

O-601-15

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 3049983

BY FITNESS INITIATIVE LIMITED

TO REGISTER THE TRADE MARK

mefit

IN CLASS 35

**AND OPPOSITION THERETO BY
MCFIT GMBH UNDER NO 403118**

Background and pleadings

1. On 3 April 2014, Fitness Initiative Limited (“the applicant”) applied to register the mark **mefit** (“the application”) in the UK. It was accepted and published in the Trade Marks Journal on 25 July 2014 in respect of the following services:

Class 35: Providing business set-up, support packages and mentoring services; marketing and client-list building services for personal trainers and for fitness instructors in the following domains: gym instruction, yoga, Pilates, tennis, physiotherapy, boot camps, martial arts, athletics, triathlon, cycling, running, swimming, team sports; providing a searchable database for members of the public to find a personal trainer or an instructor in their chosen activity.

2. On 24 October 2014, McFit GmbH (“the opponent”) opposed the application on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This is on the basis of its earlier Community trade mark registration no. 5673165 for the mark **McFit** (“the earlier mark”). Pertinent details of the registration are as follows:

Filing date: 26 January 2007

Date of entry on register: 20 December 2007

Publication date: 6 August 2007

Services relied upon:

Class 35: Advertising, business administration, business management

Class 41: Providing sporting facilities; sports studies and sports camps, rental of sports equipment (except vehicle), organisation or sports competitions, entertainment

3. The opponent argues that there is “identity or at least a striking similarity” between the respective services. The opponent also argues that there is a high degree of similarity between the respective marks.

4. The applicant filed a counterstatement denying that there is a likelihood of confusion. The applicant also requests that the opponent provides proof of use of its earlier mark.

5. Both sides filed evidence in these proceedings which shall be summarised later in this decision. Both sides also filed written submissions which shall be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful consideration of the papers.

Opponent’s evidence in chief

Witness statement of Siegfried Pfuhlmann and exhibits MF1 – MF7

6. Mr Pfuhlmann is Chief Financial Officer for the opponent, a position he has held since 2009. He is based in Hettstadt, Germany. The exhibits supporting his witness

statement have been translated by Tobias Arena. He has submitted a separate witness statement confirming that he is adequately qualified to provide a translation.

7. Mr Pfuhlmann states that the opponent's first gym was branded "McFit" and opened in 1997. Since then it opened a number of further gyms, and at the time of executing the witness statement it operates 166 gyms throughout Germany alone.

8. Mr Pfuhlmann goes on to state that in 2009, through licensees and affiliates, McFit opened gyms in Austria and Spain. This subsequently grew to Austria, Spain, Italy and Poland. He claims that there are 10 gyms in Austria, 28 in Spain, 19 in Italy and 3 in Poland, all bearing the earlier mark.

- Exhibit MF1 consists of a youtube video clip produced in 2008 which is a "TV-portrait" of the founder of McFit.
- Exhibit MF2 is a translated list of McFit gyms in Europe. The list is lengthy and covers numerous cities across Austria, Spain, Italy, Germany, etc.
- Exhibit MF3 consists of a print out from Wikipedia which relates to McFIT GmbH.
- Exhibit MF4 is a promotional flyer which shows the earlier mark and is aimed at the German market. In the opponent's evidence in reply, Ms Kathleen Schultchen's¹ witness statement states that 1500 copies of the flyer were printed. They were distributed during a street promotion on 28 and 29 December 2014.
- Exhibit MF5 is a promotional flyer published in December 2014. It shows the earlier mark and is aimed at the Austrian market. Ms Schultchen states that "it was published as a city light poster with 173 copies in Vienna, 58 copies in Graz, 58 copies in Innsbruck and 40 copies in Klagenfurt in the time between December 25, 2014 and January 6, 2015."²
- Exhibits MF6 and MF7 are advertising emails dated 6 and 8 November 2013. Mr Pfuhlmann claims that these advertise goods and services of others, under the earlier mark.

