

**O-528-17**

**TRADE MARKS ACT 1994  
IN THE MATTER OF  
TRADE MARK APPLICATION NO 3168364  
IN THE NAME OF REALISTIC GAMES LIMITED  
FOR  
THE TRADE MARK**

**GOAL!**

**IN CLASS 41  
AND  
OPPOSITION THERETO (UNDER NO. 407539)  
BY  
GOAL.COM (HOLDCO) S.A.**

## BACKGROUND

1) On 07 June 2016, Realistic Games Limited ('the applicant') applied to register **GOAL!** as a trade mark in respect of the following services:

**Class 41:** Gambling; Gambling services; Casino services; Gambling services provided online, electronically, via the internet or a mobile device; Providing information online relating to computer gambling games and computer enhancements for such games; none of the aforesaid services relating to sports betting or fantasy football.

2) The application was published in the Trade Marks Journal on 01 July 2016 for opposition purposes and notice of opposition was later filed by Goal.com (Holdco) S.A. ('the opponent'). The opponent claims that the trade mark application offends under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ('the Act'). In support of the first two of those grounds, the opponent relies upon the following:

- UK registration 2639977 ('977) for the mark **GOAL.COM** which has a filing date of 26 October 2012 and was entered in the register on 22 January 2016. The opponent relies on numerous goods and services in classes 9, 35, 38, 41, 42 and 45. It suffices to set out only those in class 41 which are:

**Class 41:** Entertainment; sporting and cultural activities; education; production and distribution of radio programmes, television programmes, films, motion pictures, pre-recorded video tapes, audio and/or visual material, pre-recorded video cassettes, DVDs or pre-recorded video discs for transmission or broadcast by any means; provision of audio and/or visual content relating to entertainment, sports and cultural activities; sporting management services for footballers; arranging, organising and conducting of conferences, conventions, seminars, events and exhibitions; hospitality services (entertainment); arranging, organising and conducting of award ceremonies; provision of sports information services; provision of information relating to football; fan club services; fan club membership scheme services; provision of sports betting services; booking and ticketing services for sports,

cultural, entertainment and educational events; providing computer, electronic and online databases for sports, entertainment, cultural, educational, recreational and amusement use; provision of cinematographic and video entertainment; entertainment and educational services featuring electronic media, multimedia content, audio, visual and audio-visual content, movies, pictures, photographs, graphics, images, text, photos, games, user-generated content and related information provided via the Internet and other communications networks; film production; production of video recordings, sound recordings, DVDs, CDs, CD-ROMs, video and audio tapes; production of sporting events for television and radio; publishing services including electronic publishing services; publication, including online publication, of newspapers, magazines (periodicals), comics, journals (publications), books, instructional and teaching materials, texts and printed matter; providing online electronic publications (not downloadable); online posters, photographs, pictures, articles, tickets; publication online of sports newspapers; publication of electronic journals and web logs, featuring user generated or specified content; provision of television programmes, radio programmes, films, audio and/or visual material and games online (not downloadable) only in relation with sports games; interactive entertainment for use with mobile phones, mobile devices or personal electronic devices; providing information and news about fantasy and interactive sports games; hosting of fantasy sports leagues; provision of news online; provision of current affairs and sports information; provision of betting information; news, current affairs and educational information services; information relating to sport and entertainment provided online from a computer, a computer database or the Internet; information relating to all the aforementioned services provided online from a computer, a computer database or the Internet; information, advisory and consultancy services relating to any of the aforementioned services; all the aforesaid services not in connection with gambling (except sports betting), lotteries and games, except the game of football, fantasy football and other sports statistics based games, football manager simulation games, promotional competitions (including trivia-based), quizzes in connection with football, sports betting games, skill-based video games and

prediction games (which do not involve betting), each of the above available with or without an entry, subscription or use fee.

3) The mark relied upon is an earlier mark in accordance with section 6 of the Act and, as it had not been registered for more than five years before the publication date of the applicant's mark, it is not subject to the proof of use requirements, as per section 6A of the Act.

