

**BL O/635/22**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION 3650868**

**BY**

**ELS EURO LTD**

**TO REGISTER THE FOLLOWING TRADE MARK:**



**AND**

**OPPOSITION NO. 60002122 THERETO**

**BY**

**NEXUS EDUCATION LIMITED**

## **Background and pleadings**

1. On 3 June 2021, ELS EURO LTD (the “Applicant”) applied to register the trade mark as shown on the cover of this decision. The contested application was accepted, and published for opposition purposes in the Trade Marks Journal on 22 October 2021. Registration of the mark is sought in respect of the following goods and services:

Class 28     *Educational Toys; Wooden Toys; Children's Trikes; Children's Bike; Literacy Educational Toys; Numeracy Educational Toys; Construction Toys; Bat & Ball Toys; Soft Toys; Sorting Game Toys; Outdoor Fishing Games; Playground Exercise Ropes; Toy Trucks; Toy Tractor; Counting Toy Games; Math Counting Games; Clock Toys; Linking Playboard; Pattern Boards; Link & Lace Board Sets; Counting Beads; Magnetic Board Games; Magepad Magnetic Playboard; Magnetic Children's Whiteboard; Magnetic Toys; Magnetic Tiles Toys; Wooden Puzzle Toy; Wooden Story Telling Toy; Wooden Toy Construction Kits; Wooden Building Blocks; Wooden Stroller; Wooden Pairs Games; Wooden Marble Run; Wooden 3D Animal Sets; Wooden Construction Blocks; Wooden Castle Construction Kit; Outdoor Hand Twister; Outdoor Foot Twister; Sensory Toys; Learning Toys; Outdoor Soft Toys; Indoor Soft Toys; Counting Pegs, Linking Peg Boards.*

Class 41     *Educational Learning Resources*

2. On 4 January 2022, Nexus Education Limited (the “Opponent”) filed a Fast Track opposition. The Opponent partially opposed the application under Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), on the basis of the following two earlier United Kingdom Trade Marks (UKTMs):

UKTM no. 3647438 (series of 2)

**Nexus Education Limited**

**NEXUS EDUCATION LIMITED**

Filing date 26 May 2021

Registration date 15 October 2021

And:

UKTM no. 3647502



Registration date 15 October 2021

3. For the purposes of this opposition, the Opponent relied upon only some of its services, namely the entirety of Class 41 for which both of its earlier marks are identically registered.

4. Since the filing dates of both earlier marks predate that of the contested application, the Opponent's marks are considered to be "earlier marks" in accordance with section 6 of the Act. However, as neither mark has been registered for a period of five years or more before the filing date of the application, they are not subject to the use requirements specified within section 6A of the Act. As a consequence, the Opponent may rely upon any or all of the services for which the earlier marks are registered.

5. The opposition is partial, and is brought against the contested services in Class 41 only, i.e., *Education Learning Resources*. In its notice of opposition, the Opponent submitted that it had received notifications from current and prospective customers on a number of occasions whereby they had confused the contested mark with the Opponent's earlier marks. The Opponent argued that whilst the colours of the contested mark are different from the earlier marks (most likely referring only to UKTM no. 3647502), the overall impact of the word Nexus in the marks at issue is nevertheless similar. As such, the Opponent wished to remove the chance of further brand confusion.

6. On 5 May 2022, the Applicant filed a counterstatement disagreeing with the reasons for the opposition. The Applicant asserted that it had been trading as an established registered business since December 1994, and had “not come across Nexus Education Ltd”. The Applicant submitted that it is a supplier of educational learning equipment, whereas the Opponent is an educational consultant. According to the Applicant, it is a “totally different (sic) business that offer totally different (sic) services and products” from that of the Opponent. The Applicant expressed its astonishment at the opposition, as each company’s logo is different. In addition, the Applicant claimed many companies use the name Nexus.

7. No hearing was requested, and neither party provided submissions in lieu.

8. Neither party is professionally represented.

### **Decision**

9. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

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

10. Section 5(2)(b) of the Act is as follows:

“(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”.

