

O/612/21

TRADE MARKS ACT 1994

**IN THE MATTER OF:
TRADE MARK APPLICATION NO. 3560022
BY BLITX FITNESS LTD TO REGISTER**

BLITX

IN CLASSES 25 AND 28

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 600001652
BY HJK WORLDWIDE ASSOCIATES LIMITED**


BACKGROUND AND PLEADINGS

1. Blitx Fitness Ltd ('the applicant') applied to register the trade mark BLITX in the United Kingdom ('UK') on 24 November 2020. It was accepted and published in the Trade Marks Journal on 29 January 2021 in respect of the following goods:

Class 25: *Clothing.*

Class 28: *Fitness exercise machines.*

2. On 18 March 2021, HJK Worldwide Associates Limited ('the opponent') opposed the trade mark on the basis of section 5(2)(a) and section 5(2)(b) of the Trade Marks Act 1994 ('the Act') under the Fast Track opposition procedure. This is on the basis of its UK Trade Mark that, given the dates of its filing, qualifies as an 'earlier mark' in accordance with section 6 of the Act. The earlier mark is not subject to the proof of use provisions in section 6A of the Act. The opposition is directed against all goods in the application. The opponent filed an amended Form TM7F and statement of grounds on 26 April 2021, the details of the earlier mark and the goods relied upon are as follows:

Earlier Trade Mark	UK Trade Mark Registration ('UKTM') no. 3366507 for 
Goods relied upon	Class 25: <i>Clothing, footwear, headgear; clothing, footwear and headgear for all sports use; clothing, footwear and headgear for boxing, soccer, hockey, rugby, motorbike, cycling, Broom ball, ice hockey, field hockey; basketball, volleyball, motorcycling, ridding, ski, snowboard, swimming, karate, gymnastic, yoga, hurls, kickboxing, muay Thai, golf, polo, judo, taekwondo and martial arts; gloves; boxing shoes, boxing shorts, boxing pants; hockey shoes, hockey shorts, football shoes, football shorts, football pants, soccer shoes, soccer shorts, soccer pants, soccer wears, soccer clothing gym wear, gym shorts, head bands, sweat bands, wrist bands,</i>

sweat shirts, polo shirts, t-shirts, sweat pants, boxing club, hooded tops, hooded sweat shirts, track suits, track suit bottoms, jogging pants, sports shoes, jogger, and studs for all sports games; jogging tops, jogging suits, caps, hats, Lycra clothing for all sports; pants, shorts, casual clothing, shorts, trousers, pants, tops, sports bra, vests, t-shirts, polo shirts, jackets, coats, jumpers, leg warmers, leggings, socks, belts; clothing; caps and hats, beachwear, swimwear, underclothing, boxer briefs, boxer shorts, motorcycle shoes, clothing, gloves, headgear, motorbike shoes ,clothing, gloves, headgear ,Cycle Clothing, footwear, headgear, Clothing, footwear, headgear; Non-slipping devices for footwear; Boots for all sports; Sports shoes for all sports; Clothing; Anglers; shoes; Antiperspirant socks; Aprons; clothing; Ascots; Athletics vests; Balaclavas; Ballet suits; Bandannas; neckerchiefs; Baseball uniforms; Bath robes; Bathing costumes for women; Bathing drawers; Bathing suit cover-ups; Bathing suits for men; Beach robes; Beach wraps; Beachwear; Bed jackets; Bed socks; all sports Clothing, all sports footwear, all sports headgear; clothing, footwear and headgear for sports use; clothing, footwear and headgear for boxing and martial arts; gloves, sports gloves; boxing shoes, boxing shorts, boxing pants; gym wear, gym shorts, head bands, sweat bands, wrist bands, sweat shirts, sweat pants, hooded tops, hooded sweat shirts, track suits, track suit bottoms, jogging pants, jogging tops, jogging suits, casual clothing, shorts, trousers, pants, tops, vests, t-shirts, polo shirts, jackets, coats, jumpers, leg warmers, leggings, socks, belts (clothing), caps and hats, beachwear, swimwear, underclothing, boxer briefs, boxer shorts; Belts ;clothing; Belts ;clothing; Belts made from imitation leather; Belts made out of cloth; Bermuda shorts; Bib shorts; Bibs, Bikinis; blazers; Bloomers; Boas; Boas Bodices ;lingerie; Boiler suits; Boleros; polo ties; Boot cuffs; Bottoms ;clothing; Booties; Boxer shorts; Boys clothing; Brassieres; Bridesmaid dresses; Bridesmaids wear; Burnouses; Bush jackets; Button down shirts; Caftans; Cami knickers;

