

BL O/0351/23

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION 3704011

BY

NEWITT & CO LTD

TO REGISTER THE FOLLOWING TRADE MARK:

APOLLO

AND

OPPOSITION NO. 432049 THERETO

BY

TASKER HOLDINGS LTD

Background and pleadings

1. On 29 September 2021, Newitt & Co Ltd (the “Applicant”) applied to register the word only trade mark **APOLLO** for the following goods in Class 28:

Class 28 *Gymnastics and sporting articles, apparatus and equipment; sports training apparatus; sports balls; toy sporting apparatus; sports training apparatus.*

2. The contested application was accepted, and published for opposition purposes in the Trade Marks Journal on 24 December 2021.

3. On 22 March 2022, Tasker Holdings Ltd (the “Opponent”) opposed the application under Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is aimed against all of the goods in the contested application. For the purposes of the opposition the Opponent relied upon all of the goods and services for which the following earlier United Kingdom Trade Mark (UKTM) is registered:

UKTM 3369325

Apollo boxing

Filing date: 23 January 2019

Registration date: 12 April 2019

Class 9 *Boxing helmets; Mouth guards for boxing.*

Class 25 *Boxing shoes; Boxing shorts.*

Class 28 *Boxing gloves; Boxing rings; Gloves (Boxing -);Punching bags for boxing; Punching balls [for boxing practice];Punching balls for boxing.*

Class 41 *Boxing instruction; Entertainment in the nature of boxing contests; Organization of boxing matches; Providing information about boxing match results.*

4. Since the filing date of the earlier mark predates that of the contested application the Opponent's mark is considered to be an "earlier mark" in accordance with Section 6 of the Act. However, as the mark has not been registered for a period of five years or more before the filing date of the contested application it is not subject to the use requirements specified within section 6A of the Act. As a consequence, the Opponent may rely upon any or all of the goods and services for which the earlier mark is registered without having to show that it has used the mark at all.

5. The Opponent submitted that the marks at issue contain the identical element 'APOLLO', which is the dominant and distinctive element of the earlier mark. The Opponent argued that as a result of sharing the element 'APOLLO', there is a high degree of visual, phonetic and conceptual similarity between the marks. The Opponent also submitted that there is either identity, overlap, or similarity between the respective goods and services at issue.

6. On 27 June 2022, the Applicant filed a counterstatement in which it denied that there is a likelihood of confusion between the marks. The Applicant argued that although the respective marks both contain the common element 'APOLLO', the earlier mark also contains the word 'boxing' which is not present in the contested mark. The Applicant argued that there are therefore significant visual, aural and conceptual difference between the marks. In relation to the goods and services at issue, the Applicant submitted that those of the earlier mark are entirely limited to boxing, and argued that there is therefore a minimum overlap between the respective goods and services.

7. Both parties are professionally represented. The Applicant is represented by Bailey Walsh & Co LLP, and the Opponent is represented Appleyard Lees IP LLP.

Evidence and submissions

8. Only the Opponent filed evidence and submissions in these proceedings. I do not intend to summarise the entirety of the Opponent's evidence and submissions, however, I shall capture the pertinent points to the extent that I consider necessary.

9. On 13 October 2022, the Opponent filed evidence in the form of a witness statement by Rachel Louise Garrod, Chartered Trade Mark Attorney of the Opponent's appointed

representative Appleyard Lees IP LLP. The witness statement referred to exhibits RLG2 and RLG3, which consisted of screenshots from the Opponent's website www.taskers-sports.co.uk (RLG2), and screenshots from the Applicant's website www.newitts.com (RGL3). The screenshots did not show either the earlier mark or the contested mark but demonstrated instead the "relevant goods sold" by each respective party. The witness statement also referred to Exhibit RLG4, which contained the notification letter sent from the UKIPO to the Opponent informing it that the contested application had been filed, and that it "may be similar or identical to your trade mark".

10. On 18 January 2023, the Opponent filed written submissions in lieu of a Hearing. The Opponent submitted that whilst the earlier mark contains the additional word 'boxing' the word is purely descriptive and/or non-distinctive in view of the nature of the goods and services for which the earlier mark is registered. The Opponent contended that the contested mark is identical to the most prominent element of the earlier mark, and the marks are therefore visually, phonetically and conceptually similar to a high degree.