## Section 5A

11. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

12. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v 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 services

13. Both of the earlier marks have the same Class 41 specification, with the Opponent relying upon only some of those identical services. The respective services are:

14. Earlier mark(s)	Application
Class 41 <i>Education; Educational research; Educational demonstrations; Educational testing; Educational examination; Further education; Educational consultancy; Physical</i>	Class 41: <i>Educational Learning Resources</i>

*education; Educational instruction; Singing education; Educational seminars; Religious education; Education (Religious -); Education services; Educational services; Education information; Educational information; Health education; Academies [education]; Education examination; Vocational education; Information (Education -); Lingual education; Legal education services; Residential education courses; Religious educational services; Primary education services; Medical education services; Business educational services; Academy education services; Information on education; Educational services provided by institutes of higher education; Educational services provided by institutes of further education; Educational services for providing courses of education; Musical education services; Physical health education; Higher education services; Pre-school education; Technological education services; Education and training; Academy services (Education -); Educational examination services; Physical education services; Conducting of educational conferences; Teaching of diet education; Organising of education exhibitions; Computer assisted education services; Rental of*

*educational materials; Setting of educational standards; Organising of educational congresses; Education in road safety; Second language educational services; Organisation of educational seminars; Educational and training services; Services of schools [education]; Provision of educational information; Education (Information relating to -); Education and training consultancy; Organisation of educational events; Arranging of educational events; Issuing of educational awards; Sports education services; Online education services; Developing educational manuals; Physical education instruction; Educational institute services; Club education services; University education services; Career counseling [education]; Team building (education); Adult education services; Educational consultancy services; Educational advisory services; Providing of education; Education academy services; Educational information services; Education information services; Computer education training; Educational assessment services; Management education services; Education and instruction; Dietary education services; Providing educational demonstrations; Examination services (Educational -);*



*Information about education; Physical-education services; Sporting education services; Providing continuing nursing education courses; Education services relating to water; Educating at senior high schools; Production of educational television programmes; Vocational education for young people; Education services relating to conservation; Provision of education and training; Organising of competitions for education; Education services relating to design; Provision of educational examination facilities; Education services relating to medicine; Education services relating to religion; Education services relating to nutrition; Providing information about online education; Educational services relating to business; Arranging of guided educational tours; Hire of educational apparatus; Workshops for educational purposes; Education and training services; Organisation of educational shows; Education and instruction services; Provision of physical education; Physical fitness education services; Foreign language education services; Publishing of educational material; Publishing of educational matter; Publication of educational texts; Organising of educational lectures; Secondary school educational services;*

<p><i>Organization of educational symposia; Organization of educational conferences; Organising of education conventions; Rental of recorded education; English language education services; Organising of educational conferences; Computer based educational services; Provision of education courses; Educational courses (Provision of -); Computer education training services; Organization of educational congresses; Research library services; Library services and rental of media; Providing multi-media entertainment via a website; Provision of entertainment services through the media of publications; Provision of audio and visual media via communications networks; Publication of texts in the form of electronic media; Provision of entertainment services through the media of television; Publication of material on magnetic or optical data media.</i></p>	
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15. In the judgment of the Court of Justice of the European Union (CJEU) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended

purpose and their method of use and whether they are in competition with each other or are complementary”.

16. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

17. It has been established by the General Court (GC) in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

18. The term 'Resources' in the contested *Educational Learning Resources* will likely be understood by its normal meaning as referring to all available items, tools, assets and services, etc., specifically those that are required and available for use in relation to providing the identified 'educational learning'. Such resources fall within the more general category of the *Educational services* of the earlier mark, and therefore the contested services are found to be identical under the *Meric* principle.

### **Comparison of the marks**

19. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (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.”

20. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

21. It appears to me that of the two earlier marks, it is UKTM no. 3647502 which offers the Opponent the better chance of success. This is based on the fact that it contains fewer words that are not contained within the contested mark, and also due to it being a figurative mark with an emphasis on a stylised letter 'X', which also occurs in the contested mark. It is therefore this particular earlier mark which I shall use for the purposes of comparison. If the Opponent does not succeed on the basis of UK

3647502, it will be in no better position in relation to UKTM 3647438 which contains the additional word 'Limited' (not included in 3647502), and which has no figurative counterpart.