Camisoles; Car coats; Cashmere scarves; Casual shirts; Casual trousers; Casual wear; Chaps ;clothing; Chasubles; Chefs whites; Chemise tops; Chemises; Christening robes; Cloaks; Cloth bibs; Clothing for children; Clothing for fishermen; Clothing for gymnastics; Clothing for horse-riding, other than riding hats; Clothing for martial arts; Clothing for skiing; Clothing for wear in judo practices; Clothing for wear in wrestling games; Clothing made of fur; Clothing of imitations of leather; Clothing of leather; Collar protectors; Collared shirts; Combative sports uniforms; clothing; Corduroy trousers; Corsets; Costumes; Costumes for use in role-playing games; Cotton coats; Cowls ;clothing; Crinolines; Cuffs; Culottes skirts; Cumberbunds; Cycling shorts; Cycling tops; Cyclists clothing; Denim jackets; Denim jeans; clothing; Desert boots; Detachable collars; Dinner jackets; Dinner suits; Detachable pieces for kimonos; hanger; Donkey jackets; Dress pants; Dress shields; Dress shirts; Dressing gowns; Duffel coats; Dust coats; Evening coats; Evening suits; Evening wear; Fishing vests; Fleece shorts; Flying suits; Fleeces; Football jerseys; Fur jackets; Fur muffs; Furs ;clothing; Garments for protecting clothing; Gloves; Girdles; Gloves for cyclists; Gloves including those made of skin, hide or fur; Golf pants, shirts and skirts; Golf trousers; Gym shorts; Hats ;clothing; Head scarves; Heavy jackets; Hosiery; Hooded tops; Hooded sweatshirts; Hooded pullovers; House coats; Jackets; Jackets; clothing; Jackets ;clothing; Jackets and socks; Jackets being sports clothing; Japanese sleeping robes ;Japanese style socks ;tab; Jockstraps ;underwear; Jodhpurs; Jogging outfits; Jogging sets ;clothing; Jogging suits; Jogging tops; Judo suits; Jumper suits; Jumpers; Karate suits; Kendo outfits; Kerchiefs ;clothing; Kilts; Kimonos; Knickers; Knit jackets; Knit shirts; Knitted gloves; Knitted underwear; Knitwear ;clothing; Laboratory coats; Layettes ;clothing; Leather belts ;clothing; Leather jackets; Leather waistcoats; Leg warmers; Leggings ;trousers; Leisure suits; Leisurewear; Light-reflecting jackets; Lingerie; Linings ; Liveries;

Long jackets; Long sleeve pullovers; Long sleeved vests; Lounge wear; Lounging robes; Lumber jackets; Mackintosh; Maillot; Maples; Mantles; Martial arts uniforms; Masquerade costumes; Maternity clothing; Mens and womens jackets, coats, trousers, vests; Mens suits; Menswear; Mittens; Morning coats; Motorcycle gloves; Motorcycle jackets; Motorcycle riding suits; Motorcyclists clothing of leather; Motorists; clothing; muffler; clothing; Muffs ;clothing; Nappy pants ;clothing; Neck scarves; Neckerchiefs; Neck wear; Negligees; Nighties; Nightwear; One-piece suits; Open-necked shirts; Outer clothing; Outer clothing for girls; Outer clothing for men; Over-trousers; Overalls; Panties -girdles; Panties, shorts and briefs; Pantsuits; Party hats ;clothing; Petticoats; Pinafore dresses; Pinafores; Play suits; clothing; Pleated skirts for formal kimonos; Pocket squares; Pockets for clothing; Polo knit tops; Polo shirts; Polo sweaters; Ponchos; Printed t-shirts; pullover; putters and gaiters; Quilted jackets ;clothing; Rain ponchos; wind proof jackets; Rain suits; Referees uniforms; Replica football kits; Riding gloves; Riding jackets; Roll necks ;clothing; Rompers; Rugby shorts; Rugby tops; Running Suits; Running vests; Sailing wet weather clothing; Sailor suits; Sole plates; Sari; Sash bands for kimono; obi; Sashes for wear; Scarves; School uniforms; Skirts; Skirts; Skirt suits; Ski trousers; Ski suits for competition; Ski jackets; Ski gloves; singles; Silk ties; Shoulder wraps; Shoulder scarves; Shorts; Short-sleeved or long-sleeved t-shirts; Short-sleeve shirts; Short sets ;clothing; Short petticoats; Short overcoat for kimono; Shirts and slips; Shirts for suits; Shirts; Shirt yokes; Shirt fronts; Shift dresses; Sheepskin coats; Shell suits; Sleep masks; Sleeved jackets; Sleeveless jackets; Sleeveless jerseys; Slip overs; Slipper socks; Slips ;undergarments; Clothing, footwear, headgear; clothing, footwear and headgear for sports use; clothing, footwear and headgear for boxing and martial arts; gloves, sports gloves; boxing shoes, boxing shorts, boxing pants; gym wear, gym shorts, head bands, sweat bands, wrist bands, sweat shirts, sweat pants,

