

**O-0263-23**

**TRADE MARKS ACT 1994  
IN THE MATTER OF  
TRADE MARK APPLICATION NO. 3630347  
BY MASKURA LIMITED  
TO REGISTER**

**MASKURA**

**AS A TRADE MARK  
IN CLASSES 8, 9, 21, 27 & 28  
AND OPPOSITION THERETO (UNDER NO. 427696)  
BY  
MAKURA SPORT LIMITED**

## Background & pleadings


1. Maskura Limited (“the applicant”) applied to register the trade mark MASKURA on 22 April 2021. The mark was examined and published in the Trade Marks Journal on 23 July 2021 in classes 8, 9, 21, 27 and 28, though these opposition proceedings only concern the following goods in 9 and 28:

*Class 9: Apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; diving suits, divers' masks, ear plugs for divers, nose clips for divers and swimmers, gloves for divers, breathing apparatus for underwater swimming; smart watches; watchbands that communicate data to smartphones; wearable activity trackers; pedometer.*

*Class 28 - Games, toys and playthings; gymnastic and sporting articles; exercise bands; manually operated exercise equipment; fitness exercise machines; machines for physical exercise; exercise balls; exercise steppers; hoops for exercise; board games; parlour games; party games; card games; sports games; quiz games; hockey games; bowls games; memory games.*

2. Makura Sport limited (“the opponent”) opposed the application on 22 October 2021 under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). Under sections 5(2)(b) the opponent relies on all goods in its UK TM registration no. 913797808 and some goods in its UK registration nos. 2494887 and 801176881. Details of the three earlier UK TM registrations and the goods which are relied on are set out below.

UK TM No. 913797808	UK TM No. 2494887	UK TM No. 801176881
<b>MAKURA</b>		

	 (series of 2)	
Filing date: 5 March 2015  Registration date: 19 June 2015	Filing date: 9 August 2008  Registration date: 2 January 2009	Filing date: 8 June 2013  Registration date: 12 August 2014
<i>9: Protective and safety equipment; mouth protectors [gum shields]; mouth guards; gum shields.</i>  <i>28: Gymnastic and sporting articles; protective articles for sport.</i>	<i>9: Mouth guards and gum shields.</i>  <i>28: Gymnastic and sporting articles</i>	<i>9: Mouth guards and gum shields.</i>  <i>28: Gymnastic and sporting articles</i>

3. Under section 5(3) the opponent relies on the same three marks as above claiming it has established a reputation in the goods set out. Finally under section 5(4)(a) the opponent relies on the sign MAKURA for which it has claimed use in the UK since 2011 for *protective sporting articles; mouth guards; gum shields*.

4. The opponent's trade marks have a registration date that is earlier than the filing date of the application and, therefore, they are earlier marks, in accordance with Section 6 of the Act. As the registration procedure for all the earlier marks was completed more than 5 years prior to the filing date of the contested application, they are all subject to proof of use conditions, as per section 6A of the Act. The opponent made a statement of use in respect of all the goods it relies on.

5. The applicant filed a counterstatement in which it denied all grounds of opposition and put the opponent to proof of use of all of its earlier UK TMs.

6. Both parties have been represented throughout proceedings. The applicant has been represented by Stobbs, whilst the opponent has been represented by Indelible IP Limited. Neither party requested a hearing. Only the opponent filed evidence and also filed submissions in lieu of a hearing.

7. I make this decision following a consideration of all the material before me.

### **Preliminary issue**

8. Section 6(3)(a) of the European (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

### **Opponent's evidence**

9. My first task is to establish whether, or to what extent, the opponent has shown genuine use of the earlier UK mark within the 'relevant period'. The relevant period is defined as being a period of five years ending with the filing date of the contested application. In this case the relevant period is 23 April 2016 to 22 April 2021.

10. The opponent filed a witness statement in the name of Robert Davies who holds the position of Managing Director in the opponent company and who appends nine exhibits. Mr Davies states that the opponent has used MAKURA as its "lead brand" since 2011. By way of illustration, Exhibit RD3 shows a number of screenshots from the Wayback Machine Internet archive showing the opponent's website on 7 August 2013, 14 August 2016, 18 October 2017 and 29 April 2019. The screenshots from 2016 to 2019 are within the relevant period and indicate use of the earlier word and device marks and show images of mouthguards. The screenshot from 2013, which falls outside of the relevant period, shows use of the word and device mark as well as the word only mark and indicates drop down menus for mouthguards and headguards.

