

**O-091-18**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3172228  
BY KATHERINE LOUISE NESBITT AND MARK NESBITT TO REGISTER THE  
FOLLOWING TRADE MARK**



**IN CLASS 41**

**AND IN THE MATTER OF OPPOSITION THERETO UNDER NO. 407633  
BY SANDRA MICHELLE KENNY**

## Background and pleadings

1) Katherine Louise Nesbitt and Mark Nesbitt (“the applicants”) applied to register trade mark no. 3172228 in the UK on 30 June 2016. It was accepted and published in the Trade Marks Journal on 15 July 2016 in respect of the following services in class 41:

*Provision of information, education and training in relation to nutrition, including food preparation, cooking classes and meal plans; physical activities for children; bespoke physical education programmes for schools and teachers; after-school clubs; summer camps; education and delivery of anti-bullying programmes; team building and leadership programmes.*

2) Sandra Michelle Kenny (“the opponent”) opposes the trade mark on the basis of section 5(2)(b), section 5(3) and section 5(4)(a) of the Trade Marks Act 1994 (“the Act”). The opposition, insofar as it is based upon section 5(2) and section 5(3) of the Act, is based upon the following three earlier marks:

<b>Mark details and relevant dates</b>
2410095  <b><i>Fizz Kidz Family Fitness</i></b>  Filing date: 28 December 2005  Registration date: 30 March 2007
<b>Specifications of goods and services</b>
<b>Class 9:</b> <i>Apparatus for the transmissions or reproduction of sound or images; compact discs, DVD's, video recordings and other recordable media; all relating to the provision of training and education.</i>
<b>Class 25:</b> <i>T-shirts all being for women and girls.</i>
<b>Class 41:</b> <i>Provision of training, all relating to family and children's health and wellbeing.</i>

## Mark details and relevant dates

3163178



(this version is representative of the series of six marks that differ only in colour)

Filing date: 6 May 2016

Registration date: 30 September 2016

## Specifications of goods and services

**Class 5:** *Dietary supplements.*

**Class 9:** *Mousemats Computer accessories; Recorded media, namely CD's, DVD's, CD Rom's, music CD's: Downloadable media; Music and video downloads.*

**Class 12:** *Recreational jet boats; Leisure boats.*

**Class 14:** *Wristbands.*

**Class 16:** *Stationery; printed matter; books; posters; diaries; planners.*

**Class 18:** *Sports bags; gym bags.*

**Class 21:** *Mugs; cups; water bottles and drinking vessels.*

**Class 24:** *Towels.*

**Class 25:** *Clothing, footwear, headgear; Sportswear; Leisurewear; Leisure shoes; Leisure suits; Leisure wear.*

**Class 27:** *Gymnasium mats; yoga mats.*

**Class 28:** *Sporting articles and equipment; Gym equipment; Weight lifting equipment; Toys.*

**Class 35:** *Advertising; Business Franchising Services; Radio advertising and commercials; Radio and television advertising; Retail services connected with the sale of clothing and clothing accessories; Retail services in relation to audio-visual equipment; Retail services in relation to dietary supplements; Retail services in relation to educational supplies; Retail services in relation to printed matter; Retail services in relation to smartphones; Retail services in relation to smartwatches; Retail services in relation to sporting articles; Retail services in relation to sporting equipment.*

**Class 41:** *Fitness classes; fitness classes for children, adults and senior citizens; gymnasium services; education, training and tuition in relation to fitness, well either get, nutrition, diets and therapy exercise; personal training services; sports coaching;*

sports and fitness; motivational speaking ; organisation of sporting and fitness events; advise and consultancy services in relation to sports and fitness; Training and education services; Training and education services; Training (Practical -) [demonstration]; Training in sports; Training of teachers; Training services relating to fitness; Recreational camps; Recreational park services; Recreational facilities; Recreational services; Recreational facilities (provision of-); Recreational services for the elderly; Recreational services relating to back-packing; Recreational services relating to bob-sledding; Recreational services relating to hiking; Recreational services relating to horse riding; Recreational services relating to skating; Recreational services relating to skiing; Leisure park services; Leisure centre services; Leisure services.

### Mark details and relevant dates

3164321



Filing date: 12 May 2016

Registration date: 7 October 2016

### Specifications of goods and services

**Class 3:** Nails (False -).

**Class 6:** Nails.

**Class 9:** Sport bags adapted [shaped] to contain protective helmets; Sports goggles; Sports (Protective helmets for -); Sports (Goggles for -); Sport whistles.

**Class 12:** Leisure boats.

**Class 14:** Sports watches.

**Class 16:** Sports trading cards; Clothing patterns; Magazines [periodicals].

**Class 18:** Sports bags; Sports (Bags for -).

**Class 21:** Sports bottles sold empty; Sports bottles [empty]; Clothing stretchers.

**Class 25:** Leisurewear; Leisure shoes; Leisure suits; Leisure wear; Sportswear; Sports caps and hats; Sports vests; Sports (Boots for -); Sports shoes; Sports jerseys; Sports singlets; Sports over uniforms; Sport stockings; Sports socks; Sport shirts; Sports jackets; Sports jerseys and breeches for sports; Sports overuniforms; Sports shirts; Sports shirts with short sleeves; Sports bras; Sports pants; Clothing for gymnastics; Clothing; Clothing for wear in judo practices; Clothing for wear in wrestling games; Clothing for cyclists; Clothing for children; Clothing for infants; Clothing for cycling; Clothing for martial arts; Clothing for

skiing; Footwear for sport; Headgear for wear.