hooded tops, hooded sweat shirts, track suits, track suit bottoms, jogging pants, jogging tops, jogging suits, casual clothing, shorts, trousers, pants, tops, vests, t-shirts, polo shirts, jackets, coats, jumpers, leg warmers, leggings, socks, belts (clothing), caps and hats, beachwear, swimwear, underclothing, boxer briefs, boxer shorts; Smoking jackets; Snow boarding suits; Snow suits; Snowboard trousers; Snowboard jackets; Sock suspenders; Socks; Sports caps and hats; Sports clothing ;other than golf gloves; Sports jackets; Sports jerseys and breeches for sports; Sports shirts with short sleeves; Sports singlet; Sports socks; Sportswear; strapless bras; String fasteners for hair; Suede jackets; Suits; Suits made of leather; Suspender belts for men; Suspender belts for women; Sweat bands for the wrist; Sweat shirts; Sweat shorts; Sweat suits; underwear; Sweatbands; Sweat jackets; Sweatpants; Swim wear for gentlemen and ladies; Swimming costumes; Swimming trunks; Tee-shirts; Tennis dresses; Tennis pullovers; Tennis shirts; Tennis shorts; Tennis skirts; Tennis socks; Tennis sweat bands; Theatrical costumes; Thermal underwear; Thermally insulated clothing; Thongs; Three piece suits ;clothing; Ties; Ties ;clothing; Tightening-up strings for kimonos; dateline; Tights; topcoat; Tops ;clothing; tracksuits bottoms; tracksuits tops; Trainers; footwear; Trench coats; Trouser straps; Trousers for children; Trousers of leather; Trousers shorts; Trunks; Tunics; Turtleneck sweaters; Tutus; Tuxedo belts; Twinsets; Undershirts; Undershirts for kimonos; Undershirts for kimonos; koshimaki; Underwear; Uniforms; Uniforms for commercial use; Uniforms for nurses; Vest tops; Waist belts; Waist strings for kimonos; koshihimo; Waistcoats; Walking breeches; Warm-up jackets; Warm-up pants; Warm-up suits; Warm-up tops; Waterproof capes; Waterproof outer clothing; Waterproof suits for motorcyclists; Waterproof trousers; Wearable garments and clothing, namely, shirts; Weather resistant outer clothing; Weatherproof clothing; Weatherproof jackets; Wet suits; Wet suits for surfing; Wet suits for water-skiing and sub-aqua; Wet

