those of the Opponent, the opposition, therefore, fails at this point. For clarity, those goods are:

Class 12: <i>Handcars; Handling carts</i>
Class 18: <i>Trimmings of leather for furniture; Leather trimmings for furniture</i>
Class 28: <i>Starting blocks for sports; Surfboard leashes; Rollers for stationary exercise bicycles; Chest expanders [exercisers]; Body-building apparatus</i>

59. For ease of the reference, the goods for which the opposition remains 'live' are:

Class 12: <i>Self-balancing electric unicycles; Self-balancing boards; Self-balancing scooters; Fishing trolleys; Camping cars; Bicycle frames; Mopeds; Delivery tricycles; Safety seats for children, for vehicles; Two-wheeled trolleys; Bicycles.</i>
Class 18:

Hiking sticks; Valises; Trunks [luggage]; Suitcases; Umbrella handles; Parasols; Umbrella covers; Umbrellas; Travelling trunks; Frames for umbrellas or parasols; Umbrella sticks; Umbrella or parasol ribs; Umbrella rings; Mountaineering sticks; Trekking sticks; Alpenstocks.

Class 28:

Baby gyms; Paddleboards; Trampolines; Snowboards; Bodyboards; Bags especially designed for skis; Sailboards; Surf skis; Skis; Surfboards; Swimming pools [play articles]; Machines for physical exercises; Stationary exercise bicycles; Swings; Body-training apparatus.

Average consumer and the purchasing act

60. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect. The word ‘average’ denotes that the person is typical. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.
61. The Opponent has submitted that the goods at stake are directed to the general public and are likely to be ‘periodical’ purchases, i.e. purchased neither seldomly nor frequently.¹⁶ It submits that ‘the relevant consumer will pay a medium degree of attention when selecting some of the goods and a medium to high level of attention for some of the goods in Classes 12 and 28 [...]’.¹⁷

Class 12

62. I find that the following goods would typically be sold in toyshops and other retail outlets, and their online equivalents: *Self-balancing electric unicycles; Self-balancing boards; Self-balancing scooters*. The purchasing act will be primarily visual in many cases, with the goods being encountered: on display in shops or in

¹⁶ Opponent’s written submissions, [11].

¹⁷ As above.

online product listings; in advertisements online, on television, or in printed matter. For some purchases, the aural aspect will be important, for instance 'word-of-mouth' recommendations. I agree with the Opponent's submission that these purchases will be neither casual nor infrequent, but somewhere in the middle. Many end-users will likely be children or young people, with the purchasers being adults. Factors influencing the purchasing process might include: the colour and styling; the safety aspect (particularly where the end-user will be a child). The price-point will likely vary from, perhaps, fifty pounds-or-so up to a couple of hundred pounds for certain models. I find that the average consumer would pay at least a medium level of attention during the purchasing act.

63. I now consider the following goods: *Two-wheeled trolleys*; *Fishing trolleys*. These goods will be sold via retail outlets and their online equivalents. The average consumer of two-wheeled trolleys will, to my mind, be predominantly the professional public, e.g. for moving goods in bulk in a warehouse. *Fishing trolleys*, on the other hand, will typically be purchased by the general public. For both, I find that the purchasing process will be predominantly visual, with the goods sold via physical outlets and their online equivalents or through catalogues. There may be an aural aspect to the purchasing process in some cases, e.g. word-of-mouth recommendations or asking for information from sellers. For both goods, I consider that the average consumer would likely pay at least a medium level of attention. Factors influencing the purchasing process might include: the weight-bearing capacity; the size of the trolley.

64. I now consider the following goods: *Camping cars*; *Mopeds*; *Delivery tricycles*; *Bicycles*. My view is that these goods are infrequent purchases, usually selected with an appreciable level of care. They are relatively expensive: ranging from a few hundred pounds for a mid-range bicycle to tens of thousands of pounds for a camping car. The goods will be sold via retail outlets (bicycles) and showrooms and their online equivalents. The purchasing act will be primarily visual; in most cases, the goods will be test-ridden or driven before concluding a transaction. I find that a high level of attention will be paid during the purchasing act. Factors considered will likely include, *inter alia*: the speed, handling, fuel efficiency (where applicable).