**Class 26:** Clothing (Edgings for -); Clothing (Fastenings for -); Clothing (Shoulder pads for -); Clothing (Eyelets for -); Clothing hooks [fasteners].

**Class 27:** Gymnasium mats; Gymnasium exercise mats.

**Class 28:** Fitness exercise machines; Sports equipment; Sport balls; Sports games; Sports training apparatus; Sport hoops; Sportballs; Sports bows [archery]; Clothing for teddy bears.

**Class 35:** Business Franchising services; Retail services in relation to headgear; Retail services in relation to physical therapy equipment; Retail services in relation to sun tanning appliances; Retail services in relation to printed matter; Retail services in relation to disposable paper products; Retail services in relation to bags; Retail services in relation to stationery supplies; Retail services in relation to umbrellas; Retail services in relation to educational supplies; Retail services in relation to dietary supplements; Retail services in relation to frozen yogurts; Retail services in relation to ice creams; Retail services in relation to audio-visual equipment; Retail services in relation to beauty implements for humans; Retail services in relation to sporting articles; Retail services in relation to dairy products; Retail services in relation to furniture; Retail services in relation to games; Retail services in relation to footwear; Retail services in relation to dietetic preparations; Retail services in relation to downloadable music files; Retail services in relation to smartwatches; Retail services in relation to smartphones; Retail services via catalogues related to non-alcoholic drinks; Retail services via catalogues related to foodstuffs; Retail services via global computer networks related to non-alcoholic beverages; Retail services via global computer networks related to foodstuffs; Retail services in relation to mobile phones; Retail shop window display arrangement services; Retail services connected with stationery; Retail services connected with the sale of clothing and clothing accessories; Retail store services in the field of clothing; Magazine advertising; Magazine advertising.

**Class 41:** Fitness classes; Fitness classes for children, adults and senior citizens; fitness bootcamp; gymnasium services; education, training and tuition relation to fitness, health, wellbeing, Nutrition, diets and therapy exercise; personal training services: sports coaching; Sports and fitness; gp exercise referral schemes, motivational speaking; organisation of sporting and fitness events: advise and consultancy services in relation to sport and fitness; Physical education services; Physical education programmes; Physical education; Physical education instruction; Physical education facilities (provision of -); Leisure park services; Leisure centre services; Leisure services; Gymnasium facilities (provision of -); Gymnasium services relating to weight training; Gymnasium services relating to body building; Gymnasium club services; Gymnasiums; Gymnasium services; Recreational facilities; Recreational park services; Recreational camps; Recreational services; Recreational facilities (provision of -); Recreational services for the elderly; Recreational services relating to back-packing; Recreational services relating to bob-sledding; Recreational services relating to hiking; Recreational services relating to horse riding; Recreational services relating to skating; Recreational services relating to skiing; Coaching in economic and management matters; Coaching; Coaching services for sporting activities; Coaching [training]; Coaching in the field of sports; Fitness club services; Health club services [health and fitness training]; Health and fitness club services; Health club [fitness] services; Health club services [exercise]; Health education; Health and wellness training; Sports events (Timing of -); Sport camp services; Sports equipment (Rental of -), except vehicles; Sports camp services; Sporting and cultural activities; Sport camps; Sporting event organization; Sports club services; Sports coaching services; Sports information services; Sports park services; Sports refereeing and officiating; Sports-park services; Sporting activities; Sporting and recreational activities; Sporting services; Sports entertainment services; Sports instruction services; Sports tuition; Sports tuition, coaching and instruction; Sporting activities (organising of -); Sporting competitions (arranging of -); Sporting competitions (organising of -); Sporting education services; Sporting results services; Sports coaching; Sports competitions (organising of -); Sports education services; Sports equipment (rental of -) [except vehicles]; Sports events (timing of -); Sports facilities (hire of -); Sports facilities (leasing of -); Sports facilities (provision of -); Sports officiating; Sports refereeing; Sports training; Academic examination services; Academies [education]; Academy education services; Academy services (education -); Adventure training for children; Aerobic and dance facilities; Aerobics competitions; Aerobics training services; Aikido instruction; Arranging and conducting of in-person educational forums; Arranging and conducting of meetings in the field of education; Arranging and conducting of seminars; Arranging and conducting of seminars and workshops; Arranging

and conducting of training courses;Arranging and conducting of training workshops;Arranging and conducting of tutorials;Arranging and conducting of workshops;Arranging and conducting of workshops [training];Arranging and conducting seminars;Arranging and conducting workshops;Arranging conferences;Arranging for students to participate in educational activities;Arranging for students to participate in educational courses;Arranging for students to participate in recreational activities;Arranging for students to participate in recreational courses;Arranging group recreational activities;Arranging of an annual educational conference;Arranging of athletics competitions;Arranging of award ceremonies;Arranging of award ceremonies to recognise achievement;Arranging of award ceremonies to recognise bravery;Arranging of competitions for education or entertainment;Arranging of competitions for educational purposes;Arranging of competitions for training purposes;Arranging of conferences relating to advertising;Arranging of conferences relating to business;Arranging of conferences relating to commerce;Arranging of conferences relating to cultural activities;Arranging of conferences relating to education;Arranging of conventions for educational purposes;Arranging of conventions for entertainment purposes;Arranging of courses of instruction;Arranging of demonstrations for educational purposes;Arranging of displays for cultural purposes;Arranging of displays for educational purposes;Arranging of exhibitions for cultural purposes;Arranging of exhibitions for educational purposes;Arranging of exhibitions for entertainment purposes;Arranging of festivals for cultural purposes;Arranging of festivals for educational purposes;Arranging of presentations for educational purposes;Arranging of seminars relating to advertising;Arranging of seminars relating to business;Arranging of seminars relating to commerce;Arranging of seminars relating to cultural activities;Arranging of seminars relating to education;Arranging of sporting events;Arranging of sports competitions;Magazines (publication of -);Magazine publishing;Magazines (publication of - );Magazine publishing.