11. The Opponent also provided further submissions in relation to the identity/similarity/complementarity of the goods and services at issue. These submissions shall not be summarised here, but rather they will be called upon if they provide assistance whilst conducting my own comparison of the respective goods and services.

Decision

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

Section 5(2)(b)

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

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

(a) ...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

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

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

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

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

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

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

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

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

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

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

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

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

Comparison of the goods and services

Earlier mark	Contested mark
Class 9: <i>Boxing helmets; Mouth guards for boxing.</i>	
Class 25: <i>Boxing shoes; Boxing shorts.</i>	
Class 28: <i>Boxing gloves; Boxing rings; Gloves (Boxing -); Punching bags for boxing; Punching balls [for boxing practice]; Punching balls for boxing.</i>	Class 28: <i>Gymnastics and sporting articles, apparatus and equipment; sports training apparatus; sports balls; toy sporting apparatus; sports training apparatus.</i>

Class 41: <i>Boxing instruction; Entertainment in the nature of boxing contests; Organization of boxing matches; Providing information about boxing match results.</i>	
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15. In the judgment of the Court of Justice of the European Union in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

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

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

whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

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

18. I note the Applicant’s submission that the goods of the earlier mark are all specific to boxing and that there is therefore only a “minimum overlap between the respective specifications”. Whilst I agree that the goods of the earlier mark are indeed all specific to boxing, they are nevertheless included in the more general category of the contested mark’s *Gymnastics and sporting articles, apparatus and equipment; sports training apparatus; and sports training apparatus*. These contested goods are therefore considered to be identical in accordance with the *Meric* principle.

19. The contested *sports balls* are also a general category, and would include the *punching balls for boxing* of the earlier mark. As a result, the contested *sports balls* are considered to be identical in accordance with the *Meric* principle, also.

20. The contested *toy sporting apparatus* is unlikely to be a general category that would include the boxing goods of the earlier mark, as by virtue of being “toys” they would likely be of a different size, weight, material and quality etc. That having been said, there is a certain degree of similarity between, for example, a toy boxing glove and an actual boxing glove insofar as they are of the same nature, intended purpose and use. They are also potentially sold through the same trade channels. As such, I consider the contested *toy sporting apparatus* to be similar to at least a medium degree with the goods of the earlier mark.

Comparison of marks

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

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

23. The respective trade marks are shown below:

Earlier mark	Contested mark
Apollo boxing	APOLLO

24. The earlier mark consists exclusively of the combination of words ‘Apollo boxing’ presented in a plain, non-stylised font. The word ‘Apollo’ may be recognised by a significant number of consumers as the name of the Greek and Roman god of light. Alternatively, consumers may recognise ‘Apollo’ as either the name of a US space programme, or as a person’s first name. The word ‘boxing’ is the English-language word for a particular style of hand-to-hand combat. As both words in the earlier mark are of equal size it is unlikely that one would be perceived to be the more dominant.

However, by virtue of being non-descriptive it is the word 'Apollo' in the earlier mark which is the more distinctive.

25. The contested mark consists exclusively of the uppercase word 'APOLLO' presented in a plain, non-stylised font. As is the case in the earlier mark, the word 'APOLLO' may be recognised either as the name of a god, a space programme, or a person's name.

Visual similarity

26. The marks are visually similar insofar as they both contain the word 'Apollo/APOLLO'. The word 'Apollo' is the first element in the earlier mark and the only element in the contested mark. The marks differ visually due to the inclusion of the second word 'boxing' in the earlier mark, which has no counterpart in the contested mark. The difference between the use of upper- and lower-case letterings for the word 'Apollo/APOLLO' in each mark is also a point of visual difference, albeit a minor one. Overall, the marks are considered to be visually similar to at least a medium degree.

Aural similarity

27. The marks are aurally similar insofar as they each contain the word 'Apollo/APOLLO', which will be pronounced identically in each mark. The word is the first element that will be spoken in the earlier mark and the only element that will be spoken in the contested mark. The marks differ aurally due to the inclusion of the two-syllable word 'boxing' in the earlier mark, which has no counterpart in the contested mark. Overall, the marks are considered to be visually similar to at least a medium degree.

