O/723/22

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 03643251 BY ENPAAS LTD TO REGISTER A SERIES OF TWO AS TRADE MARKS:

ENPAAS
Enpaas

IN CLASSES 4, 9, 35 & 36

AND

OPPOSITION THERETO UNDER NO. 600002065 BY ENPASS TECHNOLOGIES INC.

Background & Pleadings

1. **Enpaas Ltd** ("the applicant"), applied to register the series of two trade marks shown on the front page of this decision in the United Kingdom. The application was filed 18 May 2021 and was published on 17 September 2021. On 21 June 2022, the applicant filed a Form TM21B, which was published on 29 June 2022, amending its specification only in relation to the Class 9 goods while Classes 4, 35, 36 and 42 remained unchanged.[1]

2. **Enpass Technologies Inc.** ("the opponent") opposes (using the Fast Track provisions) the application on the basis of Sections 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition concerns only the applicant's goods in Class 9. The opponent is the proprietor of the following EU registration number 018203278 for the following mark:

ENPASS

> **Class 9:** Computer application software for mobile phones, handheld computers, portable media players, wearable computers, in particular software for electronically storing passwords and private data.

4. Under Section 6(1) of the Act, the opponent's trade mark clearly qualifies as an earlier trade mark. Further, as the registration of the opponent's earlier mark was completed less than five years before the application date of the contested mark, proof of use is not relevant in these proceedings as per Section 6A of the Act.

[1] The full list of goods and services is shown in the Annex to this decision.

5. The opponent, in its notice of opposition, claims that the marks should be regarded as identical or alternatively highly similar. Further, it contends the contested goods in Class 9 are highly similar to the opponent's.

6. The applicant filed a defence and counterstatement, denying any visual, phonetic and conceptual similarity between the marks. Further, the applicant denies any similarity between "the goods and services of the parties".

7. Rules 20(1)-(3) of the Trade Marks Rules (the provisions which provide for the filing of evidence) do not apply to fast-track oppositions such as the present proceedings, but Rule 20(4) does. It reads:

> "(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit."

8. The net effect of these changes is to require parties to seek leave in order to file evidence in fast-track oppositions. Rule 62(5) (as amended) states that arguments in fast-track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken.

9. No request for a hearing was made. None of the parties filed submissions. Thus, this decision has been taken following a careful consideration of the papers.

10. In these proceedings, the opponent is represented by Dynham and the applicant by Trade Mark Wizards Limited.

11. Although the UK has left the EU, Section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period.

The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

Decision

Sections 5(2)(a) and (b)

12. Sections 5(2)(a) and (b) of the Act are as follows:

> "5(2) A trade mark shall not be registered if because-
>
> (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or
>
> (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".

13. The principles, considered in this opposition, stem from the decisions of the European Courts in *SABEL BV v Puma AG* (Case C-251/95), *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* (Case C-39/97), *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market* (Trade Marks and Designs) (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-334/05 P) and Bimbo SA v OHIM (Case C-519/12 P):

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 Goods

14. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In *Canon Kabushiki Kaisha*, the Court of Justice of the European Union (CJEU) stated that:

> "23. 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 complementary."

15. Guidance on this issue was also given by Jacob J (as he then was) in *British Sugar Plc v James Robertson & Sons Limited ("Treat")* [1996] RPC 281. At [296], he identified the following relevant factors:

> "(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."

16. The General Court (GC) confirmed in *Gérard Meric v OHIM*, Case T-133/05, paragraph 29, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another, or vice versa:

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

17. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term 'computer software'. In the course of his judgment, he set out the following summary of the correct approach to interpreting broad and/or vague terms:

> "[…] the applicable principles of interpretation are as follows:
>
> (1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.
>
> (2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded."

18. In *YouView TV Ltd v Total Ltd,* [2012] EWHC 3158 (Ch), paragraph 12, Floyd J (as he then was) gave the following guidance on construing the words used in specifications:

> "[…] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless, the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words of phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

19. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU held that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods or services. The GC clarified the meaning of "complementary" goods or services in *Boston Scientific Ltd v OHIM*, Case T-325/06, at paragraph 82:

> "[…] 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."

