

O/0606/24

TRADE MARKS ACT 1994

SUPPLEMENTARY DECISION

IN THE MATTER OF APPLICATION NO. UK00003577891

BY ALPHAXF LIMITED

TO REGISTER THE FOLLOWING MARK:



IN CLASS 28

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. OP600001842

BY SPORTICA INC LTD

Background

1. On 10 May 2022, I issued a provisional decision in this case under reference number BL O/404/22.
2. The provisional decision was made pending the outcome of a separate cancellation application, No. CA000504628. I said at the time in my provisional decision, "When the outcome of the cancellation application is known, I will issue a supplementary decision and give my order as to costs. The appeal period will run from the date of that supplementary decision."
3. The decision in case No. CA000504628 has now been issued under reference number BL O/0347/24 dated 16 April 2024.
4. The decision in case No. CA000504628 found that:

"101. The proprietor's mark [being UK00003307858, the opponent's mark in the case before me] can remain registered for the following goods and services:

Class 6

Metal swivels for boxing, Martial arts and MMA apparatus; metal swivels for speed bags or punch bags; metal key rings; parts and fittings for all the aforesaid goods.

Class 9

Mouth guards; sports helmets; knee pads for workers.

Class 10

Knee bandages [supportive]; Knee guards in the nature of supports [other than sports articles]; Knee supports for medical use; Elasticated supports for the knee; Medical knee braces; Elasticated supports for the ankle; Elasticated supports for the elbow; Elasticated supports for the wrist; Elasticated bandages for supportive use; Wrist supports for

medical use; Foot bandages [supportive]; Ankle supports for medical use; Socks (Elasticated -) for medical purposes; Compression socks for medical or therapeutic use.

Class 18

All purpose sports bags and gym bags.

Class 28

Games and playthings.

Class 35

Retail services and online retail services connected with the sale of footwear, headgear and mouthguards.

The remaining goods and services will be cancelled from the date of application.”

5. As a result of some of the goods and services under UK00003307858 being cancelled, I now need to revisit the goods and services comparison in this opposition case and update my provisional decision accordingly.

SUPPLEMENTARY DECISION

Comparison of the goods and services

Opponent's goods and services	Applicant's goods
<u>Class 6</u> Metal swivels for boxing, Martial arts and MMA apparatus; metal swivels for speed bags or punch bags; metal key rings; parts and fittings for all the aforesaid goods.	

<p><u>Class 9</u> Mouth guards; sports helmets; knee pads for workers.</p>	
<p><u>Class 10</u> Knee bandages [supportive]; Knee guards in the nature of supports [other than sports articles]; Knee supports for medical use; Elasticated supports for the knee; Medical knee braces; Elasticated supports for the ankle; Elasticated supports for the elbow; Elasticated supports for the wrist; Elasticated bandages for supportive use; Wrist supports for medical use; Foot bandages [supportive]; Ankle supports for medical use; Socks (Elasticated -) for medical purposes; Compression socks for medical or therapeutic use.</p>	
<p><u>Class 18</u> All purpose sports bags and gym bags.</p>	
<p><u>Class 28</u> Games and playthings.</p>	<p><u>Class 28</u> Sports equipment; fitness training articles and equipment; weight training and weight lifting articles and equipment; boxing training articles and equipment; wrestling training articles and equipment; martial arts training articles and equipment; parts, fittings and</p>

	accessories for all the aforementioned.
<u>Class 35</u> Retail services and online retail services connected with the sale of footwear, headgear and mouthguards.	

6. In its statement of grounds, the opponent contended that its mark covers similar goods to those of the applicant. In its counterstatement, the applicant conceded that the respective Class 28 goods are similar, but it did not state to what extent they are similar. However, these statements were made prior to the cancellation of some of the opponent's goods and services.

7. I compare the applicant's Class 28 "Sports equipment" with the opponent's Class 9 "sports helmets". While the respective goods cannot be said to be *Merit* identical, being in different classes, and although the applicant's goods are sporting equipment at large whereas the opponent's goods are a specific form of protective sporting equipment, both sets of goods are used for sporting purposes. Furthermore, they would be sold through the same trade channels – outlets that specialise in sports products. The goods are also complementary in that sports helmets can be important to the carrying out of sport and customers could certainly conceive of sports equipment in Class 28 and sports helmets in Class 9 being made by the same undertaking. The goods are not in competition in that those consumers seeking the protection of a sports helmet would not find that requirement satisfied by other types of sports equipment. Overall, I find the goods to be of medium similarity.

8. I compare the applicant's Class 28 "boxing training articles and equipment" with the opponent's Class 6 "Metal swivels for boxing ... apparatus". While the respective goods cannot be said to be *Merit* identical, being in different classes, and although the applicant's goods are boxing training articles and equipment at large whereas the opponent's goods are a specific type of

fitting for boxing apparatus, both sets of goods are used for boxing. Furthermore, they would be sold through the same trade channels – outlets that specialise in boxing products. The goods are also complementary in that metal swivels are indispensable to certain types of boxing equipment and customers could certainly conceive of boxing articles and equipment in Class 28 and metal swivels for boxing apparatus in Class 6 being made by the same undertaking. The goods are not in competition in that those consumers seeking metal swivels for boxing equipment would not find that requirement satisfied by other types of boxing equipment. Overall, I find the goods to be of medium similarity.