65. The average consumer of *bicycle frames* will be predominantly the professional public, e.g. those in the business of manufacturing, building or repairing bicycles. The goods will likely be sold by way of direct sales as well as wholesale and retail outlets. The purchasing act will be primarily visual, with the goods being encountered online, in warehouses or in catalogues. There will likely be an aural aspect to the process in some cases, particularly where a bulk order is sought by a manufacturer. I would expect the consumer to display an appreciable level of care when purchasing these goods, with the factors considered including, *inter alia*: the suitability of the frames for the manufacturer's product specification; the supplier's capacity to fulfil a buyer's bulk order. I find that these goods will be purchased with a fairly high level of attention.

66. I now consider *Safety seats for children, for vehicles*. The average consumer is a member of the general public who is a parent or carer of a child. The purchasing act will be primarily visual, with the goods being sold via retail outlets and their online equivalents, although an aural aspect cannot be discounted. My view is that these goods will be purchased with particular care because child safety will be at the forefront of the prospective purchaser's mind. Of particular concern will be the following: the age and size of the child; the product's safety profile; whether the child is comfortable in it. I find that at least a high level of attention would be paid during most purchases.

Class 18

67. I find *umbrellas, parasols and umbrella covers* to be fairly casual purchases. They are sold in a variety of retail outlets, and their online equivalents; including retailers of clothing/footwear and accessories; homeware stores; and supermarkets. Umbrellas have a modest price-point ranging from a few pounds to perhaps £20 or £30 for larger or higher-quality models. Umbrella covers will have much lower price-points. Parasols tend to be more expensive; perhaps ranging from £50 to around £100. Purchases would, in most cases, unlikely involve a great deal of consideration. Factors influencing the purchasing decision might include, *inter alia*: the size of the umbrella/parasol; and whether it is windproof. I find that a low to medium level of attention would be paid during while purchasing these goods.

68. I now turn to the 'luggage' and 'bag' goods; and the various 'trekking' sticks. The purchasing act will be primarily visual, whilst acknowledging an aural aspect in some cases, in the manner already described. The average consumer will be the general public. The goods will be sold via retail outlets and their online equivalents. The bags/luggage will span a range of price-points; from a few pounds for a bag or case from a supermarket or homewares store to several hundreds of pounds – and more – for goods at the upper end of the market. The trekking sticks will likely be priced from a few pounds to several tens of pounds. For both types of good, I consider that the average consumer would pay at least a medium level of attention during the purchasing process.

69. I now consider the following 'component' goods: *Umbrella handles; Frames for umbrellas or parasols; Umbrella sticks; Umbrella or parasol ribs; Umbrella rings.* The average consumer of these goods is the professional public, i.e. manufacturers of umbrellas/parasols. The goods will likely be sold by way of direct sales or via wholesale outlets, and their online equivalents. The purchasing act will be primarily visual, although an aural aspect cannot be discounted. The goods would likely be purchased in bulk. The consumer will likely display a measure of care during the purchasing process, with factors considered including, *inter alia*: the suitability of the parts for the manufacturer's product; the capacity of the seller to fulfil the purchaser's bulk order. I find that a fairly high level of attention would be paid when purchasing these goods.

Class 28

70. I first consider *babygyms*. It is my understanding that a 'babygym' typically comprises a soft cushioned mat for the infant to sit/lie on, which is equipped with various features in the way of rattles and other playthings suspended above it, usually with a variety of textures, colours and sounds for the infant to explore. The average consumer of these goods will be parents and others caring for infants. The purchasing act will be primarily visual; with the goods sold via retail outlets, and their online equivalents, including toyshops, 'mother and baby' shops, and larger supermarkets. My view is that goods specifically for infants are usually purchased

with some measure of care. Factors influencing the purchasing process might include the colour or the composition of the materials. I find that the average consumer would likely pay at least a medium level of attention during the purchasing act.

71. I now turn to *Swimming pools* [play articles and trampolines]. My observations set out above at [70] on the average consumer and the level of attention paid will also apply here.

