

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
INTELLECTUAL PROPERTY ENTERPRISE COURT

Rolls Building
New Fetter Lane
London

Neutral Citation Number: [2020] EWHC 1678 (IPEC)

Date: 26 June 2020

Before:

HER HONOUR JUDGE MELISSA CLARKE
Sitting as a Judge of the High Court

B E T W E E N:

Claim No: IP-2019-000005

**(1) BRITISH AMATEUR GYMNASTICS
ASSOCIATION**

Claimant

- and -

**(1) UK GYMNASTICS LIMITED
(2) UK GYMNASTICS AFFILIATION
LIMITED
(3) CHRISTOPHER ADAMS**

Defendants

Miss Victoria Jones (instructed by Howard Kennedy) for the Claimant
Mr Steven Reed (instructed by SP Legal Solutions) for the Defendants

Hearing dates: 2 and 3 March 2020

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Her Honour Judge Melissa Clarke:

INTRODUCTION

1. The Claimant is a not for profit private company limited by guarantee, and a National Governing Body (“NGB”) for the sport of gymnastics in the United Kingdom. It is recognised as an NGB by the Sports Council in the UK, the European Union of Gymnastics (“UEG”) and the Federation of International Gymnastics (“FIG”). It was incorporated on 20 April 1982 but has a history which can be traced back to the very beginnings of the sport of gymnastics in the UK with the establishment in 1888 of the ‘Amateur Gymnastics and Fencing Association’. Since around 1997 it has traded and operated under and by reference to the name ‘British Gymnastics’ (“**the Mark**”).
2. The Claimant is the proprietor of the following UK registered trade marks (“**the Trade Marks**”), each of which is a series of two marks:

No	TRADE MARK	FILING DATE	GOODS/SERVICES
1		20.04.17	<p>Class 9 Digital photographs; Video recordings.</p> <p>Class 16 Photographs.</p> <p>Class 25 Clothing.</p> <p>Class 28 Gymnastics and Sporting Articles.</p> <p>Class 35 Business administration; Office functions.</p> <p>Class 41 Education; providing of training;</p>

			Entertainment; Sporting activities.
2	UK00003281771  	10.01.18	Class 9 Digital photographs; Video recordings. Class 16 Photographs. Class 25 Clothing. Class 28 Gymnastics and Sporting Articles. Class 35 Business administration; Office functions. Class 41 Education; providing of training; Entertainment; Sporting activities.

3. Since at least 1982 and until circa 1997, all of C’s activities were carried out under and by reference to the name ‘British Gymnastics Association’. Since 1997, C has operated at all material times under and by reference to the name ‘British Gymnastics’ (**‘the Mark’**). It has also operated under and by reference to certain logos incorporating the words ‘British Gymnastics’ and the following get-up:

- i) Since 2011, by reference to the Trade Marks and each of them;
- ii) Prior to 2011 the primary British Gymnastics’ logo was as follows:



- iii) The colours red, white and blue, reminiscent of the Union Jack Flag;
- iv) A background image depicting gymnastics motion in the form of coloured swirls in the colours red/white/purple/blue.

(collectively the “**Claimant’s Get-Up**”)

4. The First Defendant is a private limited company incorporated on 5 July 2000, with the nature of its business registered as ‘93120 - activities or sports clubs’. The Second Defendant is a private company limited by guarantee incorporated on 14 July 2017 with the nature of its business registered as ‘85510 - sports recreation and education’. The Third Defendant is the founding and sole director and secretary of the First Defendant and an equal shareholder with his father, Brian Adams. He is also the founding and sole director of the Second Defendant and a guarantor of it.
5. Since at least 2015, the First Defendant has advertised, offered and provided: membership services to individual gymnasts, gymnastics clubs and coaches; competitions; courses and/or badge/certificate programmes; and/or educational services to coaches and gymnasts (“**the UKG Services**”), under and by reference to the sign ‘UK Gymnastics’ in the following logo formats



(collectively “**the Signs**”), and associated get-up including the colours red, white and blue and sections or elements of the Union Jack (collectively “**the UKG Get-Up**”). The First Defendant organises and administers gymnastics competitions and runs the ‘UK Gymnastics’ website (“**Ds’ Website**”). The Second Defendant administers the

membership of UK Gymnastics, organises courses and runs an online store on Ds' Website. The Third Defendant is the sole director of the First and Second Defendants.

6. There is also a dispute about whether the Defendants use the sign 'UK Gymnastics' in a word format ("**Word Sign**") which I will have to determine. For convenience, I shall refer in this judgment to the Signs and any Word Sign as "the Signs" where the context permits.
7. On 9 January 2019 the Claimant issued a claim for trade mark infringement and passing off. It seeks, *inter alia*:
 - i) an injunction restraining the Defendants from infringing the Claimant's registered trade marks and from passing off its goods and services as being connected with those of the C; and
 - ii) damages of up to £100,000.
8. The Defendants defend the claim, *inter alia*, on the basis that the marks and the Signs used by the First and/or Second Defendants are not similar to the Trade Marks; there is no likelihood of confusion between the Trade Marks and the Signs; and that the activities undertaken by the First and/or Second Defendants do not amount to passing off of the Claimant's business.
9. The Defendants admit joint liability for any acts of infringement and/or passing off which may be found by the court.

THE ISSUES

10. At a case management conference on 25 July 2019, His Honour Judge Hacon identified the following list of issues:
 - i) Have the Defendants infringed the Trade Marks and each of them pursuant to section 10(2)(b) of the Trade Marks Act 1994

("the Act")? The Defendants have admitted that the Trade Marks each enjoy an enhanced distinctive character. The following issues remain in dispute:

- a) Have the Defendants used the Word Sign in the course of trade in relation to the UKG Services?
 - b) Are the Signs similar to the Trade Marks?
 - c) Does the use of the Signs in the course of trade in relation to the UKG Services result in a likelihood of confusion on the part of the public?
- ii) Have the Defendants infringed the Trade Marks and each of them pursuant to section 10(3) TMA? The Defendants have admitted that the Trade Marks have a reputation in the UK. The following issues remain in dispute:
- a) Is there a link between the Signs and the Trade Marks in the mind of the relevant public?
 - b) Is the use of the Signs by the Defendants detrimental to the distinctive character and/or repute of the Trade Marks and/or does the use create a serious risk of being so detrimental?
 - c) Does the use of the Signs by the Defendants take unfair advantage of the distinctive character or repute of the Trade Marks or does it create a serious risk of doing so?
 - d) Does the use of the Signs affect or create a serious risk of affecting or changing the economic behaviour of the average consumer?
 - e) Is the use of the Signs by the Defendants without due cause?
- iii) The Defendants have admitted that the Claimant had at the date when the Defendants commenced the activities complained of, and has, built up and owned valuable goodwill in the UK which

attaches to the Mark and/or the Trade Marks and each of them either alone or in conjunction with the Claimant's Get-Up or each element thereof when used in relation to the Claimant's Services and that accordingly when members of the relevant public in the UK see the Mark and/or the Trade Marks and each of them either alone or in conjunction with the Claimant's Get-Up or each element thereof when used in connection with those Services, they would believe them to be those of or connected with the Claimant and no other. The following issues remain in dispute:

- a) Whether the Defendants' use of the Signs and/or UKG Get-Up in relation to the UKG Services has led or is likely to lead a substantial number of members of the relevant public or trade in the UK to believe, contrary to fact that:
 - i) The Defendants and/or the UKG Services are those of or otherwise the subject of some commercial arrangement with the Claimant, and/or
 - ii) The Defendants and/or the UKG Services are connected with the Claimant in such a way as to cause damage to its goodwill and/or
 - iii) That the Defendants and/or UKG Services have the status of a National Governing Body conferred upon them by the Claimant.
- b) Whether the Claimant has suffered or is likely to suffer damage.

THE TRIAL

11. The trial was heard over two days on 2 and 3 March 2020. Miss Victoria Jones represented the Claimant and Mr Steven Reed the

Defendants. I thank them for their helpful skeleton arguments and oral submissions.

12. The Claimant relies on two witnesses, Ms Jane Allen, Chief Executive Officer of the Claimant, and Mr Philip John Smith, Director of Sport of the Sports Council of England ("**Sport England**"). Both filed a single witness statement, attended court and were cross-examined and re-examined.
13. The Defendants rely on two witnesses, Mr Christopher Adams who filed a single witness statement and Mr Jason Wise who filed two witness statements. Each attended court and was cross-examined and re-examined.
14. Ms Allen has been the CEO of the Claimant since 2010 and was previously the CEO of Gymnastics Australia for three years from 2007-2010. She has a total of 37 years' experience of acting in an executive capacity in sports administration. She appeared to me to be a professional witness who came to court to assist it to the best of her ability. She made appropriate concessions where necessary and gave her evidence in a straightforward manner. I found her to be a credible and reliable witness. Mr Reed for the Defendants does not suggest otherwise.
15. Mr Smith has been the Director of Sport for Sport England since 2008. He describes Sport England as an organisation that is responsible for the health and wellbeing of the community through sport and physical activity in England, and a distributor of public money, mostly from the National Lottery. In his role, he says that he has responsibilities towards both consumers who are undertaking sport and physical activity, and also those who work and volunteer in sport, including coaches and administrators.

16. Mr Smith also came across as a professional, credible and reliable witness, who has some degree of independence from the parties in this case, although Mr Smith says that Sports England considers itself as a partner with BGA, the main feature of that partnership being its long standing investment of over £70million into BGA for the delivery of specific projects, for governance, and for the management of the organisation. Some of the evidence that he gave was opinion evidence, although he appears as a witness of fact and Mr Reed reminds me that there was no permission for the Claimant to rely on expert evidence in this case and asks me not to take such evidence into account. Miss Jones submits that Mr Smith's job is to look at NGBs across the UK and as such is able to offer opinion evidence.
17. Although I agree that there is a small amount of opinion evidence which I consider he may properly give (to the extent it is interwoven with and arises from his professional perception of the facts), in paragraph 68 and the final sections M, N and O of Mr Smith's witness statement (paragraph 73 to the end), he sets out his opinion of matters which go to the specific issues for determination of the court in this case, namely:
- i) whether the consumer is confused if there is more than one NGB for a sport;
 - ii) whether UK gymnastics is an NGB or acting as an NGB;
 - iii) whether the public would be confused into thinking that the First Defendant is the recognised NGB or has a connection with the Claimant as the recognised NGB; and
 - iv) whether the use of 'UK' in the First Defendant's name would cause the public to think that the First Defendant is the recognised NGB or an NGB.