**Class 42:** Clothing design services;Clothing design services.

**Class 43:** Health resort services [provision of temporary accommodation].

**Class 44:** Health care;Health screening services in the field of asthma;Health spa services;Health screening;Health risk assessment surveys;Health resort services [medical];Health hydro services;Health farm services [medical];Health clinic services [medical];Health clinic services;Health care relating to therapeutic massage;Health care relating to remedial exercise;Health care relating to relaxation therapy;Health care relating to osteopathy;Health care relating to naturopathy;Health care relating to hydrotherapy;Health care relating to homeopathy;Health care relating to fasting;Health care relating to chiropraxis;Health care relating to acupuncture;Health care consultancy services [medical];Health assessment surveys;Healthcare;Health care services;Health-care;Healthcare services;Health-care services;Health centres;Health centers;Health care services offered through a network of health care providers on a contract basis;Health care in the nature of health maintenance organizations;Health advice and information services;Sports medicine services;Sports massage;Beautician services;Beauticians (services of-);Advice relating to cosmetics;Advice relating to hair care;Advice relating to the personal welfare of elderly people [health];Advisory services relating to beauty treatment;Advisory services relating to diet;Advisory services relating to health;Advisory services relating to nutrition;Advisory services relating to slimming;Agricultural consultancy;Airbrush tanning salon services;Airbrush tanning services for the human body;Airbrush tanning services;Alcohol screening for medical purposes;Anti-smoking therapy;Application of cosmetic products to the face;Aromatherapy services;Artificial suntanning services;Barber shops;Baths (turkish -) provision of facilities;Beautician services;Beauticians (services of-);Beauty care;Beauty care for human beings;Beauty care services provided by a health spa;Beauty consultancy;Beauty consultation;Beauty counselling;Beauty salon services;Beauty salons;Beauty therapy services;Beauty therapy treatments;Beauty treatment;Beauty treatment services;Beauty-salon services;Body piercing;Body piercing services;Body waxing services for hair removal in humans;Body waxing services for the human body;Bodywork therapy;Cellulite treatment services;Cellulitis treatment services;Charitable services, namely providing medical services;Charitable services, namely, providing medical services to needy persons;Chemotherapy services;Chiropody;Cholesterol testing;Clinic services (medical-);Compilation of medical reports;Conducting of psychological assessments and examination;Conducting screenings for cardiovascular disease risk factors;Consultancy and information services relating to medical products;Consultancy in the field of body and beauty care;Consultancy provided via the Internet in the field of body and beauty care;Consultancy relating to cosmetics;Consultancy relating to health care;Consultancy relating to nutrition;Consultancy services related to nutrition;Consultancy services relating to beauty;Consultancy services relating to

