

O-417-19

TRADE MARKS ACT 1994

**CONSOLIDATED PROCEEDINGS IN THE MATTER OF
APPLICATION NO 3293378 TO REGISTER THE FOLLOWING SERIES OF FOUR
TRADE MARKS:**

**TECH 
NATION**

 **TECH
NATION**

 **TECH NATION**


**TECH
NATION**

**AND APPLICATION NO. 3293310 TO REGISTER THE FOLLOWING TRADE
MARK:**



**BY TECH NATION GROUP LIMITED IN CLASSES 9, 16, 35, 36 & 41
AND OPPOSITION NOS. 412822 & 412823 THERETO (RESPECTIVELY) BY
THE AMROP PARTNERSHIP**

BACKGROUND

1) On 28 February 2018, Tech Nation Group Limited ('the applicant') applied to register the following, as trade marks:

Application No. 3293378 ('Application 1'):



Application No. 3293310 ('Application 2'):



2) Both applications are made in respect of the following services:

Class 09: Downloadable electronic publications; training materials in electronic format; instructional materials in electronic format.

Class 16: Printed publications; printed research reports; instructional and teaching materials; newsletters; magazines; books; newspapers; periodicals.

Class 35: Business networking services; business advisory services; business assistance; business information services; advisory services relating to business management and business operation; business appraisal services; business consultancy services; provision of commercial information; preparing business reports; collection of data; collection of business statistics; business analysis, research and information services; research of business information; preparation of business statistics; provision of market research information; provision of business statistical data; relocation services for businesses; advertising; organisation of trade fairs for commercial or advertising purposes; organisation of exhibitions for commercial or advertising purposes; advice and information relating to personnel recruitment; providing employment information.

Class 36: Financial research and information services; advice and information relating to finance; provision of online financial information; advice and information relating to finance; advice and information relating to real estate.

Class 41: Organisation of conferences and seminars; provision of educational, instructional and training courses; conducting courses, seminars and workshops; business training in the field of leadership and executive development; education, instruction and training courses for accessing via the internet and other communication and computer networks; publication of texts, books and of magazines; providing on line electronic publications (not downloadable); provision of information and consultancy; providing on-line instructional videos; production of training videos.

3) The applications were published in the Trade Marks Journal on 23 March 2018 and notice of opposition was later filed by The Amrop Partnership ('the opponent'). The opponent claims that both trade mark applications offend under sections 5(2)(b) and 5(4)(b) of the Trade Marks Act 1994 ('the Act').

4) Details of the mark relied upon under s.5(2)(b) are:

International Registration Designating the EU (No. 1049193)

Office of origin: France

Date of designation of the EU: 02 August 2010

Date protection granted in EU: 02 August 2011



Amrop

Class 35: Recruitment services and placement of personnel, particularly of managers.

The device element of the mark is registered in the colours blue, orange, mauve, red, green, white and black.¹

5) It is claimed that the respective services are identical or similar and the parties' marks similar such that there exists a likelihood of confusion.

6) The opponent's registration is an earlier mark, in accordance with section 6 of the Act. As the date of protection of the earlier mark is more than five years prior to the publication date of the contested marks, the former is subject to the proof of use conditions, as per section 6A of the Act. The opponent made a statement of use in respect of all the services relied upon.

7) Under s.5(4)(b), the opponent claims that its 'Nexus design' (which corresponds to the device element present in earlier mark no. 1049193) is an original artistic work and use of the applicant's marks would infringe the copyright in that work. It is claimed that the artistic work was designed for the opponent at least as early as 2008 and that the applicant has substantially copied that work.

¹ For those reading a black and white copy of this decision, the colours in the opponent's earlier mark can be viewed using the 'Search for a trade mark' facility on the IPO website at: <https://trademarks.ipso.gov.uk/ipo-tmcase>

8) The applicant filed a counterstatement in response to both oppositions which were subsequently consolidated. I note, particularly, the following points made by the applicant:

- Proof of use of the earlier mark is requested.
- It is denied, with explanation, that there is any similarity between the respective marks or services and that there is a likelihood of confusion under s.5(2)(b) of the Act.
- The claim under s.5(4)(b) is denied and the opponent is put to strict proof as to the circumstances in which the earlier right was created and its claim to ownership of that right.