18. Those are opinions that he is not entitled to offer as a witness of fact pursuant to section 2(3) of the Civil Evidence Act 1972 and CPR Part 35.4, and they trespass upon the functions of the Court. Accordingly, I do not take into account Mr Smith's evidence in paragraph 68 and from paragraph 73 onwards of his witness statement.
19. In relation to Mr Adams, Ms Jones for the Claimant in closing submissions raised as a factor which should affect my consideration of his credibility Mr Adams' refusal to accept facts proved in the Claimant's disciplinary proceedings which caused him to be banned for life from membership of the Claimant, in circumstances where he failed to attend the disciplinary hearing rescheduled five times to enable him to attend, failed to provide any mitigation and failed to appeal the result. He called it a Kangaroo Court and said that he had evidence which could rebut the charges. Of course, the way to do so would have been to participate in the disciplinary proceedings. Mr Reed heard this submission but made no submissions on credibility of any witness, and in particular did not address this submission made by the Claimant. In my draft judgment, which I circulated to the parties in the usual way, I commented that one of the charges proved against him was an allegation of dishonesty in his financial dealings with club members, and this, together with Mr Adams' refusal to accept the findings of the disciplinary committee, adversely affected my view of his credibility.
20. Mr Reed in his skeleton argument in advance of handing down judgment, made submissions that I was wrong to draw adverse inferences about Mr Adams' credibility from that evidence, saying:
- “11. It is well established that evidence of a conviction is inadmissible in civil proceedings (*Hollington v F Hewthorn and Company Ltd* [1943] 1 KB 587).

12. As Warby J stated, more recently, in *Hourani v Thomson* [2017] EWHC 432 (QB):

“19. Importantly, the opinions, findings, or conclusions of a court or other investigative body are, as a rule, inadmissible for the purpose of establishing the correctness of those opinions or conclusions: see *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 and the majority in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 (see in particular [28]-[33], [79], [103], (Lord Hope), and [130]-[133] (Lord Hutton)). This rule, though long controversial, remains an established part of the common law. Its effects are not limited to criminal convictions (the subject matter of the decision in *Hollington v Hewthorn*). It extends to other findings of fact or evaluative assessments, including those contained in official reports, such as the Bingham Report on the BCCI scandal (the subject matter of the passages cited from *Three Rivers*)....

21. The rule in *Hollington v Hewthorn* does not exclude reliance on hearsay statements of fact, of whatever degree, which are made or recorded in investigative reports, or in court judgments. So where a report or judgment records that a witness made a particular statement of fact to an investigator or to the court, that record can be relied on as evidence not only that the statement was made but also (if so desired) as evidence that what the witness said was true. Both sides have sought to rely on statements of this kind in relation to the issue of truth. That is legitimate. But the court has to consider what weight to attribute to such material. And that process is governed by the Civil Evidence Act 1995 and the CPR.”

21. It would have been of assistance to the Court if Mr Reed had made these submissions at the conclusion of the trial after hearing Ms Jones arguments. However, I will deal with them now. I accept Mr Reeds submission that the law is as set out by Warby J in *Hourani*, and that I should not have drawn adverse inferences from the findings of the Claimant’s disciplinary proceedings, and Mr Adams’ attitude to those

findings, in the way that I did in the draft judgment. Accordingly, I have put consideration of the disciplinary proceedings to one side and considered Mr Adams' credibility afresh and with an open mind.

22. As I said in the draft judgment, and as I once again find having considered the matter afresh, I did not find Mr Adams to be a good witness. Ms Jones describes his evidence as confused, muddled and evasive, and submits that he gave answers to suit his case while not being sure what his case was. I think that is fair comment. This was most evident in his evidence in cross-examination about whether the First Defendant was an NGB. He surprised Ms Jones, and the Court, by saying *"We've never called ourselves a national governing body. Basically, we are not a national governing body"* when the Defence explicitly states, *"The First Defendant is a national governing body"*. When Ms Jones challenged him on this and asked whether it was his understanding of the Defendants' case that the First Defendant was an NGB or not, he provided an equivocal answer: *"It depends, we can be, or we can't be"*. It was only after I pressed him to answer the question asked, that he said that the First Defendant was *"a national governing body for gymnastics in the UK"*. This equivocation is surprising, given that it is a key plank of the Defendants' case that the First Defendant is a national governing body for gymnastics in the UK.

23. Mr Adams' gave written evidence that the First Defendant had membership rules in place when the Defendants' other witness, Mr Wise, confirmed it did not at the time Mr Adams' witness statement was made. I accept Mr Wise's evidence because he was the person who drafted the membership rules and he was clear that he was still in the process of drafting them at that time. He also gave oral evidence that the Defendants wanted to distance themselves from the Claimant as much as possible, which was contradicted by a raft of

evidence to the contrary, as I set out in paragraph 143 below. Finally, much of Mr Adams' written evidence was inadmissible as it was not evidence of fact, but speculation about the Claimant's motivation for doing various things including bringing the proceedings, adverse commentary on the strength of the Claimant's case, and advocacy. For those reasons I consider that Mr Adams did not seek to assist the court by giving honest evidence to the best of his ability, but to say what he thought would assist the Defendants even when that was not true. I treat such of Mr Adams' evidence which is admissible with caution and where it is disputed, I look for corroboration from other reliable evidence or the inherent probabilities before accepting it.

24. Mr Wise appeared to be an honest witness who came to court to give truthful evidence and assist it to the best of his ability.

EVIDENCE

The Claimant's evidence

25. Except where otherwise indicated, I accept the Claimant's evidence.
26. Both parties rely on the Sports Council Recognition Policy 2017, which is a policy which is published jointly by the Sports Councils of the four nations in the UK, including Sport England. It specifies:
- i) at paragraph 1, that the process of recognition as an NGB *"determine(s) the National Governing Bodies responsible for governing the sporting activities that the Sports Councils are willing to consider supporting and working with"* and *"acknowledge[s] the status of the NGB as a private organisation which governs a particular sport through the common consent of the sport itself"*;
 - ii) at paragraph 6, the role of an NGB (whether recognised or not):

“An NGB is an organisation that governs and administers the sport on a national basis, whether that is for the whole of the United Kingdom (i.e. England, Northern Ireland, Scotland and Wales) ... Traditionally, NGBs are described as the custodians and guardians of their sport”;

- iii) at paragraph 9, what functions as a recognised NGB is expected to deliver within its area of jurisdiction;
- iv) at paragraph 10, what activities a recognised NGB is expected to undertake;
- v) at paragraph 11, acknowledges that *“Many NGBs originated as a voluntary coming together of sports people (individuals, teams and clubs) with a common purpose; to encourage and enable participants to enjoy and progress in their chosen sport. They evolved into membership organisations and individuals often became members to enable them to compete in their sport and be covered by insurance”*;
- vi) at paragraph 22, that *“the aim of recognition is to identify sporting activities, and a single lead NGB structure ideally (or joined up structure with clear lines of communication and responsibility at the very least) operating at UK, GB or Home Country level...”*
- vii) at paragraphs 40 to 56, the recognition application process;
- viii) at paragraph 45(d), dealing with pre-applications for recognition as an NGB, that the NGB *“must demonstrate that it is affiliated to the UK (GB or Irish) NGB for its sport, and the international governing body for its sport (where this exists)”*;
- ix) at paragraph 45(e), that only one NGB can be recognised for a specific jurisdiction.

27. Mr Smith explained that applicants for recognition as an NGB are required to meet the pre-application criteria as set out at paragraph 45

of the Sports Council Recognition Policy 2017, and that includes, among other criteria, that that the national governing body must normally have been in operation for a minimum of two years and should show robust management and governance procedures.

28. Mr Smith stated (at paragraphs 38 and 39 of his witness statement) that:

“Sport England invest in recognised national governing bodies, including [the Claimant], in order to ensure their governance of the sport and to help make sure that people are taking part in their sport, their chosen activity, in a safe regulated environment. That governance function usually requires staff and resources and that's why Sport England invest for that function to be performed. It usually can be argued that it's the body's position and influence in the sport that makes it relevant for us to invest and provide that function.

By way of example, if you were only responsible for a small number of clubs, or a relatively small proportion of the sport, you cannot provide that governance function across the country and therefore Sport England wouldn't partner with you to do so.”

29. Mr Smith confirmed at paragraph 41 that gymnastics is a sport that is classed as having a high safety risk. He said that Sport England had a policy that clubs or organisations that participate in such high-risk sports, must be affiliated to the NGB in order to apply for National Lottery funding. He said, *“this assists Sport England in ensuring that the club or organisation has relevant safety standards and that their customers and participants are protected.”*

30. Mr Smith's evidence was that most sports that Sport England recognises have only one recognised NGB in England, although there are some situations where there is more than one recognised NGB. Mr Smith gave the example of 'England Athletics' which takes

responsibility for amateur local community athletics, and 'UK Athletics', which takes responsibility for high performance, typically preparing athletes for the Olympic Games or similar. Mr Smith said that it was a really important function of an NGB to provide a talent pathway so that young people can join their local community club one day and however long it takes, however many years later, they can become athletes representing their country. He said that is done under the auspices of the NGB, he is not aware of any route to international representation.

31. The second category in which Mr Smith said there may be more than one recognised NGB is in relation to sports which consist of separate disciplines. He gave an example of equestrian sports, which have show jumping, dressage, eventing and a number of other disciplines. However, he said, in such situations the sports have a federated structure where there is an umbrella body that sits on top of all of these disciplines and that is the body that Sport England deals with and invests in. In the equestrian example, that was the British Equestrian Federation. He pointed out that there are a number of sports which are split into different disciplines, but which do not have different governing bodies, such as cycling.
32. The sport which Mr Smith described in oral evidence as the exception proving the rule, is Taekwondo. It is the Defendants' evidence, with which Mr Smith agrees, that there are three recognised national governing bodies in Taekwondo: the British Taekwondo Council, British Taekwondo and GB Taekwondo. Mr Smith said there are three because those three bodies have deliberately and specifically, and with agreement, set themselves up to perform different functions within the sport: one does 'the talent part', one does 'the grassroots part', and one does 'the high performance part'. He pointed out there is also an umbrella body which was set up with the assistance of

Sport England in 2011 called Taekwondo Organisation Limited and that was set up in order for there to be a unified point of reference and to act as a central representative function for all forms of Taekwondo. He said that the Taekwondo Organisation Limited attends to matters of governance, manages and stewards the public money, and makes sure that the three bodies are all performing their distinct roles.

33. Mr Smith's evidence was that he was not aware of a situation where there are two national governing bodies for the same sport that performed the same role in the same geographical location.
34. Mr Smith's evidence was that Sport England invests in the Claimant as a recognised NGB to do two things:
 - i) to develop and expand their sport to new audiences and to grow the number of people that are interested in, engaged in and doing gymnastics; and
 - ii) to govern the sport in its competitive forms and to ensure that people taking part in gymnastics do so in a safe and enjoyable way.
35. Mr Smith clarified that Sport England is not a regulator and as such does not have any regulatory powers, but it does have policies and responsibilities that mean it is looked to, and deemed responsible for, certain parts of the sport industry. He said that Sport England's power comes from its investments in recognised NGBs and the conditions that are attached to those investments, which the NGB is required to comply with.
36. Ms Allen described the Claimant as the NGB for the sport of amateur gymnastics in the United Kingdom. She describes its mission as *"to support, lead, govern and inspire all persons in the United Kingdom who are*

involved or interested in amateur gymnastics [and]... represent the sport in dealings with government agencies and international federations”.