4) In support of the ground under section 5(4)(a), the opponent claims to have used the sign GOAL.COM since 2001 and the signs GOAL and GOAL (stylised) since May 2013 throughout the UK. It is claimed that all three signs have been used in respect of the same goods and services covered by UK registration '977 and gaming services, gambling services, provision of gaming and gambling information, provision of links to third party gaming and gambling services, advertising and promotion of gaming and gambling services of others.

5) The applicant filed a counterstatement denying all of the grounds of opposition and draws attention, in particular, to the exclusion at the end of the opponent's specification which it says shows that "gambling is expressly excluded".

6) Both parties filed evidence. A hearing took place before me on 22 September 2017. The opponent was represented by Mr Gurminder Panesar of Wiggin LLP; the applicant by Ms Barbara Cookson of Filemot Technology Law Ltd.

## **Evidence**

### **Opponent's evidence**

7) The opponent's evidence comes from two individuals: Juan Delgado, Chief Executive Officer of the Perform Media division of the Perform group of companies (he explains that the opponent is a wholly owned subsidiary within the Perform group of companies) and Benjamin Richard Warn, Chief Executive Officer of the Gaming Division within the Perform Group.

8) Mr Delgado explains that the opponent, through its website, [www.goal.com](http://www.goal.com), has been providing football entertainment, news and information for over a decade and that it is now one of the most successful football portals in the world and in the UK. The aim of the website is to provide users with breaking news, live scores, match previews, exclusives, club news and games and betting news and information.

9) Mr Delgado states that the UK edition of [www.goal.com](http://www.goal.com) contains a betting section which provides betting news and information and links to third party betting services. Advertisements for those betting services also appear on the opponent's website. This advertising and promotion of third party betting services is said to generate considerable revenue for the opponent. Exhibit JD06 (confidential) provides the opponent's UK turnover figures which are generated by that "betting activity" for the years 2015 – 16. Exhibit JD05 shows prints of screen captures of the "betting section" of the opponent's website from 2013 – 16. These prints show that football news is provided on the opponent's website [www.goal.com](http://www.goal.com). They also show that, in order to engage in sports betting, the consumer must click on a link that will take them to the websites of third parties such as William Hill, Paddy Power, Coral and BetVistor. Exhibit JD07 shows news articles on the opponent's website about upcoming football matches. The services of third party betting operators are promoted in these articles. For example, one article states "Paddy Power have a choice of two enhanced prices on this game...New Players can get 9/1..."

10) Mr Delgado also provides information about the significant number of visitors to the opponent's website and evidence about several honours and accolades that the website [www.goal.com](http://www.goal.com) has won such as 'Best Football website' in the 2010 Soccerlens Awards.

11) Mr Warn explains that prior to joining the opponent, he had worked in the betting & gaming sectors for over 10 years and had held a number of senior management positions within some of the UK's leading operators.

12) Mr Warn says that the line between casino, games and sports betting is becoming increasingly blurred and that most operators use sports betting as the "Trojan Horse" to drive customer acquisition to their platform and then actively cross-

sell and promote more profitable casino products to their users. He states that, in his experience, there are no sports betting operators who don't have their own casino operations and many now integrate casino games into their offering to allow customers to place casino bets from within the sportsbook. He refers to Exhibit BW04 which he says shows that it is common practice for gaming operators to promote other forms of gambling, such as casino and slot games on their online pages dedicated to sports betting. The prints from various gambling operator websites such as [www.williamhill.com](http://www.williamhill.com), [www.888.com](http://www.888.com), [www.pokerstars.uk](http://www.pokerstars.uk). all show that those operators offer a variety of gambling services under various tabs such as 'Sports', 'Casino' and 'Poker'.

### **Applicant's evidence**

13) This also comes from two individuals: Annmarie Nixon Humphries, a solicitor at Anderson Law LLP and Andrew Robert George Harris, Chief Executive Officer of the applicant.