9) The opponent is represented by Novagraaf UK; the applicant by Ward Hadaway Solicitors. Both parties filed evidence and submissions. Neither party requested to be heard or filed written submissions in lieu. I now make this decision after carefully considering the papers before me.

EVIDENCE

Opponent's evidence

10) This comes from Daniel Halliday, UK Chartered Trade Mark Attorney at Novagraaf UK (the opponent's legal representative) and Cindy D'Haenens, Corporate & Finance Manager at The Amrop Partnership.

11) Mr Halliday explains that the opponent is a London-based specialist executive search firm that assists companies to recruit staff into senior leadership positions across various sectors including the Consumer, Financial services, Industrial, Life Sciences and Technology markets and that the UK Amrop branch was formed in 2006. Mr Halliday provides prints from the opponent's UK website². These bear various dates spanning 2015 – 2018. All of the prints bear either the earlier mark, as

² Exhibits DH1-DH14

registered, or with the letters 'UK'. The website describes the recruitment services offered by the opponent.

12) Turning to the evidence of Ms D'Haenens, she provides annual UK revenue figures in relation to services covered by, and provided under, the earlier mark³. The total revenue for those years are:

Year	Total Revenue (UK) (€)
2012	4,743,728
2014	1,775,405
2015	3,529,640
2016	1,578,960
2017	2,372,065
2018	3,329,745

13) Ms D'Haenens also provides a number of invoices dated from 11 May 2015 to 25 January 2018 for services provided under the earlier mark⁴. All of the invoices bear the earlier mark, as registered, in the top left-hand corner and are addressed to various businesses in the UK. The services listed on the invoices are for searches conducted by the opponent to fill various leadership positions at those businesses such as Senior Relationship Managers and Managing Directors.

14) In relation to the claim under section 5(4)(b), Ms D'Haenens explains that the 'Amrop & Nexus Device' was created in 2009 by a design agency named Thackway Mccord on behalf of the opponent as a project to create a unified global brand for the opponent's various companies throughout the world. A copy of a presentation, dated 2009, created by the design agency⁵ is provided showing the conception and development of the mark which, Ms D'Haenens states, is protected by virtue of copyright law.

³ Exhibit CDH1

⁴ Exhibit CDH2-CDH5

⁵ Exhibit CDH6

15) A copy of excerpts from the Brand Guidelines of the opponent from 2015 is also provided⁶. Ms D'Haenens states that this provides internal instructions on how to use the 'Amrop & Nexus Device' mark to ensure consistency of identity under the same.

Applicant's evidence

16) This comes from MB Christie, Chief Operations Officer of Tech Nation Group Limited, and Mr Adrian Philpott, Director of Philpott Design Limited.

17) Mr Christie explains that in 2017 the applicant commissioned a design agency named Philpott Design to create new branding. This led to the creation of the 'Solar' logo which forms part of the two contested trade mark applications. A copy of the design document provided to the applicant by the design agency, dated 14 December 2017, is provided⁷. MB Christie states that, to the best of their knowledge, the work carried out by Philpott Design, and the 'solar' logo which they created, is their own original work which was created entirely independently and without knowledge of, reference to, or copying the 'Nexus' device upon which the opponent relies under s.5(4)(b).

18) Mr Philpott's evidence essentially confirms the facts set out in Mr Christie's evidence above. He states that the 'Solar' logo was created by in-house employees of Philpott Design Limited for use by the applicant and is the original work of those employees which has not been copied or adapted from any other logos. He confirms that neither he nor any of his employees who were involved in the creation of the applicant's 'solar' logo have seen the opponent's 'nexus' logo before.

