

O-133-09

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2429035
BY
LIQUID BUSINESS SOLUTIONS LIMITED
TO REGISTER THE TRADE MARK:**

LIQUID

AND

**THE OPPOSITION THERETO
UNDER NO 96124
BY
LIQUID HR LIMITED**

Trade Marks Act 1994

**In the matter of application no 2429035
by Liquid Business Solutions Limited
to register the trade mark:
LIQUID
and the opposition thereto
under no 96124
by Liquid HR Limited**

1) On 4 August 2006 Liquid Business Solutions Limited (Solutions) applied to register the trade mark **LIQUID**. The application covers nine classes but this opposition only concerns five of them:

company books and documents; printed matter; books, newsletters, magazines; stationery;

telephone answering services; IT procurement; procurement of communications systems and equipment; business advice; assistance and advice for business start-ups; business advice and assistance; data warehousing; data storage;

telephone; voice over Internet protocol (VOIP) services; communications services; Internet service provision; mobile telephony; mobile communications services; call and fax forwarding; provision of virtual private networks; provision of Internet access; wireless networking services; ethernet communications services; IR linking; telephone switching;

training; providing and organising training; providing training facilities; communications and IT training;

business recovery; business continuity; disaster recovery; web hosting; hosting of Internet web-sites; design of web-sites; provision of IT and communications help-desk services; remote and on-site IT and communications support services; company formation services; rental and leasing of computer hardware and software; rental and leasing of communications equipment.

The above goods and services are in classes 16, 35, 38, 41 and 42 respectively of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

The application was published for opposition purposes on 9 November 2007.

2) On 7 February 2008 Liquid HR Limited (LHR) filed an opposition to the registration of the trade mark. LHR bases its opposition on section 5(2)(b) of the

Trade Marks Act 1994 (the Act). According to section 5(2)(b) of the Act a trade mark shall not be registered if because:

“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.”

The earlier trade mark upon which LHR relies is United Kingdom registration no 2331771:



The colours blue and white are claimed as an element of the trade mark.

The application for registration was filed on 10 May 2003 and the registration procedure was completed on 14 November 2003. The trade mark is registered for the following services;

business management; business administration particularly in relation to human resources and personnel consultancy services; professional, advisory and consultancy business services relating to the management of human resources; business advisory services relating to employment law and human resources;

providing user access to the Internet for the purpose of storing and retrieving employee information;

legal services relating to employment law and human resources; professional, advisory and consultancy services relating to employment law; information and advisory services relating to the aforesaid services.

These services are in classes 35, 38 and 42 respectively of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

3) LHR claims that the respective goods and services in classes 16, 35, 38, 41 and 42 are identical or similar. It states that the only difference between the trade marks is the hr element, a non-distinctive element meaning human resources. LHR claims that the main distinctive portion of each trade mark is the LIQUID element. It claims that the respective trade marks are similar. LHR claims that there is a likelihood of confusion and registration should be refused in

respect of the goods and services in classes 16, 35, 38, 41 and 42 of the application.

4) Solutions filed a counterstatement. It does not admit that the respective trade marks are similar. It denies that the services of the earlier registration are similar or identical to the goods and services of its application with the exception of the class 38 services of the earlier registration. However, it does not state which goods and/or services of its application are either similar or identical to these services. Solutions denies the grounds of opposition.

5) Both parties filed evidence. They were advised that they had a right to a hearing and that if neither party requested a hearing a decision would be made from the papers and any written submissions that were received. Neither side requested a hearing nor filed written submissions.

Evidence of LHR

6) This consists of a witness statement by Ms Helen Jane Forsyth, who is a partner in Nash Matthews, the representative of LHR. Ms Forsyth states that she understands that HR is an abbreviation for human resources. She exhibits hits from two Google® searches to support this. Ms Forsyth states that HR is a common abbreviation for human resources. She states that the hr element of LHR's trade mark is a "non-distinctive tag"; consequently, she believes that undertakings dealing with the respective trade marks of the parties would discount the hr element when comparing the trade marks. Ms Forsyth disagrees with part of the preliminary indication. I cannot take any cognisance of the preliminary indication¹. Ms Forsyth states that Solutions could provide training in relation to human resources or business matters or employment law and such training is likely to be associated as coming from LHR.

Evidence of Solutions

7) This consists of a witness statement by Ms Debra Clare Hiddleston who is a trade mark attorney. Ms Hiddleston also refers to the preliminary indication. She

¹ Lindsay J in *esure Insurance Limited v Direct Line Insurance plc* [2007] EWHC 1557 (Ch) stated:

"17. As a subsidiary argument, esure argues before me that the Hearing Officer was wrong to reject the Registrar's preliminary view in the way that he did. Mr Hobbs, drawing attention to the Rules to which I have referred and also to Article 6 ECHR, argues that the Hearing Officer was right in doing as he did. I have no doubt but that the Hearing Officer was right to do as he did. The Registrar's view was arrived at before there was any evidence on either side, before there was any argument on either side and in a context in which it could not be regarded as a decision against the interests of either side without the prospective loser being given an opportunity to be heard, an opportunity which was not given. So far from it being an error of principle to fail to take the Registrar's preliminary view into account, it would, in my judgment, have been a serious error of principle for it to have been taken into account."

states that Solutions has two earlier trade mark registrations that include the word LIQUID. These both post-date the registration of LHR. One is for a series of six trade marks: LIQUID IT, liquid it, LIQUID-IT, liquid-it, LIQUID_IT, liquid_it. The other is for the trade mark LIQUID MAINFRAME. The former is registered for:

communications, telephony, email, network services; and support and maintenance services relating thereto;

IT services; computer services; web-hosting and web-design; IT support, helpdesk and maintenance services; IT services provided to multi-occupancy office space; provision of hosted servers.