11. Mr Davies further states that the opponent specialises in mouthguards for contact sports and its turnover figures are set out below<sup>1</sup>. He explains that that turnover was lower in 2020 and 2021 due to the Covid 19 pandemic and related restrictions on sports participation.

2016	£101,742.17
2017	£156,636.20
2018	£100,787.49
2019	£110,671.72
2020	£48,996.38
2021	£72,924.17

12. Mr Davies states that in addition to its website the opponent uses Facebook, Twitter, LinkedIn and GoogleAds to promote its goods. Exhibit RD8 shows a selection of Google Ads invoices, payment receipts and statements showing an approximate spend of around €382 between August 2018 and February 2019. Exhibit RD7 shows a screenshot of the opponent’s Twitter page which shows that the opponent joined in May 2017. The opponent’s twitter name is MAKURA SPORT but the page shows use of the word and device mark as well as an image of mouthguards. There is a visible pinned tweet dated 28 June 2019 but the content of said tweet is not visible. The screenshot of the Facebook page also shows the words MAKURA SPORT, the word and device mark and an image of mouthguards. The print quality is poor but I believe the date of joining Facebook is also May 2017. There is an apparent post which is dated 6 October 2020 but again the content of the post is not visible.

13. Mr Davies also states that the opponent regularly advertises in “Sports Insight” magazine which is described on its January 2016 front cover as “The Official Publication of the Federation of Sports and Play Associations” and on other covers

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<sup>1</sup> Exhibit RD6

with the words TRADE-LEISURE-CYCLING-NUTRITION-FITNESS-TECH-OUTDOOR under the title.

14. Exhibit RD4 comprises 22 Sports Insight front covers dated from January 2016 to January 2019 and the opponent's associated advertisements in those publications. There are also 5 front covers which have no visible dates but which are indexed as VOL 16 ISS 151 to ISS 155. The goods advertised in the dated publications are mouthguards and both the word only mark and the word and device marks are used. An illustrative example of these advertisements from September 2017 and September 2018 is shown below:



15. In terms of a customer base, Mr Davies exhibits a selection of 14 invoices dated in the relevant period for customers based in Kent, Essex, Somerset, Wiltshire, Surrey, Worcestershire, Gloucestershire, Devon and Cornwall. There were three additional invoices dated outside of the relevant period. The word and device mark appears in the header of the relevant invoices. The goods listed on these invoices are all mouthguards and are listed by their model names, namely Kyro Pro, Ignis, Lithos, Toka and Tephra.

16. That concludes my summary of the evidence.

### Proof of use provisions

17. The relevant statutory provisions for proof of use are as follows:

“(1) This section applies where

- (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), (aa) 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 relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(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 relevant period 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 (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), 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)-(5A) [Repealed]

(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.”

18. Section 100 of the Act states that:

“100. 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 9. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J (as he then was) summarised the law relating to genuine use as follows:

“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 Bunderversammlung Kameradschaft ‘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 Marken 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].”

19. The evidence shows that the opponent has used their earlier marks for mouthguards. It is not apparent from the evidence provided whether the earlier marks appear on the goods themselves but there is sufficient evidence to show the earlier marks were used as an indicator of trade origin in the relevant period.

20. There has been a continuous turnover during the relevant period and an indication that the goods have been advertised for sale in the relevant economic sector. There is sufficient use of each of the earlier marks being used in their registered forms. I find that the evidence supports the statements made by the opponent in its witness statement and find that there has been genuine use of the earlier marks during the relevant period.

### **Framing a fair specification**

21. The next stage is to decide whether the opponent's use entitles it to rely on all of the goods for which it is registered. In framing a fair specification, I rely on guidance given in the following judgements. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*<sup>2</sup>, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

22. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors*<sup>3</sup>, Mr Justice Carr summed up the law relating to partial revocation as follows (at [47]):

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<sup>2</sup> BL O/345/10

<sup>3</sup> [2016] EWHC 3103 (Ch)

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark

has been used and which are not in substance different from them;  
*Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.”