Conceptual similarity

28. Each mark contains the concept of 'Apollo/APOLLO', the Greek and Roman god of light. I accept that not all consumers may be aware of the meaning of the word and could instead perceive it to be a first name, or reference to the US space programme. A certain number of consumers may not be familiar with it at all, in which case it would appear to be a seemingly invented word, although I consider this to be unlikely. In either scenario, the word will be perceived as having the same concept in each of the

respective marks. The marks are conceptually different insofar as the earlier mark contains the word 'boxing'. In relation to the goods for which the earlier mark is registered the word 'boxing' is directly descriptive, as conceded by the Opponent itself. Overall, the marks are conceptually similar to a high degree.

Average consumer and the purchasing act

29. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

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

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

31. The goods at issue are articles of sporting apparatus and equipment, and also toys in the form of sporting apparatus. Sporting items can vary greatly in terms of their use, quality and price, and can include both items that are relatively generic and items that are particularly specialist. The level of attention paid by the average consumer of sporting items would therefore differ accordingly, with a lower degree of attention for the more basic items and a higher degree of attention for the more specific items. The average consumer would also pay a lower degree of attention to the toys in the form of sporting apparatus as they are unlikely to ever be particularly specialist.

32. Based on the nature of the goods I consider it most likely that the purchase process would be visually dominated. The Opponent provided exhibits that showed the items

each party sell on their respective websites. Purchasing items online is very much a visual process. In general, the type of goods at issue are those which are also made available for self-selection in stores (including specialist sports stores) and in magazines, with both types of outlet utilising a visual purchasing process. In relation to the goods at issue it is therefore the visual image of the trade mark applied to the product that is the most prevalent perception in the consumer's mind. I do not entirely discount the possibility that the marks may be spoken, such as when making an order over the telephone with a sales representative, for example. However, I believe the aural aspect to be secondary to the visual one in the purchasing process of the goods at issue.

Distinctive character of the earlier trade mark

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

34. 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).”

35. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. acting as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

36. The earlier mark is a plain word mark without any additional stylisation or figurative elements, and as such any inherent distinctive character could only rest in the meaning of the words ‘Apollo boxing’. As conceded by the Opponent, the term ‘boxing’ has a directly descriptive relationship to the goods at issue. Conversely, the term ‘Apollo’ does not. Whilst the distinctive character of a mark must include an assessment of the mark as a whole, it is established that one (or more) particular element may possess

a greater degree of distinctive character, especially when one (or more) of the elements are descriptive or non-distinctive. By virtue of being the only element that is not descriptive, it is the term 'Apollo' which imbues the earlier mark with inherent distinctive character that is of a medium degree. It is of note that the element which gives the earlier mark its distinctive character comprises the sole element that makes up the contested mark.

Likelihood of confusion

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

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

39. In *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03, the GC stated that:

"49. However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may

depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.”

And

“50... Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion.”

40. In *Quelle AG v OHIM*, Case T-88/05, the GC found that visual similarity (and difference) is most important in the case of case of goods that are self selected or where the consumer sees the mark when purchasing the goods. The Court stated that:

“68... If the goods covered by the marks in question are usually sold in self-service stores where consumers choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any phonetic similarity between the signs (*NLSPORT*, *NLJEANS*, *NLACTIVE* and *NLCollection*, paragraph 53 supra, paragraph 49).

69. Likewise, the degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (*BASS*, paragraph 56 supra, paragraph 55, and Case

T-301/03 *Canali Ireland v OHIM – Canal Jean (CANAL JEAN CO. NEW YORK)* [2005] ECR II-2479, paragraph 55). That is the case with respect to the goods at issue here. Although the applicant states that it is a mail order company, it does not submit that its goods are sold outside normal distribution channels for clothing and shoes (shops) or without a visual assessment of them by the relevant consumer. Moreover, while oral communication in respect of the product and the trade mark is not excluded, the choice of an item of clothing or a pair of shoes is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly, the visual aspect plays a greater role in the global assessment of the likelihood of confusion (*NLSPORT, NLJEANS, NLACTIVE and NLCollection*, paragraph 53 supra, paragraph 50). The same is true of catalogue selling, which involves as much as does shop selling a visual assessment of the item purchased by the consumer, whether clothing or shoes, and does not generally allow him to obtain the help of a sales assistant. Where a sales discussion by telephone is possible, it takes place usually only after the consumer has consulted the catalogue and seen the goods. The fact that those products may, in some circumstances, be the subject of discussion between consumers is therefore irrelevant, since, at the time of purchase, the goods in question and, therefore, the marks which are affixed to them are visually perceived by consumers.”

