O/0184/25

REGISTERED DESIGNS ACT 1949

IN THE MATTER OF REGISTERED DESIGN NO. 6146729
IN THE NAME OF WOLVEX LIMITED
IN RESPECT OF THE FOLLOWING DESIGN:

AND

AN APPLICATION FOR INVALIDATION THEREOF
UNDER NO. 144/22
BY JFA MEDICAL LTD

Background and pleadings

1. Wolvex Limited ("the proprietor") filed application number 6146729 for "finger splint" in class 24, sub class 4 of the Locarno Classification (materials for dressing wounds, nursing and medical care) on 5 July 2021 ("the relevant date"). The design was granted with effect from the relevant date on 13 August 2021 and published on 14 August 2021. The design is depicted in the two representations shown below. The registration specifies that "no claim is made for the colour shown" and "no claim is made for the material shown".

("the registered design")

2. On 25 October 2022, JFA Medical Ltd ("the applicant") requested that the registered design be declared invalid under section 11ZA(1)(b) of the Registered Designs Act 1949 (as amended) ("the Act"), which states as follows:

> "The registration of a design may be declared invalid–
>
> […]
>
> (b) On the ground that it does not fulfil the requirements of sections 1B to 1D of this Act."

3. The application is based upon sections 1B and 1C(1) of the Act. Under section 1B, the applicant claims that the registered design is not novel and does not hold individual character when compared to multiple products which were widely available on the

market prior to the relevant date. Examples of claimed prior art are provided. As for section 1C(1), the applicant submits that the registered design is dictated solely by the technical function of a finger splint, i.e. holding and supporting the finger in a straight position without causing interference with the rest of the hand.

4. A notice of defence and counterstatement was filed by the proprietor on 2 May 2023. In respect of section 1B, the proprietor essentially states that the dates that the claimed prior art are said to have been first available cannot be relied upon. As for section 1C(1), the proprietor's position is that one or more of the features of the registered design is/are arbitrary and not simply dictated by technical function, arguing that finger splints come in various kinds and styles. It also argues that, whilst some product features may be necessary to achieve a technical function, aesthetic expression is not always separable from function. Further, that there may be alternative designs that serve the same function.

5. Neither party is professionally represented. Both parties filed evidence. No hearing was requested and neither party elected to file written submissions in lieu. This decision is taken after a careful consideration of all the papers before me.

Relevance of EU law

6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Evidence

7. The applicant attached evidence of claimed prior art (printouts from Amazon) and a dictionary definition to the application for invalidation.[1] The applicant also filed witness statements from Paul Bloore, along with two exhibits (TE1-TE2), and Joshua Jones, together with two exhibits (A-B). Mr Bloore is co-founder and Chief Technology Officer of a third-party search engine. He provides the results of image searches conducted using representations of the registered design. Mr Jones is co-founder and Director of the applicant. He provides evidence of customer product reviews on Amazon.

8. The proprietor also filed printouts from Amazon to its defence and counterstatement.[2] The proprietor then filed a witness statement from Martina Guedelian, its Director. Ms Guedelian explains the process behind the development of the registered design and seeks to distinguish it from the products shown in the applicant's evidence.

9. I have taken the evidence into account in reaching my decision and will refer to it below where necessary and appropriate.

Section 1B

10. Section 1B of the Act reads as follows:

> "(1) A design shall be protected by a right in a registered design to the extent that the design is new and has individual character.
>
> (2) For the purposes of subsection (1) above, a design is new if no identical design or no design whose features differ only in immaterial details has been made available to the public before the relevant date.

[1] These documents constitute evidence in accordance with rule 21(1)(a) of the Registered Designs Rules 2006 (as amended) ("the Rules").
[2] These documents also constitute evidence in accordance with rule 21(1)(a) of the Rules.

(3) For the purposes of subsection (1) above, a design has individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the relevant date.

(4) In determining the extent to which a design has individual character, the degree of freedom of the author in creating the design shall be taken into consideration.

(5) For the purposes of this section, a design has been made available to the public before the relevant date if–

(a) it has been published (whether following registration or otherwise), exhibited, used in trade or otherwise disclosed before that date; and

(b) the disclosure does not fall within subsection (6) below.