23. The evidence demonstrates that the opponent has used its mark on *mouthguards and gumshields*. As such I find this is a fair specification. There is no indication from the evidence that the opponent has used its earlier marks on any other goods during the relevant period. Therefore these are the only goods on which the opponent can rely.

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

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

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

(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”.

25. 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.”

26. 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.

*The principles*

(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 the goods**

27. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*<sup>4</sup>, 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”.

28. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case<sup>5</sup>, 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;

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<sup>4</sup> Case C-39/97

<sup>5</sup> [1996] R.P.C. 281

(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.

29. I also find that the following case law is useful in these proceedings where in *Gérard Meric v Office for Harmonisation in the Internal Market ("OHIM")*<sup>6</sup>, the General Court ("GC") stated 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".

30. The goods to be compared are

Opponent's goods	Applicant's goods
<i>9: Mouthguards and gumshields</i>	<i>Class 9: Apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; diving suits, divers' masks, ear plugs for divers, nose clips for divers and swimmers, gloves for divers, breathing</i>

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<sup>6</sup> Case T- 133/05



	<i>apparatus for underwater swimming; smart watches; watchbands that communicate data to smartphones; wearable activity trackers; pedometer.</i>
	<i>Class 28 - Games, toys and playthings; gymnastic and sporting articles; exercise bands; manually operated exercise equipment; fitness exercise machines; machines for physical exercise; exercise balls; exercise steppers; hoops for exercise; board games; parlour games; party games; card games; sports games; quiz games; hockey games; bowls games; memory games.</i>

31. For the purpose of a comparison, it is appropriate to group related goods together, where they are sufficiently comparable to do so<sup>7</sup>.

Class 9

*Diving suits, divers' masks, gloves for divers, breathing apparatus for underwater swimming*

32. The applicant's above goods consist of specialist equipment for participation in diving activities. The nature and purpose of these goods is different to the opponent's goods namely *mouthguards and gumshields* which are moulded flexible devices to prevent oral and dental injuries in contact sports. In its written submissions<sup>8</sup> the opponent contends that,

<sup>7</sup> *Separode Trade Mark* decision, BL O-399-10 (AP)

<sup>8</sup> Paragraph 12

“The public has become accustomed to large sports manufacturers, such as Nike and Reebok, offering a very wide range of sports clothing and equipment, and not limiting themselves to just one sports field. There is therefore a real possibility that a consumer seeing a brand in one sports/fitness field, and then seeing another sports article with a highly similar, indeed virtually identical, trade mark, to make an assumption that those goods come from the same or a related manufacturer. The fact that the precise nature of the goods differ is not necessarily the only factor in deciding whether or not there is similarity. Both the opposed goods of the Applicant, and the goods of the Opponents Earlier Registrations are sports and fitness based, and would be used, during sport or fitness training. For instance, a fitness tracker might be worn by an athlete undertaking rugby or hockey training, who is also wearing a mouthguard. Such goods being from manufacturers with virtually identical names is likely to cause some confusion, and at a minimum an association. The goods of both the Opponent and the Applicant will both be sold by sports and fitness outlets, whether online or in store. Both the goods of the Applicant and the goods of the Opponent might be used and/or marketed to the same sports enthusiasts. The goods are therefore sufficiently similar, and certainly closely related, in many respects, increasing the likelihood of confusion.”

33. I note the opponent’s contentions and accept that sporting equipment is usually sold by specialist retailers so there may be some low level of crossover in trading channels and users. However even within a specialist retailer, these goods are not likely to be in the same area/aisle given their different nature and purpose for diving on the one hand and contact sports on the other. There is no complementarity or competition between the goods. Therefore I find these goods dissimilar.

*Ear plugs for divers, nose clips for divers and swimmers*

34. The applicant’s above goods are likely to be plastic or latex devices for use in water sports to prevent water entering the body. I find these goods have a different nature and purpose to the opponent’s goods, albeit that the respective goods at a general level have some form of preventative function. As previously stated there may be some low level of crossover in trading channels and users but there is no

complementarity or competition between the respective goods. As such I find the goods dissimilar.

*Apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; smart watches; watchbands that communicate data to smartphones; wearable activity trackers; pedometer*

35. The nature and purpose of the applicant's above goods are predominantly electronic/mechanical information gathering and recording devices. From my own consumer experiences such devices usually monitor activity, steps, pulse, calorie intake, hydration etc. Such devices can receive information input from the wearer as well as outputting information to the wearer or to a remote site such as a smartphone app. However they do not provide oral protection against injury from contact sports. Therefore they differ in nature and purpose from the opponent's goods. Wearable tech goods such as smart watches are unlikely to be sold in specialist sporting equipment outlets. There may be more likelihood for a crossover of trade channels for pedometers and activity trackers. I note the opponent's contention from its written submission that users may wear a fitness tracker at the same time as using a mouthguard but neither of these goods are indispensable for the use of the other. Nor are these goods competition with one another. Taking all this into account I find these goods are dissimilar.

#### Class 28

*Games, toys and playthings; board games; parlour games; party games; card games; sports games; quiz games; hockey games; bowls games; memory games.*

36. I regard the above goods as being articles used in the pursuit of play, fun or entertainment but I accept that there may be some competitive sporting aspect to at least some of the goods. However none of the above appear to have a use in oral protection during contact sports nor has the opponent given any submissions on why it believes these goods are similar to its own *mouthguards and gumshields* beyond its contention that they could be encountered by the same users. In my view users of these goods will be the general public so an overlap in user is at too general a level for a finding of similarity. The applicant's above goods are unlikely to be found in

specialist sports retailers even if the games are sporting in nature, eg hockey games or bowls games. They will be found in a toy specialist retail establishment or in a toy section of a general retailer. Overall then I find these goods are dissimilar.

*Gymnastic articles; exercise bands; manually operated exercise equipment; fitness exercise machines; machines for physical exercise; exercise balls; exercise steppers; hoops for exercise*

37. In my view each of the above goods is a piece of equipment specifically designed for use in physical activity to develop aspects such as strength, balance and fitness. All the respective goods can be considered at a broad level as being goods for use in sports and will likely share trading channels and have some overlap of users. However none of the above goods is used for protection against oral injuries and therefore differ in nature and purpose to the opponent's goods. Neither are the goods complementary or in competition with each other. Therefore I find these goods dissimilar.

*Sporting articles*

38. As the above term is not limited by the sports it covers, I find it could include goods used in contact sports. Therefore there may be an overlap in nature and purpose if the articles are used as protective devices, as well as an overlap in user and trading channels in addition to a degree of complementarity and competition. Taking this into account I consider there to be a medium degree of similarity between the respective goods.

### **Average consumer and the purchasing process**

39. I next consider who the average consumer is for the contested goods and how they are purchased. It is settled case law that the average consumer is deemed to be reasonably well informed and reasonably observant and circumspect.<sup>9</sup> For the purpose of assessing the likelihood of confusion, it must be borne in mind that the

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<sup>9</sup> *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)

average consumer's level of attention is likely to vary according to the category of goods or services in question.<sup>10</sup>

40. The average consumer for the goods at issue will be the general public. The goods will be selected by primarily visual means either in retail premises or their online equivalents. There may be some aural element due to word-of-mouth recommendations or if advice is sought by consumers from retailers. Given the nature of the contested goods, which will vary in price, a consumer will be paying at least a medium degree of attention during the purchasing process as there will be a consideration of sizing and suitability for purpose.

### **Mark comparisons**

41. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*<sup>11</sup>, 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.”




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

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<sup>10</sup> *Lloyd Schuhfabrik Meyer*, Case C-342/97.

<sup>11</sup> Case C-591/12P

43. The respective trade marks to be compared are:

Opponent's earlier marks	Applicant's mark
<p data-bbox="204 421 539 450">UK TM No. 913797808</p> <p data-bbox="204 479 507 539"><b>MAKURA</b></p> <p data-bbox="204 647 683 676">UK TM No. 2494887 (series of 2)</p>   <p data-bbox="204 1261 533 1290">UK TM No. 801176881</p> 	<p data-bbox="759 427 1102 488"><b>MASKURA</b></p>

44. The applicant's mark consists of a single word MASKURA with no other aspect to it such as stylisation or device. Therefore the overall impression is derived solely from this word.

45. The opponent's earlier marks consists of a word mark and a word and device mark. The marks ending '887 and '881 differ only in the positioning of the device, i.e. before the word element and above it. The word mark consists of MAKURA with no other aspect to it so that the overall impression is derived solely from this word. The

word and device marks consist of the MAKURA word element and an abstract device somewhat resembling two interlocking vertical letter 'M's. The device makes a contribution to the overall impression but the rule of thumb applied in these situations is that a word will generally speak louder than a device. I consider that to be the case here so I find MAKURA will make the greater contribution to the overall impression of the marks.

