

O/137/19

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003283778 BY
F H BRUNDLE
TO REGISTER THE MARK (SERIES OF TWO):

SPIN GUARD

AND

SPINGUARD

AS A TRADE MARK IN CLASSES 6 AND 19

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 412399 BY
ANTI-CLIMB GUARDS LIMITED

BACKGROUND AND PLEADINGS

1. On 19 January 2018, F H Brundle (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 9 February 2018. The applicant seeks registration for the following goods:

Class 6 Metal fences; security fences of metal; spikes, rotating spikes and rotating fences of metal; barriers for security fences of metal; rotating barriers for security fences of metal; barriers for balustrades, banisters, pipes, tubes and fencing of metal; metal railings; parts and fittings for railings, balustrades, banisters, pipes, tubes and fencing of metal; expanded metal, perforated metal in steel, aluminium, brass and stainless steel, woven wire mesh, steel wire, galvanized and black annealed wrought iron and wrought iron components including ornamental steel tube and brass post stops, fencing products including security fencing, chain link fencing, paladin fencing panels, fencing wire, hot dip galvanized planks, hand rails, tube clamps, galvanized tube and steel disks; parts and fittings for all of the aforesaid goods.

Class 19 Fences, hand rails and railings (non metallic); hand railings of non metallic material; bars of non metallic material for railings, balustrades and banisters, pipes, tubes and fencing (non metallic); parts and fittings for railings, balustrades, banisters, pipes, tubes and fencing; non metallic fencing products including security fencing; security fences (non metallic), rotating spikes and rotating fences (non metallic); barriers for security fences (non metallic); rotating barriers for security fences (non metallic); parts and fittings for all of the aforesaid goods.

2. The application was opposed by Anti-Climb Guards Limited (“the opponent”). The opposition is based upon section 3(1)(c) of the Trade Marks Act 1994 (“the Act”). In its Notice of Opposition, the opponent states:

“6. The Application consists of a series of two marks: SPINGUARD and SPIN GUARD. Both consist of the words “SPIN” and “GUARD”. The words “SPIN” and “GUARD” are both common descriptive words in the English language. The conjoining of the two words adds nothing to the mark in terms of distinctive character, because the meaning of two words is still readily apparent and the impression created is no greater than the sum of its constituent parts.

7. The Application consists exclusively of a sign which may service, in trade, to designate the kind, intended purpose or other characteristic of the goods for which registration is sought. The marks will be seen, by the relevant consumer, as denoting a product that spins (i.e. rotates) the purpose of which is to guard (i.e. protect) premises (or other) i.e. spin guard.

8. The Applicant itself describes its SPIN GUARD products as a barrier that rotates and deters potential intruders.

9. The goods in classes 6 and 19 of the Application can broadly be described as fences, barriers and fixtures/fittings for fences and barriers. It is therefore clear that the marks SPINGUARD and SPIN GUARD are wholly descriptive of the goods for which registration is sought and that, as a result, the marks cannot fulfil the essential function of a trade mark and must be refused registration.”

3. The applicant filed a counterstatement denying the claim made (although no claim is made to distinctiveness having been acquired through use).

4. The opponent is represented by Blake Morgan LLP and the applicant is represented by Murgitroyd & Company. The opponent filed evidence in the form of the witness statement of David Waite dated 11 September 2018. The applicant filed evidence in the form of the witness statement of Michael Frank Brundle dated 12 November 2018. This was accompanied by written submissions, also dated 12 November 2018. The opponent filed evidence in reply in the form of the witness statements of Fred Moss dated 9 January 2019, Steve Ives dated 15 January 2019, Ivor Blatchford dated 15 January 2019 and David Waite dated 9 January 2019. Neither party requested a

hearing and both parties filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

EVIDENCE

Opponent's Evidence in Chief

5. As noted above, the opponent's evidence in chief consists of the first witness statement of David Waite dated 11 September 2018, with 1 exhibit. Mr Waite is the Director of the opponent; a position he has held since the opponent's incorporation in April 1998. Mr Waite confirms that the opponent trades under the name "Vandgard" and "deals with the manufacture and distribution of rotatable access deterrent products¹". Mr Waite states that he has been working in this industry for over 30 years.