20. The competing goods to be compared are shown in the following table:

Opponent's Goods	Applicant's Goods
Class 9: Computer application software for mobile phones, handheld computers, portable media players, wearable computers, in particular software for electronically storing passwords and private data.	**Class 9:** computer software; computer software and mobile applications for the management of energy, insurance and services accounts, including bill payments, tariff and product selection, monitoring usage, reviewing statements and accessing customer services; energy and power management software; software for control, regulation and monitoring of energy systems; software and hardware for remotely controlling and monitoring household devices, home electrical systems, and surveillance and security systems in homes; household energy saving and control apparatus; household energy measuring and monitoring apparatus; electric and electronic control devices for home energy management; communications software for connecting to global computer networks; software for temperature and lighting control; multiple control signal transmission units; network controlling apparatus; communication interface units; interface software; interactive software accessible on computers and via mobile telephones; mobile phone applications; software to control building access and security systems; computer software for use in meter reading, monitoring and reporting; computer network interface devices and software for monitoring electrical energy systems, managing and analysing energy consumption information associated with electrical energy systems and detecting faults in electrical energy systems; electronic control units including software for monitoring solar electric or wind power systems; downloadable electronic publications; downloadable audio and video recordings.

21. In its notice opposition, the opponent stated:

> "The Class 9 goods of the opposed application are highly similar to the Class 9 goods of the earlier registration, in particular they are of similar nature, their end users overlap and they are in competition with each other. Computer software for management of energy, insurance and services accounts, energy control, building access and security systems, meter reading and monitoring solar electric or wind power systems would conceivably all have the capability of also storing passwords and private data."

22. On the other hand, the applicant claimed that "the goods and services of the parties are dissimilar". Also, with the filing of the Form TM21B, the applicant introduced a limitation to the scope of its Class 9 goods by adding the following term: "*none of the aforesaid goods being in relation to cybersecurity and password management*". I consider that this limitation has very little, if any, practical impact on some of the competing terms, as shown below. This is mainly because it does not alter the factors, for example, the nature, taken into account for the assessment of the respective goods at issue.

23. Further, I note that the phrase "*in particular software for electronically storing passwords and private data*" in the earlier specification does not restrict the scope of the opponent's goods, but instead, it inserts an example of an item included in that category of goods.[2]

24. For the purpose of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where

[2] This is supported by the General Court in *Durferrit GmbH v OHIM (Nu-Tride)*, Case T-224/01, in paragraph 41, where it states that:

> "[…] In that regard, it should be recalled, as the applicant rightly stated without being contradicted on the point by either OHIM or the intervener, that the 'inorganic salts' category of goods covered by the earlier mark also includes goods which do not consist of or comprise cyanide. In fact it is clear from the use of the term 'in particular' in those products' descriptions that cyanide is given merely as an example. […]"

they are sufficiently comparable to be assessed in essentially the same way for the same reasons.[3]

Mobile phone applications; computer software; interactive software accessible on computers and via mobile telephones; interface software; communications software for connecting to global computer network

25. The contested terms are broad enough to encompass the opponent's "*Computer application software for mobile phones, handheld computers, portable media players, wearable computers*" goods, and, thus, I find them to be identical as per *Meric* or else highly similar.

Computer software and mobile applications for the management of energy, insurance and services accounts, including bill payments, tariff and product selection, monitoring usage, reviewing statements and accessing customer services; computer software for use in meter reading, monitoring and reporting

26. The contested terms fall within the ambit of the broad term "*Computer application software for mobile phones, handheld computers, portable media players, wearable computers*" covered by the earlier specification. In accordance with the *Meric* principle, the respective goods are identical. In the alternative, even if these terms are not identical, they will in any event be highly similar.

[3] *Separode Trade Mark* BL O-399-10 and *BVBA Management, Training en Consultancy v BeneluxMerkenbureau* [2007] ETMR 35 at paragraphs 30 to 38.