(6) A disclosure falls within this subsection if–

(a) it could not reasonably have become known before the relevant date in the normal course of business to persons carrying on business in the geographical area comprising the United Kingdom and the European Economic Area and specialising in the sector concerned;

(b) it was made to a person other than the designer, or any successor in title of his, under conditions of confidentiality (whether express or implied);

(c) it was made by the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date;

(d) it was made by a person other than the designer, or any successor in title of his, during the period of 12 months immediately preceding the

relevant date in consequence of information provided or other action taken by the designer or any successor in title of his; or

(e) it was made during the period of 12 months immediately preceding the relevant date as a consequence of an abuse in relation to the designer or any successor in title of his.

(7) In subsections (2), (3), (5) and (6) above "the relevant date" means the date on which the application for the registration of the design was made or is treated by virtue of section 3B(2), (3) or (5) or 14(2) of this Act as having been made.

[…]"

Prior art

11. The designs claimed by the applicant in its application for invalidation to predate the registered design are shown below.[3]

(i) Hossom Trigger Finger Splint

Sold on Amazon UK
ASIN: B07Q4GLQZR
Date first available: 15 June 2019

[3] Exhibits B, C and D contained in the applicant's statement of grounds

(ii) Paskyee Trigger Finger Splint

Sold on Amazon UK

ASIN: B07T9BQNCG

Date first available: 16 April 2020

(iii) OTOTEC Finger Support Splint

Sold on Amazon UK

ASIN: B07XHMHR96

Date first available: 5 September 2019

12. The proprietor challenged the reliability of this evidence, claiming that the images, category, price and description of a product listed on Amazon can be modified at any time, but the creation date and "ASIN" of the listing remains the same.[4] In support of this, the proprietor provides printouts from Amazon.[5] The first of these is a listing for the "Wolvex Ear Wax Remover Kit", as shown below. The ASIN is B07X6NVDKH and the date first available is given as 30 August 2019.

[4] The proprietor explains that the ASIN is a unique code which is assigned by Amazon to each listing on its website.

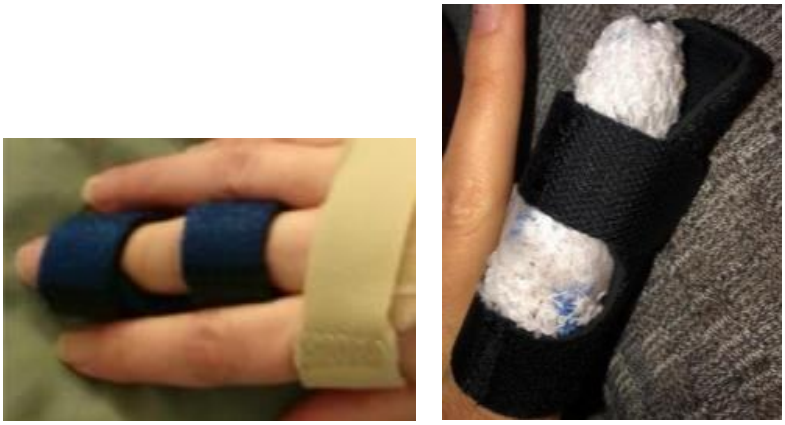
[5] Proprietor's counterstatement

13. The proprietor then provides printouts from Amazon orders with the same ASIN. The order from 10 March 2023 shows the ear wax remover kit. The order from 5 September 2019, however, shows different products, as displayed below.

14. I note that the proprietor also provides similar evidence from eBay. However, since none of the applicant's claimed prior art is from eBay, I will say no more about it.

15. The applicant's response to this, through Mr Jones' evidence, was to provide printouts of Amazon customer reviews.[6] The reviews concern finger splints which were reviewed in the UK on 3 November 2019 and 12 March 2020. These are shown below.

[6] Exhibits A and B



16. The applicant also responded to the proprietor's comments through Mr Bloore's evidence. He says that his company operates a website described as a reverse image search engine that can search the internet for copies of a given image. He says that the company has been crawling and indexing images on the internet since 2008. Mr Bloore provides search results from his company's website, generated by searching the internet with one of the depictions of the design at issue.[7] The evidence shows that 10 results were found. Mr Bloore highlights the results shown below.