suits for windsurfing; Wet suits for water-skiing; White coats for hospital use; Wind resistant jackets; Wind vests; Womens ceremonial dresses; Womens suits; Womens outer clothing; Woolen socks; Woolen tights; Wrap belts for kimonos; Tamika; Wrist warmers; Yashmaks; Yashmaks; Footwear; Ankle boots; Army boots; Ballet slippers; Baseball shoes; Basketball sneakers; Bath sandals; Bath shoes; Bathslippers; Beach shoes; Booties; Boots; Boots for motorcycling; Bowling shoes; Boxing shoes; Canvas shoes; Casual footwear; Childrens footwear; Climbing boots ;mountaineering boots; Cycling shoes; Dance shoes; Deck shoes; Dress shoes; Espadrilles; Fishing boots; Fittings of metal for footwear; Flip-flops; Football boots; Footwear ;excluding orthopaedic footwear; Footwear for men; Footwear for women; Footwear uppers; Golf footwear; Galoshes; Gym boots; Gymnastic shoes; Handball shoes; Heelpieces for footwear; High rain clogs; High-heeled shoes; Hockey shoes; Hunting boots; Infants; footwear; Inner socks for footwear; Insoles ;for shoes and boots; Intermediate soles; Japanese footwear of rice straw ; Japanese split-toed work footwear; Japanese style clogs and sandals; Japanese style sandals of felt; Japanese style sandals of leather; Japanese style wooden clogs ;get; Japanese toe-strap sandals ;assure-zori; Lace boots; Ladies boots; Leather shoes; Leather slippers; Low wooden clogs ;hiyori-get; Low wooden clogs ;koma-get; Metal fittings for Japanese style wooden clogs; Mountaineering boots; Mountaineering shoes; Mules; Non-slipping devices for footwear; Polo boots; Pull straps for shoes and boots; Pumps ;footwear; Rain boots; Rain shoes; Riding shoes; Rubber soles for jikatabi; Rugby boots; Running shoes; Sandal-clogs; Sandals; Sandals and beach shoes; Shoes soles for repair; Shoes with hook and pile fastening tapes; Ski and snowboard shoes and parts thereof; Ski boots; Slip-on shoes; Slipper soles; Slippers; Snowboard shoes; Soles for footwear; Soles for Japanese style sandals; Sports shoes; stiffeners for boots; stiffener for shoes;

	<p><i>Studs for football boots; Tips for footwear; Toe straps for Japanese style wooden clogs; Tongues for shoes and boots; Uppers for Japanese style sandals; Uppers of woven rattan for Japanese style sandals; Volleyball shoes; Waders; Walking shoes; Welts for footwear; Winter boots; Womens foldable slippers; Wooden main bodies of Japanese style wooden clogs; Wooden shoes; Wooden supports of Japanese style wooden clogs; Workboots; Work shoes; Headgear; Baseball caps; Beach hats; Berets; Bobble hats; Bonnets; Bonnets ;headwear; Cap peaks; Caps ;headwear; Caps with visors; Childrens headwear; Fezzes; Flat caps; hats; Golf caps; Head sweatbands; Headbands ;clothing; Hoods ;clothing; Knitted caps; Leather head wear; Mantillas; Miters ;hats; Nightcaps; hats for wear by chefs; hats for wear by nurses; Peaked head wear; Rain hats; Sedge hats; sue-gasa; Shower caps; Ski hats; Skull caps; Small hats; Sports caps; Sports headgear ;other than helmets; Sun hats; Sun visors; Sun visors ;headwear; Swimming caps; Tame; Top hats; torques; hats; Veils ;clothing; Visors; Visors ;head wear; Water polo caps; Woolly hats.</i></p> <p>Class 28: Fitness exercise machines</p>
<p>Relevant dates</p>	<p>Filing date: 11 January 2019</p> <p>Date of Registration: 29 March 2019, priority date of 13 August 2018 claimed from Canada TM No. 1913953</p>

3. The opponent argues that the contested mark is identical and/or similar to their earlier mark and that the goods covered are identical. The opponent argues that there is a likelihood of confusion and requests that the contested mark is refused in its entirety.

4. The applicant filed a counterstatement denying the claims made. They deny that the marks are identical and, rather, submit that “*there are important visual, aural and conceptual differences*”.

5. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Marks Rules 2008 (the provisions which provide for the filing of evidence), but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

6. The net effect of these changes is to require parties to seek leave in order to file evidence in fast track oppositions. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the Registrar considers that oral proceedings are necessary to deal with the case justly and at a proportionate cost. Otherwise, written arguments will be taken. A substantive hearing was not requested nor considered necessary in this case. Only the opponent filed written submissions. Neither party sought leave to file evidence. This decision is taken following a careful reading of all the papers.
7. Both the opponent and applicant have been self-represented in these proceedings.
8. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

DECISION

Section 5(2)(a) and Section 5(2)(b)

9. The opposition is based upon section 5(2)(a) and section 5(2)(b) of the Act. These sections read as follows:

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

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

(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”.

Case law

10. 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 Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('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, 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.

Comparison of marks

11. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
	BLITX

Section 5(2)(a)

12. The opponent bases their opposition partly on section 5(2)(a). A prerequisite of section 5(2)(a) is that the marks be identical. The applicant, however, denies that the marks are identical. I will now assess whether the marks are identical within the meaning of the case law.