### **Visual similarity**

46. In a visual comparison, the word elements of the respective marks all share the letters M-A-K-U-R-A. This is the entirety of the opponent's word mark. The applicant's mark has an additional letter S as its third letter which has no counterpart in the opponent's marks and the opponent's device element has no counterpart in the applicant's mark. Taking all these factors into account I find there is a high degree of visual similarity between the applicant's mark and the opponent's earlier word mark. This falls to a medium degree of visual similarity between the applicant's mark and the opponent's earlier word and device marks.

### **Aural similarity**

47. The opponent's device element will not feature in an aural comparison so there are only the word elements to consider. I consider all the respective marks to be invented words and as such will have no known pronunciation. The opponent's word element will, in my view, be pronounced as MAK-URA and the applicant's mark as MASK-URA. As such I find there is a high degree of aural similarity between the marks.

### **Conceptual similarity**

48. As previously stated, each of the respective marks in these proceedings are invented words and as such have no concept. The same applies to the opponent's device as it is an abstract figure with no meaning. Therefore I find there is conceptual neutrality.

### **Distinctiveness of the earlier marks**

49. The degree of distinctiveness of the earlier marks must be assessed. This is because the more distinctive an earlier mark, based either on inherent qualities or

because of use made, the greater the likelihood of confusion. In *Lloyd Schuhfabrik Meyer*<sup>12</sup> 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).”

50. Registered trade marks possess varying degrees of inherent distinctive character starting from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, scaling up to those with high inherent distinctive character, such as invented words.

51. I begin by considering the inherent position. The word MAKURA is an invented word and has no meaning in relation to the goods. The addition of the device element does not make the whole any less distinctive. Consequently, I consider the marks to be inherently highly distinctive.

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<sup>12</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97



52. Turning to enhanced distinctiveness, the relevant market I must consider is the UK. I note the following from the opponent's evidence

- The marks have been used in the UK for the five years preceding the application's filing date in relation to *mouthguards and gumshields* although there a single screenshot print dated 2013 which showed both mouthguards and headguards
- Continuous turnover figures are provided for the five years preceding the application's filing date
- 14 invoices were provided indicating a geographical spread of sales to customers across the south of England
- 22 advertisements were provided indicating promotional activity in a single publication by the opponent for the five years preceding the application's filing date

53. Taking into account the *Chiemsee* factors given above, I note that no market share is given, although I accept that this particular area of the sporting goods sector is probably not an extensive one although the sporting goods sector itself in the UK is undoubtedly huge. There was no evidence from any relevant third-party organisation such as sports governing bodies. It appears from the evidence provided that Sports Insight is a magazine for the trade but no figures given regarding its distribution and readership. No evidence was provided to indicate that the opponent advertises its mouthguards in any sports specific publications for example in boxing or rugby publications. The opponent's advertising spend is low and the turnover modest. Taking all these factors into account I do not find that the marks' distinctiveness has been enhanced through use.

### **Likelihood of confusion**

54. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them that they

have kept in mind.<sup>13</sup> I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to the interdependency principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa.

55. 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.

56. In *L.A. Sugar Limited*<sup>14</sup>, Mr Iain Purvis Q.C., sitting as the Appointed Person, explained that:

“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

57. So far in this decision I have found that,

- There is a medium degree of similarity between only some of the goods and dissimilarity between the remainder of the goods

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<sup>13</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

<sup>14</sup> *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10

- The average consumer is a member of the general public paying at least a medium degree of attention in a predominantly visual purchasing process
- There is a high degree of visual similarity between the respective word marks and a medium degree of visual similarity between the opponent's word and device marks and the applicant's mark
- There is a high degree of aural similarity between the respective marks
- There is no conceptual similarity
- The earlier marks are inherently highly distinctive

58. Firstly with respect to the word marks and taking into account the assessments I have made above, I find that there is a likelihood of direct confusion where there is similarity between the goods. The marks begin and end with the same letters and there is only a single additional letter difference between the marks, which is contained in the middle of the applicant's mark. This single letter addition could be easily overlooked and lead to one mark being mistaken for the other. As previously stated, a consumer rarely has the chance to make direct comparisons between marks but instead relies on an imperfect recollection. I consider that to be apposite in this case.