17. I acknowledge that, on the balance of probabilities, the proprietor has established the possibility that information in Amazon listings may be modified without the date the

[7] Exhibit TE1

product was first available changing. The applicant does not appear to have disputed this. Nevertheless, it is my view that the theoretical possibility of a seller changing such information is not sufficient, in and of itself, to prevent the printouts filed by the applicant from providing *prima facie* evidence that the products shown therein were first made available to the public on the dates stated. Simply because Amazon listings can be modified does not prove that those provided by the applicant have been. The proprietor has provided details of what appear to be its own products (noting that they are sold by Wolvex), which does nothing to establish that the third-party sellers in the applicant's evidence must have engaged in this practice. The designs shown at paragraph 11(i)-(iii) above were made public on Amazon UK prior to the relevant date. I am satisfied that this constitutes disclosure in accordance with the Act.[8]

18. I note that, within its counterstatement, the proprietor does not explicitly deny the applicant's claim that the registered design is neither new nor has individual character. As I have dismissed the proprietor's argument regarding the reliability of the evidence of claimed prior art, this arguably represents a tacit acceptance of the applicant's pleaded case,[9] meaning that the application for invalidation under this ground succeeds. Nevertheless, for reasons that will become apparent, I will proceed to assess the applicant's claims in full.

Novelty

19. Section 1B(2) of the Act states that a design has novelty if no identical design or no design differing only in immaterial details has been made available to the public before the relevant date. In *Shnuggle Limited v Munchkin, Inc & Anor* [2019] EWHC 3149 (IPEC), HHJ Melissa Clarke, sitting as a Judge of the High Court, said:

> "26. 'Immaterial details' means 'only minor and trivial in nature, not affecting overall appearance'. This is an objective test. The design must be considered as a whole. It will be new if some part of it differs from any earlier design in

[8] For the avoidance of doubt, I consider the applicant's evidence described at paragraphs 15 and 16 to show further prior art disclosed before the relevant date. However, I will focus my assessment on the designs at paragraph 11(i)-(iii), not least because the images thereof are much clearer.
[9] *Delta Air Lines, Inc v Ontro Limited,* BL O/044/21

some material respect, even if some or all of the design features, if considered individually, would not be."

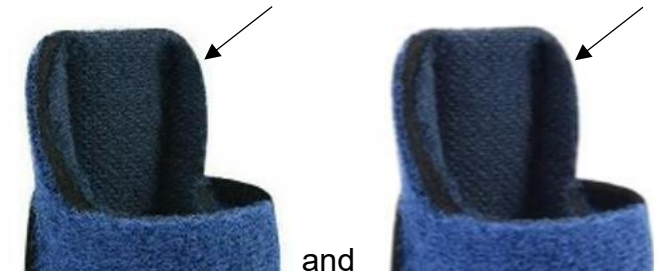
20. I will begin by comparing the registered design with the prior art shown at paragraph 11(ii) above.[10] This is because it appears to be the most similar overall to the registered design and both sides of the product are clearly visible. Therefore, the designs to be compared are as follows:

The registered design	The prior art
	

21. It is my view that the registered design and the prior art share the following design features:

a) The splints are both roughly oblong in shape, with two horizontal straps.

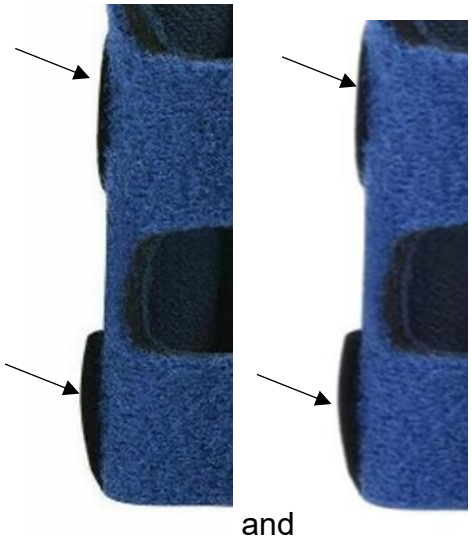
b) The oblong shape runs the length of the product and curves forwards slightly, as shown below.