DECISION

Section 5(4)(b)

19) The applicant has put the opponent to proof of ownership of the earlier artistic work. This is important because, in accordance with The Trade Marks (Relative

⁶ Exhibit CDH7

⁷ Exhibit MBC1

Grounds) Order 2007, only the owner of the copyright in that work can bring proceedings under s.5(4)(b) of the Act. The relevant part of the order states:

“Refusing to register a mark on a ground mentioned in section 5 of the Trade Marks Act 1994

2. The registrar shall not refuse to register a trade mark on a ground mentioned in section 5 of the Trade Marks Act 1994 (relative grounds for refusal) unless objection on that ground is raised in opposition proceedings by the proprietor of the earlier trade mark or other earlier right.

...”

20) Further, sections 9 and 11 of the Copyright, Designs and Patents Act 1988 (‘CDPA’) state:

“9. Authorship of work

(1) In this Part "author", in relation to a work, means the person who creates it.

(2) -

(3) In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.

(4) For the purposes of this Part a work is of "unknown authorship" if the identity of the author is unknown or, in the case of a work of joint authorship, if the identity of none of the authors is known.

(5) For the purposes of this Part the identity of an author shall be regarded as unknown if it is not possible for a person to ascertain his identity by reasonable inquiry; but if his identity is once known it shall not subsequently be regarded as unknown.”

“11. First ownership of copyright

(1) The author of a work is the first owner of any copyright in it, subject to the following provisions.

(2) Where a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.”

21) Sections 9 and 11 of the CDPA indicate that it is the person who creates a copyright work who is the first owner of it. Accordingly, if the opponent was not the first owner, it must satisfy me that it subsequently became the owner⁸. Further, any such transfer of ownership must, as per s. 90(3) of the CDPA, have been in writing.

22) The evidence in support of the claim under s.5(4)(b) comes from Ms D’Haenens, as per my summary in paragraphs 14-15 above. There are a number of problems with this evidence. Firstly, there is no explanation as to whom at Thackway Mccord (the design agency) created the work. It is therefore not possible to tell whether it was created by an employee (in which case the design agency, as the employer, would ordinarily be the first owner) or whether it was created by a third party such as a freelance designer (in which case the first owner would ordinarily be that individual). Secondly, there is nothing in the evidence showing, or explaining how (or when) the opponent became the owner. There is, for example, nothing before me to indicate that the design agency (if it was the first owner) assigned the work to the opponent let alone any evidence to show that any such assignment was in writing.

23) For the reasons given, I find that the opponent has not satisfied me that it is the ‘proprietor’ of an earlier copyright for the purposes of s.5(4)(b) of the Act and The Trade Marks (Relative Grounds) Order 2007.

24) The opposition under s.5(4)(b) fails.

⁸ This must be legal ownership rather than beneficial ownership because the CDPA does not give a beneficial owner the right to bring infringement proceedings.

Proof of use

25) Section 6A of the Act states:

“Raising of relative grounds in opposition proceedings in case of non-use

6A. - (1) This section applies where -

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if -

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes -

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Union.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

26) Section 100 is also relevant, which reads:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

Consequently, the onus is upon the opponent to prove that genuine use of the registered trade mark was made in the relevant period.

27) In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) (28 June 2018), Arnold J. summarised the case law on genuine use of trade marks, as follows:

“114. The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v*

Office for Harmonisation in the Internal Market (Trade Marks and Designs) [2006] ECR I-4237, Case C-442/07 Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft 'Feldmarschall Radetsky' [2008] ECR I-9223, Case C-495/07 Silberquelle GmbH v Maselli-Strickmode GmbH [2009] ECR I-2759, Case C-149/11 Leno Marken BV v Hagelkruis Beheer BV [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG [EU:C:2013:592], [2014] ETMR, Case C-141/13 P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) [EU:C:2014:2089] and Case C-689/15 W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] to [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor.

Thus there is no de minimis rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

28) As the earlier mark is an International Registration designating the EU, the comments of the Court of Justice of the European Union (‘CJEU’) in *Leno Marken BV v Hagelkruis Beheer BV*, Case C-149/11, are also relevant. It noted that:

“36. It should, however, be observed that..... the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.”

And

“50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.”

And

“55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77).”

The court held that:

“Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to ‘genuine use in the Community’ within the meaning of that provision.

A Community trade mark is put to ‘genuine use’ within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.”