Energy and power management software; software for control, regulation and monitoring of energy systems; software […] for remotely controlling and monitoring household devices, home electrical systems, and surveillance and security systems in homes; software for temperature and lighting control; software to control building access and security systems; computer software for use in meter reading, monitoring and reporting; computer network interface […] software for monitoring electrical energy systems, managing and analysing energy consumption information associated with electrical energy systems and detecting faults in electrical energy systems; electronic control units including software for monitoring solar electric or wind power systems

27. The contested goods are intended to provide specialised software facilitating e.g. the management of security, lighting or energy systems. Although the opponent's goods are software applications, such as mobile apps, for devices, they are not restricted and can be readily covered by the applicant's terms. This is because the applicant's software could include or be in the form of mobile apps that users can access from their mobile devices or tablets. In this regard, I find them to be identical based on the *Meric* principle, or else they are highly similar.

Downloadable electronic publications; downloadable audio and video recordings

28. The contested goods in Class 9 are all intended to provide digital content to users in relation to publications and audio and video recordings. Such goods require some sort of software in order for the users to download and access them, which can be done via mobile applications or the web. Therefore, there is a degree of complementarity as the opponent's "*Computer application software for mobile phones*" could be indispensable for the use, such as downloading and reading electronic publications and audio and video recordings, of the contested goods. Further, there is overlap in purpose, nature, users, method of use and channels of trade. As a result, the average consumer would assume that the responsibility for

these type of goods lies with the same undertaking. I consider the respective goods to be highly similar.

Computer network interface devices […] for monitoring electrical energy systems, managing and analysing energy consumption information associated with electrical energy systems and detecting faults in electrical energy systems; […] hardware for remotely controlling and monitoring household devices, home electrical systems, and surveillance and security systems in homes

29. The contested terms are clearly items of hardware specified for use in relation to managing and controlling energy and security systems. Although the contested goods differ in nature (hardware v software) from the earlier "*Computer application software for mobile phones, handheld computers, portable media players, wearable computers*" goods, they fulfil the same intended purpose. They may have the same relevant users as well as trade channels and could be sold in the same stores. In addition, they are complementary insofar as the software is indispensable or essential to the use of the hardware and vice versa. I find them to be similar to a medium degree.

Network controlling apparatus

30. The contested term relates to a computer or a device that controls a network. Following the approach of the preceding paragraph, the contested goods differ in nature from the earlier "*Computer application software for mobile phones, handheld computers, portable media players, wearable computers*" goods, but they may fulfil the same general purpose. There is complementarity as the one is indispensable or essential to the use of the other. They may share the same users and trade channels. I find the respective goods to be similar to a medium degree.

Household energy saving and control apparatus; household energy measuring and monitoring apparatus; electric and electronic control devices for home energy management

31. The contested goods are intended to control, measure and monitor the use/consumption of home energy. In recent years, such goods include smart thermostats, meters, or plugs that offer automatic readings over wireless networks and/or allow the users to control them via a mobile application or online from everywhere. Accordingly, the use of a software application could be indispensable for the use of the contested goods. In light of the above, it is my view that there is a sufficient degree of complementarity between the opponent's "*Computer application software for mobile phones*" and the applicant's goods where consumers are likely to believe that the same commercial undertaking could offer the respective goods. Although the competing goods differ in nature, they share the same general purpose that of controlling and managing home energy. Further, I consider that the competing goods may be provided through the same distribution channels. I find that the respective goods are similar to a medium degree.

Multiple control signal transmission units

32. The contested goods are not commonplace items, and there are no submissions to guide me. Based on the ordinary meaning of the term, the goods relate to a machine that transits signals and can be seen as a communication/control equipment. In this respect, there is no overlap in nature and purpose between the opponent's "*Computer application software for mobile phones, handheld computers, portable media players, wearable computers*" and the applicant's goods. However, there is a degree of complementarity, as the contested goods may be "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". In addition, they could share trade channels, and they could be manufactured by the same producers. Therefore, I find them to be similar to a low degree.