Applicant's evidence in chief

Witness statement of Martin Giles Aspin

9. Mr Aspin is Co-Director of the applicant. He states that the applicant has used its "mefit" mark since 2012 providing business support to personal trainer and sports instructors to help them set up, run and develop their respective businesses. He states that the applicant also provides internet search facilities for members of the public to find a personal trainer in their local area.

10. Mr Aspin goes on to state that the applicant bought the domain name mefit.co.uk on 22 February 2012 and that he is not aware of any instances of confusion. He also makes reference to being able to provide a witness statement from a Mr Colin Waggett who is the Chief Executive of The Third Space Group and former Chief

¹ Head of the "Marketing Communication" division of the McFit group, a position she has held since March 2014.

² Paragraph 4 of the witness statement

Executive of Fitness First World Wide, who would also confirm that he is not aware of any instances of confusion. No referred to witness statements were filed.

11. Mr Aspin identifies two businesses which he claims to have a similar name to mefit who were trading in the UK. He also identifies two trade mark registrations which he considers to be similar to the application.

12. Mr Aspin states that on 1 August 2012 the applicant successfully registered the following mark under no. 2630566.



13. The mark has been registered for the following services and was not the subject of third party opposition.

Class 35: Business set-up, support packages & mentoring services; marketing and client-list building for fitness instructors in the following domains: personal training, gym instruction, yoga, pilates, tennis, physio, boot camps, martial arts, athletics, triathlon, cycling, running, swimming, team sports; providing a searchable database for members of the public to find an instructor in their chosen activity.

Class 41: Arranging training venues and private gyms.

14. Finally, Mr Aspin states that prior to these opposition proceedings he was not aware of the opponent and believes that they have not operated in the UK.

Opponent's evidence in reply

2nd Witness statement of Siegfried Pfuhlmann and exhibits MF8 – MF18

15. The opponent's evidence in reply is a second witness statement from Mr Pfuhlmann. Once again translations for the exhibits, and a confirming witness statement, have been provided by Tobias Arena. Mr Pfuhlmann states that in 2011 the number of McFit customers in 2011 exceeded one million and it has remained this high ever since.

16. Through various affiliates, Mr Pfuhlmann states that on 21 April 2015 there are 226 gyms in Germany, Austria, Spain, Italy, and Poland all branded McFit. It is claimed that except for the gyms listed in exhibit MF2, all of the gyms were operating prior to 25 July 2014.

17. Mr Pfuhlmann attached the following exhibits to his witness statement:

- Exhibit MF8 consists of an online blog article dated 22 September 2011. The article is in Spanish with an English translation. It states that McFit has opened 3 new gyms in Spain, and is now available in Barcelona and Madrid.

There are numerous photographs of people stood outside the gyms under the McFit sign.

- Exhibit MF9 consists of another online blog article dated 6 December 2012. The article makes reference to another gym being opened in Austria.
- Exhibit MF10 is a German newspaper article dated 25 July 2013. It refers to, and includes a picture of, a new McFit gym opened in Germany.
- Exhibit MF11 consists of a blog article from the McFit website. It is dated 15 July 2013 and refers to, and includes a picture of, a new gym opening in Berlin.
- Exhibit MF12 consists of another blog article fro, the McFit website. It is dated 18 July 2013 and refers to, and includes a picture of, a new gym opening in Aachen, Germany.
- Exhibit MF13 is a print out from Wikipedia dated 9 March 2014. It states that “McFit GmbH is the largest fitness center chain in Germany with 197 studios and over 1.2million members in Germany, Austria, Italy, Poland and Spain. The company’s headquarters is in Schlusselfeld. Directed by founder Rainer Schaller, the company generated about €160 million in total revenue in 2010.”
- Exhibit MF14 consists of an excerpt (Executive Summary) of the study “Assessing the accuracy and quality of Wikipedia entries compared to popular online encyclopaedias – A preliminary comparative study across disciplines in English, Spanish and Arabic”. It was published in 2012.
- Exhibit MF15 consists of an extract from the McFit blog. It is dated 28 October 2012. The article related to the launch of a McFit career portal.
- Exhibit MF16 consists of two transmission reports of the opponent’s service provider “CleverReach” dated 8 November 2013 regarding the email advertisements under exhibit MF6. Ms Schultchen states that “CleverReach” is an advertising service which transmits emails then counts how many of the emails were send and delivered. It shows that on 8 November 2013 288,569 emails were sent, of which 284,375 were delivered.
- Exhibit MF17 consists of a transmission report of the opponent’s service provider “CleveReach” dated 6 November 2014. It relates to exhibit MF7 and was delivered to 291,859 German recipients³.
- Exhibit MF18 consists of a transmission report of the opponent’s service provider “CleveReach” dated 6 November 2014. It relates to exhibit MF7 and indicates that of the email was delivered to 25,859 Austrian recipients⁴.