22. The respective trade marks are shown below:

Earlier trade mark 3647502	Contested trade mark
	

23. The earlier mark consists of two verbal elements: the word NEXUS and the word EDUCATION. Each word is an English-language word, with Nexus meaning a series of connections or a focal point,<sup>1</sup> and Education referring to the delivery and receipt of information.<sup>2</sup> The word NEXUS is the larger of the two words, and is placed above the word EDUCATION. The two words are separated by a horizontal line. The central letter of the word NEXUS is a stylised figurative element, and consists of one blue and one grey arrow/chevron facing one another. In my opinion, the construction of the figurative element clearly creates the appearance of a letter 'X', and contributes to the overall impression of the word being NEXUS. I refer to the fact that neither party made any contention, nor attempted to argue in anyway, that the stylised, central figurative element of each mark was anything other than a letter 'X'. Indeed, both parties made their submissions on the basis that the earlier mark contained the words NEXUS EDUCATION. The word EDUCATION is in a smaller, thinner font than the word NEXUS, and is grey in colour. It certainly contributes to the overall impression of the earlier mark, but by being smaller and placed below, and also by virtue of being a term that is descriptive or at least allusive in relation to the services at issue, I consider the

<sup>1</sup> <https://www.lexico.com/definition/nexus>

<sup>2</sup> <https://www.lexico.com/definition/education>

dominant and more distinctive element of the earlier mark to be the stylised word NEXUS.

24. The contested mark contains the letters NE and US in bold white. The central figurative element consists of two yellow lines, that intertwine to create a stylised letter 'X'. I refer again to the fact that neither party has made submissions to argue that this element is anything other than the letter 'X', and I am firmly of the opinion that it will be perceived as that letter, especially given its central position where the preceding and succeeding letters appear to create a whole word. As such, the verbal element in the contested mark consists of the stylised word NEXUS. The contested mark also contains a navy-blue border/background, which houses the word NEXUS. Whilst it certainly contributes to the overall impression, it is essentially banal. It is therefore the word NEXUS which is the more dominant and distinctive element of the contested mark.

### **Visual similarity**

25. Visually, the marks are similar insofar as they share the sequence of letters NE\_US. Although each mark contains a differently stylised central element, the element is nevertheless intended to represent (and most likely to be perceived as) a letter 'X' in each instance, and therefore represents an additional visual similarity. The marks are visually different due to the inclusion of the word EDUCATION in the earlier mark, which has no counterpart in the contested mark, and the navy-blue border/background in the contested mark, which has no counterpart in the earlier mark. The difference in stylisations of each central letter 'X' must also be considered to represent a slight visual difference.

26. In my opinion, overall the marks are visually similar to at least a medium degree.

### **Aural similarity**

27. Aurally, the marks are similar insofar as they both contain the word NEXUS, which will be pronounced identically in each mark. The marks therefore share the same two syllables NEX-US. The marks are aurally dissimilar due to the earlier mark containing the additional four syllable word pronounced phonetically as ED-U-KAY-SHON. It is possible that a certain number of consumers would not pronounce the word

EDUCATION, as they will perceive it to be secondary and purely descriptive/allusive/informational in relation to the services at issue. However, as identified by Mr Philip Harris acting as the Appointed Person in BL O-115-22 *Purity Hemp Company*, the descriptiveness of a word does not of itself render an element negligible or aurally invisible. Therefore, it should be considered to have some aural impact. Nevertheless, I believe it will most certainly be spoken second due to its smaller size and lower position reading from top to bottom. The figurative element in the contested mark will not be enunciated and so it has no impact on the mark's aural aspect.

28. In my opinion, the marks are at least highly aurally similar, with the only difference being the descriptive/allusive word EDUCATION, which may or may not be spoken by every consumer. In those instances where the term EDUCATION is not spoken, the marks are aurally identical.

### **Conceptual similarity**

29. The word NEXUS in the earlier mark is not necessarily the most common English-language word, however, it is also not the most obscure, and I consider it likely that the majority of average consumers will be aware of its meaning. In isolation, it is potentially allusive in relation to the services at issue, suggesting that the services are in some way connected, or that the service provider is a central or focal player. Whilst the secondary verbal element EDUCATION may not always be spoken, and will in my opinion certainly be attributed less weight, it will nevertheless be read in combination with the word NEXUS. This is because the two words hang together, with the concept of a connection or focal point relating unequivocally to the provision of education.