The latter is registered for:

communications, telephony, email, network services; information and advisory services relating thereto;

IT support and helpdesk services; IT support services provided to multi-occupancy office space; provision of hosted servers; updating and upgrading of computer software relating to communications, telephony, e-mail and network systems.

Ms Hiddleston states that LHR's trade mark was not cited against the two registrations of Solutions.

8) Ms Hiddleston asks me to take the above into account when reaching my decision. The issue with which I am seised is whether there is a likelihood of confusion in relation to the registration and the application before me. I cannot see that the two other registrations are relevant to this. The class 42 specification is very different, the trade marks are not the same. The absence of citations simply begs the question as to whether citations should have been raised. Even if Solutions had registrations that predated the registration of LHR this would not affect the analysis and the outcome of the opposition (see the judgment of the Court of First Instance (CFI) in *PepsiCo, Inc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) T-269/02*²).

² "23 Thus the applicant did not at any stage of the proceedings before OHIM rely on the use of that mark in order to prove de facto coexistence of that mark and the intervener's mark, although such coexistence could have been a relevant factor in the assessment, carried out independently by OHIM in application of Regulation No 40/94, of the likelihood of confusion between the Community mark requested and the intervener's mark.

24 Nor did the applicant claim, and even less prove, that it had used its earlier German mark to obtain cancellation of the intervener's mark before the competent national authorities, or even that it had commenced proceedings for that purpose.

Average, relevant consumer and the purchasing process

9) The goods and services listed below could all be purchased by both the public at large and/or businesses.

printed matter; books, newsletters, magazines; stationery;

telephone answering services;

telephone; voice over Internet protocol (VOIP) services; communications services; Internet service provision; mobile telephony; mobile communications services; call and fax forwarding; provision of virtual private networks; provision of Internet access; wireless networking services; ethernet communications services; IR linking;

25 In those circumstances, the Court notes that, quite irrespective of the question whether the applicant had adduced evidence of the existence of its earlier German mark before OHIM, the existence of that mark alone would not in any event have been sufficient reason for rejecting the opposition. The applicant would still have had to prove that it had been successful in having the intervener's mark cancelled by the competent national authorities.

26 The validity of a national trade mark, in this case the intervener's, may not be called in question in proceedings for registration of a Community trade mark, but only in cancellation proceedings brought in the Member State concerned (Case T-6/01 *Matratzen Concord v OHIM – Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 55). Moreover, although it is for OHIM to ascertain, on the basis of evidence which it is up to the opponent to produce, the existence of the national mark relied on in support of the opposition, it is not for it to rule on a conflict between that mark and another mark at national level, such a conflict falling within the competence of the national authorities.

27 Thus the Board of Appeal, at paragraph 17 of the contested decision, was able to state that 'the alleged priority of one national registration with respect to another in a Member State ha[d] no effect on the opposition proceedings before the Office, since it [had] not been demonstrated that the applicant [for the Community mark] ever filed a cancellation action against the opponent's registration'.

28 Contrary to the applicant's assertions, there is nothing absurd or anomalous in OHIM's allowing an opposition based on an earlier national mark, even when the applicant for the Community trade mark invokes an even earlier national mark, where the validity of the opponent's mark is not challenged before the competent national authorities. On the contrary, that approach is fully in keeping with the division of competence between OHIM and those national authorities.

29 The applicant puts forward other arguments. The first argument is that OHIM's position would lead to the absurd situation that the rejection of its application for the Community trade mark RUFFLES would obstruct the conversion of that application into a national trade-mark application exclusively in Germany, the country where the applicant has a registration allowing it to market the goods in question under that mark. Next, it argues that it is anomalous for it to be refused the protection relating to the Community mark when in practice it can obtain such protection through national registrations. Those two arguments are based on the unsubstantiated premiss that the applicant actually does have the right to market its products in Germany under the RUFFLES trade mark. In fact, it has not been established at all that the intervener is unable to challenge that right on the basis of its mark RIFFELS."

training; providing and organising training; providing training facilities; communications and IT training;

provision of IT and communications help-desk services; remote and on-site IT and communications support services.

The goods and services below are likely to be purchased by businesses:

company books and documents;

IT procurement; procurement of communications systems and equipment; business advice; assistance and advice for business start-ups; business advice and assistance; data warehousing; data storage;

telephone switching;

business recovery; business continuity; disaster recovery; web hosting; hosting of Internet web-sites; design of web-sites; company formation services; rental and leasing of computer hardware and software; rental and leasing of communications equipment.

I have included *rental and leasing of computer hardware and software; rental and leasing of communications equipment* in this category as in my experience the public at large purchase computer hardware and software and communications equipment rather than lease or rent it. It is businesses that rent and lease such goods.

The class 35 and 38 services of the earlier registration are likely to be purchased by businesses rather than the public at large. The class 42 services of the earlier registration can be purchased by both businesses and the public at large eg an employee in dispute with an employer could use these services.

10) The purchase of the services of both the earlier registration and those of the application are likely to be the result of a careful and educated decision; they are not services that are likely to be purchased on impulse. Those services which are purchased by businesses are likely to involve even more consideration in the purchasing process.

11) *Printed matter; books, newsletters, magazine and stationery* are all items that can be purchased on impulse eg buying a ball point pen or a magazine at a railway station. There could be exceptions to this, for example a luxury pen, however, there is nothing in the nature of these goods that gives rise to a careful and educated purchasing decision. Owing to the nature of these goods, I consider that the effects of imperfect recollection could have a major effect. *Company books and documents* are by their nature designed for business and

the professional and so they are likely to involve a reasonably careful and educated purchasing decision.