72. I now consider the goods intended for water and snow sports. The average consumer will be the general public. The purchasing act will be primarily visual in the manner described above at [62]. The price-point will likely vary from around £80 for a basic snowboard to several hundreds of pounds for skis. These will be fairly infrequent purchases made with an appreciable level of care. Factors considered will likely include, *inter alia*: the shape, colour, aerodynamism of the goods. I find that a medium to high level of attention would likely be paid.

73. Finally, I turn to the exercise machines. These goods are fairly expensive and will not often be purchased. The relevant consumer will include members of the general public as well as professional in the sports and fitness industry. The purchasing act will be primarily visual, with the goods being sold via retail outlets and their online equivalents and, by way of direct sales (in the case of professionals). I find that, for both consumer groups, a high level of attention will be paid during the purchasing act.

Comparison of the marks

74. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) 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 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.’

75. The marks to be compared are:

Opponent’s mark:	Contested Mark:
Triumph	Triumphkey

76. Both marks are word marks. In this connection, I remind myself of the case of *LA Superquimica v EUIPO*,¹⁸ at paragraph [39] in which it was held that:

‘[...] it should be noted that a word mark is a mark consisting entirely of letters, words or groups of words, without any specific figurative element. The protection which results from registration of a word mark thus relates to the word mentioned in the application for registration and not the specific figurative or stylistic aspects which that mark might have. As a result, the font in which the word sign might be presented must not be taken into account. It follows that a word mark may be used in any form, in any colour or font type (see judgment of 28 June 2017, *Josel v EUIPO — Nationale-Nederlanden Nederland (NN)*, T-333/15, not published, EU:T:2017:444, paragraphs 37 and 38 and the case-law cited).’

Overall impression of the marks

¹⁸ Case T-24/17.

77. The earlier mark comprises a single word, and, by necessity, the overall impression of the mark resides in the word 'Triumph'.

78. The Contested Mark comprises the single word element 'Triumphkey'. The Opponent has submitted that the 'TRIUMPH' element of the word plays the dominant role due to its positioning at the beginning of the mark.¹⁹ In this connection, I note that the GC has observed that the beginnings of words *tend* to have more visual and aural impact than their endings.²⁰ However, it is important to treat this observation as a rule of thumb, rather than an absolute rule. The Applicant has argued that it is the 'key' element that dominates. In my view, whilst the word elements 'Triumph' and 'key' are run together as one 'string', the two 'components', to my mind, make a fairly unusual alliance. It is difficult (although not impossible) to see how the word 'triumph' could be understood as qualifying the word 'key'. In my view, a significant proportion of average consumers will register the mark in its entirety, with the first element 'triumph' playing the greater role within the overall impression of the mark.

Visual comparison

79. The word 'Triumph' is present in both marks; the earlier mark being wholly incorporated within the Contested Mark and forming the first part thereof. The visual difference resides in the presence of the characters 'key' at the end of the Contested Mark, which are absent from the Opponent's mark. I find that the presence of 'key' will be noticed by many average consumers. All things considered, I find the marks to be visually similar to a degree within the medium to high range, albeit not 'very high'.

Aural comparison

80. The word 'triumph' will be articulated in the normal way, in both marks. The only point of aural difference between them is the presence of the 'key' sound at the end of the Contested Mark, which is absent from the Opponent's mark. The Opponent has submitted that the marks are aurally highly similar, by virtue of the

¹⁹ Opponent's written submissions, [15].

²⁰ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, [81] – [83].

shared first two syllables.²¹ My view is that the difference in the lengths of the marks will be readily perceived aurally. The earlier mark is just two syllables. The presence of a third syllable in the Contested Mark will unlikely escape the attention of the average consumer. Aurally speaking, I find the marks to have a medium to high level of similarity.

Conceptual comparison

81. The Opponent has provided several definitions for the words ‘triumph’ and ‘key’ taken from the Collins Dictionary (online version).²² I summarise them as follows:

triumph – (noun): denoting a great success or achievement; or a feeling of great satisfaction/pride from a success or victory.

(verb): to triumph at something after a long struggle.

key – (noun): The shaped piece of metal to turn in a lock to open a door or start an engine;

The buttons that are pressed on a computer keyboard;

The long narrow wooden/plastic pieces on a piano that are pressed in order to play it;

The means to achieve something (e.g. the key to achieving an outcome);

and

The list of symbols/abbreviations on a map or diagram and their meanings.

