

O/598/19

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3246259
IN THE NAME OF FIT B CLUB FOR THE TRADE MARK**

Fit Bitch Club

IN CLASSES 25 & 41

AND

THE OPPOSITION THERETO UNDER NUMBER 411516

BY

RACHAEL WOOLSTON

Background

1. On 26 July 2017, Fit B Club Limited (“the applicant”) applied for the trade mark Fit Bitch Club in respect of the following goods and services:

Class 25: *Fitness clothing; activewear.*

Class 41: *Fan club organisation; fan club services; fan club services (entertainment); fan clubs; fan club purposes; fitness classes; sports club.*

2. The trade mark application was published for opposition purposes in the *Trade Marks Journal* on 27 October 2017. It was opposed under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”) by Rachael Woolston who relies upon the following earlier trade mark registration for her grounds of opposition:

UK trade mark 2522513



Class 41: *Fitness boot camp classes.*

Date of filing: 30 July 2009; completion of registration procedure: 22 January 2010.

3. Ms Woolston has made a statement that she has made genuine use of her mark. As these proceedings commenced prior to 14 January 2019, when the Trade Mark Regulations 2018 came into force¹, the relevant period for proof of use purposes is the five years prior to and ending on the date of publication of the contested application: 28 October 2012 to 27 October 2017.

4. Ms Woolston claims that there is a likelihood of confusion under sections 5(2)(b) and 5(3) of the Act. Under section 5(3), Ms Woolston also claims that use of the

¹ SI 2018/825.

applicant's mark would damage the reputation of her earlier mark, although it is not explained how, over and above alleged confusion with her own mark.

5. The applicant filed a defence and counterstatement, denying the grounds of opposition. It puts Ms Woolston to proof of use of her earlier trade mark.

6. Ms Woolston represents herself whilst the applicant is represented by Linda Cerminara (at the same address as the applicant). Both parties filed evidence and written submissions with their evidence. Neither party chose to be heard or to file written submissions in lieu of a hearing. I make this decision having carefully read all the papers.

Preliminary remarks

7. I note that Ms Woolston's evidence includes references to clothing. This is because at the time the opposition was filed, her earlier trade mark registration was also registered in class 25 (clothing). The registration was revoked with effect from 23 January 2015 in respect of the registered class 25 goods by way of a decision of the Intellectual Property Office, reference BL O/740/18, owing to a finding of non-use in relation to the class 25 goods. The applicant for revocation was the same entity as the applicant for the contested mark in the present proceedings. The applicant did not attack Ms Woolston's class 41 services. However, in the current opposition proceedings, the applicant has requested proof of use of the class 41 services. Since the revocation was successful from a date prior to the filing of the contested application, the class 41 services were the only goods or services protected by the earlier mark at the time when the contested application was filed (and opposed).

Ms Woolston's evidence

8. Ms Woolston's first witness statement is dated 19 July 2018. Her second, dated 15 May 2019, was filed in reply to the applicant's evidence. She states that she has been the owner and CEO of Fitbitch Boot Camp since March 2009.

9. Ms Woolston states that her mark was first used in relation to fitness classes in March 2009. An undated screenshot of a webpage (Exhibit RW1) says that it is possible to book “small group fitness and healthy eating camps, Boxing Belles, Body Athletic and HiiT Squad sessions” on the website fitbitchbootcamp.com. There is also a reference to the option to buy t-shirts, hoodies or race vests. Another undated screenshot from the website is provided as Exhibit RW12, showing the mark as registered and the words London Camps. From Ms Woolston’s description of it, it appears that it dates from after the end of the relevant period: “we have been collecting a database of names for a launch in London, as part of a plan to expand into the city”.

10. Exhibit RW2 comprises three photocopies of press excerpts featuring Ms Woolston. They are from *Weight Watchers*, *SportSister* and *Top Sante* magazine and are dated February 2010, December 2011 and March 2012, respectively. These date from before the relevant five-year period for proving use of genuine use of the mark in this opposition. The articles refer to Ms Woolston’s Fitbitch Boot Camps. The *Top Sante* article refers to interviews with Ms Woolston in *Woman’s Own* magazine, also in March 2012.