37. The Claimant’s objects are set out in its Articles of Association which are contained in the trial bundle. They are not standard Articles but are tailored to the organisation. They include the following:

- i) To act as a governing body for gymnastics in the UK;
- ii) To develop and implement a strategy for the development of gymnastics in the UK;
- iii) To make rules for persons participating in gymnastics in the UK;
- iv) To develop a commercial marketing and public relations programme for gymnastics in the UK;
- v) To develop a competition programme in the UK;
- vi) To select representative teams to represent the UK in international events;
- vii) To consult and nurture relationships with other organisations operating in gymnastics and sports councils, including the British Olympic Association and relevant Commonwealth Games councils;
- viii) To support, set up and administer charities for the benefit of gymnastics; and
- ix) To take such action as the Board may consider for the benefit of gymnastics and the members of the Association.

38. In Ms Allen’s witness statement she set out four areas of operations of the Claimant, which are carried out through 205 full time employees, namely: (i) Sport: performance education events and participation; (ii) Commercial and Finance: commercial operations, finance, membership and community services; (iii) Strategy and Innovation: IT, strategy and marketing services; and (iv) Integrity and Human Resources: safeguarding, governance, health and safety, equality and

diversity, data protection, staff training/performance/talent management.

39. As at December 2018, she says the Claimant had approximately 400,000 individual members and 1500 member clubs across the UK, with the numbers of each having grown every year over the previous seven years. The Claimant offers different levels of membership, each of which attracts a different fee payable to the Claimant. For example, individual members are offered gold, silver or bronze membership depending on their level of participation and their financial contribution to the Claimant. Clubs currently pay a fee depending on the number of club members they have.
40. Ms Allen states that the Claimant offers its members a range of benefits including the provision of public liability and employer liability insurance cover to clubs and their employees, personal accident cover for participants, access to competitions, coach/judge education courses and support services such as safeguarding, health and safety, employment and data protection. The importance of safeguarding is highlighted by: (i) the physical risks inherent in the sport of gymnastics, which was confirmed by Mr Smith to be classified as a 'high risk' sport; and (ii) the vulnerability of the Claimant's individual members, as 95% are under the age of 18, 73% are under the age of 12 and 80% are female.
41. Ms Allen's evidence is that the Claimant's annual gross income has consistently been in excess of £10 million pounds since 2010 and is currently £19.1 million. Its income arises roughly one third from membership fees, one third from government grants and one third from the Claimant's commercial activities.
42. Ms Allen states that the Claimant holds a comprehensive event programme each year for all of its seven disciplines, which culminates

in a British Championship annually for each discipline. These events are part of the Claimant's national development program within its talent pathway, which is intended to identify and nurture talent to develop international standard athletes that can be competitive on the world stage. It is also responsible for bidding for, and delivering, international events staged in the UK which between 2010 and 2019 have included two European Championships, two World Championships, one Olympic Games, one Commonwealth Games and an annual World Cup. It has been awarded the rights to deliver the 2022 and 2023 World Championships and is integral to the delivery of the gymnastics section of the 2022 Commonwealth Games.

43. Ms Allen placed a great deal of emphasis in her oral and written evidence on the educational, governance and stewardship functions of the Claimant.
44. In relation to education, the Claimant runs courses in coaching and judging which Ms Allen says all have been awarded United Kingdom Coaching Certificate ("UKCC") endorsement which means that they meet a set of agreed standards required by UK Coaching (formerly sports coach UK) regulated by Ofqual. She provides documentary evidence of this. For example in a letter of 19 July 2013 from the Chair of the Coaching Standards Group of sports coach UK, it informs the Claimant that the British Gymnastics Qualifications Level 1 Award in Coaching Gymnastics (General, Trampoline, Rhythmic, Tumbling, Acrobatic, Women's Artistic, Men's' Artistic, Aerobic, Pre-School and Team) has been re-endorsed in accordance with the UKCC Endorsement Criteria. The Annex to that letter sets out that the endorsement "*may be removed as a breach of these conditions [set out below], or as an outcome of the UKCC Monitoring and Evaluation process*". The conditions include:

- i) That the Claimant, its representatives and associated delivery centres must conduct their activities in an appropriate manner, which would not seriously prejudice the standing or reputation of the UKCC or its principles;
 - ii) Any changes to the submission that alter the nature of the qualification, and may be deemed to change the emphasis, must be authorised by sports coach UK;
 - iii) The Claimant, its representatives and associated delivery centre must remain committed to the sharing of good practice, continue to review the ongoing relevance of the coach education programme in the context of the participants and performers needs, champion the UKCC as a development framework based on good practice delivery in adult education, continue to commit to an inclusive approach which embraces diversity.
45. In relation to governance, the Claimant is required, as are all recognised NGBs in the UK, to comply with the Code of Sports Governance agreed by UK Sport and Sport England. Ms Allen describes that as 'the gold standard' in domestic governance standards and says that the Claimant has been formally advised by government authorities that it provides the highest level of compliance. She exhibits a letter from the COO of UK Sport of 19 December 2017 demonstrating compliance with it.
46. To support her evidence that a key function of an NGB is governance, Ms Allen also points to:
- i) the Articles of Association of the Claimant which, inter alia, require it to conduct AGMs and publish the minutes of such meetings for the purposes of public transparency;

- ii) its suite of Board approved policies reviewed and updated every three years, covering such subjects as Safeguarding, Complaints, Conduct and Disciplinary, Anti-Doping, Manipulation of Competitions;
 - iii) its Membership Rules (version 4.0 of 31 August 2018 is exhibited to her witness statement), which run to 23 pages and are comprehensive in nature, setting out specific rules for Coach, Assistant Coach, National/Brevet Judge, Judge, Club Official, Competitive Gymnast, Gymnast Pre-school, Honorary Life and Complimentary memberships as well as Registered Clubs); and
 - iv) handbooks for each of the different gymnastic disciplines, which include the protocol, governance and requirements of participation in each type of event. She exhibits to her witness statement the 2019 Women's Artistic Competition Handbook v. 1.4 of 16 October 2019, and the 2019 Gymnastics for All GymFusion Handbook v 1.1, which I have looked at. Once again, these are comprehensive documents running to 44 and 23 pages respectively and covering all aspects of eligibility, competition entries, and technical information, as well as relevant contact information and competition calendars.
47. In relation to stewardship functions, as well as its work in relation to national and international competitions, Ms Allen points to the Claimant's work in supporting initiatives within its membership, such as working with competitions that are organised on a regional basis to support the national competition structure, and in assisting and supporting Club members who wish to structure their own competitions. In addition, she points to assistance provided to Club members such as: assistance with facilities development (including identifying potential sources of funding); provision of Club

management tools and training to ensure clubs remain strong and viable businesses which provide a safe environment for participants; and provision of a Club hotline to provide Club members with telephone advice and assistance with queries or concerns around their activities.

48. In relation to these proceedings, Ms Allen said that she was aware of the existence of the Defendants and their use of the signs from 2015, and kept an eye on Ds' Website. She said that when the website had information she felt was confusing to the Claimant's membership and potential members, the Claimant would ask them to change it. The Claimant was particularly concerned when the Defendants put every one of the Claimant's Club members on their own "Find a Club" function on their website, and when they started making the assertion that they were a national governing body for gymnastics in the UK.
49. Ms Allen became aware of this from an email from the Claimant's Community Services Director, Simon Evans, of 13 April 2018 ("**Mr Evans' Email**"), who said:

"The new function came to my attention via one of the Customer Relationship Managers, following a conversation with a British Gymnastics registered club appearing on the UKG site. The club had contacted UKG to demand that their details were removed and were advised by UKG that the content was in the public domain and they would not remove it. The club, Leeds Gymnastics Club, are considering taking legal action. The site appears to be listing all [British Gymnastics] registered clubs across England, Scotland Wales and Northern Ireland. The huge majority of these clubs will have no relationship or affiliation whatsoever with UKG. The site doesn't have any wording to clarify that they are UKG clubs, but neither does it have anything to say they aren't. This is extremely confusing to anyone using that function and poses the following issues:

1. Clubs that have no affiliation with UKG may get members that have found the club via the UKG site. This is extremely confusing for the member and difficult for the club to explain.
2. For clubs that are new or not associated with BG or UKG, their exploratory searching could suggest that UKG are considerably more successful in their club network than they are and could be viewed as disingenuous at best.
3. There could be impact on the natural listing on search engines that we work extremely hard to develop - a member searching for a club may be served the UKG search option rather than ours as the club would be listed in both
4. It could be a tactical ploy to try to create a circumstance where UKG can claim to be generating members for a BG club, to attempt to gain leverage to create a relationship with that club.

The whole situation is extremely confusing for clubs and members comment particularly given that this is on top of a number of other attempts to great gain credibility through pulling through our website content onto their site, running video news footage from our championships and international competitions, and overtly advertising in social media for BG tutors to run UKG courses.”

50. According to an email from Stuart Featherstone, the Customer Relationship Manager referred to in Mr Evans’ Email, he spoke to Leeds Gymnastics Club (“LGC”) who confirmed they had no relationship with the First Defendant, but said they had called them to complain and ask them to take their information down. LGC told him that the First Defendant initially refused, saying that the information was in the public domain and they were just promoting the sport. It later said that if LGC emailed, it would look to take it down and might put a statement on Ds’ Website stating that *“Not all clubs represented on the list are affiliated to UK Gymnastics”*. It appears from various screenshots appended to Ms Allen’s witness statement that Mr Wise did add such a statement to Ds’ Website.

51. In her witness evidence Ms Allen said that the Defendants' reference to the First Defendant as an NGB for the sport of gymnastics in the UK, *"especially when used in conjunction with the name 'UK Gymnastics', is incredibly confusing for the gymnastics community. As we are and have always been the only UK national governing body for the sport of gymnastics in the UK and given our name is [British Gymnastics Association] which we brand in identical colours to those used by [the First Defendant], gymnasts and their clubs are going to believe that either [the First Defendant] is connected to us in some way or authorised by us. This problem is worsened by the fact that [the First Defendant] has also copied our product names such as Discover Gymnastics, Free G, Gymshop and our brand image, such as the swirl."*
52. Ms Allen said that she believed, as a matter of fact, that the First Defendant was not an NGB. She said that as well as being confusing to members and potential new members, the Defendant's claim was damaging to the sport of gymnastics. She explained in cross-examination that the Claimant's main concern is to protect the standards of the sport, and it can only do so if the public knows who is the NGB, who upholds those standards, and who to come to for issues of health and safety and safeguarding. That, she says, is the Claimant.
53. The Claimant through its solicitors on 27 April 2018 requested the removal of the words *"We are a UK governing body for the sport of gymnastics"* from the Ds' Website. The Defendants responded by a solicitors' letter of 4 May 2018, offering to alter the tagline of Ds' Website to read: *"We are an independent body for the sport of gymnastics in the UK"* and place within the website the statement *"Whilst seeking the promotion of the sport of gymnastics in the United Kingdom, UK Gymnastics is independent of, and has no direct connection with the British Gymnastics Association"*. It has, since the commencement of these

proceedings, removed the reference to being “a UK governing body for the sport of gymnastics”, and replaced them with the suggested text. This documented history, which is not disputed, makes Mr Adams’ assertion in the beginning of his oral evidence that “We’ve never called ourselves a national governing body. Basically, we are not a national governing body”, all the more difficult to understand.