6. Mr Waite states:

"7. [...] In my view, a spin guard is a generic and descriptive term for a rotatable access deterrent product. These devices spin through 360 degrees to provide an unstable barrier that rotates when an attempt is made to climb over them. The mark SPINGUARD/ SPIN GUARD is therefore an entirely descriptive term of a rotatable access deterrent, namely a guard that spins.

8. The term spin guard is used throughout the industry and advertising as it describes such products in a concise and accurate way. It is also often the case that architects, design consultants and industry specifiers use the term spin guard to describe a rotatable access deterrent on drawings and specifications of works..."

7. Mr Waite has provided what he describes as examples of other firms in the industry and industry commentators describing similar devices². The articles are taken from the websites www.thecrimepreventionwebsite.com and www.insightsecurity.com

¹ First Witness Statement of David Waite, para. 5

² Exhibit DW1, pages 1-7

which are undated save for the print date of 11 September 2018. Whilst these articles describe “rotating and spinning tops³”, “anti-climb spinners⁴” and an “anti-climb system⁵”, there is no reference to the term SPIN GUARD/ SPINGUARD. Mr Waite has also referred to various definitions of such products within these articles but, again, none of them reference the term SPIN GUARD/ SPINGUARD.

8. Mr Waite goes on to state:

“9. The Oxford English Dictionary defines the word SPIN as a “rapid turning or whirling motion” or the action to “turn or cause to turn or whirly around quickly” and the word GUARD as a “device worn or fitted to prevent injury or damage” and “a person who keeps watch, especially a soldier or other person assigned to protect a person or to control access to a place”. Use of the mark SPINGUARD/ SPIN GUARD is therefore entirely descriptive of a rotatable device that is fitted to prevent damage or access.”

9. Mr Waite has provided a print out from the applicant’s website, which is undated save for the print date of 11 September 2018. This is entitled “Fence Spikes & Toppings / Spin Guard Anti Climb System”. Mr Waite refers to the description provided of the products supplied under the mark which describes them as a “series of curved vanes each revolving freely around a central shaft to create an unstable barrier which rotates if anyone attempts to climb over⁶”.

Applicant’s Evidence

10. As noted above, the applicant’s evidence consists of the witness statement of Michael Frank Brundle dated 12 November 2018, with 1 exhibit. Mr Brundle is the director of the applicant; a position he has held for 20 years. Mr Brundle confirms that the applicant is a family business which was founded in 1889.

³ Exhibit DW1, page 2

⁴ Exhibit DW1, page 4

⁵ Exhibit DW1, page 6

⁶ Exhibit DW1, page 8

11. Mr Brundle confirms that, whilst he is aware of rotating access deterrents being referred to as anti-climb products or anti-climb systems, he has never heard the term SPIN GUARD used for any steel or metal components (including rotating access deterrents) until the applicant used it as a brand name.

12. Mr Brundle has provided the results of a Google search for SPIN GUARD⁷, the majority of which he states relate to the applicant's goods or, if not, they relate to other unrelated goods or services. The print out of the Google search results are undated⁸.

13. The applicant's evidence was accompanied by written submissions. The applicant also filed written submissions in lieu. Whilst I do not propose to summarise those here, I have taken them into consideration and will refer to them below as appropriate.

Opponent's Evidence in Reply

14. As noted above, the opponent's evidence in reply consists of the witness statements of Fred Moss dated 9 January 2019, Steve Ives dated 15 January 2019, and Ivor Blatchford dated 15 January 2019, as well as the second witness statement of David Waite dated 9 January 2019, which is accompanied by 1 exhibit.

15. Mr Moss is the director of Moss Products (Plastics) Limited, which is a manufacturer of rotary fence toppings named "Raptor". He states:

"3. The Raptor anti-climb device has the facility for spinning and the word "spinning" is used in the description of the product.

4. Based on my experience within the industry, it is my view that the words SPIN and GUARD are common words used within the security industry to describe rotating anti-climb fence toppers."