cosmetics;Consultancy services relating to personal behaviour;Consultancy services relating to slimming;Consultation services in the field of make-up;Consultation services relating to beauty care;Consultation services relating to skin care;Consulting services relating to health care;Cosmetic analysis;Cosmetic and plastic surgery clinic services;Cosmetic body care services;Cosmetic electrolysis;Cosmetic electrolysis for the removal of hair;Cosmetic facial and body treatment services;Cosmetic laser treatment for hair growth;Cosmetic laser treatment of skin;Cosmetic laser treatment of spider veins;Cosmetic laser treatment of tattoos;Cosmetic laser treatment of toenail fungus;Cosmetic laser treatment of unwanted hair;Cosmetic laser treatment of varicose veins;Cosmetic make-up services;Cosmetic treatment;Cosmetic treatment for the body;Cosmetic treatment for the face;Cosmetic treatment for the hair;Cosmetic treatment services for the body, face and hair;Cosmetician services;Cosmetics consultancy services;Counseling relating to occupational therapy;Counselling relating to diet;Counselling relating to nutrition;Deep tissue massage;Depilatory treatment;Depilatory waxing;Dermatological services for treating skin conditions;Dermatology services;Diabetes screening services;Diet planning and supervision;Dietary and nutritional guidance;Dietary guidance;Dietetic advisory services;Dietetic counselling services [medical];Dietician service;Dietitian services;Drug rehabilitation services;Drug testing of participants in sports for the use of illegal or prohibited performance enhancing substances;Electro therapy services for physiotherapy;Electrolysis for cosmetic purposes;Exercise facilities for health rehabilitation purposes (provision of-);Eyebrow dyeing services;Eyebrow shaping services;Eyebrow tattooing services;Eyebrow threading services;Eyebrow tinting services;Eyelash curling services;Eyelash perming services;Eyelash tinting services;Facial beauty treatment services;Family planning;Food nutrition consultation;Foot massage;Guidance on nutrition;Hair braiding services;Hair braiding services;Hair care services;Hair colouring services;Hair curling services;Hair cutting;Hair cutting services;Hair dressing salon services;Hair perming services;Hair restoration;Hair salon services;Hair salon services for children;Hair salon services for men;Hair salon services for military service members;Hair salon services for women;Hair straightening services;Hair styling;Hair treatment;Hair weaving;Hairdressing;Hairdressing salons;Hairdressing services;Health advice and information services;Health assessment surveys;Health care consultancy services [medical];Health care relating to fasting;Health care relating to homeopathy;Health care relating to hydrotherapy;Health care relating to naturopathy;Health care relating to relaxation therapy;Health care relating to remedial exercise;Health care relating to therapeutic massage;Health care services offered through a network of health care providers on a contract basis;Health centers;Health centres;Health clinic services;Health clinic services [medical];Health farm services [medical];Health hydro services;Health resort services [medical];Health risk assessment surveys;Health screening;Health screening services in the field of asthma;Health screening services in the field of sleep apnea;Health spa services;Healthcare;Health-care;Healthcare services;Health-care services;Herbalism;Holistic psychotherapy;Hospital services;Hydrotherapy;Hygienic and beauty care;Hygienic and beauty care for human beings;Hygienic and beauty care for humans;Hygienic and beauty care services;Hygienic care for human beings;Hypnotherapy;Individual and group psychology services;Individual medical counseling services provided to patients;Information relating to massage;Information services relating to health care;Injectable filler treatments for cosmetic purposes;Insomnia therapy services;Laser hair removal services;Laser removal of spider veins;Laser removal of tattoos;Laser removal of varicose veins;Laser skin rejuvenation services;Laser skin tightening services;Liposuction services;Maintaining files and records concerning the medical condition of individuals;Maintaining personal medical history records and files;Make-up application services;Make-up consultation services provided on-line or in-person;Make-up services;Manicure and pedicure services;Manicure services;Manicuring;Manicuring services;Massage;Massage and therapeutic shiatsu massage;Massage services;Massages;Medical advice for individuals with disabilities;Medical advice in the field of pregnancy;Medical advisory services;Medical analysis for the diagnosis and treatment of persons;Medical analysis services;Medical assistance;Medical assistance consultancy provided by doctors and other specialized medical personnel;Medical assistance services;Medical counseling relating to stress;Medical counselling;Medical, hygienic and beauty care;Medical screening;Medical screening services in the field of asthma;Medical screening services in the field of sleep apnea;Medical screening services relating to cardiovascular disease;Medical services in the field of diabetes;Medical services in the field of treatment of chronic pain;Medical spa services;Medical testing services, namely, fitness evaluation;Medical treatment services;Medical treatment services provided by a health spa;Medical treatment services provided by clinics and hospitals;Meditation services;Mental health services;Microdermabrasion services;Micropigmentation services;Monitoring of patients;Music therapy for physical, psychological and cognitive purposes;Music therapy services;Nail care services;Nail salon services;Narcotic rehabilitation;Nutrition consultancy;Nutrition counseling;Nutritional advisory and consultation services;Nutritional advisory services;Nutritional guidance;Occupational psychology services;Occupational therapy and rehabilitation;Occupational therapy services;On-line make-up consultation services;Operation of sauna facilities;Osteoporosis

screening;Permanent hair removal and reduction services;Personal hair removal services;Personal therapeutic services relating to cellulite removal;Personal therapeutic services relating to circulatory improvement;Personal therapeutic services relating to fat dissolution;Personal therapeutic services relating to hair regrowth;Personal therapeutic services relating to muscle re-education;Personality assessment services [mental health services];Personality testing for psychological purposes;Personality testing [mental health services];Physical rehabilitation;Physical therapy;Physical therapy services;Physiotherapy;Physiotherapy services;Pregnancy testing;Preparation of reports relating to medical matters;Preparing psychological profiles;Private hospital services;Professional consultancy relating to diet;Professional consultancy relating to health;Professional consultancy relating to nutrition;Providing health information;Providing hot tub facilities;Providing information about beauty;Providing information about dietary supplements and nutrition;Providing information in the field of hair styling;Providing information relating to beauty salon services;Providing information relating to dietary and nutritional guidance;Providing information relating to dietary and nutritional supplements;Providing information relating to physical examinations;Providing information relating to the treatment of dislocated joints, sprains or bone fractures;Providing information relating to traditional Japanese massage;Providing laser therapy for treating medical conditions;Providing medical advice in the field of weight loss;Providing medical information;Providing medical information in the field of weight loss;Providing mental rehabilitation facilities;Providing nutritional information about drinks for medical weight loss purposes;Providing nutritional information about food for medical weight loss purposes;Providing nutritional information about food;Providing on-line information relating to the prevention of cardiovascular disease and strokes;Providing physical rehabilitation facilities;Providing psychological treatment;Providing weight loss program services;Provision of dietetic advice;Provision of information relating to behavioural modification;Provision of information relating to development in the field of weight reduction;Provision of information relating to medical practitioners;Provision of information relating to medical specialists;Provision of information relating to nutrition;Provision of information relating to psychology;Provision of medical facilities at sporting events;Provision of sauna facilities;Provision of solarium [sun tanning] facilities;Psychological assessment services;Psychological counseling;Psychological counseling of staff;Psychological counselling;Psychological diagnosis services;Psychological therapy for infants;Psychological treatment;Psychotherapy services;Rental of towels;Salon services (beauty-);Salon services (hairdressing-);Salons (beauty-);Salons (Beauty -);Salons (hairdressing-);Salons (Hairdressing -);Sauna facilities (provision of-);Sauna services;Services for the care of the hair;Services of a hair and beauty salon;Services of a make-up artist;Services of a psychologist;Services of a solarium;Services rendered by a dietician;Shampooing of the hair;Skin care salons;Skin tanning service for humans for cosmetic purposes;Slimming salon services;Slimming treatment services;Smoking (anti-) therapy;Solarium facilities (provision of-);Solarium services;Spas;Speech and hearing therapy;Speech therapy services;Sports massage;Sports medicine services;Spray tanning salon services;Spray tanning services;Sun tanning salon services;Supervision of weight reduction programmes;Tanning salon and solarium services;Tanning salons;Tanning (sun-) salon services;Tattoo parlors;Tattooing;Tattooing of pets for identification purposes;Tattooing services;Teeth whitening services;Thai massage;Therapeutic treatment of the body;Therapeutic treatment of the face;Therapy (physical -);Therapy services;Towels (rental of-);Traditional Japanese massage;Treatment of allergies;Treatment to joint-dislocation, sprain, bone-fracture or the like (judo-seifuku);Vascular screening;Weight control evaluation;Weight control treatment;Weight reduction diet planning and supervision;Weight reduction services;Weight-reduction programmes (planning of-);Weight-reduction programmes (supervision of-);Withdrawal treatments for addicts.