11. A copy of an article in *Sainsbury’s Magazine* in August 2016 is shown in Exhibit RW8. This refers to Rachael Woolston as the founder of Fitbitch Boot Camp and lists fitness tips from her. A similar article appeared in the *Daily Express*, dated March 2016 (Exhibit RW9). In her reply evidence, Ms Woolston states that this newspaper, together with its online publication, had an estimated monthly readership of 11.4 million. This figure is taken from *Campaign Journal*, dated February 2016 (Exhibit RW2 to Ms Woolston’s second witness statement).

12. Ms Woolston describes Exhibit RW5, which comprises an incomplete spreadsheet, as business planning for franchising the business in 2016, to include a large-scale increase in fitness classes and merchandise sales. It is not possible to extract any meaningful picture from this spreadsheet. Exhibit RW3 comprises an invoice for seven Fitbitch hoodies at a cost of £35 each. This is dated 9 August 2013. Exhibit RW4 comprises transaction records showing the sale of three t-shirts to a US customer, at a total cost of £45. This took place in 2015. Exhibit RW6

comprises the transaction details of the sale of a single t-shirt on 22 September 2017 (at £15). Exhibit RW7 comprises two copies of invoices for the cost of merchandising and printing. The first invoice is from 'polo-shirts.co.uk, dated 8 July 2013, for eleven hoodies. The second invoice is from ESC Products T-Shirt & Sportswear Printing and is dated June 2013. This was for fifteen vests. Ms Woolston gives turnover figures for goods and services in classes 25 and 41. They are not separated into figures for the goods and for the services. However, given the tiny amounts of clothing sold, and the outcome of the previous revocation action, I infer that the vast majority of the turnover relates to the services. The figures are:

2012-13	£66,128
2013-2014	£61,742
2014-2015	£55,579
2015-2016	£42,566

The applicant's evidence

13. The applicant's evidence comes from Linda Cerminara, who states that she is the applicant's founder and Managing director. Her witness statement is dated 12 March 2019. I note the following:

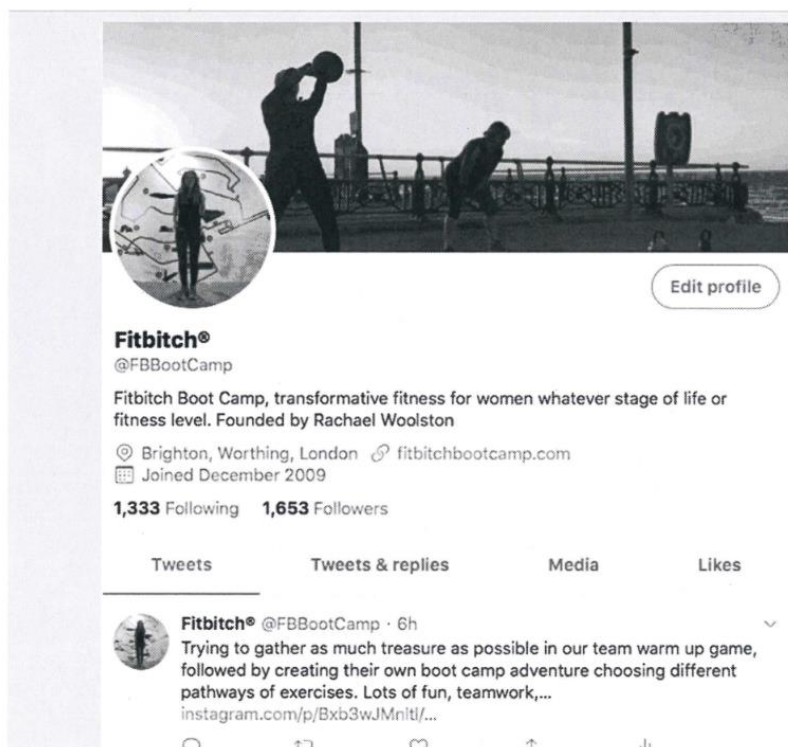
- Exhibit LC2: an undated screenshot from the Fitbitch Boot Camp Instagram site, which refers to empowering women through fitness and a healthy lifestyle in locations in Sussex. I note that there are 2550 posts, 690 followers and 936 following.
- Exhibit LC5: a screenshot from the Fitbitch Boot Camp Facebook page, from January 2019, showing that there have been 41 reviews. Ms Cerminara states that this is since 2013, although I can see no reference to this date.
- Exhibit LC8: an email from Ms Woolston to Ms Cerminara dated 16 November 2017 in which Ms Woolston states that Fitbitch Boot Camp is not a legal entity. Ms Cerminara states that the email suggests that, as a sole trader, Ms Woolston's income for the business is combined with her personal income as a freelance journalist and personal trainer. Ms Cerminara submits that this

means the turnover figures are unreliable as they combine income from areas other than those generated under the earlier trade mark.