⁷ Exhibit MFB1

⁸ Exhibit MFB1, pages 1-3

16. Mr Ives is the director of Spa Aluminium Ltd and describes himself as “a supplier and fabricator of security fencing products⁹”. He states:

“3. The word “spin” is a fundamental term used to describe the functionality of security fencing products which are designed to rotate on contact i.e. spin.

4. The word “guard” is intrinsically linked with this industry. Two of the major suppliers of security fencing products use the word (or a version of it) in their company names and it is also one of the first descriptive terms you would use to define the products purpose i.e. to guard certain premises.”

17. Mr Blatchford is the Managing Director of Insight Security, a business he formed in 1990. Mr Blatchford states:

“3. Over many years in the industry, our anti-climb product range and perimeter security systems in particular have been variously described using words such as anti-climb spinner systems, spinners, spin, guard, etc. all of which are standard descriptive words used in everyday language. Such terminology has been used in our various marketing activities and literature as well as within our on-line websites for at least the last 15 years. These types of word are also often used by potential end users of such products (potential customers), who contact us seeking advice on potential security options that may help them tackle their specific security or safety issues of the moment.”

18. In his second witness statement, Mr Waite states that although Mr Brundle claims to have never heard the term SPINGUARD before, advanced rotating barriers were invented, as anti-climb guards, around 1985 and the opponent has been selling them under the brand Vandgard since 1991. Mr Waite has provided various press clippings which appear to be dated 1991¹⁰ which use the terms “anti-scaling barrier”, “rotating

⁹ Witness statement of Steve Ives, para. 1

¹⁰ Exhibit DW2, page 1

vanes”, “anti-scaling perimeter fence barrier” and “spinning barrier”. No reference is made in these clippings to the term SPINGUARD/ SPIN GUARD.

19. Mr Waite has provided various website printouts which he states show use of the terms “spin”, “spinner” and “spinning” within the industry “to describe various anti-climb devices¹¹”. These refer to “Nylon and Climb Spinners¹²”, “anti-climb spinners¹³”, “Raptor anti-climb spinners¹⁴”, “Roller spinner system¹⁵” and “rotating and spinning tops¹⁶”. All of the print outs are undated save for the print dates of 11 December 2018 and 12 December 2018, with the exception of the final article which is dated 5 December 2014. Mr Waite has also provided a MODEL DESIGN APPRAISAL form dated 25 January 2016 which includes the word “Vandgard Safe Edge spinners¹⁷”. None of these documents contain any reference to the term SPINGUARD/ SPIN GUARD.

20. Mr Waite states that the word “guard” is also frequently used in the industry to describe anti-climb barriers. He has provided print outs of websites which include a reference to the word “guard”. The first is taken from the applicant’s website and makes reference to “Spin Guard Anti-Climb Guards¹⁸”. This page is undated save for the print date of 12 December 2018. Mr Waite states that the second print out is taken from the website of Truguard which describes its product as an “anti-climb guard”. However, the print quality of this document renders it illegible. The third is a print out from the website www.ribaproductselector.com which describes IntruderGuard products as a range of anti-climb deterrents. This is undated save for the print date of 12 December 2018 and appears to be trade mark use of the word “guard” in any event. The last print out is from the website www.britplas.com and relates to a product called Fortress Climb Guard which is described as being an anti-climb product. This is undated save for the print date of 12 December 2018 and appears to be trade mark use of the word “guard” in any event.

¹¹Second witness statement of David Waite, para. 7

¹² Exhibit DW2, page 3

¹³ Exhibit DW2, page 5

¹⁴ Exhibit DW2, page 6

¹⁵ Exhibit DW2, page 7

¹⁶ Exhibit DW2, page 13

¹⁷ Exhibit DW2, page 16

¹⁸ Exhibit DW2, page 23

21. The opponent also filed written submissions in lieu. Whilst I do not propose to summarise those here, I have taken them into consideration and will refer to them below as appropriate.

