

O-791-22

TRADE MARKS ACT 1994

IN THE MATTER OF UK APPLICATION NO 3643260  
BY ENPAAS LIMITED, FOR A SERIES OF TWO TRADE MARKS:

The logo consists of a stylized orange icon on the left, resembling a lowercase 'i' with a dot, and the word 'enpaas' in a dark blue, lowercase, sans-serif font to its right.

AND

The logo consists of a stylized grey icon on the left, resembling a lowercase 'i' with a dot, and the word 'enpaas' in a dark blue, lowercase, sans-serif font to its right.

AND

THE OPPOSITION THERETO UNDER NO 600002092 BY  
ENPASS TECHNOLOGIES INC.

## Background and pleadings

1. On 18 May 2021, Enpaas Ltd (the applicant) applied to register the above series of two trade marks in classes 9 and 42. The goods which are opposed in these proceedings are in class 9 and are as follows:<sup>1</sup>

### **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.

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<sup>1</sup> *International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).*

2. The applicant's mark was published on 18 May 2021, following which it was opposed under the fast-track opposition procedure by Enpass Technologies Inc. (the opponent).

3. The opponent bases its case on section 5(2)(b) of the Trade Marks Act 1994 (the Act). It relies upon the following Trade Mark:

Mark details and relevant dates	Goods relied upon
<p data-bbox="217 651 448 685"><b>TM:</b> 918203278</p> <p data-bbox="288 775 660 853"><b>ENPASS</b></p> <p data-bbox="217 927 568 960"><b>Filed:</b> 28 February 2020</p> <p data-bbox="217 983 600 1016"><b>Registered:</b> 25 June 2020</p>	<p data-bbox="751 651 868 685"><b>Class 9</b></p> <p data-bbox="751 707 1401 960">Computer application software for mobile phones, handheld computers, portable media players, wearable computers, in particular software for electronically storing passwords and private data.</p>

4. The opponent claims that the respective marks are highly similar and that the applied for goods in class 9 are highly similar to the opponent's goods contained in the specification for its earlier trade mark.

5. The applicant filed a counterstatement in which it denied the ground raised by the opponent.

6. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 No. 2235, disapples paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

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

7. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. Neither side made such a request.

8. 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. The opponent is represented by Dynham. The applicant is represented by Trade Mark Wizards Limited.

10. Neither party requested to be heard, nor did they file submissions. I make this decision based on careful consideration of the papers before me.

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 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**

12. Under Section 6(1) of the Act, the opponent's trade mark qualifies as an earlier trade mark. However, proof of use is not relevant in these proceedings because registration of the opponent's earlier mark was completed less than five years before the application date of the contested mark.<sup>2</sup>

13. Section 5(2)(b) of the Act states:

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

(a)...

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<sup>2</sup> See section 6A of the Act.

(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,

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

14. The following principles are gleaned from the decisions of the EU 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 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.

(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 they have kept in their 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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

## Comparison of goods

15. The goods to be compared are as follows:

Opponent's goods	Applicant's goods
<p><b>Class 9</b> Computer application software for mobile phones, handheld computers, portable media players, wearable computers, in particular software for electronically storing passwords and private data.</p>	<p><b>Class 9</b> 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</p>

	<p>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.</p>
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16. Before engaging in the comparison of goods I need first to deal with the wording of both parties' specifications.

17. The opponent's specification concludes with the words "in particular software for electronically storing passwords and private data". Such wording does not have the effect of restricting the scope of the opponent's goods, but rather, inserts an example of an item included in that category of goods.<sup>3</sup>

18. See, for example, *Durferrit GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (Nu-Tride)*, in which the General Court (GC) held:

"41[...] 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. [...]"

19. In other words, it has no effect on the assessment I must make.

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<sup>3</sup> Case T-224/01



20. Similarly, the application includes a limitation, “none of the aforesaid goods being in relation to cybersecurity and password management”.<sup>4</sup> The principles outlining the operation of limitations to specifications can be found in *POSTKANTOOR*.<sup>5</sup> In essence, it is necessary that such limitations have sufficient clarity to operate effectively. In this case I find that the limitation has no material effect on the particular comparisons I must make in this case. I will say no more about it.

21. In *Gérard Meric v OHIM*,<sup>6</sup> the GC stated that:

“29...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”.

22. In *Canon*,<sup>7</sup> the Court of Justice of the European Union (CJEU) stated at paragraph 23 of its judgment that:

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

23. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(a) The respective uses of the respective goods or services;

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<sup>4</sup> The limitation was added by the filing of Form TM21B, dated 21.06.22.

<sup>5</sup> See C-363/99.

<sup>6</sup> Case T-133/05.

<sup>7</sup> Case C-39/97.

- (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.”