Ms Woolston's evidence-in-reply

14. Ms Woolston's second witness statement is dated 15 May 2019. She refers to evidence from Ms Cerminara about the reach of *SportSister*. As the article which Ms Woolston has exhibited from *SportSister* is dated from prior to the relevant period for proving use, neither parties' evidence assists in this respect. Furthermore, the readership figures referred to by Ms Cerminara are dated six years after the article which Ms Woolston has supplied.

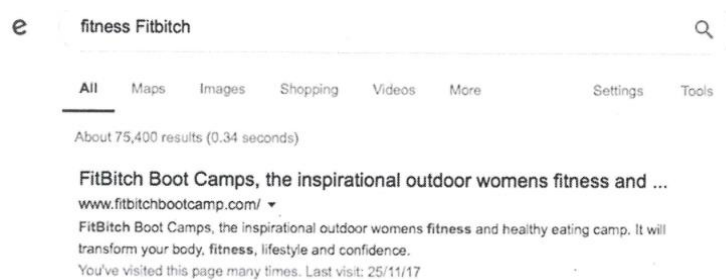
15. Ms Woolston refers to a launch on Twitter in April 2009 and that Fitbitch Boot Camp has tweeted over three times a week, creating over 33,000 tweets. Exhibit RW3 comprises a screenshot of the Fitbitch Boot Camp Twitter profile, presumably dating from when Ms Woolston made her second witness statement. The page says that there are 1,333 following and 1,653 followers. Ms Woolston states that the tweets show use of the mark in relation to fitness classes. A single tweet is shown:



16. Ms Woolston states that she has advertised on Facebook and that Fitbitch Boot Camp has existed as a business page on Facebook since April 2009. She exhibits (Exhibit RW4) a screenshot of what is described as a Facebook dashboard:



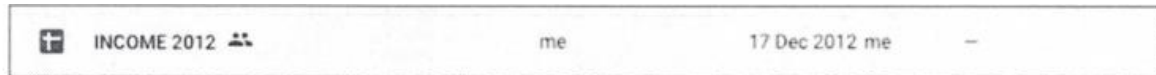
17. Ms Woolston points out that this shows proof of advertising on 25 May 2015, although the exhibit indicates the date to be 25 February 2015. The evidence provided about the results after “Fitbitch and fitness” is searched on Google does not assist as the evidence dates from the time of Ms Woolston’s second witness statement, which is over 18 months after the end of the relevant period for proving use. However, I note that the screenshot of the Google results, also exhibited at Exhibit RW4, refers to Ms Woolston (or whoever did the search) having last visited the page on 25 November 2017, 18 months before her second witness statement:



18. Ms Woolston states that she uses the website to post reviews. She exhibits a screenshot of three testimonials which she states are featured on the website, but they are not dated and Ms Woolston does not state when they were posted.

19. In answer to Ms Cerminara’s submission that none of Ms Woolston’s evidence shows the mark in use as registered, Ms Woolston states that the words Fitbitch Boot Camp “is unique and distinctive enough without the need to use a logo”.

20. An exhibit which is not numbered, but which Ms Woolston’s statement identifies as Exhibit RW8, comprises details of her revenue streams dated December 2012, broken down into three locations:



A	B	C	D	E	F
Month	Hove Lawns	Queens Park	Preston Park	Total	
Jan	2,072.45	713.84	536.40	3,322.69	
Feb	3,948.65	1,689.82	709.01	6,347.48	
March	2,393.46	62.59	0.00	2,456.05	
April	4,102.34	1,242.76	334.36	5,679.46	
May	4,007.35	1,097.42	96.00	5,200.77	
July	4,004.68	2,069.87	0.00	6,074.55	
August	1,112.72	321.82	0.00	1,434.54	
Sept	2,893.86	732.71	0.00	3,626.57	
Oct	2,632.81	0.00	0.00	2,632.81	
Nov	2,963.42	692.80	0.00	3,656.22	
Dec	0.00	300.00	0.00	300.00	
Annual	30,131.74	8,923.63	1,675.77	40,731.14	