3) The opponent submits that there is a likelihood that the applied for mark will be confused with all three earlier marks and will take unfair advantage of the earlier marks that have been “traded under a numerous amount of years”.

4) Further, the opponent asserts that she has built up a reputation over a considerable amount of years, building a range of “Fizz” products, services and fitness programs that are offered to the education sector, health sector and general



public. Further, it is claimed that the “Fizz brands” have been advertised and promoted in Plymouth.

5) It is claimed that the applied for mark could be confused with, and considered part of, the opponent’s Fizz brands and that the application offends under section 5(2)(b) and section 5(3) of the Act.

6) In addition, the opponent also claims that the application offends under section 5(4)(a) of the Act. In respect of this ground of opposition, the opponent relies upon claimed use in Plymouth since 2008 in respect of the third mark relied upon for the other grounds and since 2003 for the first and second marks relied upon for the other grounds.

7) The opponent states that these marks have been used in respect of Class 9 and Class 25 goods and Class 41 services.

8) The applicants filed a counterstatement denying many of the claims made and putting the opponent to proof of use in respect of her earlier mark 2410095 “Fizz Kidz Family Fitness”. The applicants claim that reliance by the opponent on her Class 9 and Class 25 goods is not relevant to these proceedings and accept that the wide terms in the opponent’s Class 41 specifications “encompass some of the Applicants services” but also argue that the trade channels that the parties operate in are different. The applicants also note that two of the opponent’s marks are not subject to the genuine use provisions and they concede that the respective Class 41 specifications contain identical and similar services. Detailed submissions are also provided that I will not detail here, but I will keep in mind when making my decision.

9) Both sides filed evidence in these proceedings and both also filed written submissions. The opponent was not represented in these proceedings and the applicants were represented by Bright (South West) LLP. Neither side requested to be heard and I make my decision following a review of all the papers.

## **Opponent's Evidence-in-chief**

10) This takes the form of a witness statement by the opponent, dated 7 March 2017. The opponent states that she is known as "Fizz" the fitness trainer and has been for many years and has worked in schools, communities, parks, clubs, sports centres, education and homes.

11) The opponent provides evidence in support of her claim that she has traded for many years using a number of "Fizz" marks. For reasons of procedural economy, it is not necessary that I detail this evidence.

## **Applicants' evidence**

12) This takes the form of a witness statement by Katherine Louise Nesbitt, one of the applicants. She explains that the applicants and their predecessor provided fitness boot camps under the name "FIT Kidz", but in an attempt to make the services more inclusive (and not just appear to be targeted at fit children), the name was changed to in "FizzBug" "to provide the message 'Do the Phys' (Fizz) and 'Get the Bug'."

13) Ms Nesbitt states that clearance searches were conducted by Just Enough Brave Limited. A witness statement from its director, David John Smith, is provided at Exhibit KLN3 in which he states that he met the applicants on or about 11 August 2015 to discuss ideas for a new name. Upon deciding upon the mark "FizzBug", clearance searches were undertaken, but only "Fizz the magician" was found. On this basis the applicants moved forward and developed the brand.

14) It is not necessary for me to detail the applicants' evidence further.

## **DECISION**

### **Section 5(2)(b)**

15) The opponent relies upon three earlier marks, one of which (2410095) is subject to the genuine use provisions. It is my view that reliance upon this earlier mark provides the opponent with no stronger case than reliance upon earlier mark 3163178 that is not subject to proof of use. Therefore, I intend to consider the pleading under section 5(2)(b) of the Act based upon the latter of these two earlier marks only. As a consequence, it is not necessary that I undertake an assessment of whether the former earlier mark has been genuinely used as required by section 6A of the Act.