Comparison of trade marks

12) The trade marks to be compared are:



LIQUID

13) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details³. The visual, aural and conceptual similarities of the marks must, therefore, be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components⁴. Consequently, I must not indulge in an artificial dissection of the trade marks, although I need to take into account any distinctive and dominant components. The average consumer rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he/she has kept in his/her mind and he/she is deemed to be reasonably well informed and reasonably circumspect and observant⁵. The assessment of the similarity of the trade marks must be made by reference to the perception of the relevant public⁶.

14) Solutions' trade mark consists of the ordinary English word LIQUID, that is not going to be divided by the average consumer, whether professional or the public at large; there is no separate distinctive and dominant element.

15) In its grounds of opposition LHR states that the only difference in the trade marks are the letters hr. This is not the case. The earlier registration has a rectangle in blue and white, it has a blue line running at the bottom and the letters are portrayed in blue and white. The colours blue and white are claimed as an element of the trade mark and so are an integral part of it⁷.

³ *Sabel BV v Puma AG* [1998] RPC 199.

⁴ *Sabel BV v Puma AG* [1998] RPC 199.

⁵ *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* [2000] FSR 77.

⁶ *Succession Picasso v OHIM - DaimlerChrysler (PICARO)* Case T-185/02.

⁷ See by analogy the decision of Mr Geoffrey Hobbs QC, sitting as the appointed person in *Robert McBride's Application* BL/0/392/02 in relation to an absence of a colour claim:

"14. It is assumed, unless otherwise stated, that trade mark registration has been requested and conferred on the basis that use of the relevant mark in colour is neither claimed nor disclaimed. The absence of a colour claim or limitation effectively makes it a condition of registration that no colouring is necessary for the mark in question to possess a distinctive character: Cases T-

16) LIQUID has no meaning in relation to the services of the earlier registration. It is at the beginning of the trade mark and strikes the eye. I consider that LIQUID is the distinctive and dominant element of the trade mark. LHR refers to the meaning of hr, although it refers to this in upper case. The meaning, or absence thereof, attributed to hr will depend on the context of use. In some contexts its use will be likely to give rise to it being perceived as meaning human resources, in other contexts it might be seen as an abbreviation for hour or herr or as having no meaning for the average relevant consumer; just as in one context AA will be seen as referring to a car breakdown service and in another to a group for alcoholics. When I first looked at the trade mark, without reference to the services, I gave no meaning to the letters hr. In relation to those services that are limited or directly related to human resources, I am sure that the average consumer for the services will perceive hr as meaning human resources. In relation to other services I am not convinced that the average consumer will give any meaning to the letters. The letters hr in relation to services that are limited or directly related to human resources will, owing to its meaning, be given little weight by the average consumer; they will be seen as describing the service that the undertaking provides. In relation to services where there is no reason that the letters will have meaning, I consider that the letters will be simply seen as letters with no attached concept, perhaps indicating a particular sub-brand of the LIQUID brand. Consequently, these letters will have a trade mark significance.

17) Phonetically both trade marks share the word LIQUID. This is the sole component of the application and the distinctive and dominant element of the earlier trade mark. The trade marks enjoy a good deal of phonetic similarity. Visually both trade marks share the word LIQUID, although one in lower case and one in upper case; neither is an unusual font. The importance of the visual effects of letters that form words, and are not in an usual font, is inextricably linked to the meaning of the words; it is the word that the average consumer will primarily remember. The trade marks differ in that the earlier right has the letters hr, has a blue and white rectangle, a blue line and is in the colours blue and white. Consequently, there are clear visual differences between the trade marks. Owing to the common presence of the word LIQUID, which is the distinctive and dominant element of the earlier trade mark, I consider that the respective trade marks have a degree of visual similarity. The LIQUID elements of the trade marks are conceptually identical. In relation to certain services hr will have the conceptual meaning of human relations; however, the effect of the conceptual meaning will be effectively nullified as it will be seen as a descriptor. The respective trade marks, depending on the services, are conceptually identical or conceptually very, very similar.

128/00 and T-129/00 Procter & Gamble Company v. OHIM (19th September 2001) paragraph 55. A mark validly registered without a colour claim or limitation may therefore be taken to have been used when it appears in colour no less than when it appears in black-and-white, if the representation conforms to the template or pattern of the mark as registered."

18) Overall, the respective trade marks are similar to a high degree.

Comparison of goods and services

19) The goods and services of the application that are the subject of the opposition are:

company books and documents; printed matter; books, newsletters, magazines; stationery;

telephone answering services; IT procurement; procurement of communications systems and equipment; business advice; assistance and advice for business start-ups; business advice and assistance; data warehousing; data storage;

telephone; voice over Internet protocol (VOIP) services; communications services; Internet service provision; mobile telephony; mobile communications services; call and fax forwarding; provision of virtual private networks; provision of Internet access; wireless networking services; ethernet communications services; IR linking; telephone switching;

training; providing and organising training; providing training facilities; communications and IT training;

business recovery; business continuity; disaster recovery; web hosting; hosting of Internet web-sites; design of web-sites; provision of IT and communications help-desk services; remote and on-site IT and communications support services; company formation services; rental and leasing of computer hardware and software; rental and leasing of communications equipment.

The services of the earlier registration are:

business management; business administration particularly in relation to human resources and personnel consultancy services; professional, advisory and consultancy business services relating to the management of human resources; business advisory services relating to employment law and human resources;

providing user access to the Internet for the purpose of storing and retrieving employee information;

legal services relating to employment law and human resources; professional, advisory and consultancy services relating to employment law; information and advisory services relating to the aforesaid services.