Communication interface units

33. According to Online Collins English Dictionary, communication interface is "an electronic circuit, usually designed to a specific standard, that enables one machine to telecommunicate with another machine"[4]. Based on this definition, the opponent's goods, namely "*Computer application software for mobile phones, handheld computers, portable media players, wearable computers*", and the applicant's goods have different nature and purpose. I consider that they could be offered by same providers and could be distributed through the same trade channels. The earlier goods may be deemed important for the use of contested goods "in such a way that customers may think that the responsibility for those goods lies with the same undertaking". Thus, the complementarity element is satisfied here, but I do not consider the competing goods to be in competition. Taking all the above factors into account, the respective goods are similar to a low degree.

Average Consumer and the Purchasing Act

34. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purposes of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question: *Lloyd Schuhfabrik Meyer,* Case C-342/97. In *Hearst Holdings & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch), at paragraph 70, Birss J (as he then was) described the average consumer in these terms:

> "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

[4] See https://www.collinsdictionary.com/dictionary/english/communication-interface.

that constructed person. The word 'average' denotes that the person is typical. The term 'average' does not denote some form of numerical mean, mode or median."

35. The average consumer of the goods at issue will be a member of the general public without excluding professionals/business users. The goods will be self-selected in physical retail stores or from websites. Therefore, visual considerations will dominate the selection process, but aural considerations will not be ignored in the assessment. Even for those goods at the inexpensive end of the scale, there will be considerations as to suitability for the consumer's needs. Thus, the average consumer will pay an average degree of attention, heightened to higher than average degree for goods which are more expensive and/or technically more complex and/or for professionals/business users.

Comparison of Trade Marks

36. 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."

37. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant

components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

38. The marks to be compared are:

Opponent's Mark	Applicant's Series of Two Marks
ENPASS	ENPAAS Enpaas

Overall Impression

39. The contested marks consist of the words "ENPAAS" and "Enpaas" presented in a standard font. Registration of a word mark protects the word itself presented in any regular font and irrespective of capitalisation.[5] The overall impression of the marks lies in the words themselves.

40. The earlier mark consists only of the word element "ENPASS", which has the greatest weight in the overall impression and appears in an upper case with a slightly stylised font, though the stylisation is minimal.

Visual Comparison

41. The competing marks share the same letters except for the fifth, i.e. ENPASS/ENPAAS/Enpaas. Bearing in mind that the beginnings of words tend to have more impact than the ends, and considering the overall impression of the marks, I find them to be visually similar to a high degree, as the contested mark can be presented in the same font as it is a word mark.

[5] See *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17, paragraph 16.

Aural Comparison

42. The opponent claims that the competing marks will be pronounced identically. However, the applicant claims that “the marks will be pronounced differently as the Applicant's marks have the additional letter 'A', which elongates the pronunciation of the marks compared to the Opponent's mark. Therefore, the rhythmic intonation and sonority of the trade marks will naturally be divergent because of these dissimilarities.”

43. The competing marks have the same number of syllables, EN-PASS/EN-PAAS/En-paas. The presence of the additional vowel (‘A’) in the second syllable of the series of the contested marks does not create a significant difference in the pronunciation of the ending of the marks. Thus, I find that the marks are aurally highly similar.

Conceptual Comparison

44. In its counterstatement, the applicant asserted that “the marks have no meaning in the English Language. Therefore, any conceptual comparison is redundant.”

45. I concur with the applicant’s contention and note that no immediate perceptible meaning can be attributed to the competing marks. In the absence of evidence, I find that the UK average consumer will see both marks as invented words with no identifiable concept. Therefore, I find that the marks are conceptually neutral.

Distinctive Character of the Earlier Trade Mark

46. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, paragraph 22 and 23, the CJEU stated that:

> "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).
>
> 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)."

47. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

48. The opponent has not shown use of its mark and, thus, it cannot benefit from any enhanced distinctiveness; hence, I have only the inherent distinctiveness of the earlier mark to consider. As described above in this decision, the earlier mark consists of the word element "ENPASS". The earlier mark has no real suggestive or allusive significance in relation to the goods for which it is registered. The mark will be perceived by

consumers as an invented word, and I find that the level of inherent distinctiveness will be high.