21. A further spreadsheet shows bookkeeping for Fitbitch Boot Camp and separate figures for her journalism income in March 2014:

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if -

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Union.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

24. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) (28 June 2018), Arnold J. (as he then was) summarised the case law on genuine use of trade marks, referring to judgments from the Court of Justice of the European Union (“CJEU”):

“114. The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundersvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

25. The onus is on Ms Woolston, as the proprietor of the earlier mark, to show use because Section 100 of the Act states:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

26. In *Plymouth Life Centre*, O/236/13 Mr Daniel Alexander QC, sitting as the Appointed Person, observed that:

“20. Providing evidence of use is not unduly difficult. If an undertaking is sitting on a registered trade mark, it is good practice in any event from time to time to review the material that it has to prove use of it.

...

The burden lies on the registered proprietor to prove use.... it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

27. Ms Woolston’s evidence suffers from being thin on both detail and dating. For example, her first set of evidence shows website prints, but as these are undated, it is not possible to find that the content was the same or even similar during the relevant period for proving genuine use. The articles from *Weight Watchers*, *SportSister* and *Top Sante* all date from prior to the relevant period. This does not show what use was made of the mark during the relevant period. Nor do the screenshots of the boot camp timetables in Spring 2019, which is 18 months after the end of the relevant period. The testimonials are undated and the evidence about Google search results is from over 18 months after the end of the relevant period.

28. The spreadsheet from December 2012 spreadsheet shows that fitness classes took place in three locations during that year. This is at the beginning of the relevant period. The spreadsheet from March 2014 indicates that her journalism figures are

separate to the fitness services; the spreadsheet shows figures for two of the three camp locations (Hove Lawns and Queen's Park). The *Sainsbury's Magazine* and *Express* articles are dated within the relevant period, referring to her as the founder of Fitbitch Boot Camp.

29. Whilst Ms Woolston points to the *Express* article as being evidence of national reputation, this does not mean that the services have been provided nationally. Ms Cerminara's evidence shows that Ms Woolston's Instagram account refers to empowering women through fitness and a healthy lifestyle in locations in Sussex. Ms Woolston's spreadsheets show that the classes took place in specified locations, which were the same places in 2012 as in March 2014.

30. Ms Cerminara challenged Ms Woolston's first set of evidence as showing turnover which included journalism income. Ms Woolston met that challenge in her evidence-in-reply. There has been no request to cross-examine her on that evidence, which appears broadly to reflect the turnover figures given in her first evidence. I accept it.

31. It appears to me that Ms Woolston, during the relevant period, had a local business in Sussex delivering fitness classes at regular locations which she referred to as Fitbitch Boot Camps, which occurred at least between 2012 and 2016. These generated £40,000 in the calendar year 2012, and £4,726 in March 2014, which is a comparable figure. I bear in mind that the genuine use provision is not there to assess economic success or large-scale commercial use², and even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods or services. I also bear in mind that the evidence in relation to the services (not clothing) shows only that the mark has been used in relation to services provided in Sussex. I am aware that, in *Memory Opticians Ltd's Application*, BL O/528/15, Professor Ruth Annand, as the Appointed Person, upheld the Hearing Officer's decision to revoke the protection of the mark STRADA on the grounds that it had not been put to genuine use within the requisite five-year period. There had, in fact, been

² General Court of the European Union, Case T-334/01 *MFE Marienfelde GmbH v OHIM*.

sales of goods bearing the mark, but these were very low in volume (about 40 pairs of spectacles per year) and all the sales were local from three branches of an optician. There was no advertising of goods under the mark, and the evidence indicated that they were only displayed in-store on occasions. The mark was said to have been applied to the goods via a sticker applied to the arms of the frame and on the dummy lenses. This level of use was held to be insufficient to create or maintain a market under the mark. Consequently, it was not genuine use. However, there is a difference between the provision of certain types of goods and services. Whilst goods such as spectacles may 'travel', making the UK as a whole the relevant territory, fitness classes are usually provided at a local level. Fitness classes generate a small fee per individual per class attended. Taking into account these particular characteristics of the market concerned, I find that the level of use, in Sussex, during the relevant period of 28 October 2012 to 27 October 2017, was warranted in the economic sector concerned as a means of creating a market share for fitness boot camp classes.