30. The concept of the contested mark is limited to the meaning of the word NEXUS, as there are no other verbal nor conceptually impactful figurative elements to be considered.

31. Overall, the marks are conceptually similar insofar as they both convey the notion of a connection or focal point. The marks differ conceptually to the extent that the earlier mark clearly specifies what the connection or focal point relates to (i.e., education), whilst the contested mark does not. Although the inclusion of the term

EDUCATION in the earlier mark will most likely be perceived to be descriptive, it still conveys a clear message that is not present in the contested mark.

32. In my opinion, the marks are conceptually similar to at least a medium degree.

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

33. 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.<sup>3</sup> In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

34. The services at issue are education-specific. The average consumer of such services includes both the student and the teacher, as well as organisational leads, administrators and board members of educational establishments. The concept of education-specific services is so broad that the respective student, teacher etc., could be involved at any level of the education spectrum, from as young as primary school age to as advanced as post-grad age. The student, teacher etc., could also be a person attending/delivering night-school, or adult learning college, or even pre-school/nursery. In those instances where the education services are offered to younger generations, the average consumer would be the parent or responsible adult. I consider the purchase process of such education-specific services to be a visually-dominated one, whereby the service provider is searched for or spotted in printed publications or online. I do not, however, discount the possibility that for some of the

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<sup>3</sup> *Lloyd Schuhfabrik Meyer, Case C-342/97*



services the marks may also be spoken, for example over the telephone further to a consultation with a student or professor etc. The services at issue include both everyday consumer services, as well as offering more specialist consumer services, depending at which stage of the education spectrum the prospective student, teacher or administrator etc., is. The level of attention is likely to therefore vary. However, in my opinion, even in the more daily interaction of services at issue, the level of attention will always be more than low, as by its very nature education is a type of service that requires thought and attention. As a result, I believe the overall level of attention of the average consumer to be at least medium.

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

35. The Opponent has not made a direct claim that its earlier mark has acquired an enhanced degree of distinctive character, nor has the Opponent filed any evidence of use that may indicate such a position. My assessment of the degree of distinctive character of the earlier mark is therefore to be made only on the basis of its inherent features.

36. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically

widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

37. The earlier mark consists of a stylised representation of the word NEXUS, followed by the less stylised descriptive/allusive term EDUCATION. Although I have previously made clear that the combination of terms hang together, that is not to say that neither element is unable to be more dominant or distinctive than the other. In reality, due to its bigger size and more obvious stylisation, the term NEXUS is found to be the more distinctive, especially in light of the descriptive/allusive quality of the secondary term EDUCATION. The term NEXUS is itself arguably allusive or laudatory in relation to the services at issue, nevertheless it is distinctly stylised with graphic elements. The distinctive character of the earlier mark is found to be of a medium degree.

### **Likelihood of confusion**

38. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related.

39. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind (see *Sabel*, C-251/95, para 22). The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa (see *Canon*, C-39/97, para 17). It is necessary for me to keep in mind the distinctive character of the Opponent’s trade mark, the average consumer for the services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons

between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

40. The earlier mark contains the two words NEXUS and EDUCATION, which hang together insofar as the concept of the nexus is confined to relating to education. In isolation, the term EDUCATION is purely descriptive. As I have previously referred to, the decision *Purity Hemp Company* established that the descriptiveness of a word does not of itself render an element negligible or aurally invisible. This means that the word EDUCATION should be considered to be spoken when referring to the mark aurally. However, in my opinion, whilst the element will be spoken by the average consumer, in all likelihood the average consumer would perceive the element to be descriptive, and therefore assign the element NEXUS the role of being the true indicator of trade origin.

41. As is well-established in case law, the visual, aural and conceptual similarities of the marks at issue must normally be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. However, it is permissible to make the comparison solely on the basis of the dominant elements when all other components of a complex mark are negligible. It seems to me that an element which is purely descriptive is essentially conceptually negligible. It also seems to me that an element which is a banal background/border is conceptually negligible. Therefore, the elements of the marks at issue to be compared for the purpose of finding a potential likelihood of confusion is the word NEXUS in the earlier mark Vs the word NEXUS in the contested mark.