29) In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. reviewed the case law since the *Leno* case and concluded as follows:

“228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issues in London and the Thames Valley. On that basis, the General Court dismissed the applicant's challenge to the Board of Appeal's conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant's argument was not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guildford, and thus a finding which still left open the possibility of conversion of the Community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that "genuine use in the Community will in general require use in more than one Member State" but "an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State". On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark,

was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon's analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use.”

30) The General Court ('GC') restated its interpretation of *Leno Marken* in Case T-398/13, *TVR Automotive Ltd v OHIM* (see paragraph 57 of the judgment). This case concerned national (rather than local) use of what was then known as a Community trade mark (now a European Union trade mark). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of an EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM. This applies even where there are no special factors, such as the market for the goods/services being limited to that area of the Union.

31) Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the EUTM, in the course of trade, sufficient to create or maintain a market for the goods/services at issue in the Union during the relevant five-year period. In making the required assessment I am required to consider all relevant factors, including:

- i) The scale and frequency of the use shown
- ii) The nature of the use shown
- iii) The goods and services for which use has been shown
- iv) The nature of those goods/services and the market(s) for them
- iv) The geographical extent of the use shown

32) In accordance with section 6A(3)(a) of the Act, the relevant period in which genuine use must be established is the five-year period ending on the date of

publication of the contested marks. In the case before me, that period is 24 March 2013 to 23 March 2018.

33) The opponent's evidence focuses, primarily, upon the use it has made in the UK. That use has generated annual revenue averaging 2-3 million Euros since 2014. The prints of the opponent's UK website show that the mark, as registered, has featured prominently on the same throughout the relevant period. The invoices also bear the mark, as registered and show that the opponent has put its mark to use in relation to 'search' services provided to various commercial customers in the UK to fill senior management positions. The evidence also indicates there has been use in other European countries including Germany, Spain and France given that revenue figures (again amounting to several million Euros) are also shown for these countries in the relevant table in the evidence⁹. I find that the earlier mark has been put to genuine use in the EU in the relevant period.

34) I now need to consider what constitutes a fair specification, having regard for the services upon which genuine use has been shown. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

35) In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows.

⁹ Exhibit CDH1

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark

has been used and which are not in substance different from them;
Mundipharma AG v OHIM (Case T-256/04) ECR II-449; EU:T:2007:46.”

36) Genuine use has been shown in relation to recruitment services with a focus on assisting companies to find individuals to fill senior management roles. The opponent’s specification, as registered, appears to me to accord with how the average consumer is likely to fairly describe such use. I therefore find that the opponent is entitled to rely upon its specification in class 35, as registered, under s.5(2)(b) of the Act.

Section 5(2)(b)

37) Section 5(2)(b) of the Act states:

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

(a)....

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

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

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

The principles

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

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

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

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

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

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

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

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

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

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

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

Comparison of services

39) All relevant factors relating to the respective services should be taken into account when making the comparison. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU, Case C-39/97, stated at paragraph 23 of its judgment:

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

40) Guidance on this issue has also come from Jacob J where, in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, the following factors were highlighted as being relevant:

(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.

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

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

42) In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v OHIM* Case T- 325/06, it was stated:

“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..”

43) I also bear in mind that in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM Case T-133/05) (*‘Meric’*), the GC held:

“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).”

44) The claim under s.5(2)(b) is directed against classes 35 and 41 of the application only. Accordingly, the services to be compared are:

Opponent’s services	Applicant’s services
<p>Class 35: Recruitment services and placement of personnel, particularly of managers.</p>	<p>Class 35: Business networking services; business advisory services; business assistance; business information services; advisory services relating to business management and business operation; business appraisal services; business consultancy services; provision of commercial information; preparing business reports; collection of data; collection of business statistics; business analysis, research and information services; research of business information; preparation of business statistics; provision of market research information; provision of business statistical data; relocation services for businesses; advertising; organisation of</p>

	<p>trade fairs for commercial or advertising purposes; organisation of exhibitions for commercial or advertising purposes; advice and information relating to personnel recruitment; providing employment information.</p> <p>Class 41: Organisation of conferences and seminars; provision of educational, instructional and training courses; conducting courses, seminars and workshops; business training in the field of leadership and executive development; education, instruction and training courses for accessing via the internet and other communication and computer networks; publication of texts, books and of magazines; providing on line electronic publications (not downloadable); provision of information and consultancy; providing on-line instructional videos; production of training videos.</p>
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45) The opponent provides no explanation as to why it considers all the applicant's services in classes 35 and 41 to be similar to its services. Accordingly, I can only take account of factors which are obvious in my assessment.