32. There is a further issue which I need to address which is that Ms Woolston's evidence does not show use of the mark in its registered form in relation to the class 41 services. All the evidence is of the word Fitbitch Boot Camp, but without the particular font and without the stars element of the mark. Her evidence-in-reply shows a screenshot from her Twitter profile: this shows use only of "Fitbitch" and "@FBBootCamp". Ms Cerminara pointed out the lack of evidence showing the mark as registered; Ms Woolston's reply was that the words Fitbitch Boot Camp were "unique and distinctive enough without the need to use a logo". She provided no evidence to address the issue beyond this statement.

33. Section 6A(4)(a) of the Act provides that use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered. It is necessary, therefore, to look at whether the use that has been made is an acceptable variant of the mark as registered, or whether its distinctive character has been altered.

34. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold QC (as he then was), sitting as the Appointed Person, summarised the test under s.46(2) of the Act (which is equally applicable to section 6A(4)(a)) as follows:

"33. The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter's distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

35. Although this case was decided before the judgment of the CJEU in *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, it remains sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered. The later judgment of the CJEU must also be taken into account where the mark is used as registered, but as part of a composite mark.

36. In *Hyphen GmbH v EU IPO*, Case T-146/15, the General Court ("GC") held that use of the mark shown on the left below constituted use of the registered mark shown on the right. The court held that the addition of a circle, being merely a banal surrounding for the registered mark, did not alter the distinctive character of the mark as registered.



37. The court set out the following approach to the assessment of whether the addition of additional components is likely to alter the form of the registered mark to a material extent.

“28. ..a finding of distinctive character in the registered mark calls for an assessment of the distinctive or dominant character of the components added, on the basis of the intrinsic qualities of each of those components, as well as on the relative position of the different components within the arrangement of the trade mark (see judgment of 10 June 2010, *ATLAS TRANSPORT*, T-482/08, not published, EU:T:2010:229, paragraph 31 and the case-law cited; judgments of 5 December 2013, *Maestro de Oliva*, T-4/12, not published, EU:T:2013:628, paragraph 24, and 12 March 2014, *Borrajo Canelo v OHIM — Tecnoazúcar (PALMA MULATA)*, T-381/12, not published, EU:T:2014:119, paragraph 30).

29 For the purposes of that finding, account must be taken of the intrinsic qualities and, in particular, the greater or lesser degree of distinctive character of the [registered] mark used solely as part of a complex trade mark or jointly with another mark. The weaker the distinctive character, the easier it will be to alter it by adding a component that is itself distinctive, and the more the mark will lose its ability to be perceived as an indication of the origin of the good. The reverse is also true (judgment of 24 September 2015, *Klement v OHIM — Bullerjan (Form of an oven)*, T-317/14, not published, EU:T:2015:689, paragraph 33).

30 It has also been held that where a mark is constituted or composed of a number of elements and one or more of them is not distinctive, the alteration of those elements or their omission is not such as to alter the distinctive character of that trade mark as a whole (judgment of 21 January 2015, *Sabores de Navarra v OHIM — Frutas Solano (KIT, EL SABOR DE NAVARRA)*, T-46/13, not published, EU:T:2015:39, paragraph 37 and the case-law cited).

31 It must also be remembered that, in order for the second subparagraph of Article 15(1)(a) of Regulation No 207/2009 to apply, the additions to the registered mark must not alter the distinctive character of the mark in the form in which it was registered, in particular because of their ancillary position in the sign and their weak distinctive character (judgment of 21 June 2012, *Fruit of the Loom v OHIM—Blueshore Management (FRUIT)*, T-514/10, not published, EU:T:2012:316, paragraph 38).

32 It is in the light of those considerations that it must be determined whether the Board of Appeal was correct in finding, in paragraph 9 of the contested decision, that it had not been proven that the European Union trade mark rights had been used in a manner so as to preserve them either in the form registered or in any other form that constituted an allowable difference in accordance with the second subparagraph of Article 15(1)(a) of Regulation No 207/2009.”