54. The Claimant in the same letter of 27 April 2018 objected to the inclusion of the Claimant’s club members on the Defendants’ “Find a Club” feature and demanded their removal, stating that their inclusion was misleading to the public and appeared, incorrectly, to indicate (i) there was a connection between those clubs and the Defendants, and (ii) there was a critical mass to the Defendants’ membership. This request was rejected by the Defendants in its response letter of 4 May 2018, but once again the Defendants removed the clubs objected to from this feature after the commencement of these proceedings.
55. The reference in Mr Evans’ Email about the Defendants putting “*video news footage from our championships and international competitions*” on Ds’ Website is supported by emails appended to Ms Allen’s witness statement. On 6 April 2018 Nigel Hill, the Commercial Director of the Claimant, emailed Robert Horton at the BBC asking him to have a look at the Ds’ Website, stating “*They’re putting Commonwealth Games content out on their social media channels & it’s causing some confusion with the athletes & members. I haven’t been through all of it, but interested to know if they’re breaching any rights from BBC perspective?*”. Mr Horton replied “*Yes, this will be an infringement on our rights and I have spoken with people internally who will be following up today*”. Similarly, the reference in Mr Evans’ Email about the Defendants “*overtly advertising in social media for BG tutors to run UKG courses*” is supported by screenshots of tweets by the UK Gymnastics twitter account on 21

February 2018: *"@UKFYM requires Tutors for all disciplines in Gymnastics Coaching, at all levels, if you are a @BritGymnastics Tutor, then we wish to hear from you!"*

56. Finally, Ms Allen seeks to support the reference in Mr Evans email to *"pulling through our website content onto their site"* by screenshots from Ds' Website, taken on 14 August 2019, and from the Claimant's website, taken on 25 September 2019. The Claimant's website states:

"Welcome

We are here to help, support and advise you at every stage of your membership, whether you are just getting started or already involved in this exciting sport.

Membership is vital in ensuring that British Gymnastics can continue to help and support you as a valued member and also positively contributes to the growth of the sport. Interest in the sport has never been stronger and we are fully committed to helping everyone achieve their full potential. We are a membership organisation - you are the lifeblood of the sport and we recognise that the gymnastics community continues to develop, grow and be successful through the contribution that you make. If you are excited about the possibilities of gymnastics, we can offer you the opportunity to be part of a large and growing community that shares your excitement.

Our pledge to you is that we will work with you to help you achieve your ambitions in gymnastics, whatever they are. In particular, we will:

- Respond constructively to your queries and requests
- Keep communications clear and precise
- Treat you with courtesy fairness and respect..."

57. Ms Allen points out, and I accept, that exactly the same wording appears on screenshots from Ds' Website, save 'UK Gymnastics' appears in place of 'British Gymnastics'. Of course, the first in time of

the screenshots that have been put before me are those relating to Ds' Website, not the Claimant's, and there is no evidence before me that the Claimant's wording came first in time, although the Defendants do not allege that the Claimant copied Ds' Website. I will return to this.

58. Ms Allen also relies on an email of 25 September 2015 from Ms Claire Jackson, the Head of Marketing and Communications of the Claimant, drawing her attention to similarities of Ds' Website to that of the Claimant: *"from the swirls to using the language discover gymnastics, free g and gymshop"*. Mr Reed submits that the allegation that the Defendants have copied the 'swirls', which Ms Allen called *"an obvious replication"* of the Claimant's Get-Up, are not pleaded by the Claimant, but it seems to me that to the extent they are found on Ds' Website they are referred to at paragraph 28(c) of the Particulars of Claim (in which they are described as *"a ribbon/ribbons (akin to those used in rhythmic gymnastics)"* and the use on the advertisement complained of falls within paragraph 34 of the Particulars of Claim. Ms Allen points to the use of the 'swirls' on Ds' Website, on its certificates of membership documents and on a membership advertisement of 12 March 2018 which describes itself as *"A UK GOVERNING BODY FOR THE SPORT OF GYMNASTICS"*. In fact, this advertisement was not published to the public as it was produced for insertion into one of the Claimant's events, and the programme publisher refused it as the Defendants were not associated with the Claimant. However, the image that it contains, including the swirls, is found as the background to Ds' Website. It can be found at Annex 1.

59. Ms Allen says the logo *"FREE-G"* is a term and brand which the Claimant created for the marketing of its freestyle gymnastics discipline, and *"Discover Gymnastics"* and *"Gymshop"* are categories

which she says have been used by the Defendants but derived directly from the Claimant's website. The Defendants say that FREE-G is a recognised term for freestyle gymnastics which is also used by Gymnastics Australia, and exhibits screenshots from the Gymnastics Australia website, and Discover Gymnastics and Gymshop are descriptive terms in which the Claimant has no proprietary interest.

60. Ms Allen also states that the Claimant's core proficiency badge scheme for different levels of competence and achievement have been replicated by the Defendants, who have used on all of their badges the identical graphic image of a gymnast as the Claimant does on its level 2 badge. Images can be found at Annex 1. It appears that since these proceedings have started the Defendants have changed their badges to remove that image. Ms Allen describes these actions as "*an attempt to replicate [the Claimant] and the services which [the Claimant] was promoting to its membership*".
61. In terms of evidence of actual confusion, Ms Allen produces little evidence in her witness statement. At paragraph 61(ii) of her witness statement, Ms Allen provides third hand hearsay, rather vague evidence that some of the Defendants' accredited coaches have contacted the Claimant to access their next level of course, and have been unaware that the course they have attended: (i) is not the Claimant's course; and (ii) does not sit on a recognised qualification framework. This means that they are required to start the process of coach education again. Ms Allen states "*I know from my conversations with Kathryn*" (Katherine Bonner, the head of the Claimant's Education team) "*that this is an issue which is frequently referred to her for an explanation to be given to any caller*". Although I am satisfied that Ms Allen is giving honest evidence to the best of her ability, there is no documentary evidence of this at all which would enable me to assess how significant this confusion is, if it is indeed confusion at all.

None of these complaints has been made in writing or reduced to writing afterwards by the complainant or customer service operative. There are no emails between customer service operatives and Ms Bonner asking her for an explanation to be passed on. No logs or records appear to have been made of any such complaints. There is no evidence about the number or frequency of such complaints. There is no evidence from any of the customer operatives of the hotline or from Kathryn Bonner. I can put little weight on such evidence.

62. In paragraph 62 of her witness statement, Ms Allen again provides hearsay evidence about the quality of the First Defendant's coaching education programme. She says *"I have received feedback from Kathryn [Bonner] who in turn has spoken to coaches who have attended both [Claimant] and [Defendant] run courses. The feedback from Kathryn is that coaches report that the [Claimant] courses are superior. Not only is this an example of confusion in the community it also raises a concern over the safety of the gymnasts and indeed [Claimant's] reputation if people are wrongly believing that such courses are provided by [Claimant]"*. This does not assist the Court in determining the issues. It does not follow, in my judgement, that various reports that the Claimant's courses are better than the First Defendant's, means that the attendees or the public believe that the First Defendant's courses are provided by the Claimant, and there is nothing in Ms Allen's evidence (or in any documentary evidence which is, again, wholly lacking) to explain why she considers this is evidence of actual confusion. In my judgment, it is mere speculation.

63. In oral evidence, Ms Allen provided two further examples of what the Claimant relies on as actual confusion. The first related to a booking by the Defendants of Lilleshall National Gymnastics Centre ("Lilleshall") for the purposes of holding a 2-day event for 80 young gymnasts in October 2018.

64. Lilleshall is owned by Sport England, run by Serco, and houses the Claimant's base. Mr Wise in witness evidence explained that he was permitted to make that booking in May 2018, but it was cancelled by Lilleshall one week before the scheduled event, for the reason that: "*Sport England decided that we are not allowed to book the facility as we are not affiliated to [the Claimant]*". The letter cancelling the booking stated that the decision also took into account that the Claimant was a tenant at Lilleshall. The Defendants rely on that as evidence that the Claimant was motivated in bringing these proceedings by a desire to prevent any other national governing body operating within gymnastics, a claim Ms Allen denied. Ms Allen said in oral evidence that it had always been the case that for an organisation to book Lilleshall, it needed to be affiliated to the Claimant, but upon investigation it was discovered that the person who took the booking was a new employee of Serco, thought that 'UK Gymnastics' was affiliated with 'British Gymnastics', and so allowed the booking to be made. This evidence was not contained in her witness statement and Mr Reed submits that she should not be permitted to rely on it. However, Miss Allen provided this evidence in cross-examination in answer to a situation raised by Mr Wise in his evidence, and so I do not object to it. I accept it as evidence of actual confusion by the Serco employee.

65. The second example was produced by Ms Allen for the first time in oral evidence. It related to a change in the Chair of the Claimant in March 2019. Ms Allen said that the current incumbent told her that when he was considering coming to the role, he decided to research the Claimant. Because his daughter was a member of UK Athletics, he looked up 'UK Gymnastics' on the internet, which brought him to the Defendants' site, and it took him a while to realise that he was on the wrong site. Ms Allen said that if it was confusing to him, it would be

confusing to others. Mr Reed submits that Ms Allen should not be permitted to rely on oral evidence which is not contained in her witness statement. In my judgment this cannot be an example of actual confusion caused by the Defendants' acts, since it appears the future Chair made his mistake without even knowing of the existence of the First Defendant and without seeing any of its signs. He simply guessed at a search which might bring him to the Claimant's website, and instead it brought him to Ds' Website. At the most, in my judgment, it goes to the likelihood of confusion: that a member of the public may think 'UK Gymnastics' is interchangeable with 'British Gymnastics', or want to go to the recognised NGB for gymnastics and wrongly guess its name is UK Gymnastics, as the future Chair did.

66. I accept Ms Allen's complaints that Ciaran Gallagher, the CEO of Gymnastics Ireland was concerned about the activities of the Defendants in Ireland, and that the Defendants included the International Gymnastics Federation ("FIG") logo on Ds' Website who had to ask the Defendants to cease such use as they were not affiliated with it. I note that Mr Adams *"cannot recall receiving anything from FIG or their solicitors asking us to remove the FIG logo from our site"*. There is no dispute that the First Defendant was not affiliated with FIG and so would not have had the right to use that logo on Ds' Website. Although I do not have a screenshot of the use, I have seen a contemporaneous email from Ms Allen to FIG notifying it of what she had found and I am satisfied that it is more likely than not that the Defendants did use the logo on Ds' Website, and were asked to cease its use by FIG. However, neither of these are evidence of actual confusion in my judgement, although I accept them as evidence which tends to support a likelihood of confusion.
67. In relation to likelihood of confusion, Ms Allen's oral evidence was that the Defendants are a group of people putting on competitions

and activities, but not to the requisite standards of an NGB. She said her concern about the Defendants' activities was not that they run competitions, as many others do and which she said was a matter for them, but that they call themselves 'UK Gymnastics' and present themselves as an alternative NGB when they are not. She said that saying the First Defendant is an NGB does not make it so, and in doing so they are passing themselves off as connected to the work of the Claimant. The damage she identifies is that if people believe they are connected to or affiliated with the Claimant, they will believe that they are operating to the Claimant's standards, when in fact it is not clear what the First Defendant's standards are. I will return to this point.