(adjective): to refer to something or someone as of crucial importance (e.g. a key figure).

82. The Opponent argues that, conceptually speaking, the marks must have at least a medium level of similarity owing to the overlapping element ‘triumph’.²³ I agree that there will be a medium level of conceptual similarity between the marks for the following reasons.

²¹ Opponent’s written submissions, [24] – [25].

²² Opponent’s written submissions, [26] and [28].

²³ Opponent’s written submissions, [31].

83. I find that the word 'triumph', *solus*, will be understood by most as meaning an achievement/victory, or, perhaps, a reference to the feeling of being triumphant or victorious. I have considered the possibility that 'Triumphkey' might be understood as a neologism denoting some sort of 'key' to victory or success. However, the concept evoked is a somewhat nebulous one that I consider too great a conceptual exercise for a significant proportion of average consumers to achieve. The shared element 'triumph' gives rise to significant conceptual overlap between the marks. However, the presence of the element 'key' in the Contested Mark amounts to an appreciable point of conceptual difference. All things considered, I find a medium level of conceptual similarity between the marks.

Distinctive character of the earlier mark

84. 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)'.

85. Registered trade marks possess varying degrees of inherent distinctive character. Where a mark is suggestive or allusive of a characteristic of the goods or services, it tends to be low. Inherent distinctive character may range up to a high level for marks which consist of invented words with no allusive qualities.

86. The word 'Triumph' is an ordinary dictionary word that will be understood as denoting achievement or victory (or the feeling of accomplishment experienced by the achiever/victor). It neither describes nor alludes to the relevant goods. The word 'triumph' might not be heard with great regularity in everyday parlance, but it cannot be said to be a particularly unusual word, either. In the light of the foregoing, I find the earlier mark to have a medium to high level of inherent distinctive character.

87. In the absence of any evidence being filed by the Opponent, there is no finding to be made in respect of enhanced distinctiveness.

Likelihood of confusion

88. Confusion can be direct or indirect. Mr Iain Purvis Q. C., (as he then was) as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v By Back Beat Inc*²⁴. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*²⁵, the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that they have kept in mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark but mistakenly matches it to the imperfect image of the earlier mark in their 'mind's eye'. Indirect confusion occurs when the average consumer recognises that the competing marks are not the same in some respect, but the similarities between them, combined with the goods/services at issue, leads them to conclude that the

²⁴ Case BL O/375/10 at [16].

²⁵ *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

goods/services are the responsibility of the same or an economically linked undertaking.

89. I must keep in mind that a global assessment is required taking into account all of the relevant factors, including the principles a) – k) set out above at [15]. When considering all relevant factors ‘in the round’, I must bear in mind that a greater degree of similarity between goods/services *may* be offset by a lesser degree of similarity between the marks, and vice versa.

90. I will address direct confusion, first. I have found a number of the Applicant’s goods to have some level of similarity to those of the Opponent; ranging from ‘identical’ to ‘very low’. I have found the level of visual similarity of the marks to be within the medium to high range, by virtue of the earlier mark being wholly subsumed in, and forming the first part of, the Contested Mark. My finding of a medium to high level of aural similarity between the marks also stems from the ‘key’ element. Conceptually speaking, the marks are similar to a medium degree. To my mind, the visual difference by way of the presence of the word element ‘key’ will likely be noticed by the average consumer. I, therefore, do not think that ‘key’ will be overlooked by way of an imperfect recollection. That said, I do not consider ‘imperfect recollection’ to be the only mechanism by which one mark can be mistaken for the other, giving rise to direct confusion. It is the ‘Triumph’ element that would likely have the most impact within the Contested Mark by virtue of its positioning and the fact that ‘key’ will likely be seen as less distinctive. I have found the earlier mark - which forms the shared element - to have a medium to high level of inherent distinctiveness. The conceptual difference, in my view, leaves the distinctive character of the common element ‘Triumph’ undisturbed. I consider that the ‘key’ element might be seen as a reference, perhaps, to the key to a moped or camping car (both relevant goods with the Applicant’s specification) or perhaps to a lock used to secure the goods (e.g. to tether a scooter, or to lock a suitcase or bag). I find that a significant proportion of average consumers will likely see the competing marks as alternative marks; with one version (the Contested Mark) referring to a key to certain of the goods: to start the motor (mopeds, electric unicycles etc), to tether the vehicle to a railing (e.g. scooter) or to ‘lock’ the goods such that only the owner can operate them (e.g. an electric self-balancing board)

or to lock a suitcase or bag etc. Having made a global assessment of the relevant factors at play, I find that there will be a likelihood of direct confusion for the following contested goods, i.e. those that I have found to have a level of similarity between 'identical' and 'low':