46) The applicant's 'advice and information relating to personnel recruitment; providing employment information' ('recruitment-type' services) are in my view identical to the opponent's services since the former would fall within the latter on the *Meric* principle. If I am wrong on that, they are nonetheless highly similar given the

obvious overlap in users, trade channels, intended purpose and the complementary relationship between them.

47) The applicant's 'business assistance' would include assisting businesses to locate and fill vacant positions. I find these to be highly similar to the applicant's services.

48) The applicant's 'advertising' includes advertising job roles. The nature of the respective services is not the same. However, the respective services may both be used by businesses seeking to fill vacant positions. There is also degree of complementarity because the opponent's services are likely to involve some sort of advertising for its business clients to attract and locate suitable candidates to fill their vacant roles. A business consumer may also choose between using a recruitment consultancy firm or advertising the roles it wishes to fill. There is therefore a degree of competitiveness in play. Overall, I find there to be a low to medium degree of similarity between the applicant's 'advertising' and the opponent's services.

49) As for the rest of the applicant's services in classes 35 and 41, it is not obvious to me that there is any real similarity between any of those services and the opponent's services. I have no submissions from the opponent to assist me on the matter. Having regard for the comments in *Avnet*, and the core meanings of the respective terms before me, I consider the nature, purpose and trade channels of the parties' services to be different and I cannot see that there is any real complementary or competitive relationship in play. I find no self-evident similarity between the applicant's remaining services in classes 35 and 41 and the opponent's services. The opposition under s.5(2)(b) must therefore fail at this point against those services¹⁰.

¹⁰ In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that: "49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity."

Average consumer and the purchasing process

50) It is necessary to determine who the average consumer is for the respective services and the manner in which they are likely to be selected. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

51) The average consumer of the parties’ recruitment-type services is the commercial user and the general public (individuals seeking employment). The applicant’s advertising services will also be used by both commercial users and the general public. The applicant’s ‘business assistance’ will be used by commercial customers. I would expect the purchasing act to be primarily visual for all the services; they are likely to be selected from Internet websites and the like. However, the aural aspect must still be considered because the services may sometimes be the subject of discussions with representatives or ‘word of mouth’ recommendations.

52) While the recruitment-type services may vary in price, they are generally not inexpensive, for the commercial consumer at least (as evidenced by the opponent’s invoices). The same can be said for ‘business assistance’ services. These are not every day or impulse purchases and a number of factors are likely to be taken into account by the relevant consumers when selecting a provider. In the light of all this, I would expect a higher-than-average degree of attention to be paid during the selection of recruitment-type services (by both businesses and the general public) and business assistance services. The applicant’s ‘advertising’ services will vary greatly in price depending on the type and duration of the advertising which is being

purchased. I would expect the degree of attention paid during the purchase of 'advertising' to range from normal to higher-than-average.







Comparison of marks

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

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

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

54) The marks to be compared are:

Opponent's mark	Applicant's marks
	<p data-bbox="810 309 1007 342"><u>Application 1:</u></p>     <p data-bbox="810 1182 1007 1216"><u>Application 2:</u></p> 

55) I will begin by comparing the opponent's mark with application 2.

56) The opponent's mark consists of the word Amrop and a circular device element presented in the colours blue, orange, mauve, red, green, white and black. Both elements are distinctive (and independently so of the mark as a whole) and are striking upon the eye. The two elements play a roughly equal role in the overall impression of the mark. The overall impression of the applicant's mark lies solely in the circular device element of which it consists.