and

[10] Which, for ease of reference, I shall refer to as "the prior art" from this point onwards.

c) The straps have an identical shape, thickness and placement;

d) The straps end in the same place on the splint, as shown below.



and

22. I note that a white label extrudes from one side of the splint in one representation of the registered design but not in the other. This appears to be consistent with the registered design showing two designs, rather than one. Although the legislation allows for 'sets' of products to be registered,[11] there is no obvious reason why finger splints would be sold in a pair. Therefore, I have reservations that the registered design is a single design rather than two designs. Nonetheless, the applicant has not pleaded that the design is invalid on that basis and, as such, it is a matter which is beyond the scope of this decision.

23. I acknowledge that the straps do not appear to extend all the way around the splint in one representation of the registered design, whereas they do in the prior art. However, I consider this to be an immaterial detail. This is on the basis that the straps wrap around to precisely the same place in the second representation as in the prior art. It is also considered that the straps could have been fixed to a different place for the purposes of the first representation of the registered design (as would be the case for a looser fit around the finger, or to account for a larger finger).

[11] *GBL UK Trading Ltd v H&S Alliance Ltd*, BL O/374/21

24. The registered design differs from the prior art in the areas of the respective exteriors which are darker and brighter blue. In the prior art, the darker blue covers the full length of the oblong shape, whereas there is a horizontal strip of brighter blue at the top in the registered design. The registered design makes no claim as to the colour(s) of the splint in the representations so this aspect cannot constitute a material difference between it and the prior art. However, even setting aside the colours, the appearance of the construction still differs. For instance, the back of the prior art (the oblong shape) includes a single, long rectangle, whereas the back of the registered design has a rectangular piece which stops short of the top. In addition, and perhaps more importantly, the registered design includes the aforementioned white label which extrudes from one side of the splint. This feature is not present in the prior art.

25. Taking all of the above into account, it is my view that the registered design differs in more than immaterial details from the prior art. I find that the design is new when compared to the prior art.

26. A design may be new but still lack the necessary individual character compared to the prior art. As such, I shall now go on to consider whether the registered design has individual character.

Individual character

27. The approach to carrying out an assessment of individual character was helpfully summarised by HHJ Hacon, sitting as a Judge of the High Court, in *Safestand Ltd v Weston Homes PLC & Ors* [2023] EWHC 3250 (Pat) at paragraph 237:

> "(1) Decide the sector to which the products in which the designs are intended to be incorporated or to which they are intended to be applied belong;
>
> (2) Identify the informed user and having done so decide
>
> (a) the degree of the informed user's awareness of the prior art and

(b) the level of attention paid by the informed user in the comparison, direct if possible, of the designs;

(3) Decide the designer's degree of freedom in developing his design;

(4) Assess the outcome of the comparison between the RCD and the contested design, taking into account

(a) the sector in question,

(b) the designer's degree of freedom,

(c) the overall impressions produced by the designs on the informed user, who will have in mind any earlier design which has been made available to the public,

(d) that features of the design which are solely dictated by technical function are to be ignored in the comparison, and

(e) that the informed user may in some cases discriminate between elements of the respective designs, attaching different degrees of importance to similarities or differences; this can depend on the practical significance of the relevant part of the product, the extent to which it would be seen in use, or on other matters."

28. I also bear in mind the comments of HHJ Birss (as he then was), sitting as a Deputy Judge of the Patents Court, in *Samsung Electronics (UK) Ltd v Apple Inc* [2012] EWHC 1882 (Pat):

"58. How similar does the alleged infringement have to be to infringe? Community design rights are not simply concerned with anti-counterfeiting. One could imagine a design registration system which was intended only to allow for protection against counterfeits. In that system only identical or nearly identical products would infringe. The test of 'different overall impression' is

clearly wider than that. The scope of protection of a Community registered design clearly can include products which can be distinguished to some degree from the registration. On the other hand the fact that the informed user is particularly observant and the fact that designs will often be considered side by side are both clearly intended to narrow the scope of design protection. Although no doubt minute scrutiny by the informed user is not the right approach, attention to detail matters."