13. In *S.A. Société LTJ Diffusion v Sadas Vertbaudet SA*, Case C-291/00, the Court of Justice of the European Union ('CJEU') held that:

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

14. As can be seen above, the marks are clearly not identical in a literal sense. In terms of whether the *"differences are so insignificant that they may go unnoticed by an average consumer"*, whilst both marks consist of a word beginning with the letter 'B' and end with 'ITX', the earlier mark contains a 'R' as its second letter whereas

the contested mark contains a 'L' as its second letter. The earlier mark is also stylised and contains a device. These differences will not go unnoticed. The section 5(2)(a) ground of the opposition fails.

Section 5(2)(b)

15. I now turn to consider the second ground of the opposition that relies on section 5(2)(b).

16. It is clear from *Sabel BV v Puma AG* (particularly paragraph [23]) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph [34] of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

17. 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.

18. The opponent submits that the marks “*are so similar*”. They do not provide any further argument as to why this is.

19. The applicant states that the marks are visually distinguishable, for instance, that the earlier mark is in colour and stylised and includes a “*shield logo containing a*

letter B”, and also that the second letters in both marks (R versus L) are visually different. The applicant states that the marks are aurally distinguishable, since “*the Applicant’s mark would be pronounced “BRIT-EX”. Consumers will easily recognise the word BRIT and would perceive and pronounce the letter X as a separate element therefrom, particularly given the use of contrasting colours*” (my emphasis added) yet “*Conversely, the Applicant’s mark is a play on the word “BLITZ” and is intended to be pronounced as such*”. Upon reading this statement, I notice that the applicant refers to the “*Applicant’s mark*” twice yet references the differing colours when describing the first mark. Whilst I will take the counterstatement at face value, I bear in mind the possibility that the applicant may have performed a typing error and the first reference to the “*Applicant’s mark*” (as I have highlighted in bold), might be referring to the opponent’s mark. Conceptually, they submit that the earlier mark evokes a reference to “*British*” or “*a British person*” whilst their mark is a “*play on the word BLITZ*”, which could be perceived as an invented term or a word with several meanings. For instance, “*BLITZ*” could be understood as “*A fast, violent attack, or to conduct such an attack*”, “*To mix up/blend food*” and/or “*To make a great effort to do something*”.

20. The applicant also makes a specific reference to the decision of the CJEU in *The Picasso Estate v OHIM, Case C-361/04P*. They refer to the following paragraph:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law”.

They also highlight several decisions where they submit that the UKIPO has found that “*conceptual dissimilarity outweighed aural and visual similarity where all but one letter of a word mark is the same*”. Whilst I bear these in mind, I will add that decisions of the UKIPO are not binding on the matter before me, and, in any event, each case must be decided upon its own merits.

Overall impression

The applicant's contested mark

21. The applied for mark is a word mark consisting of the word “*BLITX*” in normal black font. The overall impression lies in the word itself.

The opponent's earlier trade mark

22. The earlier mark is a composite word and device mark. It comprises a diamond shape device predominantly in black, with a capitalised block stylised ‘B’ and two diagonal white lines and one diagonal red line within it. To the right of the diamond device are the letters ‘*BRITX*’ in uppercase bold and italic. The ‘*BRIT*’ letters are in black, the ‘X’ is in red. Due to the size of this word and letter element, they play a slightly greater role in the overall impression than the diamond device, although the latter still plays a reasonably important role. The colourway, however, plays a much more secondary role; although I agree with the applicant that it does have the effect of highlighting that BRIT and X are separate elements.

Visual comparison

23. The respective length of the parties’ marks can have an impact on whether they are visually similar. Where the signs are short, differences are more likely to be noticed, although, of course, this is just a rule of thumb. In the matter before me, both marks share the letter ‘B’ at the forefront of the word element and ‘ITX’ at its ending. However, the second letter of the earlier mark is an ‘R’ and there is a device before the word element, whilst the contested mark is word only, with the second letter being a ‘L’. The stylisation also has the effect of the earlier mark being seen as “*BRIT X*”, whilst the applicant’s mark will be seen as a five letter invented word “*BLITZ*”. I pitch the overall visual similarity to be of a low to medium degree.