14) Ms Humphries explains that her firm assists the applicant in its regulatory compliance requirements (for example preparing any necessary licence applications). She further explains that gambling and betting activity in the UK is governed by The Gambling Act 2005 and that 'Gambling' is defined in that Act as betting, gaming or participating in a lottery, each of which has a specific legislative definition. Under those three broad headings, The Gambling Commission (which is the national regulator for gambling in the UK) defines 7 categories of licence type which reflect the specific gambling sectors of betting, lotteries, gaming machines, casino, bingo, gambling software and arcades. She states that a gambling operator cannot provide the specific facilities for gambling without holding the appropriate licence. For example, an operator with a non-remote casino licence cannot provide casino facilities on the internet as this would require a remote casino licence.

15) Ms Humphries states that she conducted a search of the public register of operating licence holders on 9 May 2017 using the terms 'PERFORM', 'GOAL' and 'GOAL.COM'. At exhibit AMH01 she provides a print of the results of that search which she says shows that there are no gambling licences held by, surrendered or

associated with the opponent in respect of any betting activity. Ms Humphries says that this shows that the turnover figures provided in the opponent's evidence are in respect of advertising services only (of the betting services of others) and are not for betting activity per se.

16) Mr Harris provides information about his background in the casino-style gaming industry. Exhibit AH1 shows prints from various gambling operators' websites such as Coral, William Hill and BetVictor, which he says shows that there is a clear delineation between product types with each 'product' having its own distinct tab e.g. a 'sports' tab, a 'games' tab, a 'casino' tab etc. He says that the prints show that when those tabs are opened, their format is very different. He also states that several operators have specific product wallets that a player must make their deposits into. Therefore if a player only has funds in his 'casino' wallet, he cannot use those to place a 'sports bet', for example. All of this is said to show that the consumer is not going to be confused by the different forms of gambling activity as those activities are not similar.

17) Mr Harris also makes some submissions on the nature of the reputation shown by the opponent in its evidence. I have borne these submissions in mind but will not detail them here other than to note that he submits that the evidence shows that the opponent does not provide any gambling services but rather an information website for football fans.

18) That concludes my summary of the parties' evidence to the extent that I consider it necessary.

## **DECISION**

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

19) Section 5(2)(b) of the Act provides that:

“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.”

20) The leading authorities which guide me are from the Court of Justice of the European Union ('CJEU'): *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

### **The principles**

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

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

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

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



all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

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

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

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

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

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

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

### **Comparison of services**

21) In the judgment of the CJEU in *Canon*, Case C-39/97, the Court stated at paragraph 23 of its judgment that:

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

22) 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 users of the respective goods or services;
- b) The physical nature of the goods or acts of services;
- c) The respective trade channels through which the goods or services reach the market;
- d) 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;
- e) 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.

23) 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."

24) In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

"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."

25) In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criteria capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court stated that "complementary" means:

"...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking".

26) In *Sanco SA v OHIM*, Case T-249/11, the General Court ('GC') indicated that goods and services may be regarded as 'complementary' and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

27) At the hearing, Mr Panesar identified certain of the opponent’s services in class 41 as representing its strongest case. On that basis, the services to be compared are as follows:

Opponent’s services	Applicant’s services
<p><b>Class 41:</b> Entertainment; ...; <u>provision of sports betting services; ...; information, advisory and consultancy services relating to any of the aforementioned services; all the aforesaid services not in connection with gambling (except sports betting), lotteries and games, except the game of football, fantasy football and other sports statistics based games, football manager simulation games, promotional competitions (including trivia-based), quizzes in connection with football, sports betting games, skill-based video games and prediction games (which do not involve betting), each of the above available with or without an entry, subscription or use fee. (my</u></p>	<p><b>Class 41:</b> Gambling; Gambling services; Casino services; Gambling services provided online, electronically, via the internet or a mobile device; Providing information online relating to computer gambling games and computer enhancements for such games; <u>none of the aforesaid services relating to sports betting or fantasy football. (my emphasis)</u></p>