20) In “construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of

trade⁸". Words should be given their natural meaning within the context in which they are used, they cannot be given an unnaturally narrow meaning⁹. Consideration should be given as to how the average consumer would view the goods or services¹⁰. The class of the goods in which they are placed is relevant in determining the nature of the goods¹¹. In assessing the similarity of goods it is necessary to take into account, inter alia, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary¹². In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, Jacob J also gave guidance as to how similarity should be assessed¹³. In considering the services the judgment of Jacob J in *Avnet Incorporated v Isoact Ltd* [1998] FSR 16 must be taken into account:

"In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of

⁸ *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281.

⁹ *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267.

¹⁰ *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32 dealt with a non-use issue but are still pertinent to the consideration of the meaning and effect of specifications:

"In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under section 10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus, the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use"

¹¹ *Altecnic Ltd's Trade Mark Application* [2002] RPC 34.

¹² *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117.

¹³ He considered that the following should be taken into account when assessing the similarity of goods and/or services:

- (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."

activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

The concept of the complementary nature of goods and/or services has been dealt with by the CFI on a number of occasions. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T- 325/06 the CFI stated:

“82 It is true that goods are complementary if 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 (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 P *Rossi v OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR I-0000, paragraph 48).”

In the context of this case, in relation to certain of the respective services, the findings of the CFI in *Commercy AG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-316/07 are particularly apposite:

54 The mere fact that the information, booking and reservation services covered by the trade mark at issue are exclusively provided via the internet and therefore require software support such as that provided by the goods and services covered by the earlier trade mark does not suffice to remove the essential differences between the goods and services concerned in terms of their nature, their intended purpose and their method of use.

55 Computer goods and computer services are used in nearly all sectors. Often, the same goods or services – for example, a certain type of software or operating system – may be used for very different purposes, and that does not mean that they become different or distinct goods or services. Conversely, travel agency services do not become something else – in terms of their nature, intended purpose or method of use – solely because they are provided via the internet, particularly since, nowadays, use of computer applications for the provision of such services is almost essential, even where those services are not provided by an internet shop.

56 Moreover, the goods and services concerned are not substitutable, since they are intended for different publics. Therefore, the Board of Appeal was right to find that those goods and services are not in competition with each other.

57 Finally, those same goods and services are also not complementary. It must be recalled in this respect that goods or services which are complementary are those where 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 consumers may think that the responsibility for the production of those goods or provision of those services lies with the same undertaking (Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60; judgment of 15 March 2006 in Case T-31/04 *Eurodrive Services and Distribution v OHIM – Gómez Frías (euroMASTER)*, not published in the ECR, paragraph 35; and Case T-420/03 *El Corte Inglés v OHIM – Abril Sánchez and Ricote Saugar (Boomerang TV)* [2008] ECR I-0000, paragraph 98).

58 That case-law definition implies that complementary goods or services can be used together, which presupposes that they are intended for the same public. It follows that there can be no complementary connection between, on the one hand, the goods and services which are necessary for the running of a commercial undertaking and, on the other, the goods and services produced or supplied by that undertaking. Those two categories of goods or services are not used together since those in the first category are used by the relevant undertaking itself whilst those in the second are used by customers of that undertaking.”

It is necessary not to conflate points of coincidence with similarity.

21) Neither party has put forward any arguments within the parameters of the case law as to why the respective goods and services are similar or not.

Class 16 of the application

22) I can see no point of coincidence between *stationery* and the services of the earlier registration. Publications could have as their subject such things as the law and business administration. However, this tenuous link does not satisfy the criteria set out in the case law. If registration of a trade mark was to be refused because the subject matter of a publication related to a product or service this could virtually debar registrations for publications. The subject matter also does not reflect the essential nature of the goods. A similar sort of argument has been used in relation to computers and services that use computers, and has been dismissed by the CFI¹⁴. This might not be the basis of the claim of similarity by

¹⁴*Les Editions Albert René v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-336/03:*

“69 Next, the Court must reject the applicant’s argument that all the goods and services covered by the Community trade mark application are linked, in one way or another, to ‘computers’ and ‘computer programs’ (Class 9) covered by the earlier trade mark. As the defendant rightly points out, in today’s high-tech society, almost no electronic or digital equipment functions without the

LHR but I don't know as LHR has put forward no arguments as to the basis of the claim. **The class 16 goods of the application are neither similar nor identical to the services of the earlier registration.**

Class 35 of the application

23) In considering the claim as to the similarity of the services I have reminded myself of the *Avnet* principle in relation to the scope of specifications for services. Taking into account the qualifications of parts of the specification eg *relating to the management of human resources*, I consider that LHR's best hope for success is born of *business management* and *business administration* in class 35 (the use of particularly after the latter term does not limit the specification¹⁵) and *providing user access to the Internet for the purpose of storing and retrieving employee information* in class 38. The services involve the managing and administration of a business, a service that is being furnished to a third party. *Telephone answering services; IT procurement; procurement of communications systems and equipment* are services that can be supplied to businesses but I cannot see that a normal reading of the wording would lead to the services of the application being included in those of the earlier registration. These are specialist services. I cannot see that there is any coincidence between the respective services in terms of the *Canon* criteria. In terms of the *British Sugar Plc v James Robertson & Sons Limited* criteria there is the coincidence of potentially having the same user, a business. However, if such a generalised level of coincidence led to similarity there would be few services and goods that could not be described as similar. In the end, if one takes an ad absurdum approach, it is possible to find a degree of similarity between any goods and services; such an approach has been rejected by the ECJ in its endorsing the

use of computers in one form or another. To acknowledge similarity in all cases in which the earlier right covers computers and where the goods or services covered by the mark applied for may use computers clearly exceeds the scope of the protection granted by the legislature to the proprietor of a trade mark. Such a position would lead to a situation in which the registration of computer hardware or software would in practice exclude subsequent registration of any type of electronic or digital process or service exploiting that hardware or software."