38. These findings indicate that the relative distinctiveness of the registered mark and the components added to (or omitted from) it in use are relevant factors to take into account in the required assessment. In this instance the addition of a circle around the registered mark was not sufficient to alter the distinctive character of the registered mark. Further the court held that, although it was relatively more distinctive than the registered mark, the addition of the word ‘Hyphen’ to the registered mark in a circle (“sign No.3”) did not alter the distinctive character of the registered mark either. In this connection, the court stated that:

“57 It must borne in mind in that regard that, where several signs are used simultaneously, steps must be taken to ensure that, for the purposes of the application of the second subparagraph of Article 15(1)(a) of Regulation No 207/2009, such use does not alter the distinctive character of the registered sign, having regard inter alia to business practices in the relevant sector (judgment of 24 September 2015, *Form of an oven*, T-317/14, not published, EU:T:2015:689, paragraph 31; see also, to that effect, judgment of 8 December 2005, *CRISTAL CASTELLBLANCH*, T-29/04, EU:T:2005:438, paragraphs 33 and 34).

58 The joint use of a figurative element and a word element on the same textile or clothing item does not undermine the identification function of the registered mark; it is not unusual in the clothing sector to juxtapose a figurative element with word element linked to the designer or manufacturer, without the figurative element losing its autonomous identification function in the overall impression. This finding extends to all the goods and services referred to in paragraph 6 above.

59 Thus, in sign No 3, the target consumer’s attention will be drawn to both the word element and the figurative element.”

60 It follows that, in sign No 3, the mere addition of the word element ‘hyphen c’ does not alter the distinctive character of the registered mark, as found, in essence, by the Board of Appeal in paragraph 29 of the contested decision.”

39. In *Menelaus BV v EUIPO*, Case T-361/13, the GC found that use of the marks shown on the left and middle below constituted use of the registered mark on the right.



The court held that the word VIGAR was the dominant and distinctive element of all the marks. As regards the other features, the court held that:

“73 [The first sign] sign differs from the earlier mark as registered only in the ascending orientation of its oval background, the use of standard lower-case instead of standard capital letters and the replacement of the crown element by a sequence of three dots. As the Board of Appeal rightly found, a different orientation of the same background, the use of upper-case or lower-case

letters when they are standard letters which reproduce the same term, or the substitution of an ornamental element (the sequence of dots) for a laudatory element when both of those elements serve to reinforce the term 'vigar', are minor differences that do not alter the distinctive character of the earlier Community trade mark as it was registered.

74 That finding is not called into question if the second form of use, reproduced in paragraph 63 above, is taken into account inasmuch as, even though, in that case, the basic background disappears and the word 'spain' is present, the latter will be understood as a merely descriptive addition.

75 Lastly, contrary to what the applicant submits, the Board of Appeal did not fail to apply the case-law according to which it is only if the element of the earlier mark as registered which is omitted in the signs as used is in a secondary position and not distinctive that its omission does not alter the distinctive character of the trade mark (judgment of 24 November 2005 in *GfK v OHIM — BUS (Online Bus)*, T-135/04, ECR, EU:T:2005:419, paragraph 37). It is apparent from the foregoing analysis that the figurative elements of the earlier mark as registered, namely the crown and the oval background, are in a secondary position.”

40. In *Dreamersclub Ltd v KTS Group Ltd*, BL O/091/19, Professor Philip Johnson, sitting as the Appointed Person, found that the use of the mark shown below qualified as use of the registered word-only mark DREAMS. This was because the stylisation of the word did not alter the distinctive character of the word mark. Rather, it constituted an expression of the registered word mark in normal and fair use.

The image shows the word "dreams" written in a black, cursive, handwritten-style font. The letters are connected and have a fluid, flowing appearance.

41. In relation to this last point, I find that the use of the plain word form of FitBitch, instead of the stylised form in the registered mark, constitutes normal and fair use: the lack of stylisation of the words in use does not alter the distinctive character of the words. The words Boot Camp have been used alongside the plain words

FitBitch. The words “Building better bodies” are lacking in distinctive character, appearing as a motivational statement, so that their omission does not alter the distinctive character of the mark. The other element, the stars emanating from the ‘i’ in the word Bitch, is in a secondary position relative to the rest of the mark, comparable to the VIGAR case cited above. The omission does not alter the distinctive character of the mark. Finally, the registered mark does not claim colour as a feature of the mark, so the absence of the colour in use does not alter the distinctive character of the mark.

42. It follows that Ms Woolston may rely on her earlier mark in respect of the registered services, “Fitness boot camp classes”.

Section 5(2)(b) of the Act

43. Section 5(2)(b) of the Act states:

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

(a) ...

(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.”

44. The following principles are gleaned from the decisions of the Court of Justice in the European Union (“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.