emphasis)	
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28) Mr Panesar submitted that the opponent's 'sports betting services' and 'information services' relating thereto are closely related to the applicant's services despite the exclusion in the applicant's specification because both parties' services are still types of gambling services and they are all aimed at visitors to the websites of gambling operators as demonstrated, in his submission, by the evidence of Mr Warn<sup>1</sup> and the applicant's own evidence from Mr Harris<sup>2</sup>. Ms Cookson, on the other hand, argued that the opponent's sports betting services are quite distinct from the other types of gambling services which fall in the applicant's specification. In support of this, she referred me to the evidence of Mr Harris and exhibit AH1 thereto which she submitted shows that there are different tabs on the websites of gambling operators (such as 'Coral', 'William Hill' and 'BetVictor', for example) such that 'Sports betting', 'games' and 'casino', for example, each have their own distinct tabs. This, she argued, is analogous to a supermarket. If, in her submission, one considers 'gambling' at large to be the supermarket, then it is clear that 'sports betting services' are found in a distinct area away from other types of gambling services in much the same way as 'tea' and 't-shirts' are also found in different areas of a supermarket. Accordingly, she contended that the respective services are quite different.

29) I do not find Ms Cookson's analogy to a supermarket to be helpful. True it is that there are many goods sold in supermarkets which are very different in nature, purpose, method of use etc. and therefore, the mere fact that those goods are all sold in a supermarket will not render them similar. However, in the instant case, the respective services are likely to not only share trade channels by all being offered on the same gambling websites (as supported by both parties' evidence) but they also, notionally and objectively speaking, have similarities in nature, purpose and method of use (given that they are all types of gambling/information relating thereto) and there may be competition between them. I find there to be a good degree of similarity between the applicant's services and the opponent's 'sports betting services' and 'information services [relating to the same]'. This finding is not disturbed by the

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<sup>1</sup> Paragraphs 12-17 of the witness statement and exhibits BW03-04.

<sup>2</sup> Paragraph 14 of the witness statement and exhibit AH1.

applicant's evidence showing that different types of gambling services have specific legislative definitions as per The Gambling Act 2005 and, in order to lawfully provide different specific kinds of gambling services, operators must hold the appropriate license for each e.g. betting, lotteries, casino etc. As Mr Panesar pointed out, the average consumer is highly unlikely to be aware of those legislative definitions or licensing requirements and therefore this has no bearing on the consumer's perception of the similarity between the respective services.

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

30) It is necessary to determine who the average consumer is for the respective services and the manner in which they are likely to be selected. 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) Notionally speaking, the average consumer of both parties' services is the general public. They may be accessed in a variety of ways including both online and in bricks-and-mortar establishments. I would expect the selection to be primarily a visual one but the aural aspect is also borne in mind. The level of attention paid is likely to vary. The consumer may take into account factors such as betting odds or the variety of games on offer. Generally speaking, I would expect a normal level of attention to be paid by the average consumer during the purchase.

## Comparison of marks

32) 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.”

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

**GOAL.COM            v            GOAL!**

33) The opponent's mark consists of GOAL.COM and the applicant's mark of GOAL followed by an exclamation mark. Mr Panesar argued that the dominant and distinctive element of both marks is the word GOAL, with '.COM' being non-distinctive as it simply indicates a domain name and the exclamation mark having little impact. Ms Cookson submitted that neither '.COM' nor the exclamation mark are negligible elements and they will not go unnoticed. I agree with Ms Cookson that neither '.COM' nor the exclamation mark are negligible in the overall impressions of the respective marks. However, given the prominence of GOAL at the beginning of

both marks and its relative distinctiveness to the other elements of each mark, it is that word which carries the greatest weight in the overall impression of both marks.