68. In her witness statement, Ms Allen said that the Defendants' actions seek to take unfair advantage of the Claimant's reputation and standing, and that they do not seek to promote the sport of gymnastics or govern the sport, but promote UKG as an organisation for their own profit and benefit, at the Claimant's expense. She is concerned that if their use of the Signs were allowed to continue, it would dilute the Claimant's brand significantly. I will address these points in the discussions of the issues below. Ms Allen said she was seriously concerned that the Defendants may be providing or facilitating an environment that due to lack of scrutiny attracts undesirable personnel which could place its members at risk, and this in turn posed a reputational risk to the Claimant if consumers believe the Defendants to be the Claimant, or the NGB for gymnastics in the UK, or connected to or somehow authorised by the Claimant. Ms Allen had no evidence that any such undesirable personnel were attracted to the First Defendant. In fact, when the Claimant did observe a competition organised by the First Defendant, it had no criticism to make.

69. Ms Allen said that she was happy for the First Defendant to run competitions, call themselves by an appropriate name and do what they wish in the sport of gymnastics but not to pass themselves off as connected to the Claimant. It was put to her by Mr Reed that the Claimant simply wished to stifle competition and she denied it. She said (I paraphrase) that the First Defendant was too small and too financially insignificant an operator to pose any financial threat to the Claimant.

The Defendants' evidence

70. Mr Adams describes himself as Chief Executive of both the First Defendant and the Second Defendant, but as he works full time elsewhere, they are operated on a day to day basis by Mr Jason Wise together with one other member of staff. Mr Adams said that he speaks to Mr Wise about once a week and trusts him to make decisions which do not require the input from a director.

71. Both the First Defendant and the Second Defendant operate under what appear to be standard form Memorandum and Articles of Association for trading companies, with no reference being made to an intention to govern and with only one reference to gymnastics (in the First Defendant's Memorandum of Association).

72. Mr Adams asserts that the First Defendant was set up with a view to potentially *"starting his own gymnastics organisation offering coaching courses competitions etc"*.

73. In the particulars of claim, the Claimant stated that the First Defendant appears to have been dormant until some point in the year ending 31 July 2013, and this was admitted in the Defence. However, Mr Adams said at paragraph 12 of his witness statement that it remained dormant *"until around 2009/10 when it began trading with a*

view to being a governing body for gymnastics". When asked about this in cross-examination, he gave a discursive response to the effect that he organised little competitions between clubs but did not earn sufficient to file first year accounts until 2012/2013. On 15 October 2009, he sent an email from the First Defendant's domain to Sport England asking *"about the p[r]ospect of UK Gymnastics becoming a recognised national gymnastics organisation within the United Kingdom. We ask also about the National Governing Body status and how we can apply"*. It is difficult to understand how he considered a dormant company (so far as Companies House was concerned) which was only involved in 'organising little competitions between clubs' could support an application to Sport England to be a recognised NGB within the UK.

74. In 2012 Mr Adams applied to renew his membership of the Claimant, which had lapsed following allegations made against him in 2006. That prompted the disciplinary proceedings against him to which I have already referred. In cross-examination, Ms Jones asked Mr Adams why he wanted membership of the Claimant when he was setting up his own NGB for gymnastics. It seemed to me that he did not want to answer that question. He first replied, *"Let sleeping dogs lie. I wrote a nice letter and [the Claimant] said come back to a disciplinary hearing, so I left it"*. When asked again, he said *"There was no legal reason not to join. I had a lot of friends in BG, we could exchange coaching ideas, travel with them to competitions in America"*. It is not clear to me why that required him to be a member of the Claimant but perhaps there is a reason I do not understand. However, it does not really provide an explanation for the contradiction identified by Ms Jones, in my view.

75. As at February 2019, the First Defendant had 97 member clubs. As at December 2019 it had 10,146 members, of which 10,000 were in England and the rest in Scotland. At trial, Mr Adams said it now had

11,400 members and about 120 clubs, including one in Wales. It does not seem to be disputed that a membership organisation such as the First Defendant will have a fluctuating membership of individual members and clubs. I understood Mr Adams' oral evidence to be that the First Defendant had had members in all four countries of the Union, although not at the same time.

76. The First Defendant has two members of staff, being Mr Wise and one other. In his witness statement, Mr Wise said that he oversaw the operations of the First and Second Defendant, and his tasks include:

- i) Dealing with current and prospective members' enquiries by telephone and email;
- ii) Issuing certificates;
- iii) Processing memberships and orders;
- iv) Communicating with suppliers and purchasing products and equipment;
- v) Meeting with insurers;
- vi) Maintaining Ds' Website (including designing documents and website elements such as the competition artwork);
- vii) Communicating with current and prospective tutors of the First Defendant;
- viii) Managing accounts;
- ix) Drafting policy documents for approval at meetings; and
- x) Chairing such meetings.

77. Mr Wise gave candid evidence about his background, which is that he had administrative experience from Dixons Retail and Dixons Carphone but had no previous experience of working in sport or for a governing body before joining the First Defendant in December 2016 and had no experience of drafting policy documents. He said that he

works 3 or 4 days a week for the First Defendant in an administrative capacity and also maintains a separate business on a self-employed basis, building websites, databases and carrying out general IT work for other clients. He said that before he joined the First Defendant, it had a very limited infrastructure from which it served members, as his predecessor had only worked one day a week. Mr Wise said he has put together various policies for the First Defendant, including in relation to data protection and safeguarding, by researching what other bodies such as the NSPCC had in place. I accept this evidence.

78. Mr Adams and Mr Wise both referenced Ms Allen's statement that the Claimant offers its members a number of benefits (the provision of public liability and employer liability insurance cover to clubs and their employees, personal accident cover for participants, access to competitions, coach/judge education courses and support services such as safeguarding, health and safety, employment and data protection), and says that the First Defendant offers all of those to its members. I accept that.
79. In his second witness statement of December 2019, Mr Wise said at paragraph 9 that the First Defendant had no membership rules but was "*in the process of finalising them*". Mr Adams' witness statement dated over a month earlier stated in paragraph 34 that: "*We... manage the rules and regulations such as child protection and equality for our members*". Mr Wise was asked by Ms Jones if his witness statement was correct, and that at the time it was written there were no membership rules, and he replied "*That's right. There were unwritten rules, but not put in a document*". He said they had since been completed and were available to view on Ds' Website, as were policies covering safeguarding, health & safety, data protection etc. I prefer Mr Wise's evidence to that of Mr Adams.

80. Mr Wise's oral evidence was that the proficiency awards and certificates granted by the First Defendant were not externally vetted but were reviewed by the First Defendant's 'executive committee' who *"all have extensive experience of the sport"*. I believe the executive committee he referred to is Mr Adams and his father, who both have been involved in gymnastics for many years. Mr Wise said proficiency certificates were *"either awarded to candidates by the assessing coaches, or were not"*. The Defendants have disclosed the syllabus and standards required for each proficiency certificate.
81. In relation to coaching courses, in his second witness statement Mr Wise said that the First Defendant organised such courses, running at least one coaching course per month in (i) gymnastics for all; (ii) women's artistic and (iii) trampolining; and the tutors for each course were qualified via the Claimant. As at December 2019 his evidence was that the First Defendant was going to start certifying such coaches who have attended such a course. Mr Wise confirmed in oral evidence that it now does so. He accepted that the First Defendant's coaching certifications were not governed by any particular rules or standards, such as UKCC, saying *"We don't do that. They are in-house coaching awards"*.
82. Mr Wise's evidence is that the First Defendant organises approximately 10 competitions per year, with about 20-30 coaches and at least 200 and sometimes close to 300 gymnasts at each event. He accepted that all but one of them had been held at Milton Keynes, local to the First Defendant, but stated that was because it was the only suitable venue his colleague, who organised the competitions, had found which accepted bookings from an organisation not affiliated to the Claimant. He disputed the Claimant's assertion that the fact that Milton Keynes was close to Aylesbury, home of the

Defendants, meant that the First Defendant' competitions had only a "*local geographic dimension*".

83. In relation to safeguarding, Mr Wise's evidence was that the Defendants take it very seriously and work with local authorities, police and other appropriate bodies. He keeps records of allegations that are notified to him by other bodies, including the Claimant. He says he based the safeguarding policy from a free template on the NSPCC website.
84. Mr Wise says that the 'Find a Club' service on Ds' Website was simply a service available for free to website users to enable them to find a gymnastics club near them, whether or not they were members of the First Defendant. He said that he had taken advice from the Office of the Information Commissioner who said that was permitted because the information was in the public domain, and had put a message on the website saying that the clubs listed were not all affiliated to the First Defendant. He removed them following the Claimant's complaint without accepting liability. I will come back to this point in my discussion of the issues.
85. In relation to whether the First Defendant is an NGB both Mr Adams and Mr Wise point to the definition in the Sports Council Recognition Policy 2017 and say that the First Defendant comes within it. Mr Wise also points to the Sport England Application Form for recognition as an NGB, which includes threshold criteria for consideration which he says the First Defendant exceeds by some margin:

"Criteria: The organisation must be able to evidence a current membership level (individual members) in excess of the following thresholds dependant on the jurisdiction:

- UK: 1,650
- Britain: 1,500

- England: 750
- Scotland: 500
- Wales: 250
- Northern Ireland: 150"

86. Mr Adams says that far from wanting to confuse the public about the Defendants' connection with the Claimant, it is in their interests to make themselves as distinct from the Claimant as possible. He said they have set up as a competing national governing body for gymnastics to offer an independent alternative to the Claimant, so that gymnasts and clubs now have a choice of which governing body to affiliate to. He says, "*So rather than 'pass ourselves off' as [the Claimant], we do not want any association with [the Claimant]*". I do not accept this evidence for reasons which I set out in my discussion of the issues.

87. Mr Adams evidence is that the Defendants have never had a member of the public approach them thinking that they were the Claimant, and they have never approached any of the Claimant's club or individual members asking them to come to them. I will come back to that.

IS THE FIRST DEFENDANT AN NGB?

88. I need to determine as a matter of fact whether the First Defendant is an NGB for the sport of Gymnastics in the UK. The Claimant, as I have set out, submits that it is not. The Defendants submit that it is, and that the Claimant's position is fundamentally flawed, as its definition of NGB is too narrow because (i) it assumes that in order for an entity to be an NGB it must be recognised by one of the Sports Councils; and (ii) it assumes that there can only be one NGB for the sport of gymnastics.

89. In fact, during the course of the trial Ms Allen accepted that there was a difference between an NGB and a recognised NGB, and that an NGB may or may not be recognised by one of the Sports Councils. She also accepted that governance of a sport is determined "*through the common consent of the sport itself*". The Defendants submit that if individuals and clubs taking part in gymnastics are willing and desirous of being governed by or affiliated to a private organisation in accordance with that organisation's rules then, by virtue of that desire and willingness, that private organisation is a governing body for the sport of gymnastics.
90. The difficulty with this submission is that until very recently, and perhaps prompted by this litigation, there were no rules governing membership of the First Defendant: nothing to tell members what they were getting for their money and what their rights and responsibilities were. Looking at the definition in the Sports Council Recognition Policy 2017, there is, in my judgment, no real evidence of governance of the sport of gymnastics by the First Defendant anywhere, let alone throughout the UK, and no real evidence that the First Defendant is either a custodian or guardian of the sport of gymnastics. I have gone into quite extensive detail about the level and type of governance and stewardship evidenced by the Claimant, as in my judgement it puts into sharp relief the lack of similar processes and procedures by the First Defendant. Neither it nor the Second Defendant have objects of association that one would expect to see in a governing body. There is no transparency in the governance structure, no strength and depth in the board of directors. There is no quality assurance, no external audit or oversight or endorsement in the proficiency awards or coaching certifications that it sells. There are no defined disciplinary procedures. There is no evidence that it seeks to develop or improve the sport or its safety. There are only two

employees, and Mr Wise, who is responsible for drafting policies for approval and implementation by the Board, admits he has no experience of doing so. The majority of the policies he has produced are of the type that are found in any organisation, particularly those working with children. The First Defendant has no connection or liaison or relationship with the Sports Councils, other NGBs or international gymnastics organisations. The First Defendant's talent pathway stops when, as Mr Adams states in evidence, gymnasts become "too good" for the First Defendant - when they then have to join the Claimant in order to compete at the top levels, including internationally. This is not conducive to a finding that the First Defendant is an NGB.