Witness statement of Kathleen Schultchen and exhibits MF4 to MF7 and MF16 to MF18

18. Ms Schultchen works in the marketing department of Loox Sports who are part of the McFit group. She has worked in this department since July 2013 and has been the head of the Marketing communication department since March 2014. She is also the head of advertising for the opponent. Ms Schultchen provides further comments in relation to exhibits MF4 to MF7 and MF8 and MF16 of Mr Pfulhmann’s witness statement. The comments which have been considered relevant have been included in my summary above.

³ Paragraph 7 of Ms Schulten’s witness statement dated 24 August 2014

⁴ Paragraph 8 of Ms Schulten’s witness statement dated 24 August 2014

Proof of use

19. Since the earlier mark has been registered for over five years prior to publication of the application, the applicant has requested that the opponent provide proof of use for all of the relied upon services. For procedural economy reasons, I shall proceed on the basis that there has been use. If, following a global assessment, I find that there is a likelihood of confusion, I shall consider the evidence further.

DECISION

20. Sections 5(2)(b) of the Act is as follows:

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, or there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

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

The principles

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

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

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

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

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

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

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

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

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

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

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

Average consumer

22. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. 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*.

23. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer at paragraph 60 in these terms:

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

24. The services in question are business support services provided to professionals in the fitness industry. They are not provided to the general public. Businesses seeking these services are likely to take a greater degree of care and attention since they could be a factor to the success or failure of the business. Therefore, I consider the level of care and attention paid to be higher than medium, but not high.

25. The applied for services are aimed at new businesses seeking assistance with the development thereof. These services are likely to be sought following visual perusal of websites, brochures or magazines and aural recommendations. The remaining applied for services are aimed at promoting businesses in the fitness sector. I also consider these services will be sought by businesses (new and old) following visual perusal, though aural recommendations are also taken into account. Since the services are likely to impact on the success or failure of the business, and they will be sought by businesses, the degree of care and attention paid will be above medium but not high. With regard to the opponent's services, the advertising, business administration and management will also be sought following a visual perusal, though aural recommendations are also taken into account. The degree of care and attention paid will also be above medium but not high.

Comparison of services

26. In the judgment of the Court of Justice of the European Union in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“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”.

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

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services
- c) The respective trade channels through which the goods or services reach the market
- d) 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;
- e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

28. The respective services are:

Application	Earlier mark
Class 35: Providing business set-up, support packages and mentoring	Class 35: Advertising, business administration, business management

services; marketing and client-list building services for personal trainers and for fitness instructors in the following domains: gym instruction, yoga, Pilates, tennis, physiotherapy, boot camps, martial arts, athletics, triathlon, cycling, running, swimming, team sports; providing a searchable database for members of the public to find a personal trainer or an instructor in their chosen activity.

Class 41: Providing sporting facilities; sports studies and sports camps, rental of sports equipment (except vehicle), organisation or sports competitions, entertainment

Class 35:

“Providing business set-up support packages”

29. Providing business set-up support services are sought by new businesses that require assistance and advice on a number of issues that they will need to become familiar with. These are likely to include, *inter alia*, tax requirements, marketing, advertising, sales techniques and tactics, product or service development, human resources, business administration and management and many more issues. The services covered by the earlier mark, i.e. advertising, business administration, business management, are broad general terms which all relate to the promotion, functioning and running of a business. Accordingly, the nature of the respective services are similar. Further, the users will generally be the same. However, I do not consider them to be in competition. Accordingly, I find there to be a medium degree of similarity between the respective services.

