

O-589-18

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION No. 3231605

BY MINDSCREEN LIMITED

TO REGISTER THE TRADE MARK

CHILD INSIGHTS

IN CLASSES 16, 41 & 44

AND

IN THE MATTER OF OPPOSITION

THERE TO UNDER No. 410136 BY

THE INSIGHTS GROUP LIMITED

BACKGROUND

1) On 17 May 2017, Mindscreen Limited (hereinafter the applicant) applied to register the trade mark “Child Insights” in respect of the following goods and services:

Class 16: Instructional manuals for teaching purposes; Printed teaching materials; Printed teaching activity guides; Instructional and teaching material (except apparatus); Teaching materials [except apparatus]; Instructional and teaching materials; Teaching manuals.

Class 41: Personal development courses; Personal development training; Provision of training courses in personal development; Conducting workshops and seminars in self awareness; Conducting workshops and seminars in personal awareness; Provision of courses of instruction in self awareness; Education services relating to the development of childrens' mental faculties; Coaching [training]; ;Life coaching (training); Personal coaching [training]; Training or education services in the field of life coaching; Educational services in the nature of coaching; Training for parents in parenting skills; Provision of skill assessment courses; Educational assessment services; Teaching assessments for counteracting learning difficulties; Publication of educational teaching materials; Teaching services for communication skills; Education, teaching and training; Educational and teaching services; Providing online courses of instruction.

Class 44: Psychological assessment services; Preparing psychological profiles; Psychological tests.

2) The application was examined and accepted, and subsequently published for opposition purposes on 26 May 2017 in Trade Marks Journal No.2017/021.

3) On 25 August 2017 The Insights Group Limited (hereinafter the opponent) filed a notice of opposition. The opponent is the proprietor of the following trade marks:

Mark	Number	Dates of filing and registration	Class	Specification relied upon
Insights	EU 1398478	25.11.99 24.01.01	41	Arranging training courses, training events and seminars for personnel assessment, consultancy and development, career consultancy, conflict and stress

				management, psychological type theory, psychometric testing, sales training, strategic management.
Insights	EU 7120661	01.08.08 05.01.12	16	Printed matter; periodical publications; magazines; books; notepads; all the aforementioned in the field of people (but not personal relationship) and organisational development; folders; catalogues; calendars; diaries; booklets; cards; stationary; office requisites; pens; pencils; erasers; pencil sharpeners; pencil cases; rulers; boxes for pens; book markers; drawing materials; instructional and teaching materials.
			35	Psychometric testing for the selection, professional development and advising on staff or personnel; testing by psychological type theory for the selection, professional development and advising on staff or personnel.
			41	Organisation and arranging of seminars, workshops, training sessions, conferences and symposiums, congresses and colloquiums; educational information; educational services; publication of books and texts; all of the aforementioned in the field of people (but not personal relationship) and organisational development; arranging training courses; training and seminars for personnel and business assessment, consultancy and development; presentation skills training; team building training; career consultancy; training service in relation to conflict and stress management; sales training.
 Insights	EU 7135148	05.08.08 20.12.11	16	Printed matter; periodical publications; magazines; books; notepads; all the aforementioned in the field of people (but not personal relationship) and organisational development; folders; catalogues; calendars; diaries; booklets; cards; stationery; office requisites; pens; pencils; erasers; pencil sharpeners;

				pencil cases; rulers; boxes for pens; book markers; drawing materials; instructional and teaching materials.
			35	Psychometric testing for the selection, professional development and advising on staff or personnel; testing by psychological type theory for the selection, professional development and advising on staff or personnel; strategic business management.
			41	Organisation and arranging of seminars, workshops, training sessions, conferences and symposiums, congresses and colloquiums; educational information; educational services; publication of books and texts; all of the aforementioned in the field of people (but not personal relationship) and organisational development; arranging training courses; training and seminars for personnel and business assessment, consultancy and development; presentation skills training; team building training; career consultancy; training service in relation to conflict and stress management; sales training.

4) The grounds of opposition are, in summary:

- a) The opponent contends that the mark applied for and its marks are similar and that all the goods and services applied for are identical and/or similar. As such it contends that the application offends against Section 5(2)(b) of the Act.
- b) The opponent contends that it has a reputation under its marks in respect of, very broadly speaking, training and psychometric testing and as such use of the mark in suit upon the goods and services applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier marks. The opponent has invested in creating its reputation which the applicant is attempting to free-ride upon. Use of the mark in suit could tarnish the earlier mark, as well as dilute its capacity to distinguish the opponent's goods and services. The mark in suit offends against section 5(3) of the Act.

c) The opponent has used the sign “Insights” since 1996 in respect of, very broadly speaking, training and psychometric testing in the UK and has acquired goodwill and reputation such that use of the mark in suit upon the goods and services applied for would lead to misrepresentation and offend against section 5(4)(a) of the Act.