24. Terms in the respective specifications should be given their ordinary and natural meanings. In *YouView Ltd v Total Ltd*,<sup>8</sup> Floyd J stated:

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

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<sup>8</sup> [2012] EWHC 3158 (Ch) at [12].

unnaturally so as to produce a narrow meaning which does not cover the goods in question”.

25. With regard to broad terms in specifications, I bear in mind *Sky v Skykick* [2020] EWHC 990 (Ch), in which 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.”

26. On the matter of complementarity, in *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that “complementary” means:

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

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

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

28. Whilst on the other hand:

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

29. Computer software in the application clearly includes the opponent’s computer application software for mobile phones, handheld computers, portable media players, wearable computers. These are identical goods in accordance with the principle in *Meric*.

30. The applicant’s ‘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’ falls within the term ‘computer application software for mobile phones’ in the earlier specification and is identical.

31. Computer software for the management of energy, insurance and services accounts, including bill payments, tariff and product selection, monitoring usage, reviewing statements and accessing customer services’, will include the same

software for use on mobile phones and handheld computers, which is contained within the earlier specification. These too are identical goods.

32. 'Interactive software accessible on computers' in the application will include software, including interactive software for handheld computers. These are identical goods on the *Meric* principle.

33. 'Interactive software accessible via mobile telephones' in the application is included within the term 'computer application software for mobile phones', in the earlier specification and is identical.

34. The applicant's mobile phone applications are also identical to computer application software for mobile phones in the opponent's specification.

35. The applicant's specification includes a range of software products for control, regulation and management of power/energy systems and entry/access systems to buildings. These types of software are included within the broader term computer application software for mobile phones and handheld computers in the earlier specification. In my experience it is not uncommon for a consumer to be able to control, for example, their heating thermostat or video entry system via their mobile phone. Additionally, all of these software products could be used on handheld computers. I find the following goods to be identical on the *Meric* principle:

'Energy and power management software; software for control, regulation and monitoring of energy systems; communications software for connecting to global computer networks; software for temperature and lighting control; interface software; software to control building access and security systems; computer software for use in meter reading, monitoring and reporting; software for remotely controlling and monitoring household devices, home electrical systems, and surveillance and security systems in homes; software for monitoring electrical energy systems, managing and analysing energy consumption information associated with electrical energy systems and detecting faults in electrical energy systems; software for monitoring solar electric or wind power systems.'

36. The applicant's 'downloadable electronic publications' and 'downloadable audio and video recordings' provide digital content to the user. The opponent's 'computer application software for mobile phones and handheld computers' includes the software to access such content. In fact, handheld computers could feasibly include e-readers and music players. Consequently, there is a degree of complementarity between the respective goods to the extent that the software is indispensable for the access to the goods, being digital content, and the average consumer may presume that both are provided by the same undertaking. There is also potential overlap in users, uses and trade channels. I consider these competing goods to be similar to a high degree.

37. The applicant's specification in class 9 also includes a range of hardware products which enable network and communication connection, security and surveillance and control, measurement and monitoring of energy systems. These goods differ in nature from the opponent's software goods but may coincide in users, uses and trade channels. In addition, in order for these goods to function, they require software, which in many cases could be the type of software goods contained in the opponent's earlier specification. As such, the opponent's goods and the applicant's hardware devices have a complementary relationship of the kind identified in the case law outlined above. I find the following goods to be similar to the opponent's goods, to a medium degree:

'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; multiple control signal transmission units; network controlling apparatus; communication interface units; 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; electronic control units for monitoring solar electric or wind power systems.'

## The average consumer and the nature of the purchasing act

38. In accordance with the above cited case law, I must determine who the average consumer is for the goods at issue and also identify the manner in which those goods will be selected in the course of trade.

39. 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*<sup>9</sup>, Birss J. (as he then was) 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 word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”




40. The goods include normal everyday goods provided to members of the general public and also specialised goods likely to be purchased by professional or business users. The purchase is likely to be primarily visual, the consumer encountering such goods online, through a store selling/providing application software, a website or in a bricks and mortar store. I do not rule out an aural element where word of mouth recommendation plays a part. The frequency of purchase is likely to vary as the goods range from a fairly cheap mobile phone application, which might be bought on a fairly regular basis, to expensive energy control or security systems, which may involve a tendering process and are much less frequently bought. Across the range of goods, the consumer is likely to pay at least a medium degree of attention to the purchase, as, even at the cheaper end of the spectrum, they will need to ensure the goods are fit for their particular purpose and operating systems.

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<sup>9</sup> [2014] EWHC 439 (Ch)

## Comparison of marks

41. The marks to be compared are:

Opponent	Applicant
	 

42. In making a comparison between the marks, I must consider the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created by them, bearing in mind their distinctive and dominant components<sup>10</sup>, but without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.