59. Turning to the opponent's word and device marks, I find that the device is impactful enough such that I do not find that consumers will directly confuse the two marks, i.e. mistake one mark for another. I remind myself of the guidance given in *L.A. Sugar* that indirect confusion requires a consumer to undertake a thought process whereby they acknowledge the differences between the marks yet attribute the common element to the same or an economically connected undertaking, taking the later mark to be a possible brand extension or sub brand of the earlier mark. In this instance consumers may note the fact that there is distinctive device but assume that the device indicates that it is a brand extension or sub-brand from the same economic undertaking. As such I find there is a likelihood of indirect confusion.

60. The opposition based upon section 5(2)(b) succeeds in relation to the following goods: *Class 28: Sporting articles*

61. The opposition based upon section 5(2)(b) fails in relation to the following goods, for which the mark will proceed to registration:

*Class 9: Apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; diving suits, divers' masks, ear plugs for divers, nose clips for divers and swimmers, gloves for divers, breathing apparatus for underwater swimming; smart watches; watchbands that communicate data to smartphones; wearable activity trackers; pedometer.*

*Class 28: Games, toys and playthings; gymnastic articles; exercise bands; manually operated exercise equipment; fitness exercise machines; machines for physical exercise; exercise balls; exercise steppers; hoops for exercise; board games; parlour games; party games; card games; sports games; quiz games; hockey games; bowls games; memory games.*

### **Section 5(3)**

62. Section 5(3) of the Act states:

“5(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 and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.”

63. Section 5(3A) of the Act states:

“Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.”

64. The relevant case law can be found in the following judgments of the CJEU: *Case C-375/97, General Motors, Case 252/07, Intel, Case C-408/01, Adidas-Salomon,*

Case C-487/07, *L’Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora* and Case C383/12P, *Environmental Manufacturing LLP v OHIM*. The law appears to be as follows.

(68) 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*.

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

(68) I 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 and Environmental Manufacturing, paragraph 34.*

(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.*

(68) (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 of the earlier mark; *L'Oreal v Bellure NV, paragraph 40i)* 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*).

65. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that its mark is similar to the applicant's mark. Secondly, that the earlier mark has achieved a level of knowledge/reputation amongst a significant part of the public. Thirdly, it must be established that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the earlier mark being brought to mind by the later mark. Fourthly, assuming that the first three conditions have been met, section 5(3) requires that one or more of the three types of damage claimed will occur. It is unnecessary for the purposes of section 5(3) that the goods be similar, although the relative distance between them is one of the factors

which must be assessed in deciding whether the public will make a link between the marks.

66. Having found that the marks are similar, I now consider reputation. As outlined above, for an opposition under section 5(3) to get off the ground it is first necessary for the opponent to show that it has the necessary reputation. I must be satisfied that the earlier marks are known by a significant part of the relevant public, in this case consumers of goods for use in contact sports.

67. In its written submissions<sup>15</sup>, the opponent contends that,

In terms of reputation, the Opponent has in the witness statement of Robert Davies explained at paragraph 2 that the Opponent has been called Makura Sport since 2011, and has provided not only examples of the Opponents website as it currently appears at Exhibit RD2, but also historical examples of the website taken from the Internet Wayback Archive, detailing website pages from 2013, 2016, 2017 and 2019. The Opponent has also demonstrated a consistent presence in Sports Insight magazine at Exhibit RD4. Whilst subscriber numbers are not included, it is clear that this is a long running magazine with examples of editions from 2017 onwards provided. The magazine is described as being aimed at Trade/Leisure/Cycling/Nutrition/Fitness/Tech/Outdoor, thereby encompassing the interests of both the Opponent and the Applicant as well as a wide selection of sports, with the Opponents goods appearing alongside leading brands such as Hilly and Mammut (page 2 of Exhibit RD4), Golds Gym (page 5 of Exhibit RD4), Gola and Pure Lime (Page 9 of Exhibit RD4), Body Armour (page 12 of Exhibit RD4), Asics (page 14 of Exhibit RD4), to mention just a few. Whilst it is accepted that this in itself does not mean a reputation, the Opponent can be seen to be having products selected for mention fairly regularly by the magazine, and places half page and in some cases full page advertisements. These will have a high profile in such magazines and the readers and sports people who read them will regularly see reference to the Opponents products, making them known to a high proportion of the relevant