The sector in question

29. The relevant sector is that of finger splints.

The informed user

30. Earlier in *Samsung Electronics*, the judge gave the following description of the informed user:

> "33. […] The identity and attributes of the informed user have been discussed by the Court of Justice of the European Union in *PepsiCo v Grupo Promer* (C-281/10 P) [2012] FSR 5 at paragraphs 53 to 59 and also in *Grupo Promer v OHIM* [2010] EDCR 7, (in the General Court from which *PepsiCo* was an appeal) and in *Shenzhen Taiden v OHIM*, case T-153/08, 22 June 2010.
>
> 34. Samsung submitted that the following summary characterises the informed user. I accept it and have added cross-references to the cases mentioned:
>
> > i) he (or she) is a user of the product in which the design is intended to be incorporated, not a designer, technical expert, manufacturer or seller (*PepsiCo* paragraph 54 referring to *Grupo Promer* paragraph 62, *Shenzhen* paragraph 46);
> >
> > ii) however, unlike the average consumer of trade mark law, he is particularly observant (*PepsiCo* paragraph 53);

iii) he has knowledge of the design corpus and of the design features normally included in the designs existing in the sector concerned (*PepsiCo* paragraph 59 and also paragraph 54 referring to *Grupo Promer* paragraph 62);

iv) he is interested in the products concerned and shows a relatively high degree of attention when he uses them (*PepsiCo* paragraph 59);

v) he conducts a direct comparison of the designs in issue unless there are specific circumstances or the devices have certain characteristics which make it impractical or uncommon to do so (*PepsiCo* paragraph 55).

35. I would add that the informed user neither (a) merely perceives the designs as a whole and does not analyse details, nor (b) observes in detail minimal differences which may exist (*PepsiCo* paragraph 59)."

31. It is my view that the informed user will either be a medical professional, such as a doctor or nurse, or a member of the general public in need of a finger splint to support the recovery of an injury. They will possess a relatively good awareness of the prior art and display a relatively high degree of attention. I see no reason why they should not be able to conduct a direct comparison of the designs in issue. The informed user is likely to have concerns regarding the efficacy of the splint at the forefront of their minds when choosing such items and I will bear this in mind when it comes to assessing the overall impression on the informed user.

Design freedom

32. In *Dyson Ltd v Vax Ltd* [2010] FSR 39, Arnold J (as he was then) stated that:

"34. […] design freedom may be constrained by (i) the technical function of the product or an element thereof; (ii) the need to incorporate features common to such products; and/or (iii) economic considerations (e.g. the need for the item to be inexpensive)."

33. Neither party has commented on the how much design freedom there is for finger splints. The only evidence before me of finger splints was produced by the applicant in support of its claim that identical designs had been made public prior to the relevant date, i.e. there is no evidence showing the state of the market more generally.

34. It is my understanding that a finger splint stabilises the finger and holds it in one position, to support and protect the finger following an injury. This is supported by the dictionary definition provided by the applicant.[12] A critical feature is likely to be a part which runs the length of the finger. Another key feature is likely to be a means of keeping the finger in place. It will need to be shaped to fit the finger. Aside from this, it is considered that the designer has a significant degree of design freedom. For example, they could have a different number of straps. In addition, they could be designed to either fully or partially cover the finger, or either draw support from other parts of the hand or solely cover the finger.

Overall impression

35. I have already dismissed the difference between the designs based upon where the straps end. This is immaterial. In any event, in his *Safestand* summary of the approach to assessing the overall impression, HHJ Hacon said that the informed user may attach greater importance to some parts of the design. Moreover, in Shenzhen Taiden Industrial Co Ltd v OHIM, T-153/08, the General Court stated that:

> "66. […] That impression [the overall impression produced on the informed user] must necessarily be determined also in the light of the manner in which the product at issue is used, in particular on the basis of the handling to which it is normally subject on that occasion."