Likelihood of Confusion

49. In assessing the likelihood of confusion, I must adopt the global approach set out in the case law to which I have already referred above in this decision. Such a global assessment is not a mechanical exercise. I must also have regard to the interdependency principle, that a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa.[6] It is essential to keep in mind the distinctive character of the opponent's trade mark since the more distinctive the trade mark, the greater the likelihood of confusion. I must also keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon imperfect recollection.[7]

50. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. Indirect confusion is where the consumer notices the differences between the marks but concludes that the later mark is another brand of the owner of the earlier mark or a related undertaking.

51. In *L.A. Sugar Limited v Back Beat Inc*, Case BL O/375/10, Iain Purvis Q.C., sitting 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

[6] See *Canon Kabushiki Kaisha*, paragraph 17.

[7] See *Lloyd Schuhfabrik Meyer*, paragraph 27.

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."

52. In *Duebros Limited v Heirler Cenovis GmbH,* BL O/547/17, Mr James Mellor Q.C. (as he then was), 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.

53. Earlier in this decision I have concluded that:

- the goods at issue range from identical to low similarity;
- the average consumer for the goods at issue will be a member of the general public or professionals and business users, the level of attention will be of average degree, heightened to higher than average degree for goods which are more expensive and/or technically more complex and/or for professionals/business users. The selection process is predominantly visual without discounting aural considerations;
- the competing marks are visually and aurally highly similar, and conceptually neutral;
- the earlier mark has a high degree of inherent distinctiveness.

54. Taking into account the above factors and considering the identical goods in play, there is likelihood of direct confusion. I consider that the difference in the spelling of the competing marks, namely ENPASS / ENPAAS / Enpaas, is insufficient to allow the average consumer to distinguish between the marks even when a higher than average degree of attention is employed. Thus, based on the principle of imperfect recollection, coupled with the conceptual neutrality and the high degree of distinctiveness of the earlier mark, the consumers will misremember the difference in the spelling and will misrecall one mark for the other. The above finding extends to the rest of the contested goods that I have found to be similar between high and low degree.

Outcome

55. The opposition under Section 5(2)(b) of the Act is **successful in its entirety**. Therefore, subject to appeal, the application will be refused.

56. Since the opposition succeeds under Section 5(2)(b) of the Act, it is not necessary for me to consider the ground of opposition under Section 5(2)(a) of the Act.

Costs

57. The opponent has been successful and is entitled to a contribution towards its costs. Awards of costs in fast-track opposition proceedings are governed by Tribunal Practice Notice 2 of 2015. I award costs to the opponent on the following basis:

Filing a notice of opposition	**£200**
Opposition fee	**£100**
Total	**£300**

58. I, therefore, order Enpaas Ltd to pay Enpass Technologies Inc. the sum of £300. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 24th day of August 2022

Dr Stylianos Alexandridis
For the Registrar,
The Comptroller General

Annex – Applicant's Specification

Class 4: Gas and oil fuels; natural gas; hydrogen for use as a fuel; industrial oils and greases; lubricants; fuels; gas, gaseous fuels, oils; fossil fuels; electricity; electrical energy; electrical energy from renewable sources; electrical energy from non-renewable sources.

Class 9: Electric and electronic control apparatus, systems, devices and installations; programmable control apparatus; remote control apparatus; temperature controllers; temperature controlling apparatus; thermostats; energy control devices; thermostat control apparatus; thermal controls; boiler control apparatus; communications controllers; electrical and electronic control devices for energy and power management; apparatus, instruments and devices for collecting, compiling, storing, registering, creating, managing, summarising, sharing, supplying, transmitting, exchanging, reading, identifying, transcribing, organising, viewing, interpreting, cleansing, consolidating, engineering, calculating, projecting, forecasting, tracking, analysing, assessing, visualising, recording, describing, modelling, researching, transforming, supporting, generating, mapping, operating, controlling, scheduling, dispatching, planning, reporting, monitoring, systemising, settling, updating, maintaining, displaying, and processing data, information, analytics, graphics, projects; Apparatus, instruments and devices for collecting, compiling, storing, registering, creating, managing, summarising, sharing, supplying, transmitting, exchanging, reading, identifying, transcribing, organising, viewing, interpreting, cleansing, consolidating, engineering, calculating, projecting, forecasting, tracking, analysing, assessing, visualising, recording, describing, modelling, researching, transforming, supporting, generating, mapping, operating, controlling, scheduling, dispatching, planning, reporting, monitoring, systemising, settling, updating, maintaining, displaying, and processing data, information, analytics, graphics, projects in relation to energy and fuel; computer software; computer software and mobile applications for the management of energy, insurance and services accounts, including bill payments, tariff and product selection, monitoring usage, reviewing statements and accessing customer services; energy and power management software; software for control, regulation and monitoring of energy systems; software and hardware for remotely controlling and monitoring household devices, home electrical systems, and surveillance and security systems in homes; household energy saving and control apparatus; household energy measuring and monitoring apparatus; electric and electronic control devices for home energy management; communications software for connecting to global computer networks; software for temperature and lighting control; multiple control signal transmission units; network controlling apparatus; communication interface units; interface software; interactive software accessible on computers and via mobile telephones; mobile phone applications; wireless communication