¹⁵ In *Scil proteins GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-87/07 the CFI commented on the meaning of the synonymous phrase 'in particular':

"40 Those arguments are not convincing. The fact that the words 'in particular' indicate an example is not disputed where a list of goods is drafted as follows: 'biological preparations containing in particular antibodies'. The interpretation must be identical where the list of goods is wider and is drafted as follows: 'chemical preparations; biological preparations; pharmaceutical preparations; all these products containing in particular antibodies'. The expression 'all the aforesaid goods' used in the list of goods designated by the earlier mark is simply designed to avoid repetition of the phrase 'containing in particular antibodies' for each of the categories of goods mentioned. It follows that the list of goods designated by the earlier mark is not ambiguous and that the words 'in particular' which appears therein must be understood as simply listing a category of goods of particular interest to the applicant."

judgment of the CFI in *Assembled Investments (Proprietary) Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-105/05* and *Waterford Wedgwood plc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case C-398/07*. I can see nothing in the class 38 and 42 specifications of the earlier registration that would assist LHR. **Telephone answering services; IT procurement; procurement of communications systems and equipment are neither identical nor similar to the services of the earlier registration.**

24) *Providing user access to the Internet for the purpose of storing and retrieving employee information* will involve accessing data, data that has to be stored somewhere. All of these services could be furnished by a cloud computing service, and form an integral part of it. The storage and warehousing of the data would have little purpose if it could not be accessed, the providing of access to the data clearly requires access to stored or warehoused data. There is a mutually dependent and symbiotic relationship between the services. The services will have the same user, someone who wishes to access data. Owing to the symbiotic relationship the services are likely to be supplied through the same channels of trade. **Data warehousing and data storage are similar to providing user access to the Internet for the purpose of storing and retrieving employee information.**

25) *Business management and business administration* must include business assistance and advice; they are part of the very nature of the former services. Consequently, **I find business advice; assistance and advice for business start-ups; business advice and assistance are identical to business management and business administration.**

Class 38 of the application

26) The class 38 service of the earlier registration allows a user access to a database in relation to employee information, no more, no less. It is not a general communications service, the access is secondary to the data that is being accessed. It is a very limited specification, a specification that could give rise to a question as to if the applicant was fully aware of the nature of class 38 services, that they are not content services. I have to deal with the specification as it exists, not what it might have been hoped that it contained. The *Avnet* principle must be born in mind. The user of the service of the earlier right is someone who wishes to interrogate or upload data in relation to employee information. How the average consumer would view the services is also important in the consideration of the respective services.

27) *Telephone; voice over Internet protocol (VOIP) services; mobile telephony; mobile communications services* are all general telecommunication services which provide general access to telecommunication systems. The class 38 services of the earlier registration will require a telecommunication system to

operate but this is a level of coincidence on the most general of levels; both systems are also likely to be dependent on electricity, this does not create a similarity to power supply services. A plethora of services make use of telecommunication services, it would require a strained interpretation of complementarity to consider that because of this the services are complementary. A travel agent uses telecommunications, accesses data bases; this does not give rise to travel agency services being similar to telecommunication services or computers or telephones. The key nature of the service of LHR is that it gives access to employee records. The services of Solutions under consideration here are not linked to the furnishing of a data base, let alone a data base containing employee information. The respective services are not fungible and so are not in competition. The purpose of one service is to access employee data, the purpose of the services of the application are to have general access to a telecommunication system. The users are, consequently, different, being defined by the purpose of the use. The channels of trade are not comparable. **Telephone; voice over Internet protocol (VOIP) services; mobile telephony; mobile communications services are neither similar nor identical to the class 38 services of the earlier registration. The other services of the earlier registration are even more distant and LHR cannot succeed in relation to these services.**

28) **Telephone switching involves the routing of telecommunication signals. I can see no possible meaningful coincidence between this service and any of the services of the earlier registration; these services are neither identical nor similar to the services of the earlier registration.**

29) **Call and fax forwarding are telephone answering services. A business might use such services, as it might use an Internet service or a postal service. I cannot see that such a general level of coincidence gives rise to any meaningful similarity between the aforesaid services and any of the services of the earlier registration. These services are neither identical nor similar to the services of the earlier registration.**

30) *Provision of virtual private networks; wireless networking services; ethernet communications services; IR linking* supply the effective infrastructure for communication between computers in a network. These are IT services. The services are not fungible with those of the earlier right; they are not in competition. There is no mutually dependent or symbiotic relationship between these services and those of the earlier registration. The purpose of the service is to allow various computers to interconnect with one another in the form of a network; this is no comparable purpose for any of the services of the earlier registration. The channel of trade will be different to that of all of the services of the earlier registration. **The aforesaid services are neither similar nor identical to the services of the earlier registration.**

31) *Communications services; Internet service provision; provision of Internet access* will include the class 38 services of the earlier registration and so must be 'deemed' to be identical¹⁶. **Consequently, communications services; Internet**

¹⁶ See *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-133/05 paragraph 29:

"In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42)."

The above is a translation from the French. There is no variation in the judgment in French:

"29 En outre, des produits peuvent être considérés comme identiques lorsque les produits que désigne la marque antérieure sont inclus dans une catégorie plus générale visée par la demande de marque [arrêt du Tribunal du 23 octobre 2002, Institut für Lernsysteme/OHMI – Educational Services (ELS), T 388/00, Rec. p. II 4301, point 53], ou lorsque les produits visés par la demande de marque sont inclus dans une catégorie plus générale visée par la marque antérieure [arrêts du Tribunal du 23 octobre 2002, Oberhauser/OHMI - Petit Liberto (Fifties), T 104/01, Rec. p. II 4359, points 32 et 33 ; du 12 décembre 2002, Vedial/OHMI - France Distribution (HUBERT), T 110/01, Rec. p. II 5275, points 43 et 44, et du 18 février 2004, Koubi/OHMI - Flabesa (CONFORFLEX), T 10/03, Rec. p. II 719, points 41 et 42]."