34) Visually, the marks coincide in the word GOAL and differ as to the '.COM' and exclamation mark. Aurally, the marks share the syllable GOAL. The earlier mark also has second and third syllables (i.e. 'dot com') which are absent from the applicant's mark. I do not consider that the exclamation mark affects the aural comparison. It is a general rule of thumb that the beginnings of marks will tend to have more impact on the consumer's perception than the endings<sup>3</sup>. I consider that to be the case here. I agree with Mr Panesar's submission that the marks are visually and aurally similar to a high degree.

35) Conceptually, Mr Panesar submitted that the marks are highly similar. Ms Cookson submitted that the marks are not similar because the elements of each mark form a unit, the overall respective meanings of which are different. In her submission, the opponent's mark will be conceptualised as an internet address and the applicant's mark as an 'exclamation with a winning theme'. I agree with Mr Panesar. Whilst I accept that the opponent's mark denotes an internet address, the main conceptual hook for the consumer is likely to come from the word 'Goal' in that mark, which is the same concept portrayed by the opponent's mark (I do not consider that the exclamation mark contributes to the conceptual hook). The marks are conceptually highly similar.

36) Overall, the marks are highly similar.

### **Distinctive character of the earlier mark**

37) The distinctive character of the earlier mark must be considered. The more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

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<sup>3</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02 [81] - [83]



“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).”

38) From an inherent perspective, the earlier mark is somewhat allusive of ‘sports betting services’ which relate to sports that involve ‘scoring a goal’ (such as football). I find it to be of below average distinctiveness for those sorts of services. For other sorts of sports betting services (betting on horse racing, for example), the allusive message is not apparent and I find it to have an average degree of distinctiveness for such services.

39) At the hearing, Mr Panesar accepted that the opponent does not provide ‘sports betting services’<sup>4</sup>. Nevertheless, he drew my attention to the opponent’s evidence which he submitted shows that the opponent’s mark has been used extensively on a football news website and that consumers are able to click on links on that website which take them to third party betting websites. As such, he argued that the

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<sup>4</sup> See also the opponent’s written submissions of 10 July 2017 filed in reply to the applicant’s evidence (paragraphs 1-2 therein).

opponent's mark has an enhanced distinctive character in relation to providing access to, and promoting, betting services. I agree with Ms Cookson's submission that providing access to and/or promoting the sports betting services of third parties is not the same as providing 'sports betting services' per se. I find no enhanced distinctiveness in relation to 'provision of sports betting services'.

### **Likelihood of confusion**

40) I must now feed all of my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors: i) the interdependency principle, whereby a lesser degree of similarity between the services may be offset by a greater similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*); ii) the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*), and; iii) imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*).

41) There is a good degree of similarity between the parties' services and a high degree of similarity between the marks. These are factors weighing heavily in the opponent's favour. In terms of the distinctiveness of the earlier mark, I have found that for some services it is of average distinctiveness but for others it is below average. Having weighed all of these factors, I find that, even in the latter circumstances, there is a likelihood of direct confusion on the part of an average consumer paying a normal level of attention having regard to imperfect recollection. Further, even if the average consumer were to recognise that the marks are not the same, they are nevertheless likely to believe that the later mark is a variant of the earlier mark and used by the same (or linked) undertaking. The ground under section 5(2)(b) succeeds.

42) In the light of my finding under section 5(2)(b), I do not consider it necessary to consider the grounds under sections 5(3) and 5(4)(a).

**43) The opposition succeeds.**

## **COSTS**

44) As the opponent has been successful, it is entitled to a contribution towards the costs it has incurred in these proceedings. At the hearing, both parties agreed that costs should be on the scale. Using the guidance in Tribunal Practice Notice 2/2016, I award the opponent costs on the following basis:

Preparing a statement and considering the counterstatement	£300
Official fee	£200
Preparing evidence and considering the other side's evidence	£800
Attending the hearing	£600
<b>Total:</b>	<b>£1900</b>

45) I order Realistic Games Limited to pay Goal.com (Holdco) S.A. the sum of **£1900**. This sum is 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 19<sup>th</sup> day of October 2017**

**Beverley Hedley**  
**For the Registrar,**  
**the Comptroller-General**