57) Visually, there is a clear difference between the marks owing to the presence/absence of the word Amrop. In terms of the respective device elements, the opponent's mark consists of a circular device made up of eight quadrilateral shapes extending outwards from a central circle. At the outer rim of the circular device, in between those quadrilaterals, are eight smaller quadrilaterals. The applicant's device consists of sixteen equally sized quadrilaterals which extend out from the central circle. Examined at this level of detail, it could be said that the devices are very different. However, I remind myself that the average consumer would not analyse the respective devices in this way. As relevant case law makes clear, "the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details". I therefore find that the device elements in both marks are likely to make an overall impression of a circular device consisting of multiple segments protruding from a central point. However, I would expect the differences in the number of segments and their relative sizes to also make some impact on the consumer's visual perception. Further, in terms of colour, I do not consider that it would be permissible to consider the applicant's mark in the same, or similar, palette of multiple colours as that present in the device element of the earlier mark. To do so would, in my view, go beyond the boundaries of 'normal and fair' use of the contested mark, as applied for. Whilst I do bear in mind that the applicant's mark may be used in colours such as red on a white background, blue on a white background etc., the absence of a multiple colour palette, which is the same or similar, to that in the opponent's mark is a striking visual difference. Bearing all of this in mind, I find a medium degree of visual similarity between the respective device elements and a low degree of visual similarity between the marks as wholes.

58) Aurally, the opponent's mark will be articulated as AM-ROP. Neither of the parties' device elements are likely to be verbalised. Therefore, there is no aural similarity between the marks.

59) Amrop appears to be an invented word and neither parties' device elements portray any immediately graspable concept. Accordingly, as neither mark evokes any clear concept, they are conceptually neutral.

60) Overall, I find that there is a low degree of similarity between the earlier mark and application 2.

61) Turning to application 1, there is a lower degree of visual similarity between all of the marks in the series and the earlier mark than for application 2 because of the additional point of visual difference created by the words 'TECH NATION'. The presence of those words also means that the applicant's marks are aurally different to the earlier mark and the applicant's marks evoke the concept of a technical nation which is not shared by the earlier mark. Overall, I find no similarity between the earlier mark and application 1.

Distinctive character of the earlier mark

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

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

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

services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

63) Inherently, the invented word Amrop is highly distinctive. The meaningless device element, whilst visually striking, is not, in my view, particularly unusual; it has a normal degree of distinctiveness. It follows that the mark, as a whole, is highly distinctive when the two elements of the mark are considered together. However, it is the normal degree of distinctiveness of the device element which is key¹¹.

64) As to whether the distinctiveness of the earlier mark has been enhanced due to the use made of it, I find that it has not. The mark has clearly been used and the revenue figures in the UK are far from insignificant. However, there is no evidence to show the kind or extent of any advertising or other promotional activities in the UK or evidence of market share, for example.

Likelihood of confusion

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

66) I will first consider the likelihood of confusion between the opponent’s mark and application 2. In this connection, I have found that:

¹¹ In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar.

- The applicant's 'advice and information relating to personnel recruitment; providing employment information' is identical or, if I am wrong, highly similar to the opponent's services. The applicant's 'business assistance' is also highly similar to the opponent's services.
- The applicant's 'advertising' is similar to a low to medium degree to the opponent's services.
- The average consumer includes both professional consumers and the general public. The level of attention paid to the purchase will vary from normal to higher-than-average in respect of advertising services and is likely to be higher-than-average for the recruitment-type services and business assistance services.
- The average consumer is likely to encounter the marks primarily by visual means but the aural aspect must also be borne in mind.
- The respective device elements are visually similar to a medium degree and the marks, as a whole, are visually similar to a low degree. There is no aural similarity between the devices or the marks as a whole and the conceptual position is neutral. Overall, the marks are similar to a low degree.
- The earlier mark, as a whole, is highly distinctive. However, I must keep in mind that the point of similarity between the respective marks stems from the element of the opponent's mark which is, of itself, distinctive to a normal degree.

67) Weighing all of these factors, I find no likelihood of one mark being mistaken for the other bearing in mind the low degree of similarity between the marks overall. There is no likelihood of direct confusion.