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<sup>15</sup> Paragraph 19

public. The Opponent is regularly shown as being featured in the Sports Hub section of the magazine where select products are featured. Indeed, whilst not the Opponent's product, page 25 of Exhibit RD4 shows the Sports Insight magazine featuring on its front cover a competing product to that of the Opponent, demonstrating the importance and recognition of these products to the sports sector. The Opponent then features on the front page of the January 2019 cover (page 27 of Exhibit RD4). Page 34 of Exhibit RD4 is an interview with the Managing Director of Reydon Sports who mentions Makura as one of the brands they stock (bottom of second column) alongside the likes of Head, Speedo and Shock Doctor. A reference such as this amongst the numerous sports brands available demonstrates industry recognition for the Opponent."

68. Taking the evidence into account, I find that the earlier marks have been used on the opponent's website and on social media channels. I further note the advertisements and promotion of the goods in Sports Insight. However as the opponent notes above, simply appearing alongside other branded goods does not equate to a reputation for MAKURA. Furthermore no figures are provided for the readership of Sports Insight magazine so it follows that there is no evidence on how many readers saw or read the advertisements. No information is provided by the applicant as to whether its sales have gone up specifically as a result of these Sports Insight advertisements. I note the opponent's reference to the Reydon Sports article on p34 of Exhibit RD4. Reydon Sports are said in the article to be the "UK's largest sports wholesale and distribution company". My understanding of the article is that Reydon stocks and supplies a very large range of sports equipment and apparatus either under their own brand or from other brand manufacturers. They do not appear to be making a statement on the quality or reputations of the other brands, only emphasising their own reputation for their wide range of products and the quality of their customer service. In my view the article does not equate to a tangible reputation for the opponent's goods.

69. Taking the above into account, I do not find that the opponent has demonstrated a reputation for its goods and its 5(3) case falls at this hurdle. If I am wrong on that point and I had established that the opponent had demonstrated a very modest (at



best) reputation for *mouthguards and gumshields*, then I would find that the relevant public would not make the necessary link. Whilst similarity of goods is not essential under section 5(3), the distance between the respective goods in this case would, in my view, offset any link and damage that might arise in relation to the goods for which 5(2)(b) opposition has failed. As such this ground also fails.

### **Section 5(4)(a)**

70. Section 5(4)(a) states:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) [...]

(a) [...]

(b)

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

71. In *Discount Outlet v Feel Good UK*<sup>16</sup>, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

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<sup>16</sup> [2017] EWHC 1400 IPEC

56. In relation to deception, the court must assess whether "a substantial number" of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21)."

72. I recognise that the test for misrepresentation is different to that for likelihood of confusion, namely, that misrepresentation requires "a substantial number of members of the public are deceived" rather than whether the "average consumers are confused". However, as recognised by Lewison L.J. in *Marks and Spencer PLC v Interflora*, it is doubtful whether the difference between the legal tests will produce different outcomes. In my view, this is the case here. Whilst I accept that the opponent has demonstrated sufficient use for *mouthguards and gumshields* and I would find protectable goodwill in those goods, its claim under Section 5(4)(a) does not provide any better an outcome for the goods which I found to be dissimilar. Therefore I do not need to consider this ground further.

### **Conclusion**

73. The opposition has been partially successful. Subject to any appeal against this decision, the application can be refused for the term *Sporting articles* in class 28 and accepted for the remainder of its goods in class 8, 9, 21, 27 and 28.

### **Costs**

74. The opposition has been partially successful, but the applicant has retained all its goods in class 9 and the majority of its goods in class 28 so has the greater extent of success. As such it is entitled to a contribution towards the costs incurred in these proceedings. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 2/2016. Bearing in mind the guidance given in TPN 2/2016 but factoring in the partial nature of its success, I award costs as follows:

### **£300 Considering Notice of Opposition & preparing a Counterstatement**

75. I order Makura Sport Limited to pay Maskura Limited the sum of £300. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 10<sup>th</sup> day of March 2023**

**June Ralph**

**For the Registrar**

**The Comptroller-General**