Aural comparison

24. The diamond device in the earlier mark will not be articulated, though I consider that the word element will likely be articulated in two syllables, as 'brit-ex'. This is particularly because of the emphasis of the 'X' in red. I acknowledge the applicant's submission that their mark could be articulated as 'blitz', and whilst it may be counterintuitive to come to this conclusion because the mark reads "*BLITX*" not "*BLITZ*", I agree that some average consumers will see it (and say it) as such. For those that do, the articulation is between 'brit-ex' and 'blitz' which I equate to a medium degree of aural similarity. However, this is not the only possibility. I also consider it possible that the average consumer will articulate the contested mark in two syllables, as 'blit-icks' or, potentially (but of a lesser likelihood) as 'blit-ex'. For those that see it in those ways there is more aural similarity, of a reasonably high level.

Conceptual comparison

25. Whilst the earlier mark has no meaning as a whole, the separation between the 'BRIT' and the 'X' elements emphasise that they are two separate components. The word 'BRIT' is an informal word used to refer to Britain, something British or a British person¹; I consider that the average consumer will consider the earlier mark evokes a concept along those lines. I acknowledge the applicant's submission regarding the word 'BLITX' being perceived as a "*play on the word BLITZ*", which could evoke a range of concepts including to be a type of quick and violent attack/ambush, an energetic activity and/or to do something quickly over a short period of time². As per my earlier comments, some may see it that way, although, some may view the word as invented and without meaning. On either interpretation the marks are conceptually dissimilar; the British concept of the earlier mark is not shared by the applicant's mark.

¹ See Cambridge Dictionary, Definition of 'Brit'
<<https://dictionary.cambridge.org/dictionary/english/brit>> Accessed 16 August 2021

² See Cambridge Dictionary, Definition of 'Blitz'
<<https://dictionary.cambridge.org/dictionary/english/blitz>> Accessed 16 August 2021

Comparison of goods

26. The opponent submits that the goods are identical. The applicant admits that their coverage of “*clothing*” and “*fitness exercise machines*” are identical to the opponent’s respective “*clothing*” and “*fitness exercise machines*”. I also agree - these terms are self-evidently identical. There is, therefore, no need to analyse the applicant’s terms against the remaining terms in the opponent’s specification.

Average consumer and the purchasing act

27. I next consider who the average consumer is for the contested goods and the way in which those goods are purchased. 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 in question³.

28. 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. (as he then was) 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.”

29. The average consumers of clothing are members of the general public. Fitness exercise machines are purchased commercially by gyms, for instance, in addition to the general public. The price of the contested clothing will vary, though will

³ See *Lloyd Schuhfabrik Meyer*, Case C-342/97

generally be inexpensive and purchased on a reasonably frequent basis. The average consumer of clothing will often take account of the size, price, colour and overall aesthetic impact of the clothing. Fitness exercise machines, however, are likely more expensive and purchased less regularly. The average consumer will pay slightly more attention to the price and characteristics of a fitness machine, particularly its construction and technical functions. While the purchase of the contested goods will be a primarily visual experience, I nevertheless bear in mind that the marks are spoken. For example, they may be recommended by sales assistants in a retail establishment or when making a purchase from a catalogue or over the telephone. However, in such circumstances, the consumer will have had an opportunity to view the goods, perhaps electronically via an app, website or online catalogue, or on paper in the traditional sense of catalogue shopping. The applicant submits that the average consumer of clothing will have a level of attention “*at least average*”, whilst those of the fitness exercise machines will be high. Whilst I agree that the average consumer will pay a medium degree of attention when purchasing clothing, I find that only a slightly higher than medium (and not of the highest) degree of attention will be paid during the purchase of fitness exercise machines. When fitness exercise machines are purchased commercially, due to the importance of their safety and being fit for purpose, I find that level of attention is increased slightly more; albeit, again not of the highest degree.

Distinctive character of the earlier trade mark

30. 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).”*

31. Registered trade marks possess varying degrees of inherent distinctive character, ranging from low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctive character of a mark can be enhanced by virtue of the use made of it.

32. There is no evidence in the proceedings so I only have the inherent position to consider. As I have already mentioned, whilst the verbal component of the mark contains the letters “*BRITX*” it will be seen as two components ‘BRIT-X’, with that first component evocative of Britain/British. The word ‘BRIT’ is an inherently weak word given that it is suggestive of a country where the goods might be made, or a supplier is based. However, the combination as ‘BRIT- X’ gives that component a medium level of inherent distinctiveness. Whilst the device component may add to the distinctiveness of the mark slightly, this will not increase the likelihood of confusion given that it is the distinctiveness of the common element that matters⁴.