9. I compare the applicant's Class 28 "martial arts training articles and equipment" with the opponent's Class 6 "Metal swivels for ... Martial arts ... apparatus". While the respective goods cannot be said to be *Merici* identical, being in different classes, and although the applicant's goods are martial arts training articles and equipment at large whereas the opponent's goods are a specific type of fitting for martial arts apparatus, both sets of goods are used for martial arts. Furthermore, they would be sold through the same trade channels – outlets that specialise in martial arts products. The goods are also complementary in that metal swivels are indispensable to certain types of martial arts equipment and customers could certainly conceive of martial arts articles and equipment in Class 28 and metal swivels for martial arts apparatus in Class 6 being made by the same undertaking. The goods are not in competition in that those consumers seeking metal swivels for martial arts equipment would not find that requirement satisfied by other types of martial arts equipment. Overall, I find the goods to be of medium similarity.

10. I compare the applicant's Class 28 "fitness training articles and equipment" with the opponent's Class 6 "Metal swivels for boxing, Martial arts and MMA apparatus". Fitness training is a broad term and fitness training can be conducted by practising a wide range of sports, including boxing, martial arts and MMA, and so the respective goods can be said to have something in common. There would also be an overlap in trade channels where sporting

equipment in general is sold. The respective goods are not complementary given that fitness training equipment can take other forms than equipment for boxing, martial arts and MMA. The goods are not in competition in that those consumers seeking metal swivels for boxing, Martial arts and MMA apparatus would not find that requirement satisfied by other kinds of fitness training equipment. I find the respective goods to be of low similarity.

11. I compare the applicant's Class 28 "wrestling training articles and equipment" with the opponent's Class 6 "Metal swivels for ... MMA apparatus". Given that MMA incorporates wrestling techniques, it is possible that MMA training apparatus could be used for wrestling training and so the respective goods can be said to have something in common. There would also be an overlap in trade channels where equipment for combat sports is sold. The respective goods are not complementary given that wrestling training equipment can take other forms than equipment for MMA. The goods are not in competition in that those consumers seeking metal swivels for MMA apparatus would not find that requirement satisfied by other kinds of wrestling training equipment. I find the respective goods to be of low similarity.

12. I compare the applicant's Class 28 "weight training and weight lifting articles and equipment" with the opponent's "Metal swivels for boxing, Martial arts and MMA apparatus". While they are all sporting goods, there is no overlap between the weight lifting equipment which is very specific in nature and the opponent's goods which are used in different sporting activities. The goods are not complementary, nor are they in competition. I find them to be dissimilar.

13. As some degree of similarity between the goods and services is required for there to be a likelihood of confusion,¹ the opposition must fail in respect of the following goods in the applicant's specification:

Class 28 weight training and weight lifting articles and equipment; parts, fittings and accessories for all the aforementioned.

¹ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

Likelihood of confusion

14. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises that the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. 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. The first 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 opponent's trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.
15. When compared with the applicant's mark, I have found the earlier mark to be of medium similarity visually, aurally, and conceptually [as stated at paragraph 50 of my provisional decision]. Except where I have found them to be dissimilar, the respective goods are either of medium or low similarity. The typical consumer will pay a medium level of attention during the purchasing process where visual considerations will predominate, although I do not discount aural considerations.
16. I consider there to be sufficient differences between the opponent's mark and the applicant's mark to avoid them being mistakenly recalled as each other. While they share the word "ALPHA", they differ in that the opponent's mark has a second word, "FORCE", while the applicant's mark contains a figurative element which will be perceived as the letters "XF" or "X". The

opponent's mark contains no figurative elements, being a plain word mark. There is therefore no likelihood of direct confusion.

17. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by 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 recognised 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.”

18. The typical consumer would recognise the earlier mark as different from the applicant's mark. The question remains whether they would consider the later mark to be another brand of the owner of the earlier mark, or that of a related undertaking, the marks having the word “ALPHA” in common.

19. If the applicant's mark is perceived as the words “ALPHA XF” (which is also how the applicant describes the verbal element of its mark), the average consumer who is already familiar with the opponent's mark would, in my view, plausibly see a brand variation when encountering the applicant's mark. They might regard the letter “F” as an abbreviation of the word “FORCE”, and the letter “X” as the unknown quantity of the force. Alternatively, the

applicant's mark could be regarded as a line of goods of the "ALPHA" brand that had the "X-Factor", or just the "XF" brand of "ALPHA" sporting goods.

20. Where the comparison is between "ALPHA FORCE" and "ALPHA X", the average consumer would also plausibly see a brand variation, regarding "ALPHA X" as the "X" brand of "ALPHA" sporting goods.

21. In any of the above scenarios, the average consumer would see an economic connection such that they would conclude that the parties' marks indicate goods sold by the same or economically linked undertakings for those goods that I have found to be of medium similarity, and I make a finding of a likelihood of indirect confusion in these cases. However, it would be a leap too far to make such a finding for those goods that I have found to be of low similarity.

CONCLUSION

22. Subject to appeal, the opposition has succeeded in relation to the following goods, for which the application is refused:

Class 28 Sports equipment; boxing training articles and equipment; martial arts training articles and equipment; parts, fittings and accessories for all the aforementioned.

23. The application will proceed to registration in respect of the following goods:

Class 28 Fitness training articles and equipment; weight training and weight lifting articles and equipment; wrestling training articles and equipment; parts, fittings and accessories for all the aforementioned.

COSTS

24. Both parties have achieved a roughly equal measure of success, and so I make no award as to costs.

Dated this 27th day of June 2024

JOHN WILLIAMS

For the Registrar