Class 12:

Self-balancing electric unicycles; Self-balancing boards; Self-balancing scooters; Bicycle frames; Mopeds; Delivery tricycles; Safety seats for children, for vehicles; Bicycles

Class 18:

Valises; Trunks [luggage]; Suitcases; Umbrella handles; Parasols; Umbrella covers; Umbrellas; Travelling trunks; Frames for umbrellas or parasols; Umbrella sticks; Umbrella or parasol ribs; Umbrella rings

Class 28:

Baby gyms; Trampolines; Bags especially designed for skis; Swimming pools [play articles]; Machines for physical exercises; Stationary exercise bicycles; Swings;

91. Where I have found the contested goods to bear only a very low level of similarity, My view is that the differences that I have identified between the marks are capable of muting the aforesaid similarity. For those goods, I do not think that consumers would likely confuse the marks. I find this to be the case even for the goods where only a medium level of attention might be paid during the purchasing act.

92. For completeness, I now consider whether there is a likelihood of indirect confusion. In the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said the following at [16]:

'a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say

that, if there is no likelihood of direct confusion, ‘one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion’.

93. Arnold LJ emphasised that ‘there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion’.²⁶

94. I also note that, in *L.A. Sugar Limited v Back Beat Inc*²⁷ Mr Iain Purvis Q. C. (as he then was), as the Appointed Person, explained that

‘17. Instances where one may expect the average consumer to reach such a conclusion [i.e. to conclude that marks relate to the same or economically linked undertakings] tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (‘26 RED TESCO’ would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as ‘LITE’, ‘EXPRESS’, ‘WORLDWIDE’, ‘MINI’ etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (‘FAT FACE’ to ‘BRAT FACE’ for example)’.

95. I acknowledge that these categories are not intended to be exhaustive. I do not consider that the instant case aligns with any of the categories that Mr Purvis has identified. The common element ‘Triumph’ does not strike me as so distinctive that the average consumer would conclude that no other undertaking would be using it

²⁶ *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207.

²⁷ Case BL O/375/10

for the goods concerned. This case does not easily align with the second category, either: whilst 'key' might be presumed to refer to a key to a moped or lock on a suitcase, I have found that the average consumer would see the marks as 'alternatives' rather than related or sub-brands. As to the third category, I can think of no commercially sensible rationale according to which 'key' is a logical brand extension of the earlier mark 'Triumph'. Aside from these non-exhaustive categories, I can conceive of no other mental process that would move an average consumer to presume the competing marks to derive from the same or economically-related undertakings. I find that there is no likelihood of indirect confusion.

Conclusion

96. The opposition has been partially successful. Subject to a successful appeal, application UK00003970548:

- Is refused for the following goods:

Class 12:

Self-balancing electric unicycles; Self-balancing boards; Self-balancing scooters; Bicycle frames; Mopeds; Delivery tricycles; Safety seats for children, for vehicles; Bicycles

Class 18:

Valises; Trunks [luggage]; Suitcases; Umbrella handles; Parasols; Umbrella covers; Umbrellas; Travelling trunks; Frames for umbrellas or parasols; Umbrella sticks; Umbrella or parasol ribs; Umbrella rings

Class 28:

Baby gyms; Trampolines; Bags especially designed for skis; Swimming pools [play articles]; Machines for physical exercises; Stationary exercise bicycles; Swings;

and

- may proceed to registration for the following goods (as well as the goods and services that were unopposed):