41. I have found that the goods at issue are self-selected by consumers based predominantly on the visual image of the trade mark applied to the product. This means that it is the visual similarity between the marks which is of greater significance when assessing the likelihood of confusion. It is therefore important to recognise that I consider the degree of visual similarity between the marks to be at least medium. It is also important to recognise that I did not discount entirely the possibility that in certain purchasing situations it would be the aural aspects of the mark which carry greater significance. With this in mind, I reaffirm that I found the degree of aural similarity between the marks to be at least medium, also.

42. As indicated in the *Lloyd Schuhfabrik* judgement, the assessment of the distinctive character of a mark should take into account its inherent characteristics, and whether or not a particular element is descriptive, for example. I agree entirely with the

Opponent's submission that the term 'boxing' in the earlier mark is descriptive. The effect of this is that the more inherently distinctive element of the earlier mark is the word 'Apollo', which is a word that is replicated identically in the contested mark. The fact that the contested mark is presented in upper-case instead of lower-case does not impact this finding of identity, as the potential protection offered by the registration of the contested word mark would apply to the word itself, and not any individual graphic or stylistic characteristics which the mark might possess.¹ In other words, the registration of the contested mark would enable protection for all subsequent forms of the word, including in both upper and lower case.

43. The marks at issue are, in my opinion, likely to be mistaken for one another by the average consumer. The most distinctive element of the earlier mark is the term 'Apollo', which is replicated identically and exclusively in the contested mark. The contested goods are also either identical or similar to at least a medium degree with the goods of the earlier mark. It seems to me likely that when encountering the contested mark 'APOLLO' on gymnastic and sporting goods, or toy versions thereof, the average consumer would mistake it for the earlier mark 'Apollo boxing' they had previously encountered on identical or similar goods.

44. I am aware of the principle of interdependency, whereby a lesser degree of similarity between the respective goods at issue may be offset by a greater degree of similarity between the respective marks, and vice versa. Any apparent "lesser" degree of similarity between the contested *toy sporting apparatus* and goods of the earlier mark is to my mind offset by the greater degree of similarity between the marks at issue. Similarly, any supposed "lesser" degree of similarity between the marks at issue (caused exclusively by the inclusion in the earlier mark of the descriptive word 'boxing') is to my mind offset by the identity and at least medium degree of similarity between the respective goods at issue.

45. In my opinion, the average consumer is likely to directly confuse the contested mark for the earlier mark.

46. As an alternative and additional finding, I consider the marks at issue to at least lead to a likelihood of indirect confusion. In any potential instance where the average

¹ *Radio Regenbogen Hörfunk in Baden v OHIM (RadioCom)*, T-254/06, paragraph 43

consumer attributes significance to the word 'boxing' as being a differential between the marks, I believe that the same consumer would nevertheless assume that no-one other than the brand owner would be using the distinctive word 'Apollo' in relation to the goods at issue. In addition, I believe that the consumer would consider the descriptive element 'boxing' to be entirely expected, logical and consistent with a brand extension or sub-brand.² In such a scenario, the consumer's resulting conclusion would be that the marks belong to the same or an economically linked undertaking.

Conclusion

47. The opposition under Section 5(2)(b) is successful in its entirety. Subject to an appeal, the application will be refused.

COSTS

48. The Opponent has been successful and is entitled to a contribution towards its costs. I bear in mind that the relevant scale is contained in Tribunal Practice Notice 2/2016. In the circumstances I award the Opponent the sum of £650 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fees	£100
Preparing a statement and considering the counterstatement of the other side	£250
Preparing evidence and submissions	£500
Total	£850

49. I therefore order Newitt & Co Ltd to pay Tasker Holdings Ltd the sum of £850. The above sum should be paid within twenty-one days of the expiry of the appeal period

² *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10

or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings

Dated this 11th day of April 2023

Dafydd Collins

For the Registrar

The Comptroller-General