42. Apart from the slight stylisation differences due to the chosen fonts, the only difference between the respective mark's dominant and distinctive elements is the central letter 'X'. As I have previously established, I do not find there to be any ambiguity as to the specific letter being 'X' in each word, and it is noted that neither party has attempted to argue otherwise. The differences between the dominant and distinctive element NEXUS in each mark at issue are purely visual, as they will be pronounced identically and have an identical concept.

43. It must be kept in mind that the services at issue have been found to be identical. Whilst the level of attention of the perspective average consumer will on average be

medium, it is important to remember that the average consumer rarely has a chance to make direct comparisons between marks, and must instead rely upon the imperfect picture of them he has kept in his mind. It appears to me to be relatively clear that the marks at issue will be directly confused. I consider it a distinct possibility that when the average consumer is faced with the contested stylised NEXUS mark it will mistake it for an earlier stylised NEXUS mark it has seen or heard of previously in relation to identical services. The stylisation differences between the central 'X's will be totally missed in those situations when the marks are purchased aurally. And even in those scenarios when the marks are purchased visually, I do not consider the stylisation difference of only one letter (the differences between the respective NE\_US letters are in my opinion insignificant and forgettable) to be sufficient enough to alert a consumer to the possibility that the marks are being provided by different trade origins. In my opinion, the marks at issue will be directly confused.

44. In case I am wrong in this regard, I consider it likely that the marks will at least lead to indirect confusion. The process of indirect confusion would essentially involve the average consumer recognizing the slight stylisation differences between the marks at issue, in particular the letter 'X', and conducting the conscious or subconscious mental process of thinking: "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."<sup>4</sup> If the average consumer were to focus on the difference between the stylised letter 'X', which in my opinion would be unlikely due to the fact that the marks are very rarely compared side by side, it is my opinion that the average consumer would consider the change of one element to be entirely logical and consistent with a brand extension. I therefore find the marks at issue will be indirectly confused.

## **Conclusion**

45. The opposition based on the earlier UKTM 3647502 is entirely successful against the contested services *Educational Learning Resources*. Subject to appeal, the

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<sup>4</sup> *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10

application may proceed to publication for the applied for goods which are not subject to the opposition proceedings, i.e.,:

Class 28 *Educational Toys; Wooden Toys; Children's Trikes; Children's Bike; Literacy Educational Toys; Numeracy Educational Toys; Construction Toys; Bat & Ball Toys; Soft Toys; Sorting Game Toys; Outdoor Fishing Games; Playground Exercise Ropes; Toy Trucks; Toy Tractor; Counting Toy Games; Math Counting Games; Clock Toys; Linking Playboard; Pattern Boards; Link & Lace Board Sets; Counting Beads; Magnetic Board Games; Magepad Magnetic Playboard; Magnetic Children's Whiteboard; Magnetic Toys; Magnetic Tiles Toys; Wooden Puzzle Toy; Wooden Story Telling Toy; Wooden Toy Construction Kits; Wooden Building Blocks; Wooden Stroller; Wooden Pairs Games; Wooden Marble Run; Wooden 3D Animal Sets; Wooden Construction Blocks; Wooden Castle Construction Kit; Outdoor Hand Twister; Outdoor Foot Twister; Sensory Toys; Learning Toys; Outdoor Soft Toys; Indoor Soft Toys; Counting Pegs, Linking Peg Boards.*

## **Costs**

46. A successful party to proceedings before the tribunal (here the Opponent) may generally be entitled to a contribution towards its costs. Since the parties are without professional representation, such cost would be based on £19 per hour<sup>5</sup>, reflecting the necessary tasks in the process. In its letter to the parties on 20 May 2022, the Registry informed the parties that if they intended to make a request for an award of costs they were required to complete and return the provided form before 20 June 2022, else costs may not be awarded. Neither party returned a costs form, so I make no award of costs in this case.

**Dated this 26<sup>th</sup> day of July 2022**

**Dafydd Collins, for the Registrar**

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<sup>5</sup> The Litigants in Person (Costs and Expenses) Act 1975.