Comparison of goods and services

45. The competing goods and services are:

Earlier mark	Application
Class 41: <i>Fitness boot camp classes.</i>	Class 25: <i>Fitness clothing; activewear.</i> Class 41: <i>Fan club organisation; fan club services; fan club services (entertainment); fan clubs; fan club purposes; fitness classes; sports club.</i>

46. The law requires that goods/services be considered identical where one party's description of its goods/services encompasses the specific goods/services covered by the other party's description (and vice versa): see *Gérard Meric v OHIM*, Case T-33/05, General Court. The applicant has cover for *fitness classes*. This term covers the earlier mark's *fitness boot camp classes*. These services are identical.

47. The case law which is pertinent to the comparison of goods and services for the purposes of section 5(2)(b) of the Act is very well-established. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the CJEU stated at paragraph 23 of its judgment:

“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.”

48. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC stated that “complementary” means:

“82 ... there is a close connection between [the goods], in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking...”.

49. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] R.P.C. 281 for assessing similarity between goods and services also include an assessment of the channels of trade of the respective goods or services.

50. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. stated:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

51. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J said:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

52. The applicant has cover for *sports club* services. Sports club services could include fitness classes, including those of a boot camp style. In my view, these are identical. If I am wrong about that, they are similar to a high degree, since the purpose of sports club services is to facilitate sport or exercise, which increases fitness. The channels of trade may be shared, and the users and method of use will be the same.

53. There is no similarity between the services covered by the earlier mark and the applicant's *fan club organisation; fan club services; fan club services (entertainment); fan clubs; fan club purposes* within the parameters of the case law cited above. The purpose of fitness boot camp classes is to undertake exercise. The purpose of fan club services is to enable fans of something or somebody to connect about, and possibly with, the object of their affiliation. The services do not share nature, trade channels, or method of use; are not in competition and are not complementary.

54. The applicant's goods in class 25 are *fitness clothing; activewear*. The fact that users of fitness boot camp classes may be users of sports clothing is not enough, by itself, to justify a finding of similarity. The nature of the services compared to the goods is, self-evidently, different. They serve different purposes; the one to increase

fitness, the other to clothe the body during exercise, or simply as a fashion choice. They are not complementary in the sense of the case law; neither is indispensable or important for the use of the other in such a way that customers may think that the responsibility for the goods and services lies with the same undertaking, and they are not in competition. However, there may be shared channels of trade in the sense that a provider of fitness boot camp classes may also sell clothing suitable for the activity, with the same branding (for example, local football clubs provide clothing for players bearing the club logo). There is a low degree of similarity between the applicant's class 25 goods and the services of the earlier mark.

The average consumer and the purchasing process

55. 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. The parties' goods and services are all aimed at the general public and will be relatively inexpensive. I bear in mind, though, that this does not mean that the goods will necessarily only require a low level of attention during purchase. Consumers will look to ensure that the classes and the clothes are suitable for them. I find that the level of attention will be medium. The purchase will be overwhelmingly visual in respect of clothing. The selection of fitness classes is also likely to be predominantly visual, after reading leaflets, seeing posters or reading a website, but there may also be an aural aspect, such as word-of-mouth recommendation.

Comparison of marks

56. 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 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.

57. 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.”

58. 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.

59. The marks to be compared are:

Earlier mark	Application
	Fit Bitch Club

60. The overall impression of the applicant’s mark is of a club called Fit Bitch. The words Fit Bitch carry more weight in the overall impression of the mark than Club because they signify the name of the club. The words Fit Bitch dominate the overall impression of the earlier mark. This is partly because they are much larger than the other elements and partly because the BOOT CAMP and Building better bodies are lacking in distinctive character. The stars are small and faint, adding very little to the overall impression of the earlier mark.

61. The marks converge visually and aurally in the words Fit Bitch. In the earlier mark, the additional words BOOT CAMP and Building Better Bodies are small and

dominated by the words Fit Bitch. Taking into account the additional word elements which are not common to each mark, the dominance of Fit Bitch in the earlier mark and its position as the first two words in the applicant's mark, I conclude that there is at least a medium degree of visual similarity between the marks.

62. It is unlikely that the words Building better bodies would be articulated when the earlier mark is referred to orally, as it will be seen simply as a motivational strapline. I find that there is at least a medium degree of aural similarity between the remaining words, Fit Bitch Boot Camp and Fit Bitch Club.