⁴ See, in particular, paragraphs [38-39] of Mr Iain Purvis Q.C. as the Appointed Person in *Kurt Geiger v A-List Corporate Limited*, BL O-075-13

Likelihood of confusion

33. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. I point particularly to the principles I referred above in paragraph 10. One of these is the interdependency principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods, and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier trade mark, the average consumer for the goods and the nature of the purchasing process.
34. There are two types of possible confusion: direct (where the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks/goods down to the responsible undertakings being the same or related). The distinction between these was explained by 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:

“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).”*

35. I also find it important to mention the case of *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch). Here, Arnold J. (as he then was) considered the impact of the CJEU’s judgment in *Bimbo*, Case C-591/12P, on the court’s earlier judgment in *Medion v Thomson*. The judge said:

“18 The judgment in Bimbo confirms that the principle established in Medion v Thomson is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In Medion v Thomson and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole,

and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

36. I will first analyse whether there is a likelihood of direct confusion. The applicant's goods are identical to the opponent's and the marks have a low to medium visual similarity and a medium to reasonably high degree of aural similarity (depending on the perception of the BLITZ mark). The marks, however, are conceptually dissimilar. In that respect, I highlight that the decision of the CJEU in *The Picasso Estate* aforementioned in paragraph 20, in addition to the case law that confirms that conceptual differences do not always overcome visual and/or aural similarities⁵. Whether or not the conceptual differences are sufficient to outweigh the visual and aural similarities must be decided on the facts of each particular case. Taking into account all the relevant factors in the matter before me, I nevertheless find that the evocation from the word element 'BRIT' in the earlier mark is so strong that it does indeed counteract the similarities between the marks.

⁵ For instance, see the decision of the General Court in *Nokia Oyj v OHIM*, Case T 460/07 and Mr Geoffrey Hobbs QC, sitting as the Appointed Person in *Diramode S.A. v Richard Turnham and Linda Turnham* (BL O/566/19).

The dissimilarity is heightened further where the contested mark is also viewed to evoke a concept surrounding 'blitz'.

37. Besides recalling the conceptual differences, I find that the average consumer will also remember that the one mark has two word elements in addition to a diamond device encasing a letter 'B'. Notwithstanding the earlier mark's medium distinctiveness, and the principle of imperfect recollection, I therefore find that the differences between the marks are enough for the average consumer not to be directly confused.

38. I now turn to consider indirect confusion. At the outset, I highlight that the three categories of indirect confusion identified by Mr Purvis QC above are just illustrative – he stated that indirect confusion "*tends*" to fall in one of them. Nevertheless, when I bear the aforementioned analysis in mind, including the interdependency principle, I find it unlikely that average consumer is indirectly confused as to the origin of the goods sold under the respective marks. This is whether a medium or higher than medium level of attention is paid during the purchasing process. I have already found under direct confusion that the average consumer, notwithstanding the principle of imperfect recollection, will identify and recall that one mark made reference to the word 'BRIT' and the other did not. To that extent, even if the average consumer recognises that the two marks share something in common ('B' and 'ITZ'), due to the strong conceptual dissimilarity I consider that the average consumer will attribute the shared aspects to being a coincidence, not an indicator of an economic connection. Quite simply, an average consumer would not expect two related brands to have marks evoking different concepts and/or containing different letters. My findings are notwithstanding the possibility that the marks are misremembered. There is no likelihood of indirect confusion.

CONCLUSION

39. The opposition under section 5(2)(a) and section 5(2)(b) of the Act fails. Subject to any successful appeal against my decision, the application is allowed to proceed to registration for the full range of goods applied for.

COSTS

40. As the applicant has been successful, it is, in principle, entitled to an award of costs. Awards of costs in fast track opposition proceedings are governed by Tribunal Practice Notice (“TPN”) 2 of 2015.

41. As the parties are both unrepresented, the tribunal invited them to indicate whether they wished to make a request for an award of costs and, if so, to complete a proforma, including a breakdown of their actual costs. As the applicant elected not to complete a costs proforma and as it has incurred no official fees in the defence of its application, I make no order as to costs.

Dated this 19th day of August 2021

**B Wheeler-Fowler
For the Registrar**