<p>Class 12: <i>Fishing trolleys; Camping cars; Handcars; Handling carts; Two-wheeled trolleys;</i></p>
<p>Class 18: <i>Hiking sticks; Trimmings of leather for furniture; Leather trimmings for furniture; Mountaineering sticks; Trekking sticks; Alpenstocks.</i></p>
<p>Class 28: <i>Starting blocks for sports; Surfboard leashes; Rollers for stationary exercise bicycles; Chest expanders [exercisers]; Body-building apparatus; Paddleboards; Snowboards; Bodyboards; Sailboards; Surf skis; Skis; Surfboards; Body-training apparatus.</i></p>

Costs

97. The parties have enjoyed roughly even levels of success. I therefore make no order for costs.

Dated this 6th day of March 2026

N. Rhea Morris
For the Registrar

Annexe 1 – The full specification for application UK00003970548

Class 6:

Bars for metal railings; Balustrades of metal; Arbours [structures] of metal; Tent pegs of metal; Tool chests of metal, empty; Chests of metal; Buildings, transportable, of metal; Doors of metal; Water-pipe valves of metal; Roof coverings of metal; Buildings of metal; Door frames of metal; Cabanas of metal; Bicycle parking installations of metal; Swimming pools [structures] of metal; Bird baths [structures] of metal; Latticework of metal; Firedogs [andirons]; Tanks of metal; Ironmongery.

Class 11:

Smart light bulbs; Fog machines; Electric cooktops; Wicks adapted for oil stoves; Hydromassage bath apparatus; Urinals being sanitary fixtures; Sinks; Shower cubicles; Pocket warmers; Solar furnaces; Toilet bowls; Roasters; Lamp globes; Radiators, electric; Showers; Cooking stoves; Pipes [parts of sanitary installations]; Lamps; Turkish bath cabinets, portable; Bath tubs.

Class 12:

Trolleys; Self-balancing electric unicycles; Self-balancing boards; Self-balancing scooters; Pet strollers; Roll cage trolleys; Fishing trolleys; Prams; Cleaning trolleys; Camping cars; Bicycle frames; Wheelbarrows; Mopeds; Pushchairs; Delivery tricycles; Safety seats for children, for vehicles; Handcars; Handling carts; Two-wheeled trolleys; Bicycles.

Class 18:

Hiking sticks; Valises; Trunks [luggage]; Suitcases; Umbrella handles; Parasols; Umbrella covers; Umbrellas; Travelling trunks; Frames for umbrellas or parasols; Umbrella sticks; Umbrella or parasol ribs; Umbrella rings; Mountaineering sticks; Trekking sticks; Trimmings of leather for furniture; Leather trimmings for furniture; Alpenstocks.

Class 22:

Bivouac sacks being shelters; Outdoor blinds of textile; Canvas for sails; Purse seines; Sails for ski sailing; Awnings of synthetic materials; Tents; Wadding for padding and stuffing upholstery; Wadding for filtering; Sails; Awnings of textile;

Hammocks; Packing [cushioning, stuffing] materials, not of rubber, plastics, paper or cardboard; Padding materials, not of rubber, plastics, paper or cardboard; Rope ladders; Ropes; Ropes, not of metal; Commercial fishing nets; Tarpaulins; Stuffing, not of rubber, plastics, paper or cardboard.

Class 28:

Baby gyms; Paddleboards; Trampolines; Snowboards; Bodyboards; Starting blocks for sports; Surfboard leashes; Bags especially designed for skis; Sailboards; Surf skis; Skis; Surfboards; Swimming pools [play articles]; Rollers for stationary exercise bicycles; Chest expanders [exercisers]; Body-building apparatus; Machines for physical exercises; Stationary exercise bicycles; Swings; Body-training apparatus.