5) On 24 October 2017 the applicant filed a counterstatement, subsequently amended, which basically denied all the grounds pleaded. The applicant accepts that there is a low degree of similarity between the marks of the two parties but denies that the goods and services are similar. The applicant does not put the opponent to strict proof of use.

6) Both parties filed evidence and both seek an award of costs in their favour. Neither side wished to be heard but both provided written submissions. I shall refer to the evidence and submissions as and when necessary in my decision.

DECISION

7) The first ground of opposition is under section 5(2)(b) which reads:

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

(a)

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

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

8) An “earlier trade mark” is defined in section 6, the relevant part of which states:

"6.-(1) In this Act an "earlier trade mark" means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks."

9) The opponent is relying upon its trade marks listed in paragraph 3 above which are clearly earlier filed trade marks. The applicant did not put the opponent to Proof of Use (pou).

10) When considering the issue under section 5(2)(b) I take into account the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are

negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

11) I shall first consider the opponent's mark EU 7120661 against the mark in suit as I believe this provides the opponent with its strongest case.

The average consumer and the nature of the purchasing process

12) As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods/services. I must then determine the manner in which these goods/services are likely to be selected by the average consumer in the course of trade.

13) In its evidence the applicant describes its goods and services as providing "mums, dads, carers and children with affordable simple to use online tools". It goes onto contrast its goods and services with those of the opponent when it states at paragraph 4(a) at page 6:

"The goods and services registered by the opponent in classes 16, 35 and 41, clearly describe goods or services provided to businesses for organisational development and professional development of adult staff, but not personal relationship. In contrast, the goods or services, applied for by the applicant describe personal development, educational and teaching goods or services, supporting parenting skills and children's personal awareness and development."

14) Whilst this may describe the actual consumers for the goods and services at the present, it does not consider the potential consumers for the goods and services for which the opponent's mark is registered, which are unlimited. There is no limitation upon the opponent's goods and services which states that it can only deal with businesses and not parents / children. I accept some of the services described would apply only to businesses, but other services would apply equally to individuals. I therefore believe that the average consumer for the goods and services of the two parties would be the general UK public, including businesses. I do not believe that such services as those in classes 35,41 & 44 would be purchased on a whim, instead I would expect **the average consumer for these types of goods and services to pay a medium to high degree of attention to the selection of such goods and services. I accept that for some of the class 16 goods such as pencils the level of attention paid will be much lower.**

Comparison of goods and services

15) When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*, the CJEU stated at paragraph 23 of its judgement:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

16) Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

17) In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. *Treat* was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam,

or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question”.

18) In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) OHIM* case T-133/05, the General Court (“GC”) stated:

“29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T110/01 *Vedial V OHIM France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T- 10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

19) I also take into account the comments of Jacob J. in *Avnet Incorporated v. Isoact Ltd* [1998] FSR 16 where he said:

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

20) Neither party has provided much in the way of comments regarding the similarity or otherwise of the goods and services in each parties’ specification. The applicant merely comments:

“The goods or services registered by the opponent in classes 16, 35 and 41, clearly describe goods or services provided to businesses for organisational development and professional development of adult staff, but not personal relationship. In contrast, the goods or services

applied for by the applicant describe personal development, educational and teaching goods or services, supporting parenting skills and children's personal awareness and development.”

21) I will take these views into account when comparing each aspect of the specifications of the two parties. The specifications of both sides are reproduced below for ease of reference:

Opponent's goods and services	Applicant's goods and services
<p>Class 16: Printed matter; periodical publications; magazines; books; notepads; all the aforementioned in the field of people (but not personal relationship) and organisational development; folders; catalogues; calendars; diaries; booklets; cards; stationary; office requisites; pens; pencils; erasers; pencil sharpeners; pencil cases; rulers; boxes for pens; book markers; drawing materials; instructional and teaching materials.</p>	<p>Class 16: Instructional manuals for teaching purposes; Printed teaching materials; Printed teaching activity guides; Instructional and teaching material (except apparatus); Teaching materials [except apparatus]; Instructional and teaching materials; Teaching manuals.</p>
<p>Class 41 Organisation and arranging of seminars, workshops, training sessions, conferences and symposiums, congresses and colloquiums; educational information; educational services; publication of books and texts; all of the aforementioned in the field of people (but not personal relationship) and organisational development; arranging training courses; training and seminars for personnel and business assessment, consultancy</p>	<p>Class 41: Personal development courses; Personal development training; Provision of training courses in personal development; Conducting workshops and seminars in self awareness; Conducting workshops and seminars in personal awareness; Provision of courses of instruction in self awareness; Education services relating to the development of childrens' mental faculties; Coaching [training]; ;Life coaching (training); Personal coaching [training]; Training or education services in the field of life coaching; Educational services in the nature of coaching;</p>