“Mentoring services”

30. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

31. The applied for mentoring services are to assist and guide new and existing businesses. The mentor(s) will provide guidance, contacts and advice in order for the business to grow and develop. The earlier mark’s services include the broad term business management. Applying the principle of *Meric I* I consider business management to include mentoring services. Therefore, they are identical.

“Marketing for personal trainers and for fitness instructors in the following domains: gym instruction, yoga, Pilates, tennis, physiotherapy, boot camps, martial arts, athletics, triathlon, cycling, running, swimming, team sports; providing a searchable

database for members of the public to find a personal trainer or an instructor in their chosen activity”

32. The applied for marketing and the earlier advertising are both aimed at promoting and selling goods and services for others. They will be sought by the same people or businesses and will be in competition with one another. If they are not identical they are highly similar.

“Client-list building services for personal trainers and for fitness instructors in the following domains: gym instruction, yoga, Pilates, tennis, physiotherapy, boot camps, martial arts, athletics, triathlon, cycling, running, swimming, team sports”

33. I consider client-list building services *per se* to predominantly be a service intended to gain further custom or as business management service to collate client details in a manageable format. It is akin to advertising but not identical. I find that they are highly similar.

“Providing a searchable database for members of the public to find a personal trainer or an instructor in their chosen activity”

34. Providing a searchable database which is directed towards the public which assists them with finding a personal trainer or an instructor is a form of advertising. Accordingly, applying the principles of *Meric* I find these services to be identical to advertising. If they are not found to be identical to advertising because providing a searchable database is not advertising then it could only be considered to be a form of business administration, in which case the services would still be identical.

Comparison of marks

35. 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 Court of Justice of the European Union 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.”

36. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

37. The respective trade marks are shown below:

Earlier mark	Application
McFit	Mefit

38. Both marks consist of one single invented word, neither of which has a dictionary definition. Whilst Me and fit are conjoined it is likely that consumers will view the two words separately and consider them to be allusive of an individual referring to themselves as either being fit or wanting to become fit. With regard to the earlier mark, the initial impression of the mark is “Mc”, being the common prefix of a Scottish or Irish name combined with “fit” being allusive of the industry to which the services relate.

39. Visually, both marks consist of five letters with the first and last three being the same. The earlier mark does begin with a capital M which does not alter the visual comparison, however due to the common use of Mc as a prefix to a name, the capital F does impact the visual comparison. I find that there is an above low, but not as high as medium, degree of visual similarity.

40. Aurally, the earlier mark would be pronounced as two syllables, i.e. “Mc” and “fit”. The application is also likely to be pronounced as two syllables, i.e. “me” and “fit”. Whilst I consider this to be the likely pronunciation, I do not discount that some consumers would refer to the application as one word: mefit. Since each mark begins with “M” and ends with “fit”, there is some aural similarity. However, I consider the first syllable to be distinct from one another and this does lessen the overall degree of aural similarity to a low to medium degree.

41. As previously outlined, whilst neither of the respective marks have a literal meaning, they are individually allusive (mefit alluding to someone who is fit or wanting to become fit, and McFit being the common prefix of a Scottish or Irish name). Since the respective allusive nature of each mark is likely to be remembered by consumers, I consider there to be a conceptual gap between the two. Therefore, I find that are not conceptually similar.

Distinctive character of earlier mark

42. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated at paragraphs 22 and 23 that:

“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 *WindsurfingChiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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).”