This is also the position of Professor Annand, sitting as the appointed person in *Galileo International Technology LLC v Galileo Brand Architecture Limited* BL 0/269/04:

"13. I agree with Mr. Onslow that the issue raised by this appeal is whether, when considering the test of identity for section 5(1), it is sufficient that goods or services overlap or must they be co-extensive. Like Mr. Onslow, I am unaware of any authority supporting a co-extensive test. Kerly's Law of Trade Marks and Trade Names, 13th Edition, states at para. 8-10:

"... the goods or services must be the same as those the subject of the earlier trade mark. Although not explicit, it would seem that this provision can only sensibly be interpreted as prohibiting registration where there is an overlap of goods or services."

A footnote indicates that such interpretation is in accordance with Article 13 of Council Directive 89/104/EEC. Although not expressly included, it is well established that the TMA must be read subject to Article 13, which provides:

"Where grounds for refusal of registration or for revocation or invalidity of a trade mark exist in respect of only some of the goods or services for which that trade mark has been applied for or registered, refusal of registration or revocation or invalidity shall cover those goods or services only."

14. The equivalent to section 5(1) in Council Regulation (EC) No. 40/94 on the Community trade mark ("CTMR") is Article 8(1)(a). Mr. Onslow referred me to two decisions of the Opposition Division of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ("OHIM") concerning Article 8(1)(a) of the CTMR where identity of goods and services was found to subsist through overlaps in specifications. In WALLIS, Decision No. 1978/2004, identity was

found inter alia between Class 14 specifications even though the contested CTM application covered additional goods in that class. The Opposition Division said:

“There is identity between the goods or services that are subject to comparison if they either have the same wording or can be considered synonyms. The identity is also found if the specification of the earlier mark includes a generic term that covers the specific goods of the contested application. Similarly if the goods specifically designated in the earlier mark are covered by a generic term used in the contested application, such goods are identical, to the degree that they are included in the broad category. Finally, in case that the goods in question overlap in part they are also to be considered as identical.”

A similar decision was arrived at in PACE, Decision No. 1033/2003. Again, the Class 41 services in the CTM application were wider than those in the earlier CTM registration. In addition, there was held to be identity between some of the applicant's Class 42 services namely, “computer programming; providing of expert opinion”. The opponent's registration was in respect of “consulting services related to improving and expediting product development, industrial research services, computer programming services” in Class 42. The Opposition Division observed:

“In particular, the applicant's expression providing of expert opinion in class 42, is broad enough to encompass any consulting services registered by the opponent in class 42, which makes them equivalent to the extent that the one includes the other.”

15. The overlap test for identity of goods and services is also applied by the OHIM in connection with priority and seniority claiming under Articles 29, and 34 and 35 of the CTMR respectively. Indeed, it is recognised that partial priority claiming (i.e. where the subsequent application is for a narrower or wider specification than in the application(s) from which priority is claimed) is a possibility under section 33 of the TMA, which speaks of a right of priority “for some or all of the same goods or services” in a Convention application.

16. I believe that overlapping specifications satisfy the test for identical goods or services in section 5(1) of the TMA. There is no necessity for such specifications to co-extend.”

I do not consider that the judgment of Norris J is in *Budejovický Budvar, národní Podnik v Anheuser-Busch Inc* [2008] EWHC 263 (Ch) is in conflict with the above. In that case he stated:

“41. There is however one respect in which this appeal succeeds. AB's application for a declaration of invalidity extended to the whole of BB's registration in respect of "beer ale and porter; malt beverages;" (although its own registration related only to "beer ale and porter"). In his decision the Hearing Officer regarded it as obvious that in respect of "beer, ale and porter" the respective specifications encompassed the same goods (and the contrary has not been argued before me). He said:-

"The only possible area of contention is the description "malt beverages" in the mark in suit. The term covers all beverages made with malt, including "malt beers" and the like. Accordingly the specification of the registration that is the subject of these proceedings is covered in its entirety by the specifications of [AB's] earlier mark"

This is a determination of a mixed question of fact and law which I must approach with caution. But in my judgement this passage discloses an error of principle. AB's earlier mark covered only "beer, ale and porter". BB's included "malt beverages". The specification of AB's earlier mark simply did not cover entirely the specification of the mark in suit. It is necessary to decide whether "malt beverages" can only be "beer ale and porter", or whether "malt beverages" can include goods which are not identical with or similar to "beer ale and porter".

service provision; provision of Internet access are identical to providing user access to the Internet for the purpose of storing and retrieving employee information.

Class 41 services of the application

32) These are all training services. The services of the earlier registration do not include any educational services. In her evidence Ms Forsyth states:

“the Applicant could provide training in relation to human resources or business matters or employment law and such training is likely to be associated as coming from the Opponent”

Ms Forsyth does not state that the services are similar but that they are likely to be associated with the opponent; these are not one and the same thing¹⁷. The

42. I do not consider that "malt beverages" can only be (and are therefore identical with) "beer ale and porter". The form of the specification would indicate that "beer, ale and porter;" is one category and "malt beverages" another, with possibly an overlap between the two. One is not simply an alternative description for the other.”

In the above judgment Norris J was considering whether the respective goods could be described as being identical, not whether they should be considered to be identical. There is a deal of difference between stating that goods **are** identical and stating that they are considered to be identical.