16) This earlier mark consists of a series of six marks where the marks that make up the series differ only in colour. I agree with the applicants when they submit “that the colour deviations of the six marks adds little to the distinctive character of the mark ... [and comparison can be based on just one version only] ...and any assertions as to the colour adding to the distinctive character are ignored”. I go further and take the view that if the opponent cannot succeed in her opposition based upon the version shown in the table at paragraph 2, she cannot succeed by relying on any of the other colour versions.

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

## Comparison of goods and services

18) In the judgment of the Court of Justice of the European Union (“the CJEU”) in *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, 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”.

19) 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.

20) I also keep in mind the following guidance of the General Court (“the GC”) in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05 (“*MERIC*”):

“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”.

21) In their counterstatement, the applicants conceded that because the opponent’s Class 41 specification includes broad terms it encompasses some of the applicants’ services and there is similarity between the services. However, they submitted further that the respective trade channels are different because the applicants’ services are “limited largely” to schools, head teachers and other professionals. I note this, but the applicants’ specification describes services that are not limited to being provided to head teachers etc. For example, their *physical activities for children* includes such services provided directly to children rather than indirectly via schools or head teachers. Consequently, I dismiss the notion that this creates a point of difference between the respective services.

22) In respect of the applicants’ *[p]rovision of information, education and training in relation to nutrition, including food preparation, cooking classes and meal plans; physical activities for children; bespoke physical education programmes for schools and teachers*, these are all covered by, at least, the opponent’s broad terms *education, training and tuition in relation to fitness [...], nutrition, diets and therapy exercise*. Keeping in mind the guidance in *MERIC*, I find that the respective services are identical.

23) In respect of the applicants’ *after-school clubs; summer camps* these are services that include clubs and camps where fitness training and sports coaching are provided, and are therefore identical at least to the opponent’s *education, training and tuition in relation to fitness*. In addition, where such clubs and camps may not be

sport or fitness related, they will nonetheless be covered by the opponent's broad term *Training and education services* and *Recreational camps*. I find that the respective services are identical.

24) Finally, in respect of the applicants' *education and delivery of anti-bullying programmes; team building and leadership programmes*, these are covered by, or overlap with, the opponent's *Training and education services; Training (Practical -) [demonstration]*. Once again, keeping the guidance from *MERIC* in mind, I conclude that the respective goods are identical.



### **Comparison of marks**

25) It is clear from *Sabel BV v Puma AG*, Case C-251/95 (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.”

26) It would be wrong, therefore, to dissect the trade marks artificially, 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.

27) The respective marks are shown below:

Earlier mark	Contested mark
	

28) The earlier mark consists of the words “Fizz” and “Fitness” in a stylised script that is allusive of hand-written text. “The word “fitness” is descriptive for the majority of the relevant services and is, therefore, of low or no distinctive character. The word “Fizz” as presented in the opponent’s mark has no obvious meaning in respect of the relevant services. The word “Fizz” is the dominant distinctive element of the opponent’s mark.

29) In respect of the applicants’ mark, they submit that “Fizz” will be perceived as an allusive reference to “Phys” being a shortened form of “physical” and, alternatively, that the more relevant meaning of the word is to “move with or display excitement”. I discuss this further later. For now, it is sufficient that I record that because of its position at the top of the mark, the word “Fizz” is a dominant and distinctive element of the applicants’ mark. The stylisation of both marks contributes to their distinctive character. The applicants’ mark consists of the word “Fizz” appearing above the word “bug” in a stylised form with the “g” of the word “bug” being embellished by having two “eyes” and a swooping tail and having two marks reminiscent of an insect’s antennae. These embellishments are likely to be noticed by the average consumer, but because of their size and position within the mark, they are not the dominant elements. Both words and the visual presentation all add to its distinctive character, but with the word “Fizz” appearing above the word “bug”, it is the more dominant of the two words.

30) In terms of visual similarity, both marks contain the word “Fizz”. They also both contain a “swoosh” element at the bottom of the marks albeit, on close analysis, they have differences. These elements create a further point of visual similarity. In other respects, there is no similarity. Taking all of this into account, I conclude that the

marks share a moderate (somewhere between low and medium) level of visual similarity.

31) Aurally, the opponent's mark consists of the three syllables FIZ-FIT-NESS, whereas the applicants' mark consists of the two syllables FIZ-BUG. Therefore, they coincide insofar as they share the same first syllable but differ in that the remaining syllables are different and because one consists of three syllables, the other two. Taking all of this into account, I find that the respective marks share a medium degree of aural similarity.

32) Conceptually, both marks begin with the same word "Fizz". Whilst this has a number of meanings such as the production of bubbles of gas in a liquid<sup>1</sup> or an informal word to describe champagne, the applicants submit that when considering their mark, the most relevant meaning is to "move with or display excitement, exuberance, or liveliness: *"anticipation began to fizz through his vein"*" (credited as being obtained from the Oxford Dictionary). It is not obvious to me that this adverbial or adjectival meaning will be perceived by the average consumer when encountering either mark. In the applicants' mark, the word "bug" is embellished with two lines added to the letter "g" to create the impression of an insect's antennae. This has the effect of strengthening the meaning of the word "bug" as being an insect and because of this, I dismiss the applicants' submissions that the word will be perceived as meaning "an enthusiastic interest" or an "obsession or enthusiasm". A further effect is that, when the mark is viewed as a whole, it is not clear to the consumer what, of a number of meanings, is intended to be conveyed by the word "Fizz". It may be perceived as a fictional type of insect called a "Fizz Bug" or, more likely in my view, the words will retain separate and unconnected meanings. Consequently, the consumer is likely to perceive the occurrence of the word "Fizz" in both marks as carrying the same meaning. Taking all of this into account, I conclude that the respective marks share a medium degree of conceptual similarity.