DECISION

Section 3(1)(c)

The Legislation

22. Section 3(1)(c) provides as follows:

“3(1) The following shall not be registered:

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering services, or other characteristics of goods or services,

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

The Case Law

23. The case law under section 3(1)(c) (corresponding to article 7(1)(c) of the EUTM Regulation, formerly article 7(1)(c) of the CTM Regulation) was set out by Arnold J. in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch) as follows:

“91. The principles to be applied under art.7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in *Agencja Wydawnicza Technopol sp.*

z o.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-51/10 P) [2011] E.T.M.R. 34 as follows:

“33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services (as regards Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40 , p. 1), see, by analogy, [2004] ECR I-1699 , paragraph 19; as regards Article 7 of Regulation No 40/94 , see *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr Co (C-191/01 P) [2004] 1 W.L.R. 1728 [2003] E.C.R. I-12447; [2004] E.T.M.R. 9; [2004] R.P.C. 18 , paragraph 30, and the order in *Streamserve v OHIM (C-150/02 P) [2004] E.C.R. I-1461 , paragraph 24).**

36. ... due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94 . Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, inter alia , *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-456/01 P) [2004] E.C.R. I-5089; [2005] E.T.M.R. 44 , paragraph 45, and *Lego Juris v OHIM (C-48/09 P) , paragraph 43).**

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley , paragraph 31 and the case-law cited).*

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on

the basis of Article 7(1)(c) of Regulation No 40/94 , it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie* , paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM* (C-80/09 P), paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 35, and Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 38). It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).

And

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive (see, with regard to the identical provision laid down in Article 3 of Directive 89/104, *Koninklijke KPN Nederland* , paragraph 86, and *Campina Melkunie*, paragraph 19).

47. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation (see, by analogy, *Koninklijke KPN Nederland*, paragraph 67), Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all

the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No.40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a 'characteristic' of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94 , the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive 89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56)."

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (C-363/99 [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97].”

24. In *Matratzen Concord AG v Hukla Germany SA*, Case C-421/04, the Court of Justice of the European Union (“CJEU”) held that:

“24. In fact, to assess whether a national trade mark is devoid of distinctive character or is descriptive of the goods or services in respect of which its registration is sought, it is necessary to take into account the perception of the relevant parties, that is to say in trade and or amongst average consumers of the said goods or services, reasonably well-informed and reasonably observant and circumspect, in the territory in respect of which registration is applied for (see Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 29; Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 77; and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 50).”

25. I am also guided by the decision of the CJEU in *Campina Melkunie BV and Benelux-Merkenbureau*, Case C-265/00, in which it stated that:

“39. As a general rule, the mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics within the meaning of Article 3(1)(c) of the Directive even if the combination creates a neologism. Merely bringing those elements together without introducing any unusual variations, in particular as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned.

40 However, such a combination may not be descriptive within the meaning of Art.3(1)(c) of the Directive, provided that it creates an impression which is sufficiently far removed from that produced by the simple combination of those elements. In the case of a word mark, which is intended to be heard as much as to be read, that condition will have to be satisfied as regards both the aural and the visual impression produced by the mark.

41 Thus, a mark consisting of a neologism composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, is itself descriptive of those characteristics within the meaning of Art.3(1)(c) of the Directive, unless there is a perceptible difference between the neologism and the mere sum of its parts: that assumes that, because of the unusual nature of the combination in relation to the goods or services, the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts.”

The Average Consumer

26. The average consumer for the goods in issue will be members of the trade engaged in the fitting of security products and members of the general public looking to purchase products to secure their own properties.

The Parties' Submissions

27. The opponent argues that the words SPIN and GUARD are descriptive words in the English language. It states that the words will be seen by the average consumer as describing a product that spins the purpose of which is to guard. The opponent argues that it does not matter if there is a more usual way for the products to be described or if the mark is grammatically incorrect and states that the mark is “clearly capable of designating a ‘characteristic’ of the goods referred to in the application”.

28. The applicant argues that neither the word SPIN nor the word GUARD are descriptive words in the English language, as neither is an adjective. The applicant states that the combination of the words create the impression of a “sentry who twirls” and their combination does, therefore, create a different meaning to the words on their own. The applicant argues that the evidence shows that the term SPIN GUARD is not one that is used to describe “rotatable access deterrent products” and instead demonstrates that such products are normally described as “anti-climb barriers or products”. The applicant argues that the evidence provided by the opponent does not show the words SPIN and GUARD used in combination in relation to security fencing.