If one did not follow the principles laid down by the CFI and Professor Annand considering similarity of goods in certain cases would become virtually impossible. If, for example, an earlier registration was for wedding dresses and an application for clothing one would have to consider the degree of similarity between the former goods and every potential product covered by the term clothing as there would be varying degrees of similarity and the global appreciation of the likelihood of confusion requires consideration of the degree of similarity between goods and/or services.

An applicant has plenty of time to amend a specification which includes a portmanteau term so that the term list goods which are of specific interest. If the applicant does not do so then it must expect to bear the consequences.

¹⁷ See the judgment of the ECJ in *Waterford Wedgwood plc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case C-398/07:

“34 However, the interdependence of those different factors does not mean that the complete lack of similarity can be fully offset by the strong distinctive character of the earlier trade mark. For the purposes of applying Article 8(1)(b) of Regulation No 40/94, even where one trade mark is identical to another with a particularly high distinctive character, it is still necessary to adduce evidence of similarity between the goods or services covered. In contrast to Article 8(5) of Regulation No 40/94, which expressly refers to the situation in which the goods or services are not similar, Article 8(1)(b) of Regulation No 40/94 provides that the likelihood of confusion presupposes that the goods or services covered are identical or similar (see, by way of analogy, *Canon*, paragraph 22).

35 It must be noted that the Court of First Instance, in paragraphs 30 to 35 of the judgment under appeal, carried out a detailed assessment of the similarity of the goods in question on the basis of

logic of her argument is that training services are potentially similar to all other goods and service as they could include training in relation to other goods and services. This conflates the content of the training with the nature of training and in relation to the similarity of the services it is the nature of the services that is key. The user of the training services is an undertaking or individual who wants training, none of the services of LHR will satisfy this requirement; they do not have the same purpose. The user of the training services is someone who is being taught something, not something that the services of LHR supply. I cannot see that the respective services are mutually dependent or are in competition with one another, so they are not complementary or in competition. Training has its own channel of trade. I do not consider that one can conflate being supplied with information or advice, as per various of the services of LHR, with being trained. If, for example, I contact a help line for advice I would not describe the help line as training me. **I find that the class 41 services of the application are neither similar nor identical to the services of the earlier registration.**

Class 42 services of the application

33) *Company formation services* represents a discrete business activity. It is an area in which specialist undertakings or specialist arms of undertakings operate. I cannot see that there is any coincidence between these services and those of the earlier right in the context of the parameters of the case law. ***Company formation services* are neither similar nor identical to the services of the earlier registration.**

34) It is necessary to bear in mind that the comparison has to be undertaken within the parameters of the *Avnet* judgment. It is also necessary to bear in mind that the specification is limited by the class within which it has been placed as per *Altecnic*. Class 38 restricts the service of the earlier registration to supplying access, for supplying effectively a telecommunication service of a restricted scope. It does not include the content which is accessed or the design of software which may be used in effecting the access. *Design of web-sites* is as the name states a design service, it is not an access service, it is a service that creates the end product for a web service, it is not a communication service, it is not an access service. I do not consider that it enjoys coincidences in any meaningful way with any of the services of the earlier registration. ***Design of***

the factors mentioned in paragraph 23 of the judgment in *Canon*. However, it cannot be alleged that the Court of First Instance did not take into account the distinctiveness of the earlier trade mark when carrying out that assessment, since the strong reputation of that trade mark relied on by Waterford Wedgwood can only offset a low degree of similarity of goods for the purpose of assessing the likelihood of confusion, and cannot make up for the total absence of similarity. Since the Court of First Instance found, in paragraph 35 of the judgment under appeal, that the goods in question were not similar, one of the conditions necessary in order to establish a likelihood of confusion was lacking (see, to that effect, *Canon*, paragraph 22) and therefore, the Court of First Instance was right to hold that there was no such likelihood.”

***web-sites* is neither similar nor identical to the services of the earlier registration.**

35) *Rental and leasing of computer hardware and software; rental and leasing of communications equipment* are services that supply equipment. LHR's registration does not encompass any goods nor does it cover the leasing or renting of any goods. If the argument of LHR is that its services could or would use computers and communication equipment, the same could be said of any service nowadays, one might as well consider that pens are similar to all services as they will be invariably be used in the effecting of the services. **I do not consider that there are any meaningful coincidences between *rental and leasing of computer hardware and software; rental and leasing of communications equipment* and the services of the earlier registration and consequently the aforesaid services are neither similar nor identical to the services of the earlier registration.**

36) *Web hosting; hosting of Internet web-sites* are, as far as I can see, one and the same thing. As with all other aspects of this case there is a dearth of information in relation to the nature of the services. I will, therefore, have to rely upon my understanding of what the term means, a most unsatisfactory situation. To my understanding, a web host is an undertaking that provides space on a server that it owns or leases, a third party then uses this space to locate its website. Again this is a specialised and discrete service. The web host is not supplying content, it is not supplying access; it is just giving space on its servers from which a third party runs its website. **I do not consider that there are any meaningful coincidences between *web hosting; hosting of Internet web-sites* and the services of the earlier registration and consequently the aforesaid services are neither similar nor identical to the services of the earlier registration**

37) Placed in class 42 *business recovery; business continuity; disaster recovery* are services that relate to continuity and recovery of IT systems. These are computer related services. These are services that could be provided after the event, or could be put in place before the event; in order to aid recovery or avoid disaster. These are services that are supplied to businesses as are many of the services of the earlier registration, but that is a level of extreme generality. One set of services relates to computer technology, it involves computer experts working on an IT system. In class 35 of the earlier registration there are general business management and administration services; these relate to looking at the general running of a business, these are not IT services. In my experience, and in the absence of evidence and submission this is all upon which I can rely, business management and IT services are supplied by different undertakings. Their purpose is different; although of course IT services will nowadays be used in virtually any business. The services are not in competition and there is no mutually dependent or symbiotic relationship between them. Any coincidence between them is neither material or significant, as with *Waterford Wedgwood plc*

v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM). **Business recovery; business continuity; disaster recovery are neither similar nor identical to the services of the earlier registration.**