91. Mr Reed submits that a young organisation like the First Defendant, with limited funds and no access to public funding cannot be expected to have processes and procedures in place comparable to those of the Claimant, a long-standing monopoly NGB. I would not expect a newly fledged, unrecognised NGB to do so. However, for the reasons I have given, I am not satisfied that the First Defendant fulfils the functions even of a young, cash-poor NGB. Rather, I find that it is an organisation that sells memberships to individuals and clubs for the purposes of promoting participation in its own gymnastics competitions, on-selling proficiency and coaching awards, and providing a number of benefits to members including insurance. There is nothing wrong with that, but it is not, now, a National Governing Body. I am satisfied on the balance of probabilities that the Claimant is the only NGB for the sport of gymnastics in the UK, and the only recognised such NGB. I make no finding about whether the First Defendant may become one, or whether there is room for another NGB for the sport of gymnastics in the UK, apart from the Claimant, as it is not necessary for me to do so.

THE LAW

Trade Mark Infringement

92. Section 10 of the Act provides:

“(1) A person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.

(2) A person infringes a registered trade mark if he uses in the course of trade a sign where because –

(a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or

(b) the sign is similar to the trade mark and is used in relation to goods or services identical or similar to those for which the trade mark is registered,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.

(3) A person infringes a registered trade mark if he uses in the course of trade, in relation to goods or services, a sign which –

(a) is identical with or similar to the trade mark,

where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.”

Likelihood of Confusion/Average Consumer

93. Likelihood of confusion for the purposes of section 10(2) infringement is considered from the point of view of the average consumer of the

products concerned, comparing the marks as a whole. The principles applicable to the assessment of a likelihood of confusion are those approved by Kitchin LJ (with whom Black LJ and the President of the Queen's Bench Division agreed) in *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24, [2012] FSR 19:

“(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular 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 greater 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; and

(k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion."

94. Ms Jones for the Claimant at paragraph 26 of her skeleton argument submits that the average consumer for the services in Class 41 and Class 28 could be any one of the following: Children or adult athletes (or aspiring athletes) (including gymnastics); parents or guardians of the aforesaid; owners or operators of sports clubs (including gymnastics); sports coaches and trainers (including gymnastics); other National and Home Country NGBs; International Federations for Sport; the Sports Councils; sporting event organisers and venue operators; spectators at sporting events (including gymnastics).
95. Mr Reed for the Defendants makes no submissions about the average consumer in his skeleton argument and did not dispute Ms Jones' submissions orally. Accordingly, I accept them.
96. Kitchin LJ summarised the process that a court should undertake at paragraph 87 of *Specsavers*: "*In assessing the likelihood of confusion arising from the use of a sign the court must consider the matter from the perspective of the average consumer of the goods or services in question and must take into account all the circumstances of that use that are likely to operate in that average consumer's mind in considering the sign and the impression it is likely to make on him. The sign is not to be considered stripped of its context.*"

That requires the court to make a global assessment of all of the relevant factors in the case when assessing the likelihood of confusion.

97. The average consumer must, for the purposes of trade mark infringement pursuant to section 10(2) of the Act, be confused about the source or origin of the goods or services. However, there will also be a likelihood of confusion if he incorrectly assumes that there is some broader kind of economic connection between users of the marks. That likelihood of confusion must be genuine and properly substantiated and not hypothetical and remote.

Section 10(3) trade mark infringement - Link in the mind of the average consumer

98. The use of the sign complained of must give rise to a 'link' between the sign and the trade mark in the mind of the average consumer of the goods or services in question. The average consumer is the same as for the purposes of section 10(2) of the Act, save that there is no requirement for confusion in the mind of the average consumer for the purposes of section 10(3) of the Act.
99. There is no dispute between the parties in respect of the law, so I gratefully borrow the summary contained in Ms Jones' skeleton argument:

"The relevant case law derives from the following rulings of the CJEU: *General Motors* [1999] ETMR 950; *Intel* [2009] ETMR 13; *L'Oréal v Bellure* [2009] ETMR 55 and *Marks & Spencer v Interflora* [2012] ETMR 1. The applicable principles are as follows:

- i) Reputation must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered, and it must be known by a significant part of the relevant public (*General Motors* at §§24 & 26);

- ii) 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 (Intel at § 63);
- iii) Whether such link exists must be assessed globally taking into account all of the relevant factors, including the similarity of the marks and between the goods/services and the strength of the earlier mark's reputation and distinctiveness (Intel at §42);
- iv) Detriment to distinctive character occurs where 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 the future (Intel at §§76-77);
- v) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact on the earlier mark (L'Oréal v Bellure at §40).
- vi) 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 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 with 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 & Spencer v Interflora at §74).
- vii) In The Tea Board v OHIM T-624/13 the General Court held as follows:

“Moreover, according to case-law, it is possible, particularly in the case of an opposition based on a mark with an exceptionally strong reputation, that the probability of a future, non-hypothetical risk of unfair advantage being taken of that mark by the mark applied for is so obvious that the opposing party does not need to put forward and prove any other fact to that end...”

Risk of harm to the distinctive character or repute of the mark

100. The claimant must satisfy the court of the existence of one of three types of injury. Only two are relied upon in this case: detriment to the distinctive character of the mark (“**dilution**”) and detriment to the repute of the mark (“**tarnishment**”). There need not be actual injury or damage. Serious risk of damage occurring in the future is sufficient (per *Intel* paragraph 72).

101. CJEU in Case C-487/07 *L’Oreal v Bellure NV* [2009] ETMR 55, [2009] E.C.R I-5185 provided the following description at paragraphs 39 and 40:

“39. As regards detriment to the distinctive character of the mark, also referred to as ‘dilution’ ‘whittling away’ or ‘blurring’, such detriment is caused when that mark’s ability to identify the goods or services for which it is registered is weakened, since use of an identical or similar sign by a third party leads to dispersion of the identity and hold upon the public mind of the earlier mark. That is particularly the case when the mark, which at one time aroused immediate association with the goods or services for which it is registered, is no longer capable of doing so (see, to that effect, *Intel*, paragraph 29).

“40. As regards detriment to the repute of the mark, also referred to as ‘tarnishment’ or ‘degradation’, such detriment is caused when the good or services for which the identical or similar sign is used by the third party may be perceived by the public in such a way that the trade mark’s power of attraction is reduced. The likelihood of such detriment may arise in particular from the fact that the goods or services offered by the

third party possess a characteristic or a quality which is liable to have a negative impact on the image of the mark.”

102. In respect of dilution, per *Intel* at paragraphs 77 and 78, the Claimant must show: “a change in the economic behaviour of the of the average consumer of the goods or services for which the earlier mark was registered consequent on the use of the later mark or a serious likelihood that such a change will occur in the future” although it is “immaterial whether or not the proprietor of the later mark draws real commercial benefit from the distinctive character of the earlier mark”.
103. This need not be an actual or present effect on the behaviour of consumers. A risk of such an effect, which may be deduced from all the circumstances of the case, is sufficient but any such deduction must be founded on “an analysis of the probabilities and by taking account of the normal practice in the relevant commercial sector as well as all the other circumstances of the case” (per Case C-383/12 *Environmental Manufacturing LLP v Office for the Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) EU:C:2013:741 at paragraphs 42 and 43, as followed by Kitchen LJ in *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41)

Passing Off

104. The law in relation to passing off is well established. For the claim to succeed in passing off the Claimants must satisfy the court of the “classic trinity” of elements identified by the Court of Appeal in the *Jif Lemon* case (*Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341) at p. 406 per Lord Oliver of Aylmerton and p. 417 per Lord Jauncey of Tulichettle. These are that:
- i) the Claimants’ goods or services have acquired goodwill in the market and are known by some distinguishing name, mark or other indication;

- ii) there is a misrepresentation by the Defendant, whether or not intentional, which has led, or is likely to lead, the public to believe that goods or services offered by the Defendant are goods or services of the Claimants, or connected with them; and
- iii) the Claimants have suffered, or are likely to suffer, damage as a result of the erroneous belief engendered by the Defendant's misrepresentation.

DISCUSSION AND DETERMINATION BY ISSUE

Issue (i) - Section 10(2)(b) Trade Mark Infringement

Issue (i)(a) - Have the Defendants used the Word Sign in the course of trade in relation to the UKG Services?

105. I was taken to a number of examples of the use by the Defendants of the Word Sign on its Twitter page, Facebook page, website, insurance certificates and proficiency awards. It also appears in the domain name of the website. Mr Reed submits that I should be cautious about accepting that each shows the use of the Word Sign and satisfy myself that they are being used to offer the UKG Services, but it seems clear to me that there are multiple examples of the use of the Word Sign in connection with an offer of the UKG Services, on Ds' Website, on proficiency and coaching certificates, and in the First Defendant's policy documents which are available for download on Ds' Website. I am satisfied that Mr Wise's evidence to the contrary is incorrect. I so find.

Issue (i)(b) - Are the Signs similar to the Trade Marks?

106. I remind myself that the Trade Marks are a series of two marks registered under one application. The Court of Appeal in *Comic Enterprises Ltd v Twentieth Century Fox Film Corp* [2016] ETMR 39 held

at paragraph 66 that these must be viewed as a bundle of different trade mark rights, and the assessment of whether the signs are similar to the earlier mark must be made in relation to each of the series. It is common ground that in order to determine similarity, the Signs must be compared on the basis of a global appreciation of the visual, aural and conceptual similarity of the Trade Marks and the Sign in question, and must be based on the overall impression given by the Trade Marks and the Signs, bearing in mind, in particular, the distinctiveness and dominant components.

107. I borrow this comparison table from Miss Jones’ skeleton argument:

The Trade Marks	The Signs
	
	
	
	<p data-bbox="683 1603 927 1641">UK Gymnastics</p>

Comparison of services

108. The Claimant submits that the UKG Services are identical or highly similar to the following services in Class 41: Education, providing of training, Entertainment, Sporting activities. I find that they are

identical. It further submits that the UKG Services are similar to Gymnastics and Sporting Articles in Class 28 to a medium degree. I accept this submission - to the extent that the First Defendant did sell Gymnastics and Sporting Articles branded with the Signs, this would be identical, but I have no evidence of that before me.