Conclusions

29. It seems to me that whilst the opposition is directed against all of the applicant’s goods, the opponent cannot possibly succeed in respect of those goods which do not have both a rotating function and a security function. The opponent’s best case (and in my view its only case) is, therefore, in respect of the following goods:

Class 6 Spikes, rotating spikes and rotating fences of metal; rotating barriers for security fences of metal.

Class 19 Security fences (non metallic), rotating spikes and rotating fences (non metallic); rotating barriers for security fences (non metallic); parts and fittings for all of the aforesaid goods.

30. I do not agree with the applicant that the fact that the words SPIN and GUARD are not adjectives prevents them from being descriptive of the goods in the way envisaged by the legislation. The word SPIN is a verb, meaning to rotate or turn. Clearly, this will be descriptive of a characteristic of a product which has a rotating function. However, the test I must apply is to determine whether the mark consists exclusively of signs or indications which may be descriptive in the trade. The mark also, of course, includes the word GUARD. Even using the dictionary definitions for the word GUARD offered by the opponent in its evidence, neither can be said to directly describe the goods or

a characteristic of them. To my mind the word GUARD is allusive in relation to the goods and not descriptive of them.

31. In any event, whilst the mark SPINGUARD/ SPIN GUARD consists of two ordinary dictionary words, when these words are used in combination, the meaning of them is not immediately apparent. Whilst I note the decision in *Campina*, the ambiguity created by the combination of these words (whether conjoined or not), in itself, creates a perceptible difference between this term and “the mere sum of its parts”. I consider that the average consumer would have to search for a meaning in the term, which would not be immediately graspable. The lack of any clear meaning attributable to SPINGUARD/ SPIN GUARD means that it cannot be descriptive, even if both SPIN and GUARD alone were descriptive of the goods.

32. Although Mr Waite states in his first statement that “the term spin guard is used throughout the industry” to describe such products, no evidence has been provided to support this. Only the printouts from the applicant’s website use the term “spin guard”. Indeed, the evidence supplied by the opponent uses terms such as “rotating and spinning tops” and “anti-climb spinners” to describe the goods. Whilst Mr Moss, Mr Ives and Mr Blatchford all confirm that the words SPIN and GUARD are used in the industry to describe such goods, none of them state that the words are used in combination or conjoined.

33. As explained in the case law cited above, the mark in issue does not need to be in use in the trade in a way that is descriptive of the goods or a characteristic of them, at the time of the application for the opposition to succeed. There is an element of futurity to the assessment under section 3(1)(c), in that it will be sufficient if the mark could be used in such a way. The lack of evidence of such use is not, therefore, fatal to the opposition. However, it seems to me that a mark which has no discernible meaning, or which will require some further explanation to identify the nature and purpose of the goods to which it relates, is unlikely to be used in the trade to describe the goods, even at some point in the future. Mr Waite has confirmed that these are not new products and, whilst not fatal to the opposition, the fact that there is no evidence that anyone has called them SPINGUARD/ SPIN GUARD descriptively to date supports the

conclusion that the term SPINGUARD/ SPIN GUARD is more than the mere sum of its parts.

34. Whilst I accept that the term SPINGUARD/ SPIN GUARD will be allusive to security products which have a rotating function, the overall significance of the mark is still ambiguous for the consumer. Trade marks are often constructed to convey an image which hints at the goods or a characteristic of them, but are nonetheless, not directly descriptive. I consider that to be the case here. The evidence provided by the opponent is insufficient to demonstrate that the mark is used in a descriptive way in the trade, and I see no reason why the mark would be used in this way in the future.

35. The opposition under section 3(1)(c) must, therefore, fail.

CONCLUSION

36. The opposition is unsuccessful and the application will proceed to registration.

COSTS

37. The applicant has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of £1,000 as a contribution towards the costs of proceedings. The sum is calculated as follows:

Preparing a statement and considering the opponent's statement	£200
Preparing evidence and considering the opponent's evidence	£500
Preparing written submissions in lieu of a hearing	£300
Total	£1,000

38. I therefore order Anti-Climb Guards Limited to pay F H Brundle the sum of £1,000. This sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

Dated 14 March 2019

S WILSON

For the Registrar