apparatus; communication networks; surveillance apparatus; burglar alarms; security control apparatus; electronic and automatic access security apparatus; security video cameras and television monitors; intruder detection systems and apparatus; software to control building access and security systems; meters; meters for measuring and monitoring energy; computer software for use in meter reading, monitoring and reporting; smart meters; smart meters, namely meters for testing, displaying and reporting on-going energy usage; electricity meters; electrical meters; gas meters; gas-flow meters; water meters; fuel dispensing, metering and storage equipment and systems; visual display units; apparatus, equipment and instruments for measuring the efficiency, performance and consumption of gas boilers; electric and electronic power consumption sensors, wireless transceivers, computer network interface devices and software for monitoring electrical energy systems, managing and analysing energy consumption information associated with electrical energy systems and detecting faults in electrical energy systems; solar panels; fuel cells; solar cells; solar modules; solar batteries; electrical apparatus utilising solar cells; apparatus for the testing of solar cells and solar panels; photovoltaic cells and modules; solar electric systems and solar electric installations for use in providing power to commercial, residential and industrial premises; photovoltaic apparatus and installations for generating solar electricity; inverters; solid state electronic controls used to regulate current flow; electronic control units including software for monitoring solar electric or wind power systems; photosensors; calibrated photovoltaic reference cells; capacitors; ultracapacitors; circuit breakers and electric circuit closers; energy storage apparatus; electricity storage apparatus; batteries; electric battery chargers; power supply devices for battery chargers; battery charging equipment and apparatus; vehicle battery charging apparatus and equipment; electric apparatus for charging vehicle batteries; charging systems for electric powered vehicles; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; mobile communication terminals; mobile data communications apparatus; data transmitting apparatus; alarms; alert systems; data processing equipment; computers; computer hardware; plugs; wireless apparatus; leak detection apparatus; sensors and detectors, motion sensors; smoke detectors; gas detectors; carbon monoxide detectors; fire alarms; electrical switches; electrical plugs; electrical sockets; electrical adaptors and remote controls for electrical equipment and devices; downloadable electronic publications; downloadable audio and video recordings; parts, fittings and accessories for the aforementioned goods; none of the aforesaid goods being in relation to cybersecurity and password management.

Class 35: Advertising; marketing; marketing, advertising and promotion services; market study and research services; Business management; business administration; office functions; energy usage management; consulting services in the field of energy efficiency;

management of telephone call centres; outsourcing services; data processing and data management; market forecasting; economic forecasting; provision of business information; procurement of contracts concerning energy supply; procurement, namely, purchasing electricity and gas for retail customers; arranging of trading transactions and commercial contracts; subscription services relating to an electric battery charging service; subscription services relating to a charging service for electric vehicles; subscription services to a supply, storage and distribution network of gas, electricity and energy; subscription services in relation to connected homes (being homes where multiple electric devices are networked or otherwise integrated together to create a home environment that can be easily controlled); gas and electricity tariff information services; energy price comparison services; comparison services for prices for electric vehicle charging; administration of loyalty programmes involving discounts or incentives; organisation, operation and supervision of incentive and loyalty schemes; customer loyalty and reward schemes; tracking and monitoring energy consumption for others; billing services; billing services in the fields of energy and utilities; business and advisory services relating to the purchase and/or sale of gas, gaseous fuels and electricity; utility bill management services, namely, tracking, reporting, analysing and delivering energy information in the form of utility bills and utility meter data rate schedules; provision of energy usage and billing information including the provision of such information online or electronically; utility meter reading services; meter reading of gas and electricity consumption; vehicle fleet management; auctioning of vehicles; information, advisory and consultancy services relating to all the aforesaid services.