36. In this case, it is my view that the informed user would pay particular attention to the features which provide support for the finger and keep the splint in place. Less importance is likely to be placed on, for instance, whether the splint has a small label, or where precisely the straps end. The back view of the design is also likely to be of

[12] Applicant's statement of grounds

less importance. Whilst I note that the case law establishes that the informed user does not merely perceive designs as a whole without any analysis of details, HHJ Birss said in *Samsung* that "minute scrutiny by the informed user" is not the right approach.[13] With this in mind, and being mindful that the informed user will be paying a relatively high degree of attention, they will no doubt notice the overall shape and appearance of the splint, its two horizontal straps and the placement thereof, but they are unlikely to analyse and notice the aforementioned minor differences. Considering all the elements and the significant number of visual similarities between the designs, it is my view that the differences between the registered design and the prior art are not sufficient to produce a different overall impression on the informed user. Consequently, the registered design does not have individual character.

Conclusion

37. The applicant's claim under section 1B of the Act is successful.

Section 1C

38. Section 1C of the Act states that:

> "(1) A right in a registered design shall not subsist in features of appearance of a product which are solely dictated by the product's technical function.
>
> […]"

39. In *Lindner Recyclingtech GmbH v Franssons Verkstader AB* [2010], Case R 690/2007-3, cited with approval by Arnold J (as he then was) in *Dyson Ltd v Vax Ltd* [2010] EWHC 1923 (Pat), the Third Board of Appeal of the Office for Harmonisation in the Internal Market (now the EUIPO) stated:

> "36. It follows from the above that art.8(1) CDR denies protection to those features of a product's appearance that were chosen exclusively for the

[13] Paragraph 58

purpose of designing a product that performs its function, as opposed to features that were chosen, at least to some degree, for the purpose of enhancing the product's visual appearance. It goes without saying that these matters must be assessed objectively: it is not necessary to determine what actually went on in the designer's mind when the design was being developed. The matter must be assessed from the standpoint of a reasonable observer who looks at the design and asks himself whether anything other than purely functional considerations could have been relevant when a specific feature was chosen."

40. Sir Anthony Mann surveyed the law on this point in *Chiaro Technology Limited v Mayborn (UK) Limited*, [2023] EWHC 2417 (Pat). He concluded:

> "36. Approaching the question as a matter of principle, it seems to me to be right that the necessary objectivity of the approach prevents the subjective intentions of the designer from being taken into account as such. A third party ought to be able to consider the question of whether his/her product or proposed product infringes by looking at the designs and deciding the question from that and from other objectively available evidence. It ought not to be the case that the answer could be swayed by the subjectively expressed intentions of the designer which would not normally be available to that third party. The objective view, which does not take into account the subjective views of the creator of the designer, is more consistent with principle, and the bulk of the caselaw."

41. In *DOCERAM GmbH v CeramTec GmbH*, Case C-395/16, the Court of Justice of the European Union ("CJEU") held that:

> "25. It follows that, under the system laid down by Regulation No 6/2002, appearance is the decisive factor for a design (judgment of 21 September 2017, *Easy Sanitary Solutions and EUIPO v Group Nivelles*, C-361/15 P and C-405/15 P, EU:C:2017:720, paragraph 62).

26. Such a finding supports an interpretation of Article 8(1) of Regulation No 6/2002 according to which that provision excludes from the protection conferred by that regulation a case in which the need to fulfil a technical function of the product concerned is the only factor determining the choice by the designer of a feature of appearance of that product, while considerations of another nature, in particular those related to its visual aspect, have not played a role in the choice of that feature.

27. Finally, such an interpretation of that provision is supported by the objective pursued by Regulation No. 6/2002.

28. It is clear from recitals 5 and 7 that that regulation aims to create a Community design which is directly applicable in each Member State which is protected in one area encompassing all Member States, encouraging the innovation and development of new products as well as investment in their production by offering enhanced protection for industrial design.

29. As regards, in particular, Article 8(1) of Regulation No 6/2002, read in the light of recital 10 thereof, that provision intends to prevent technological innovation from being hampered by granting design protection to features dictated solely by a technical function of a product.