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<sup>1</sup> <http://www.oxfordreference.com/search?q=Fizz&searchBtn=Search&isQuickSearch=true>



## **Average consumer and the purchasing act**

33) 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.

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

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

35) The applicants submit that the relevant public includes parents who “will not make a rash decision, and will undertake a moderate to high degree of care and attention” when choosing the services for their children. I accept this insofar as the parties’ services are targeted at children. I consider that the same level of care and attention will be involved where such services are provided to adults. I also acknowledge that the services may be procured by head teachers or the local council. Such a business to business service is likely to involve a reasonably detailed purchasing process with an elevated level of care and attention, but still not the highest level.

## **Distinctive character of the earlier trade mark**

36) 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).”

37) Whilst there is evidence from the opponent regarding use of her marks, it is not well marshalled with no turnover figures or promotional spend provided. Neither is it possible to ascertain the level of use made of each of the marks relied upon. In light of this I am unable to conclude whether the earlier mark benefits from an enhanced level of distinctive character because of the use made of it. In terms of its inherent level of distinctive character, the mark is likely to be perceived as consisting of a distinctive word (“Fizz”) having no meaning in respect of the services listed together with the descriptive word “Fitness” both provided in a form that adds to the overall level of distinctive character. Taking all of this together. I conclude that the mark has a reasonable level of inherent distinctive character, neither particularly high, nor particularly low.

## **GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.**

38) The following principles are gleaned from the decisions of the CJEU 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:

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

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

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

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

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

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive

role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

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

39) The applicants further submit that because they do not operate out of a gym, their consumers rely on the Internet, social media, newspapers and brochures and that there will be a greater importance on a visual comparison of the respective marks. Further, they also point out that the services provided by the opponent are chosen on the basis of the proximity to the consumer's home. Such conclusions are based upon the actual services provided in the market place and not upon a notional interpretation of the list of services covered by the opponent's specification of services. It is that latter that I must take into account for the purposes of grounds based upon section 5(2)(b). This is because the marketing strategy for the services provided under the mark may change over time (see paragraph 59 of the CJEU's judgment in *Devinlec Développement Innovation Leclerc SA v OHIM*, Case C-171/06P) and as the applicants' own business model demonstrates, the services covered by the broad terms in the opponent's specification could also be marketed to schools, head teachers and local authorities where such proximity considerations

may not apply. Therefore, I reject an approach based upon current marketing strategies.

40) I have recognised that there is a certain enhanced level of care and attention paid during the purchasing process of the relevant services. This is a factor that mitigates against a finding of a likelihood of confusion. However, this is only one of the factors that I must consider. I have also found that

- The respective services are identical;
- The word “Fizz” is the dominant distinctive element of the opponent’s mark and the word “Fizz” is the dominant, distinctive elements of the applicants’ mark;
- The respective marks share a moderate (between low and medium) level of visual similarity and a medium level of aural and conceptual similarity;
- The average consumer may be adults, parents of children, schools or local authorities;
- The opponents’ mark is endowed with a reasonable, but not high, level of inherent distinctive character and it does not benefit from any enhanced level of distinctive character.

41) I must also consider that, as the services are identical, then they are notionally targeting the same consumers. These are both factors that point more to a finding of a likelihood of confusion. I also keep in mind that the attention of the consumer is normally directed to the start of the mark (see the judgment of the GC in *Enercon GmbH v OHIM*, T-472/07) and in the current case, both marks contain the same first element “Fizz”. Additionally, the “Fizz” element of the applicants’ mark appears above the word “bug” resulting in a separation of the two and making the “Fizz” element more prominent overall. Further, I also note that descriptive or non-distinctive matter is to be given less weight when comparing marks (see paragraph 22 of the judgment of the CJEU in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97) and that the word “Fitness”, which appears as the second element in the opponent’s mark, falls into this category. A further factor that I take into account is that the visual presentation of the respective marks shares

certain similarities. The word “Fizz” in both marks is presented with a first letter having a slightly unusual backward facing arm at the top of the letter and the subsequent letters are in a similar lower case. Both marks also have a swoosh-type device underscoring the words. Whilst I have concluded that the visual similarity between the marks is moderate, these visual cues are a factor leaning towards a likelihood of confusion.

42) The applicants also offer the view that in the opponent’s mark, the word “Fizz” will be perceived as a reference to the originator of the services. I concur with this. The applicants develop their submission by explaining that in their mark, the word “Fizz” does not have such a meaning, but rather has one of the dictionary meanings identified earlier in order to qualify the word “bug”. Whilst I accept that their mark could be construed in this way, as I discussed and concluded in paragraph 32, the most likely perception is of the words “Fizz” and “bug” retaining separate and distinct meanings within the mark.

43) Before making my finding, I keep in mind the guidance of Mr Iain Purvis Q.C. sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10, in respect of “indirect confusion”:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion 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).”