38) The only potential area of coincidence with *provision of IT and communications help-desk services; remote and on-site IT and communications support services* and the services of the earlier registration rests with the class 38 services of the earlier registration. The class 38 service of the earlier registration allows a user access to a database in relation to employee information, no more, no less. The services of the application are technical services to deal with problems in IT and communication equipment services; they are specialist services, services furnished by “techies”. If there is a failure or a problem with the class 38 service of the earlier registration, this is likely to be reported. However, there is no cover in any of the classes of the specifications for services to resolve the problem. The problem being of a technical nature would then have to be handed over to a specialist in dealing with technical problems. There is a coincidence in that both sets of services can relate to IT and communications services. However, in this day and age with the reliance upon the Internet, this is an interface that could occur in relation to any business. Again, the *Avnet* principle must be born in mind. In this case the user of one service is the person who has a problem with a communications or IT service, the user of the other service is someone who wishes to interrogate or upload data in relation to employee information. The purpose of the services are different. The services are not in competition. The channels of trade for the furnishing the services will be different. There is no mutually dependent or symbiotic relationship. If there is a coincidence in the services it is at the most abstract of levels. ***Provision of IT and communications help-desk services; remote and on-site IT and communications support services are neither similar nor identical to the services of the earlier registration.***

Conclusion

39) In considering whether there is a likelihood of confusion various factors have to be taken into account. There is the interdependency principle – a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods, and vice versa¹⁸. In this case there is a high degree of similarity between the respective trade marks. It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade mark (either by nature or nurture) the greater the likelihood of confusion¹⁹. The distinctive character of a trade mark can be appraised only, first, by reference to the goods or services in respect of which registration is sought and,

¹⁸ *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117.

¹⁹ *Sabel BV v Puma AG* [1998] RPC 199.

secondly, by reference to the way it is perceived by the relevant public²⁰. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the mark to identify the goods for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings²¹. The LIQUID element of the earlier trade mark is the distinctive and dominant component. LIQUID is not an invented word but I cannot see that it is either allusive or descriptive of the services for which it is registered. I consider that LHR's trade mark in its entirety has a good deal of inherent distinctiveness. Owing to the proximity of the trade marks, however careful the purchasing process there is a likelihood of confusion where the services are similar or identical. The ECJ and CFI have reiterated on many occasions that a finding of a likelihood of confusion is the result of a cumulative process. Part of that cumulative process is that the goods and/or services are similar or identical. If they are not there cannot be a likelihood of confusion. In this case I have found that the following services of the application are similar or identical to the services of the earlier registration:

business advice; assistance and advice for business start-ups; business advice and assistance; data warehousing and data storage;

communications services; Internet service provision; provision of Internet access.

Consequently, there is a likelihood of confusion in relation to the above services and the application is to be refused in respect of those services.

Absence of particularisation by LHR

40) In *Canon* the ECJ stated:

“22. It is, however, important to stress that, for the purposes of applying Article 4(1)(b), even where a mark is identical to another with a highly distinctive character, it is still necessary to adduce evidence of similarity between the goods or services covered. In contrast to Article 4(4)(a), which expressly refers to the situation in which the goods or services are not similar, Article 4(1)(b) provides that the likelihood of confusion presupposes that the goods or services covered are identical or similar.”

The court required evidence of similarity to be adduced. This finding has been reiterated by the ECJ and the CFI eg in *Commercy AG v Office for*

²⁰ *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

²¹ *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-316/07:

“43 Consequently, for the purposes of applying Article 8(1)(b) of Regulation No 40/94, it is still necessary, even where the two marks are identical, to adduce evidence of similarity between the goods or services covered by them (see, to that effect, order of 9 March 2007 in Case C-196/06 P *Alecansan v OHIM*, not published in the ECR, paragraph 24; and Case T-150/04 *Mülhens v OHIM – Minoronzoni(TOSCA BLU)* [2007] ECR II-2353, paragraph 27).”

This part of the judgment has been more recognised in the breach than in the observance in this jurisdiction. It may not always be practical to adduce evidence of similarity, however, it behoves an opponent that it makes submissions as to why it considers that goods and services are similar within the criteria set out in the case law. Simply stating that goods and services are similar tells neither the applicant nor the hearing officer anything; it does not allow either of them to understand the basis for the claim as no basis is given. The submissions cannot be based on mere generalities (see the judgment of the ECJ in *BVBA Management, Training en Consultancy v Benelux-Merkenbureau C- 239/05*). LHR has made no attempt to justify its claim as to the similarity of goods and services, it has made a bald statement with no reasoning behind it. I am left bemused as to what argument it might have advanced to support the claim that stationery of the application is similar to the services of its registration. In the absence of analysis and submission I am left in the invidious position of making a decision without any idea as to the basis of the claim that is being made. It could be argued that in the absence of particularisation the claim of similarity should simply be dismissed. In opposition proceedings the onus is upon the opponent, it is for it to substantiate its case; it should be that it also particularises its case. In this case in the absence of particularisation and evidence I have had to rely, in my view, far too heavily on my own knowledge as to what such terms as web hosting and IR linking mean. Such reliance is obviously fraught with problems and drawbacks.

Costs

41) Solutions having been for the most part successful is entitled to a contribution towards its costs. I award costs on the following basis:

Preparing a counterstatement and considering the grounds of opposition: £300
Evidence: £50

TOTAL £350

I order Liquid HR Limited to pay Liquid Business Solutions Limited the sum of £350. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 15th day of May 2009

**David Landau
For the Registrar
the Comptroller-General**