Comparison of marks – Claimant’s submissions

109. As far as a comparison of the Trade Marks and Signs are concerned, the Claimant asks me to first compare the Trade Marks to the Word Sign. The Claimant submits that the stylisation of the Claimant’s earlier mark is in relation to font, positioning and (for one of the marks in each series) colour, and that the stylisation is fairly minimal in the sense that the words contained within the mark remain perfectly legible. It submits that it is obvious that the mark is to be read, spoken and viewed as the word ‘British’ preceding the word ‘Gymnastics’. The Claimant submits that the dominant aspect of the earlier mark is its wording which, although simple, is acknowledged by the Defendants to have an enhanced distinctiveness.
110. The Claimant acknowledges a ‘small difference’ in visual and aural similarity, but submits that there is a high degree of conceptual similarity between ‘British’ and ‘UK’ as these are very similar geographical areas in relation to which the average consumer may even confuse or consider them to refer to the same area. The Claimant therefore submits that there is a high degree of similarity between the earlier mark and the Word Sign, particularly taking into account imperfect recollection and the enhanced distinctive character of the earlier mark. The Claimant submits that the addition of the colours blue and red to one of the earlier marks in the series does not affect this, as there nevertheless remains a high degree of similarity between that earlier mark and the Word Sign, given that the dominant

elements remain the same and appear in the same sequence. Miss Jones argues that, if anything, the use of colour brings the conceptual similarity even closer given that red and blue are colours used in the Union Jack, the flag of the UK.

111. As to the logo form of the Signs, the Claimant makes the following additional submissions to those set out above:
- i) The logos both use red and blue for the words which remain clearly legible and which remain the dominant aspect of the signs. The colours and in particular the shades of red and blue are identical or highly similar to those used in the Trade Marks;
 - ii) The inclusion within the logos of imagery of the Union Jack renders the Defendants' logos even more conceptually similar to the earlier marks in the series (which include marks coloured in red and blue);
 - iii) The Claimant's inclusion in one of its series of marks of the words 'more than a sport' is ancillary to the dominant aspect of those marks being the words 'British Gymnastics' and will not affect the overall impression and similarity between the logos and the Trade Marks;
 - iv) The Defendants' second logo places 'UK' above 'Gymnastics' and both of them are clearly to be read, spoken and viewed as UK preceding the word gymnastics.

Comparison of marks – Defendants' submissions

112. The Defendants rely on a statement of the Opposition Division of OHIM in *Warsteiner Brauerei Haus GmbH & Co. KG's Application, v Opposition of Brauerei Beck GmbH & Co.* [1999] ETMR 225: "in comparing signs, it is of relevance that experience has shown that the public

attributes greater importance to the beginning of a word in identifying a sign than it does to the following components of the word. Furthermore, in aural terms, vowels always have a more striking effect than consonants..."

113. The Defendants submit that the Trade Marks and the Signs are not sufficiently similar for the following reasons:
- i) the visual similarity is limited to the word 'Gymnastics' and the use of the colours red and blue;
 - ii) The dominant elements of the Defendants' Signs are the Union Jack abstracted as a smear of paint from a paint brush and, in particular, the large block font letters 'U' and 'K' in red;
 - iii) The Claimant's marks are in equal font size, use thin rounded letters and have no accompanying image;
 - iv) The aural similarity is limited to the component 'Gymnastics'. The beginning of the Trade Marks and the Signs, which according to *Warsteiner Brauerei* is of greater importance, are not at all similar: the sound 'B' or 'BR' for the Trade Marks and the "more striking" 'U' for the Signs. The end of the first component of the Trade Marks ends in the soft and elongated 'ISH' whereas the end of the first component of the Defendants' Signs ends in the hard and clipped 'K';
 - v) The only conceptual similarity is arguably in the use of the word 'gymnastics' with a geographical component, however any such conceptual similarity is not substantial and does not play a substantial part.
114. In addition, the Defendants submit that when comparing the Word Sign to the Trade Marks, it does not look similar because 'UK' is so short and is aurally different.

Discussion and determination

115. I agree with the Claimant that the stylisation of the Trade Marks is fairly minimal, and they remain perfectly legible in a fairly simple font. In my judgment the dominant aspect of the Trade Marks is the wording and it is obvious that it is to be read, spoken and viewed as 'British Gymnastics'. I also accept that where the phrase 'more than a sport' appears this does not detract from the dominance of 'British Gymnastics' and is negligible, because it is written in much smaller font. I remind myself that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, and I consider that the overall impression is that 'British Gymnastics' is by far the dominant component.
116. In relation to a comparison of the Word Sign and the Trade Marks, the real difference is between the use of 'UK' rather than 'British'. I accept the Defendants' submission that those are visually and aurally very different giving the whole "UK Gymnastics' and 'British Gymnastics' a low level of similarity. However, the conceptual similarity is, in my judgment, strong and I consider that does play a substantial part. Ms Jones in closing submissions argued that the conceptual similarity renders the Trade Marks similar to the Word Sign in two ways: (i) because the UK and British are references to similar geographical areas, and (ii) because of the connotation of some sort of formal or official status to the services being provided that those words 'UK' and 'British' give. I accept that submission. I agree with the Claimant that the 'UK' and 'British' are confusingly similar geographical concepts to many people. I remind myself that the Chair of the Claimant was so confused, and that one type of average consumer in this case is children who are more likely to have difficulty distinguishing between them conceptually.

117. In my judgment, assessed globally, there is a medium degree of similarity between the Trade Marks and the Word Sign. In my judgment the use of colour in one of the marks in each series of the Trade Marks does not reduce that similarity in any significant way. I agree with the Claimant that the use of red and blue increases the sense of 'Britishness' about the Trade Marks which I consider further bolsters the conceptual similarity between 'British Gymnastics' in the Trade Marks and 'UK Gymnastics' in the Word Sign.
118. Turning to a visual comparison of the Signs excluding the Word Sign with the Trade Marks, and in both forms I am satisfied that it is obvious that the wording of the Signs is to be read, spoken and viewed so that the 'UK' precedes 'Gymnastics'. I consider both the wording 'UK Gymnastics' and the flag element in each of the Signs to be a distinctive element in each, but I do not consider either 'UK' or 'UK Gymnastics' or the flag element in either Sign to be dominant. The flag element is more immediately recognisable as the Union Jack in the Sign where 'UK' appears above 'Gymnastics', but in both cases I consider that the overall impression on the average consumer is that of each Sign as a whole which is not dominated by one or more of its components.
119. I do not accept the Defendant's submissions that the 'UK' is the dominant element in either Sign for the following reasons: where the 'UK' precedes "Gymnastics' on the same line, I consider the red colour of the font serves to distinguish the 'UK' from the blue 'Gymnastics', but does not dominate it or the Sign as a whole. Where the 'UK' appears above 'Gymnastics' it is certainly in a larger block font than 'Gymnastics' and in red, but it appears to have been sized so as to fit to the width of the longer 'Gymnastics' in blue below. I consider that this difference in size together with the red colour again distinguishes 'UK' from 'Gymnastics', and to a greater degree than in

the other Sign, but I consider that the average consumer will perceive and recall both words together *en bloc*, with the flag element above, as the 'UK' alone means little, and is unmemorable in its plain block font, without 'Gymnastics'.

120. I consider that the red and blue colours used in the Signs and the colour mark in the series of Trade Marks would be called to mind by the average consumer as identical, but the thin, equally sized lower case font of the Trade Marks is visually very different to the thick block capital letters of the Signs (which in one, uses different font sizes for the different words). Overall, visually I do not consider that the Signs and the Trade Marks are very similar, although the Signs are more similar to the coloured marks in the series of each Trade Mark.

121. Aurally, the comparison is the same as for the Word Sign, i.e. not very similar. Conceptually, I do not consider that the Union Jack elements materially increase the conceptual similarity with the Trade Marks, which I have already found to be strong.

122. **Taking a global view, then, I find that the Word Sign has a medium degree of similarity to the Trade Marks and the Signs (other than the Word Sign) have a low degree of similarity to the Trade Marks, although the similarity is slightly greater in the coloured version in the series of each Trade Mark.**

Issue (i)(c) - Does the use of the Signs in the course of trade in relation to the UKG Services result in a likelihood of confusion on the part of the public?

123. The Claimant submits that a global assessment of all relevant factors in this case renders a likelihood of confusion inevitable:

- i) Identity of the services and/or similarity between the services and goods for which the Trade Marks are registered and the UKG Services, as I have found;
- ii) The nature of each of the Trade Marks and Signs as indicating a national and/or official status and reach of the services provided, as I have found;
- iii) The enhanced distinctiveness of the Trade Marks as a result of their use by the Claimant in relation to its function as the NGB for the UK, which the Defendants have accepted;
- iv) The use of identical colours and/or the inclusion of parts of the Union Jack will result in the average consumer believing that the UKG Services have the same origin as the goods and services provided under the Trade Marks by the Claimant (direct confusion), or at the very least there is some sort of economic link between them (indirect confusion). In relation to this submission I am not entirely with the Claimant.

124. Ms Jones submits for the Claimant that a relevant factor in this case is that the Claimant has effectively had a monopoly as the sole NGB for gymnastics in the UK for many years, and it is therefore possible that little attention will be paid when purchasing or using the relevant services on account of an assumption by the average consumer that 'there is only one body'. I accept that as a relevant factor. In addition, I accept the Claimant's submission that the degree of attention paid may vary amongst different types of average consumer. In particular, children and spectators at sporting events are likely to pay minimal attention, compared to coaches, owners of sports clubs, and other NGBs or international federations who may pay a high degree of attention.

125. The Claimant relies on an explanation of indirect and direct confusion at paragraphs 16 and 17 of the Decision of Iain Purvis QC sitting as an Appointed Person in the case of *L.A. Sugar Limited v Back Beat Inc* O-375-10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: *“The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark”*.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

126. Ms Jones suggests that this case would fit not in category (a) in paragraph 17, but submits that, although slightly different, it would fit into the analogy in category (b), as the average consumer will see 'UK' as a brand extension or additional brand name. I do not agree that it fits in that category, which would be more apt if the sign in dispute was 'British Gymnastics UK'. Ms Jones also submits that this case could also fit into category (c), and I think that is a more tenable argument, but I have no evidence that the average consumer, or any of them, would think that the change of element from 'British Gymnastics' to 'UK Gymnastics' would be a logical and consistent brand extension, and in the context of the Claimant's long and distinctive use of the brand, it seems to me to be somewhat hypothetical and speculative to attribute those thoughts to any of the average consumers with which I am concerned.
127. The Claimant submits that although there is some evidence of actual confusion, it is not necessary for the court to find actual confusion in order for the infringement to be made out. I accept that submission which is correct as a matter of law.

Defendants' submissions

128. The Defendants submit that despite Ms Allen referencing confusion like a mantra throughout her evidence, even in response to answers to questions not involving confusion, and despite the fact that the First Defendant has been trading under the sign, in some form, since about 2009, the Claimant has failed to identify any substantive examples of actual confusion by the public. I remind myself that the instances of actual confusion relied upon by the Claimant in closing submissions are: the coaches phoning the customer service line (to which I have found I can give little weight); the new Chair of the Claimant going to the wrong website (which I have found is not

evidence of actual confusion), and the Serco employee at Lilleshall mistakenly accepting the Defendants' booking (which I have found appears to be an instance of actual confusion).