Class 36: Financial services; investment services; monetary affairs; financial risk management services; financial services for the payment of bills; bill payment services; electronic payment services; contactless payment services; direct debit services; credit services; invoice discounting services; issuing of discount coupons; insurance services; residential and landlord insurance; trade and construction insurance; insurance brokerage services; loan and credit facilities; financing of energy projects; insurance for maintenance and repair of boilers, appliances, heating systems, central heating systems, central heating controls and other related appliances; insurance for maintenance and repair of plumbing, drains and home electrics; insurance for maintenance and repair of kitchen and other household appliances; direct debiting and discount services; energy brokerage services; financing of commercial appliances and equipment; financing of home and commercial appliances and equipment; brokerage of energy to retail customers in the form of electricity and gas; derivatives trading services, trading of financial derivatives; brokerage of emission rights; information, advisory and consultancy services relating to all the aforesaid services.

Class 42: Scientific and technological services and research and design relating thereto; industrial analysis and research services; creation, maintenance and hosting of websites; information, advisory and consultancy services relating to the use of energy, energy efficiency and energy-saving; developing of integrated energy concepts; preparation of technical reports; preparing and providing engineering or technical reports relating to energy consumption; design and development of systems for generating and using energy; installation, maintenance, updating, design, rental and repair of software, computer programs and computer systems; selection, capture and storage of data relating to energy consumption; design and development of computer systems, hardware and software; engineering services in the fields of planning and deploying electrical energy systems and analysing and managing energy system efficiency; engineering services in the field of energy technology; technological analysis relating to energy and power needs of others; Software as a service [SAAS]; platform as a service [PAAS]; Software as a Service [SaaS] and platform as a service [PaaS] in relation to power and energy management; Software as a Service [SaaS] and platform as a service [PaaS] for control, regulation and monitoring of energy systems; cloud-based software as a service (SAAS) featuring software for analysing electrical power consumption data at monitored locations; providing information and hosting of platforms enabling consumers to view, manage and control the use of energy, electricity, gas and other utilities; providing information and hosting of platforms for transactions and communications relating to energy and the supply and sale of energy; energy auditing; auditing of energy consumption in buildings and domestic homes; auditing of the energy efficiency of apparatus used for heating, lighting, steam generating, drying, ventilating, air conditioning, water supply and sanitary purposes; auditing, assessing and advising on energy consumption and safety and efficiency of gas, oil or electrical appliances; surveying services; provision of expert appraisals relating to energy, sustainability and the environment; services relating to the checking of the safety of apparatus used for the purpose of generating, transmitting and distributing electricity, gas and oil; infrastructure as a service for electric vehicles; design, development and engineering services in relation to infrastructure, systems, networks, software and apparatus for the charging of electric vehicles; design, development and engineering services in relation to infrastructure, systems, networks, software and apparatus for the fuelling of vehicles powered by hydrogen or other gases; engineering work in the field of production, management, distribution of electric power, gas and renewable energy; design and development of energy and power management systems; design and development of energy distribution networks; design and development of energy management software; design and development of software for control, regulation and monitoring of energy systems; engineering services relating to energy supply systems; design and development of apparatus and instruments for conducting, switching, transforming, accumulating,

regulating or controlling electricity; design, development and engineering services for batteries and other energy storage apparatus; architectural, engineering and construction design services featuring means for energy conservation for residential and commercial premises; lighting design for homes and commercial buildings; home automation services, namely, remote monitoring of heating, lighting, ventilating and air conditioning apparatus via the use of wireless, telephonic, electric and web monitoring technologies; providing technological information about environmentally-conscious and green innovations; information, advisory and consultancy services relating to all the aforesaid services.