44) Also sitting as the Appointed Person, Mr James Mellor commented further in EDEN CHOCOLATE BE MORE CHOCSTANZA trade mark, BL O-547-17:

81. I remind myself of paragraphs [16]-[17] in the Decision of Mr Iain Purvis Q.C. as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10. These paragraphs are frequently cited by Hearing Officers. Whilst I agree with the central reasoning, some caution is required lest these paragraphs start being applied akin to a statutory test. In particular, it is important that the detail of each of the sub-paragraphs does not provoke the tribunal into too detailed an analysis of what I believe should be an emulation of an instinctive reaction in the mind of the average consumer when encountering the later mark with an imperfect recollection of the earlier mark in mind.

81.1. First, whilst the CJEU has discussed or adverted to the concept of indirect confusion in many judgments relating to EU trade mark law, the Court has never explained indirect confusion in as detailed a way as Mr Purvis’

three categories. The furthest the Court appears to have gone is to indicate that a likelihood of indirect confusion exists where the average consumer forms the view that the goods come from economically linked undertakings. As the EUIPO Guidelines indicate, the Court has only explained what it means by economically linked undertakings in the context of cases on free movement of goods.

81.2. Second, in my view it is important to keep in mind the purpose of the whole exercise of a global assessment of a likelihood of confusion, whether direct or indirect. The CJEU has provided a structured approach which can be applied by tribunals across the EU, in order to promote a consistent and uniform approach. Yet the reason why the CJEU has stressed the importance of the ultimate global assessment is, in my view, because it is supposed to emulate what happens in the mind of the average consumer on encountering, for example, the later mark or the mark applied for with an imperfect recollection of the earlier mark in mind. It is not a process of analysis or reasoning, but an impression or instinctive reaction.

81.3. Third, when a tribunal is considering whether a likelihood of confusion exists, it should recognise that there are four options:

81.3.1. The average consumer mistakes one mark for the other (direct confusion);

81.3.2. The average consumer makes a connection between the marks and assumes that the goods or services in question are from the same or economically linked undertakings (indirect confusion);

81.3.3. The various factors considered in the global assessment lead to the conclusion that, in the mind of the average consumer, the later mark merely calls to mind the earlier mark (mere association);

81.3.4. For completeness, the conclusion that the various factors result in the average consumer making no link at all between the marks, but



this will only be the case where either there is no or very low similarity between the marks and/or significant distance between the respective goods or services.

81.3.5. Accordingly, in most cases, it is not necessary to explicitly set out this fourth option, but I would regard it as a good discipline to set out the first three options, particularly in a case where a likelihood of indirect confusion is under consideration.

81.4. Fourth, I think it is important to stress that a finding of indirect confusion should not be made merely because the two marks share a common element. When Mr Purvis was explaining in more formal terms the sort of mental process involved at the end of his [16], he made it clear that the mental process did not depend on the common element alone: 'Taking account of the common element in the context of the later mark as a whole.'

45) Taking all of the above into account, I reach the conclusion that whilst the consumer is likely to perceive some differences between the marks (and therefore is not likely to confuse one mark for the other – so called “direct confusion”), there are sufficient similarities, particularly in the visual presentation and the common occurrence of the word “Fizz” at the beginning of the marks, for the consumer to believe that identical services provided under the respective marks originate from the same or linked undertaking. This will amount to a likelihood of so-called indirect confusion.

46) The concept of a “bug” or “insect” is one that may appeal to children and the choice of this concept may be perceived by the average consumer as indicating that the provider of “Fizz Fitness” services is using a sub-brand to appeal to children. Consumers of the opponent’s services, upon encountering the applicant’s mark are therefore more likely to perceive it as a brand from the same provider of “Fizz Fitness” services, but one that it is aimed at children.

47) In summary, the opponents’ case based upon section 5(2)(b) of the Act succeeds in its entirety.

## **Section 5(3) and section 5(4)(a)**

48) In light of my findings above, it is not necessary that I also consider these additional grounds of opposition.

## **Summary**

49) The opposition succeeds in its entirety and the application is refused.

## **Costs**

50) The opponent has been successful and is entitled to a contribution towards her costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 2 of 2016. I take account that both sides filed evidence and written submissions, but that no hearing was held.

51) The Registry invited the opponent to complete a costs proforma. This was duly completed and returned. The time claimed was a total of 127.5 hours, 95 hours of which was in respect to the compiling of evidence. This evidence was poorly marshalled and even it had become necessary to decide the issue of genuine use of the opponent's earlier 2410095 mark, the evidence would have been of little assistance. Consequently, it is not appropriate that I make a contribution to the time taken in compiling this. Of the remaining 37.5 hours, a further 1.5 hours was allocated to "collating witness statements" and as I have said, I make no award in respect of the preparation of the evidence. I consider the remaining 36 hours to be reasonable. Consequently, I award costs at the minimum level of compensation for litigants in person as set out in the Civil Procedure Rules (£19/hour) as follows:

Preparing statement and considering counterstatement (including £200 official fee)	£275.50
Considering other side's evidence	£285
Written submissions	£304
<b>Total:</b>	<b>£864.50</b>

52) I order Katherine Louise Nesbitt and Mark Nesbitt to pay Sandra Michelle Kenny the sum of £864.50 which, in the absence of an appeal, should be paid within 14 days of the expiry of the appeal period.

**Dated this 7<sup>th</sup> day of February 2018**

**Mark Bryant  
For the Registrar,**