43. The application is a series of two marks (hereinafter 'the applicant's mark'). Both are the invented word 'enpaas' in lower case, in a standard typeface, presented in black. In each case the first two letters 'en' are emboldened. Both marks have a device element which precedes the word. The device is made up of a dash, followed by a dot. This sits above two lines joined at a right angle at their top left corner. In the space below and to the right of that shape is another small dash. In the first mark in the series the device element is presented in orange with the dot in a slightly darker shade of the same colour. In the second mark the device is grey. The shaded difference of the dot is less obvious in this version of the mark. The device element and the word both play a part in the overall impression of the mark, with the word element playing the greater role.

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<sup>10</sup> *Sabel v Puma AG*, para.23



44. The opponent's mark is the invented word ENPASS presented in upper case and in plain black typeface with no additional stylisation. The overall impression of the opponent's marks rests in the whole mark.

45. Visual similarity rests in the fact that the word elements of these marks share five of their six letters, in the same order. The fifth letter is an 'a' in the application and an 'S' in the earlier mark. The case in which the words are presented is of no relevance as fair and notional use of the earlier mark would include it being presented in lower case type.<sup>11</sup>

46. Visual differences rest in the device element at the start of the application and the boldening of the first two letters. The device element is a noticeable feature which will not be ignored by the average consumer. The boldening of two letters is less significant and less likely to be noticed. Overall, I find the competing marks to be similar to a medium degree.

47. With regard to aural similarity, the stylised elements in the applicant's mark make no difference to the pronunciation of it.

48. The opponent submits that the competing marks will be pronounced in an identical way.

49. The applicant submits that:

*"Phonetically, 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."*

50. Both marks comprise two syllables, the first being 'EN' in both cases. The second being PAAS in the application and PASS in the earlier mark. There is very little

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<sup>11</sup> See *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41, paragraph 22.

difference between the second two syllables and depending on variations in pronunciation, the marks may be pronounced in an identical way. Overall, I find the competing marks to be aurally similar to, at least, a very high degree.

51. The applicant submits that conceptually, the marks have no meaning in the English Language. It concludes, “*Therefore, any conceptual comparison is redundant.*” I agree. I have no evidence on this point and can see no obvious meaning that would be attributed to either mark by the average consumer. The marks are conceptually neutral.

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

52. The degree of distinctiveness of the earlier marks must be assessed. This is because the more distinctive the earlier mark, based either on inherent qualities or because of use made, the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). 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* [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).”

53. I have no evidence from the opponent, so can only make the assessment of inherent distinctiveness.

54. The earlier trade mark relied on by the opponent is ENPASS. It has no obvious meaning and will be seen as an invented word. Consequently, it possesses a high degree of inherent distinctive character.

### **Likelihood of confusion**

55. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them he has kept in his mind.<sup>12</sup> I must also keep in mind the average consumer for the services, the nature of the purchasing process and have regard to the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa.

56. I have made the following findings:

- The average consumer is likely to be a member of the general public or a business/professional.
- The goods are mostly identical or highly similar, with the exception of the applicant’s hardware goods which are similar to the opponent’s goods to a medium degree.
- The level of attention paid to the purchase will be at least medium.
- The purchase will be primarily a visual one, though I do not rule out an aural element.

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<sup>12</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

- The opponent's mark is visually similar to the applicant's mark to a medium degree. The marks are aurally similar to, at least, a very high degree and conceptually neutral as neither has a meaning.
- The earlier mark has a high degree of inherent distinctive character.

57. Confusion can be direct (when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same, but puts the similarity that exists between the marks/services down to the responsible undertakings being the same or related).

58. The earlier mark is a word only mark and it is the word in the application which will be the significant element in terms of recalling the respective mark. This is because the device element does not represent or bring to mind anything in particular for the average consumer. Where marks are invented words there is no obvious conceptual hook for the average consumer to grasp and it is easier in such circumstances to misremember particular letter formations and combinations. I consider that the difference in the spelling of the competing marks, ENPASS and Enpaas, is insufficient to allow the average consumer to distinguish between the marks even when a higher than average degree of attention is paid to the purchase of goods of medium similarity. Imperfect recollection, conceptual neutrality and the high degree of distinctiveness of the earlier mark mean that consumers will mistake one mark for the other. The average consumer is used to devices presented with word elements and, in this case, the device element with no obvious meaning does nothing to prevent direct confusion between the marks, the assessment of which will be made on the basis of the highly similar invented words. The above finding extends, of course, to goods which are highly similar and identical and to goods bought with lower degrees of attention being paid to their purchase.

## **CONCLUSION**

59. The opposition succeeds under section 5(2)(b) of the Act.

## **COSTS**

60. 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 £200 for preparing and filing its opposition and £100 for the official fee.

61 . 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 14<sup>th</sup> day of September 2022**

**Al Skilton**

**For the Registrar,**

**The Comptroller-General**