Annexe 2 – the registered specification for UK910481257

Class 3: <i>Sandpaper; sandcloth; emery cloth.</i>
Class 4: <i>Petrol; diesel; oils; greases; lubricants; fuels; waxes.</i>
Class 6: <i>Badges; key chains; key rings; parts and fittings for all the aforesaid goods.</i>
Class 9: <i>Protective clothing; helmets; protective gloves and protective footwear; steel capped boots; visors; sunshades; tachometers; thermometers; speedometers; horns; alarm apparatus and instruments; parts and fittings for all of the aforesaid goods.</i>
Class 11: <i>Headlamp covers; parts and fittings for all of the aforesaid goods.</i>
Class 12: <i>Motorcycles; mopeds; scooters; powered 2-wheeled vehicles; stands for motorcycles; electrical heated hand grips for motorcycles; parts, accessories and fittings for all of the aforesaid goods.</i>
Class 14: <i>Jewellery; watches; clocks; watch bands, straps and chains; bracelets; cufflinks; key rings; key fobs; badges; articles made of precious metal or coated therewith; tie clips and pins; watch chains; parts and fittings for all the aforesaid goods.</i>
Class 17: <i>Rubber and plastic materials and goods made from these materials; parts and fittings for all the aforesaid goods.</i>
Class 18: <i>Luggage; trunks; umbrellas; belts, bands and straps; briefcases; key cases; back packs; rucksacks; bags; boxes; wallets and purses; parts and fittings for all of the aforesaid goods.</i>
Class 22:

Covers for motorcycles and land vehicles.

Class 28:

Games and playthings; playing cards; parts and fittings for all of the aforesaid goods.

Class 32:

Beer; ale; mild; lager; stout; porter; non-alcoholic beverages; fruit juices and drinks; mineral and aerated waters; preparations for making the aforesaid goods.

Class 33:

Alcoholic beverages (except beers).

Class 34:

Cigarette lighters; smokers' requisites.

Class 35:

Retail services, wholesale services, distributor services, connected with dentifrices, cleaning, polishing preparations and substances, degreasers, sandpaper, sandcloth, emery cloth, turpentine, petrol, diesel, oils, greases, lubricants, fuels, metal goods, badges, key chains, watch chains, key rings, chains, locks, nuts, bolts, screws, cables and wires (non-electric), ironmongery, protective clothing, helmets, protective gloves and protective footwear, steel capped boots, visors, cases for spectacles and sunglasses, sunshades, electrical accessories, parts and instruments for motorcycles, switches for controlling electrical accessories for motorcycles, batteries, battery chargers, electronic games, aerials, video tapes and audio tapes, compact discs, DVDs, relays, tachometers, thermometers, speedometers, horns, starters, electrical wiring, harnesses, sub-harnesses, adapters, electrical locks, alarm apparatus and instruments, lighting apparatus and instruments, light bulbs, headlamp covers, motorcycle and land vehicle reflectors, torches, motor land vehicles, motorcycles, mopeds, scooters, powered 2-wheeled vehicles, luggage racks, alarm devices for motorcycles and land vehicles, stands for motorcycles, tyres, jewellery, watches, clocks, watch bands, straps and chains, bracelets, cufflinks, key rings, key fobs, badges, articles made of precious metal or coated therewith, tie clips and pins, postcards, posters, pictures, photograph albums, decalcomanias, playing cards, tattoos, rubber and plastic materials and goods made from these materials, luggage, trunks, umbrellas, belts, bands and straps, briefcases, key cases, back packs, rucksacks, bags, boxes, tool belts, wallets and purses, covers for motorcycles and land vehicles, games and playthings,

beer, ale, mild, lager, stout, porter, non-alcoholic beverages, fruit juices and drinks, mineral and aerated waters, alcoholic beverages, cigarette lighters, smokers' requisites, parts and fittings for any of the aforementioned goods; advertising services; marketing services.

Class 36:

Credit card services; banking; financial services; provision of loans; financial management; warranty services; insurance services; financial sponsorship services; advice, information and consultancy services relating to all of the aforesaid services.

Class 37:

Motor land vehicle and motorcycle repair, maintenance and servicing services; motor land vehicle and motorcycle breakdown services; motor land vehicle and motorcycle cleaning and polishing services; advice, information and consultancy services relating to all of the aforesaid services.

Class 39:

Motor land vehicle and motorcycle recovery and towing services; motor land vehicle and motorcycle rental services; travel services; tour services; advice, information and consultancy services relating to all of the aforesaid services.

Class 41:

Club services; entertainment services; leisure services; organisation of shows, exhibitions and sports competitions; rental of sports equipment (except vehicles); recreational services; publishing services; advice, information and consultancy services relating to all of the aforesaid services.

Class 42:

Engineering services; motor land vehicle and motorcycle testing services; advice, information and consultancy services relating to all of the aforesaid services.

Class 43:

Restaurant, cafe and bar services; advice, information and consultancy services relating to all of the aforesaid services.