<p>and development; presentation skills training; team building training; career consultancy; training service in relation to conflict and stress management; sales training.</p>	<p>Training for parents in parenting skills; Provision of skill assessment courses; Educational assessment services; Teaching assessments for counteracting learning difficulties; Publication of educational teaching materials; Teaching services for communication skills; Education, teaching and training; Educational and teaching services; Providing online courses of instruction.</p>
<p>Class 35; Psychometric testing for the selection, professional development and advising on staff or personnel; testing by psychological type theory for the selection, professional development and advising on staff or personnel.</p>	<p>Class 44: Psychological assessment services; Preparing psychological profiles; Psychological tests.</p>

22) I shall first consider the class 16 goods of both parties. To my mind, the terms “printed matter” and “instructional and teaching materials” in the opponent’s specification, both encompasses the whole of the applicant’s specification applied for in this class. The applicant claims that as the opponent’s specification excludes “Personal relationships” that this means that the goods are aimed at “businesses for organisational development and professional development of adult staff, but not personal relationship. In contrast, the goods or services applied for by the applicant describe personal development, educational and teaching goods or services, supporting parenting skills and children’s personal awareness and development.” I note that the opponent’s specification includes “people development” which I take to mean an individual’s development but excluding the field of personal relationships. I do not accept that this alters the overlap that clearly exists in the specifications. The applicant’s goods are not subject to any limitations and so as per *Meric*, **the class 16 goods must therefore be regarded as identical.**

23) I next turn to the services in class 41. To my mind, the terms “Organisation and arranging of seminars, workshops, training sessions, conferences and symposiums, congresses and colloquiums” and “educational services” encompasses all of the training, coaching and development courses,

seminars and workshops listed in the applicant's specification as well as the education services which fall within training. The only item in the applicant's specification which these terms in the opponent's specification do not encompass are "Publication of educational teaching materials". However, the term "publication of books and texts; all of the aforementioned in the field of people (but not personal relationship) and organisational development" in the opponent's specification appears to encompass fully these services. I do not accept the applicant's contention that the restriction in the opponent's specification of "(but not personal relationship)" means that the services are aimed at an entirely different consumer, dealing solely with businesses and not individuals. Individuals can improve or develop in a huge range of areas other than personal relationships. **Therefore, the whole of the applicant's specification is encompassed by that of the opponent and so the class 41 services must be regarded as identical.**

24) Lastly, I turn to consider the services applied for under class 44. The term "psychometric" can be defined as:

- 1) "The branch of psychology that deals with the design, administration, and interpretation of quantitative tests for the measurement of psychological variables such as intelligence, aptitude, and personality traits. Also called *psychometry*." or
- 2) "1. (Psychology) of or relating to psychometrics or psychometry
2. (Alternative Belief Systems) of or relating to psychometrics or psychometry"

25) Neither party has provided any comments on the differences or similarities of psychometric testing and assessment and psychological testing and assessment. The only comment that the applicant makes is the same that it has made for all the goods and services, in contending its goods and services are for the individual whereas those of the opponent are for business. To my mind, the services of both parties involve testing and assessing people in terms of their psychology including other factors such as intelligence, aptitude and personality. **Because the services are in different classes they cannot be regarded as identical but to my mind they are highly similar.**

26) The applicant provided a fallback position in respect of each class. This was the addition of the following word to the end of each of its specifications: "all the aforesaid goods or services being for use by parents and carers for children's personal awareness and development". However, as I have

already stated, the opponent's goods and services are not limited and so would include the provision of goods and services to exactly this group of individuals. **The fallback provision does not assist the applicant.**

Comparison of trade marks

27) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

28) The marks of the two parties are as follows “Insights” (opponent); “Child Insights” (applicant). Clearly the opponent's mark appears in full in the applicant's mark, albeit as the second element. In *EI Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the General Court noted that the beginnings of word tend to have more visual and aural impact than the ends. The court stated:

“81. It is clear that visually the similarities between the word marks MUNDICOLOR and the mark applied for, MUNDICOR, are very pronounced. As was pointed out by the Board of Appeal, the only visual difference between the signs is in the additional letters ‘lo’ which characterise the earlier marks and which are, however, preceded in those marks by six letters placed in the same position as in the mark MUNDICOR and followed by the letter ‘r’, which is also the final letter of the mark applied for. Given that, as the Opposition Division and the Board of Appeal rightly held, the consumer normally attaches more importance to the first part of words, the presence of the same root ‘mundico’ in the opposing signs gives rise to a strong visual similarity, which is, moreover, reinforced by the presence of the letter ‘r’ at the end of the

two signs. Given those similarities, the applicant's argument based on the difference in length of the opposing signs is insufficient to dispel the existence of a strong visual similarity.

82. As regards aural characteristics, it should be noted first that all eight letters of the mark MUNDICOR are included in the MUNDICOLOR marks.

83. Second, the first two syllables of the opposing signs forming the prefix 'mundi' are the same. In that respect, it should again be emphasised that the attention of the consumer is usually directed to the beginning of the word. Those features make the sound very similar."

29) Visually and aurally there is a difference in the first element but both marks contain the word "Insights". The applicant accepts that there is a low degree of visual and aural similarity. To my mind, the marks are visually and aurally similar to a medium degree. Conceptually, both suggest that they offer an understanding of issues or an insight. The applicant's mark has as its first element the word "child" which qualifies or restricts the word "insights" to children. Conceptually the marks are similar to at least a medium degree. **Overall, the marks are similar to a medium degree.**

Distinctive character of the earlier trade mark

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

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

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

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

31) The word “Insights” has no actual meaning for the class 16 goods nor the class 35 and 41 services. It alludes to having a greater understanding but still possesses an average degree in inherent distinctiveness. The opponent has filed evidence of use of its mark including trade figures, which in the six years just prior to registration averaged approximately £7 million per annum. The opponent states that its share of the European training market is approximately 0.1%. However, I do not believe that the evidence goes far enough to warrant a finding that it has enhanced distinctiveness. **I find that the opponent’s mark has an average degree of inherent distinctiveness but cannot benefit from enhanced distinctiveness through use.**

Likelihood of confusion

32) In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent’s trade mark as the more distinctive this trade mark is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods and services, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind.

33) I also take into account the views expressed in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, by Mr Iain Purvis Q.C., as the Appointed Person, when he explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for

another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

34) I also take into account that in *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

35) Earlier in this decision, I concluded that:

- the average consumer is a member of the general public (including businesses), who will select the goods and services by predominantly visual means, although not discounting aural considerations and that they will pay a medium to high degree of attention to the selection of such services, although the goods in class 16 will be given far less attention.
- the opponent’s mark has an average degree of inherent distinctiveness, but cannot benefit from an enhanced distinctiveness through use.
- The marks are similar to a medium degree.
- The class 16 goods and class 41 services of the two parties are identical. Whilst the opponent’s class 35 services are highly similar to the applicant’s class 44 services.
- The fallback position offered does not assist the applicant.

36) Taking all of the above into account there is a likelihood of consumers being indirectly confused into believing that the goods and services applied for under the mark in suit and provided by the

applicant are, for example, those of a subsidiary of the opponent which specialises in such goods and services provided to children and parents. **The opposition under Section 5(2) (b) in respect of the opponent's mark EU 7120661 in relation to all of the goods and services applied for succeeds.**

37) As this earlier trade mark leads to the opposition being successful in its entirety, there is no need to consider the remaining trade marks upon which the opposition is based. Further, my determination is so clear cut under this ground there is no need to consider the remaining grounds as they do not materially improve the opponent's position.

CONCLUSION

38) The opposition under Section 5(2)(b) was successful in relation to all the goods in class 16 and all the services in classes 41 and 44.

COSTS

39) As the opponent has been successful it is entitled to a contribution towards its costs. The opponent asked for costs above the normal scale as it claimed that much of applicant's evidence was irrelevant. Whilst I agree that there was some extraneous matter in the applicant's evidence the overall volume of evidence was relatively light and did not take long to peruse. I see no reason to deviate from the normal scale.

Expenses	£200
Preparing a statement and considering the other side's statement	£300
Preparing evidence, reviewing the applicant's evidence & filing written submissions	£800
TOTAL	£1,300

40) I order Mindscreen Limited to pay The Insights Group Limited the sum of £1,300. This sum to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 24th day of September 2018

**George W Salthouse
For the Registrar,
the Comptroller-General**