30. As the Advocate General stated in points 40 and 41 of his Opinion, if the existence of alternative designs fulfilling the same function as that of the product concerned was sufficient in itself to exclude the application of Article 8(1) of Regulation No 6/2002, a single economic operator would be able to obtain several registrations as a Community design of different possible forms of a product incorporating features of appearance of that product which are exclusively dictated by its technical function. That would enable such an operator to benefit, with regard to such a product, from exclusive protection which is, in practice, equivalent to that offered by a patent, but without being subject to the conditions applicable for obtaining the latter, which would prevent competitors offering a product incorporating certain functional features or limit

the possible technical solutions, thereby depriving Article 8(1) of its full effectiveness.

31. In light of the foregoing, it must be held that Article 8(1) of Regulation No 6/2002 excludes protection under the law on Community designs for features of appearance of a product where considerations other than the need for that product to fulfil its technical function, in particular those related to the visual aspect, have not played any role in the choice of those features, even if other designs fulfilling the same function exist."

42. The applicant argues that "the design of a finger splint is limited by the anatomical shape of a finger and the intended function of the product which is to immobilise". The only material the applicant has filed in support of this ground is a dictionary definition, purportedly from the Cambridge Dictionary, which states that a splint is "a flat piece of material that does not bend, used to support a broken bone and to keep it in one position". However, as Jacob J (as he then was) said in *Thermos Ltd v Aladdin Sales & Marketing Ltd* [2000] FSR 402, the fact that a product or part of a product has a function does not mean that it necessarily has no design effect: "form follows function but is seldom completely limited by it". Rather, I must assess whether technical function was the only factor that determined those features, taking account of all the objective circumstances relevant to the case.

43. Later in *DOCERAM*, the CJEU gave the following guidance on the factors to be taken into account:

"37. As the Advocate General stated in essence, in points 66 and 67 of his Opinion, such an assessment must be made, in particular, having regard to the design at issue, the objective circumstances indicative of the reasons which dictated the choice of features of appearance of the product concerned, or information on its use or the existence of alternative designs which fulfil the same technical function, provided that those circumstances, data, or information as to the existence of alternative designs are supported by reliable evidence."

44. Neither the applicant nor the proprietor has filed any evidence on the functional benefit of any of the features of the registered design and I have only a limited range of alternative designs before me. Therefore, I will base my assessment largely on the design itself.

45. I accept that finger splints are designed to hold and support the finger in a straight position. It follows, therefore, that critical design features for this exclusively technical function would be a part which runs the length of the finger and a way to keep the finger in place. However, it seems to me, even in the absence of evidence, that finger splints could take various forms. For example, they could be designed to either fully or partially cover the finger. There also appears to be design freedom when determining whether the splint draws support from another part of the hand or whether it is limited to covering the injured finger. The placement, number and thickness of the straps are other features for which there could be design freedom. In my view, it is not sufficient to merely point out that a splint being designed to hold a finger in a straight position is functional *per se*. The applicant has not filed any evidence (or arguments) going to any functional benefit that may be derived from any specific features shown in the representations of the registered design, i.e. a finger splint that:

a) Has two horizontal straps, with one at the bottom and the other around 25-50% of the way down;

b) Has two open sections, one at the top and the other around 50-75% of the way down;

c) Has a slightly curved edges running along the oblong shape.

46. To my mind, the applicant has not shown that these are likely to have been chosen for, or serve, solely functional purposes.

Conclusion

47. The applicant's claim under section 1C of the Act is dismissed.

Overall outcome

48. The application for invalidation has been successful. Subject to a successful appeal against this decision, the registered design will be declared invalid.

Costs

49. The applicant has been successful and, ordinarily, would be entitled to a contribution towards its costs. As the applicant has not instructed professional representatives, it was invited by the Tribunal to indicate whether it intended to make a request for an award of costs, by filing a costs pro-forma including accurate estimates of the number of hours spent on a range of given activities relating to the proceedings.

50. It was made clear in the official letter dated 16 July 2024 that, if the pro-forma was not completed by 30 July 2024, costs (other than official fees) may not be awarded. The applicant did not return a completed costs pro-forma to the Tribunal. On this basis, I award only the £48 fee paid by the applicant in connection with the filing of its application for invalidation (Form DF19A).

51. I hereby order Wolvex Limited to pay JFA Medical Ltd the sum of **£48**. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of the proceedings if any appeal against this decision is unsuccessful.

Dated this 27th day of February 2025

James Hopkins
For the Registrar