129. Mr Reed asks me to accept Mr Adams' evidence that the Defendants are not aware of any instance where a consumer has been confused into thinking that the First or Second Defendant is the Claimant or that there is an economic connection between them. I have considered this point afresh following my reconsideration of Mr Adams' credibility. Although Mr Wise in oral evidence said that he agreed with Mr Adams' witness evidence, it became apparent in cross-examination that there were areas of that evidence which he did not agree with. Although Mr Wise was not specifically asked to address this point, on balance, I will accept it. However, I note that confusion by consumers who are paying a low degree of attention, such as spectators at sporting events, may never be discovered or reported, as is the case with confusion which continues.
130. The Defendants submit that, per *Stitching BDO v BDO Unibank, Inc* [2013] EWHC 418, the absence of evidence of confusion becomes more significant the longer the period of parallel trade without such evidence emerges. In this case, however, I have found that there was no substantive trade of the First Defendant until financial year 2012/2013, not 2009, and the Second Defendant was not incorporated until much later. I accept the Claimant's submission that the disparity in the scale of the Defendants' operations compared those of the Claimant mean that it is very possible that instances of actual confusion have been masked or not brought to the Claimant's attention.
131. Further, the Defendants submit that this is not a case where confusion can readily be inferred, because of the distinct lack of global similarity

between the Trade Marks and the Signs, but I have found that there is global similarity to a medium degree between the Trade Marks and the Word Sign.

Discussion and determination

132. I have found identity or a high degree of similarity in the UKG Services to the services identified in Class 41 and Class 28 respectively, and that the Word Sign has a medium degree of similarity to the Trade Marks, but the Signs have a low degree of similarity. I remind myself (per *Specsavers*) that a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods or services; that there is a greater likelihood of confusion where the earlier mark has a highly distinctive character as is accepted by the Defendant in this case; and that the average consumer rarely makes direct comparisons and must rely upon the imperfect picture of the marks that he has kept in his mind.

133. I also bear in mind the warnings in *Specsavers* at paragraph 85(i), (j) and (k) that mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient, and that 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; I must be satisfied that such an association causes the public wrongly to believe that the Claimant's Services and the UKG Services come from the same or economically linked undertakings to find a likelihood of confusion. **Taking all of the circumstances into account, and on balance, I am satisfied that there is a likelihood of confusion such that those who are paying a lower degree of attention, including child gymnasts, their parents, and spectators at sporting events who see the Word Sign and the Signs will mistakenly take them for that of the only NGB for the sport of**

gymnastics in the UK, i.e. the Claimant, because ‘there is only one body’.

Conclusion on issue (i)

134. The use of the Signs infringes the Trade Marks pursuant to section 10(2) of the Act.

Issue (ii) – Section 10(3) Trade Mark Infringement

Issue (ii)(a) - Is there a link between the Signs and the Trade Marks in the mind of the relevant public?

135. If I am wrong about likelihood of confusion, I am nonetheless satisfied that the degree of similarity between the Trade Marks and the Signs, plus the enhanced distinctiveness of the Trade Marks, and the reputation that the Defendants have admitted that the Trade Marks each enjoy in the UK, is sufficient to conclude that the relevant section of the public will make a connection or establish a link to the Trade Marks in their mind when they see the Signs.

Issue (ii)(b) - Is the use of the Signs by the Defendants detrimental to the distinctive character and/or repute of the Trade Marks and/or does the use create a serious risk of being so detrimental?

Submissions

136. The Claimant submits that there is a clear detriment to repute or a serious risk of the same because, as the sole recognised NGB for the sport of gymnastics in the UK, the Claimant adheres to and adopts the most stringent forms of regulation and governance. The Defendants do not. The Claimant submits that it is vital for an

organisation such as the Claimant that both its role as governor and regulator and its reputation in relation to the same are not interfered with or tarnished and it relies on the case of *British Legion v British Legion Club (Street) Limited* (1930) 148 RPC 555 at 564. The Defendant's use of the Signs in relation to the UKG Services which the Claimant submits: (i) are not those of an NGB; and (ii) which are not subject to the same scrutiny as the Claimant's Services, do not have the same degree of regulation and/or do not adhere to the same high standards as the Claimant's, presents a clear case of detriment to repute or of a very serious risk of the same.

137. The Defendants submit that detriment must be provable by real, as opposed to theoretical evidence and cannot merely be assumed from the fact that the mark has a substantial reputation (*Mastercard International v Hitachi Credit* [2005] ETMR 10), and in this case the Claimant has failed to produce evidence of actual detriment and therefore discharge its evidential burden.
138. In any event, the Defendants submit, in circumstances where the use of the Signs does not cause confusion as to the origin of the goods or services, there is no basis to conclude that the Defendants' use detrimentally affects the distinctive character and the reputation of the Trade Marks. Further, the Defendants submit that there is no basis to conclude that there is detriment to reputation, because there is no substantive evidence that the Defendants' use of the Signs would amount to an injurious association with the Claimants.

Discussion and Determination

139. **I am with the Claimant for the reasons it gives.** The Claimant's position as the sole, recognised NGB for gymnastics means that it is in a position of considerable responsibility in relation to the sport and the public. Where the use of the Signs gives rise to a link between the

UKG Services and the Claimant in the mind of the public, the public may legitimately expect that the UKG Services are provided by the First Defendant to similar a similar quality, safety and scrutiny as comparable services offered by the Claimant. My findings that they are not, means there is a serious risk that use of the Signs would be detrimental to the distinctive character and reputation of the Trade Marks.

Issue (ii)(c) and (d) - (c) Does the use of the Signs by the Defendants take unfair advantage of the distinctive character or repute of the Trade Marks or does it create a serious risk of doing so? (d) Does the use of the Signs affect or create a serious risk of affecting or changing the economic behaviour of the average consumer?

Submissions

140. The Claimants submit that this is a clear case of free-riding. The status of the Claimant as the recognised NGB for the UK, the strength of its reputation as such, and the link that will be established between the Trade Marks and the Signs will inevitably result in the Signs attracting customers to the UKG Services. Even if the consumer does not believe that the First Defendant is the same as, or economically linked to the Claimant, they will nevertheless be attracted to the UKG Services on the back of the Claimant's reputation, as they will no doubt expect a service of the same or similar nature in terms of quality, regulation and compliance with relevant codes or standards in the industry. Alternatively, they will expect that the First Defendant has the essential characteristics of a national body as defined by the Claimant's characteristics. This is likely to benefit the First Defendant economically, without any financial compensation being paid to the Claimant.

141. The Defendants submit that in determining whether the use of a sign takes unfair advantage of a trade mark, the intention of the user of the sign is an important factor. If there is no plausible reason for the user of a sign to use it other than its apparent connection to a trade mark, it may be reasonable to infer that the user of the sign intends to take a 'free-ride'. However, if the sign and the mark are descriptive and suggestive, it should not be inferred that the user of the sign intends to take a 'free-ride'.
142. The Defendants submit that not only are the Signs descriptive or suggestive of the services they provide ('UK', 'Gymnastics'), but Mr Adams' evidence is that their intention is, in fact, to distance themselves from the Claimant as much as possible. In the circumstances, there is no basis for the Court to conclude that the use of the Signs takes unfair advantage of the Claimant. It is the Defendant's position that use of the Signs does not affect or create a serious risk of affecting or changing the economic behaviour of the average consumer.

Determination

143. Mr Adams' evidence that the Defendants want to distance themselves from the Claimant as much as possible is entirely undermined, in my judgment, by the evidence before the Court of the First Defendant's proficiency badges which are a near copy of the Claimant's; the First Defendant's use of a 'swirl' motif on Ds' Website and documents which is very similar to that used by the Claimant on its website and documents; the inclusion on Ds' Website of BBC footage from the Claimant's events; the inclusion of the Claimant's member clubs on the 'Find a Club' function on Ds' Website and the identical wording found on both the Ds' Website and the Claimant's website, in

circumstances in which the Defendants do not accuse the Claimant of copying.

144. **The weight of the evidence leads me to conclude that it is more likely than not that the use of the Signs by the Defendants is intended to, and does, take unfair advantage of the distinctive character and repute of the Trade Marks, and that the reason is to drive further business to the First Defendant for its economic advantage, thus changing the economic behaviour of the average consumer.**

Issue (ii)(e) - Is the use of the Signs by the Defendants without due cause?

Submissions

145. The Claimant denies that the Defendants' use of the Signs is with due cause. It submits that they commenced use of the Signs long after the Claimant's use of the Trade Marks, and after Mr Adams had, for many years, been a member of the Claimant and so aware of them. The Claimant further denies that the First Defendant is an NGB for the UK and submits that it therefore has no justification for using the Signs including the reference to 'UK' and/or the Union Jack.
146. The Defendants say that their use of the Signs is not without due cause. They submit that the Signs are descriptive or suggestive of the UKG Services they provide, and the Claimant is seeking to assert a right to prevent any other person from using the word "gymnastics" in combination with a British based geographic component. The UK is the area in which the Defendants operate or intend to operate and 'gymnastics' is the service area in which they operate. Again, Mr Adams' evidence is that their intention is to distance themselves from the Claimant.

Determination

147. For the reasons I have given in the section above, I do not accept Mr Adams' evidence that the Defendants wished to distance themselves from the Claimant. My finding about the Defendants intentions in relation to Issue (ii)(c) and (d) means I am satisfied that the use of the Signs is without due cause.

Conclusion on Issue (ii)

148. **The use of the Signs infringes the Trade Marks pursuant to section 10(3) of the Act.**

Issue (iii) - Passing off

Issue (iii)(a) and (b) - (a) Whether the Defendants' use of the Signs and/or UKG Get-Up in relation to the UKG Services has led or is likely to lead a substantial number of members of the relevant public or trade in the UK to believe, contrary to fact, that:

- i) *the Defendants or the UKG Services are connected with the Claimant or there is otherwise some commercial arrangement between them and the Claimant; and/or*
- ii) *that the Defendants and/or the UKG Services are connected with the Claimant in such a way as to cause damage to its goodwill; and/or*
- iii) *that the Defendants and/or UKG Services have the status of a National Governing Body conferred upon them; and*

(b) Whether the Claimant has suffered or is likely to suffer damage?

149. I will deal with this very shortly. It is beyond dispute that the Defendants have used the Signs and UKG Get-up in conjunction with statements, on Ds' Website, representing that it is an NGB for the sport of gymnastics in the UK, as the screenshots in the trial bundle evidence. I have found that it is not and so this is a misrepresentation. I have found, in my discussion of section 10(2) and 10(3) infringement of the Trade Marks, that the Defendants' use of the Signs is likely to

lead the relevant public to believe there is a link or connection with the Claimant, and that the Claimant is likely to suffer damage to its goodwill as a result.

150. **Accordingly, the Claimant succeeds in passing-off.**

SUMMARY

151. **The Claimant succeeds in the entirety of its claim.**

Annex 1

The Claimant's Proficiency Award Level 2



The Defendants' Proficiency Badge Scheme



<p>The Claimant's 'swirls' within its Get-Up</p> 	<p>The Defendant's 'swirls' within its Get-Up</p> 
	