68) Turning to whether there is nevertheless a likelihood of the consumer believing that the respective services emanate from the same (or linked) undertaking(s) (also known as 'indirect confusion'), I note that in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are

very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

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

70) The judgment in *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch) is also of assistance in the instant case where Arnold J. considered the impact of the CJEU’s judgment in *Bimbo*, Case C-591/12P, on the court’s earlier judgment in *Medion v Thomson*. The judge said:

“18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also

perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

71) Further, in *Anncos, Inc. v OHIM*, Case T-385/09, the GC considered an appeal against OHIM's decision that there was no likelihood of confusion between ANN TAYLOR LOFT and LOFT (both for clothing and leather goods) and found that:

“48. In the present case, in the light of the global impression created by the signs at issue, their similarity was considered to be weak. Notwithstanding the identity of the goods at issue, the Court finds that, having regard to the existence of a weak similarity between the signs at issue, the target public, accustomed to the same clothing company using sub-brands that derive from the principal mark, will not be able to establish a connection between the signs ANN TAYLOR LOFT and LOFT, since the earlier mark does not include the ‘ann taylor’ element, which is, as noted in paragraph 37 above (see also paragraph 43 above), the most distinctive element in the mark applied for.

49 Moreover, even if it were accepted that the 'loft' element retained an independent, distinctive role in the mark applied for, the existence of a likelihood of confusion between the signs at issue could not for that reason be automatically deduced from that independent, distinctive role in that mark.

50 Indeed, the likelihood of confusion cannot be determined in the abstract, but must be assessed in the context of an overall analysis that takes into consideration, in particular, all of the relevant factors of the particular case (*SABEL*, paragraph 18 above, paragraph 22; see, also, Case C-120/04 *Medion* [2005] ECR I-8551, paragraph 37), such as the nature of the goods and services at issue, marketing methods, whether the public's level of attention is higher or lower and the habits of that public in the sector concerned. The examination of the factors relevant to this case, set out in paragraphs 45 to 48 above, do not reveal, *prima facie*, the existence of a likelihood of confusion between the signs at issue."

72) In line with the case law above, I must keep in mind that it is still a whole mark comparison that must be made when considering the likelihood of indirect confusion and that there is only a low degree of similarity between the marks overall. I bear in mind the independent distinctiveness of the device element in the opponent's mark which, of itself, has a normal degree of distinctiveness, and that some of the respective services are identical or, at least, highly similar. However, I come to the view that the average consumer is unlikely to put the medium degree of visual similarity between the respective devices (being the sole point of similarity between the marks as wholes) down to the respective services coming from the same or linked undertaking(s), notwithstanding the potential for imperfect recollection. This is particularly so for the services which are likely to attract a higher-than-average degree of attention but also applies to those for which a normal level attention may sometimes be paid (advertising). The lower degree of attention paid for those services is militated against by my finding that they are similar only to a low to medium degree to the opponent's services. The opposition under s.5(2)(b) against application 2 fails.

73) As regards application 1, there cannot be a likelihood of confusion if there is no similarity between the marks. Even had I found some similarity, which would have been very low overall (lower than the degree of similarity of application 2 with the earlier mark) it logically follows that there is even less likelihood of confusion, both directly and indirectly, between the opponent's mark and application 1. The opposition under s.5(2)(b) against application 1 fails.

OVERALL OUTCOME

74) The opposition fails in its entirety.

COSTS

75) As the applicant has been successful, it is entitled to a contribution towards its costs. Using the guidance in Annex A of Tribunal Practice Notice 2/2016, and keeping in mind that the two cases were consolidated upon receipt of the counterstatements, and prior to the filing of any evidence by the parties, I award the applicant costs on the following basis:

Reviewing the Notice of Opposition and preparing the counterstatement (x 2)	£300
Reviewing the opponent's evidence and Preparing evidence and submissions	£700
Total:	£1000

76) I order The Amrop Partnership to pay Tech Nation Group Limited the sum of **£1000**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 18th day of July 2019

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