43. The opponent has not claimed that it has an enhanced distinctive character by virtue of the use made of the mark. If it had, it is clear from the evidence that all of its use is outside of the UK and therefore it would not have shown that the mark has acquired distinctive character in the UK by virtue of the use made of the mark. Therefore, I shall only consider the inherent distinctiveness in the mark. The earlier mark is an invented word, combining “Mc” with “Fit”, the latter alluding to the area in which the services are focussed. Accordingly, whilst invented words are generally deemed to be at the higher end of the distinctiveness spectrum, since the mark is only one word and alludes to an area in which the services are provided, I consider the mark to have a medium degree of inherent distinctive character.

Global assessment – likelihood of confusion

44. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of considering all the factors, weighing them and looking at their combined effect, in accordance with the authorities set out earlier in this decision. One of those principles states that a lesser degree of similarity between the goods and services may be offset by a greater degree of similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*). I must also keep in mind the distinctive character of the opponent’s mark as the more distinctive these marks are, the greater the likelihood of confusion. I must also keep in mind the average consumer for the services, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between marks and must instead rely upon the imperfect picture retained in their mind.

45. I summarise my key findings as follows:

- The earlier mark has a medium degree of inherent distinctive character.
- The services in question will be sought following aural referrals and visual inspection of websites, brochures, etc. A higher than medium, but not high, degree of care and attention will be paid.
- Some of the respective services are identical.
- Visually, the marks are similar to an above low, but not medium degree; aurally, the marks are similar to a low to medium degree; they are not conceptually similar.

46. Whilst I take into consideration that some of the services are identical and this would offset any lesser degree of similarity between the marks, I do not consider there to be a likelihood of confusion. In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the General Court noted that the beginnings of words tend to have more visual and aural impact than the ends. The court stated at paragraphs 81 to 83 that:

“It is clear that visually the similarities between the word marks MUNDICOLOR and the mark applied for, MUNDICOR, are very pronounced. As was pointed out by the Board of Appeal, the only visual difference between the signs is in the additional letters ‘lo’ which characterise the earlier marks and which are, however, preceded in those marks by six letters placed in the same position as in the mark MUNDICOR and followed by the letter ‘r’, which is also the final letter of the mark applied for. Given that, as the Opposition Division and the Board of Appeal rightly held, the consumer normally attaches more importance to the first part of words, the presence of the same root ‘mundico’ in the opposing signs gives rise to a strong visual similarity, which is, moreover, reinforced by the presence of the letter ‘r’ at the end of the two signs. Given those similarities, the applicant’s argument based on the difference in length of the opposing signs is insufficient to dispel the existence of a strong visual similarity.

As regards aural characteristics, it should be noted first that all eight letters of the mark MUNDICOR are included in the MUNDICOLOR marks.

Second, the first two syllables of the opposing signs forming the prefix ‘mundi’ are the same. In that respect, it should again be emphasised that the attention of the consumer is usually directed to the beginning of the word. Those features make the sound very similar.

47. See also: GC cases: *Castellani SpA v OHIM*, T-149/06, *Spa Monopole, compagnie fermière de Spa SA/NV v OHIM*, T-438/07 (similar beginnings important or decisive), *CureVac GmbH v OHIM*, T-80/08 (similar beginnings not necessarily important or decisive) and *Enercon GmbH v OHIM*, T-472/07 (the latter for the application of the principle to a two word mark).

48. In this instance, the second letters in each of the respective marks differ. Further, the third letter of the earlier mark is capitalised which also puts a distance between the marks. I have also found that the marks are not conceptually similar. Whilst I acknowledge that some of the respective services are identical, I do not consider this offsets the overall lack of similarity between the marks. Therefore, I conclude that there is no likelihood of confusion, either direct or indirect.

Outcome

49. The opposition fails in its entirety. Subject to appeal, the application shall proceed for all of the applied for class 35 services.

Costs

50. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant the sum of £900 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering the opponent's statement and preparing a counterstatement	£300
Filing and considering evidence and submissions	£600
Total	£900

51. I therefore order McFit GmbH to pay Fitness Initiative Limited the sum of £900. The above sum should be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 30TH day of December 2015

MARK KING
For the Registrar,
The Comptroller-General