63. There is also at least a medium degree of conceptual similarity between the marks. In the context of the words BOOT CAMP Building Better Bodies, the words Fit Bitch are likely to signify women who are engaged in activities (in boot camp style) to achieve athletic fitness. In the applicant's mark, the same meaning of Fit Bitch will be perceived, but without the clear reference to exercise; instead, the mark includes the concept of a club.

Distinctive character of the earlier mark

64. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*³ 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).

³ Case C-342/97

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).”

65. One of the principles which must be taken into account in deciding whether there is a likelihood of confusion is that 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. The lack of detail referred to above in respect of the evidence, already described, means that I am unable to conclude from the evidence that the earlier mark was entitled to claim an enhanced level of distinctive character as of 26 July 2017, which is the date on which the contested application was filed.

66. The mark includes elements which are lacking in distinctive character and describe the services. Fit Bitch alludes to fitness services for women. This is not a particularly distinctive concept. In relation to the services, the earlier mark has a relatively low degree of inherent, or intrinsic, distinctive character.

Likelihood of confusion

67. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of considering all the factors, weighing them and looking at their combined effect, in accordance with the authorities set out earlier in this decision. One of those principles states that a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa. I found that some of the applicant’s services in class 41 were not similar to those of the earlier mark. Without similarity, there can be no likelihood of confusion (*Canon*,

paragraph 22). The opposition under section 5(2)(b) therefore fails in respect of *fan club organisation; fan club services; fan club services (entertainment); fan clubs; fan club purposes*.

68. I find that, in relation to the applicant's *fitness classes; sports club*, there is a likelihood that the marks will be mistaken for one another. This is because the services are identical and the conceptual hook of Fit Bitch is the same, with the other elements of the marks lacking in distinctive character. It will be Fit Bitch that will remain in the mind of the average consumer, while the other elements will be imperfectly recalled, if at all.

69. If I am wrong about that and the average consumer is aware of the differences, I find that they will, nevertheless, assume that the similarities between the marks (Fit Bitch) arise either because one mark is a variant of the other or that the parties are economically linked. This type of confusion is 'indirect'. Its nature was explained in *L.A. Sugar Limited v By Back Beat Inc*, case BL O/375/10, by Mr Iain Purvis QC, sitting as the Appointed Person:

"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).”

70. While the examples given are non-exhaustive, the present case appears to me to fall into category (b) in relation to fitness classes and sports club services: the addition of club is a non-distinctive element to vary the type of offering under the Fit Bitch brand. I also consider there to be a likelihood of indirect confusion in relation to the applicant’s class 25 goods as these will be seen as a tie-in, or affiliated goods, to the fitness classes offered under the Fit Bitch fitness umbrella.

71. The ground of opposition under section 5(2)(b) succeeds in relation to the applicant’s class 25 goods and in relation to fitness classes and sports club services in class 41. The opposition fails in respect of *fan club organisation; fan club services; fan club services (entertainment); fan clubs; fan club purposes*.

Section 5(3) of the Act

72. Section 5(3) states:

“(3) A trade mark which-

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a

reputation in the United Kingdom (or, in the case of a Community trade mark or international trade mark (EC), in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

73. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Adidas-Salomon*, [2004] ETMR 10 and Case C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark’s reputation and distinctiveness; *Intel*, paragraph 42.

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the

future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel*, paragraphs 76 and 77.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel*, paragraph 74.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact on the earlier mark; *L'Oreal v Bellure NV*, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

74. In *General Motors*, Case C-375/97, the CJEU held that:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.”

75. As will be clear from the evidence summary above, I have found that Ms Woolston has used her mark in relation to fitness boot camp classes. However, the evidence falls far short of showing that the mark had the requisite reputation at the relevant date of 26 July 2017. The section 5(3) ground fails.

Outcome

76. The opposition succeeds in relation to:

Class 25: Fitness clothing; activewear.

Class 41: Fitness classes; sports club.

The application is refused for these services.

77. The opposition fails in relation to:

Class 41: Fan club organisation; fan club services; fan club services (entertainment); fan clubs; fan club purposes.

The application may proceed to registration for these services.

Costs

78. Since both parties have achieved a roughly equal measure of success, I direct each party to bear its own costs.

Dated this seventh day of October 2019

Judi Pike

For the Registrar,

the Comptroller-General