

O/140/20

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3410360

BY

BRADLEY LONG

TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 41 AND 42

**SHOPTIMIZED**

AND OPPOSITION THERETO (NO.600001204)

BY

SHOPTIMISED LTD

## Background and Pleadings

1. Mr Bradley Long (“the Applicant”) applied to register the word trade mark, “SHOPTIMIZED” on 28 June 2019 for services in classes 41 and 42 listed below. It was accepted and published on 6 September 2019.

Class 41: Business training, namely, training in the field of e-commerce.

Class 42: Software as a Service (SAAS) services featuring software to allow users to perform electronic business transactions via a global computer network.

2. Shoptimised Ltd (“the Opponent”) opposes the application under sections 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 (“the Act”). It relies on its earlier UK registered trade mark “Shoptimised” numbered 3274396 for goods and services in class 9, 35, 42 and 45, as outlined in full at paragraph 23 below. The Opponent’s mark was filed on 1 December 2017 and completed its registration on 9 March 2018.

3. The Opponent relies on all its goods and services in classes 9, 35, 42 and 45 for which the mark is registered claiming that there is a likelihood of confusion because the trade marks are identical or similar and the applied for mark is to be registered for services identical or similar to those for which the earlier mark is protected.

4. The Applicant filed a defence and counterstatement denying the claims made, disputing that the marks are identical but appearing to concede that the marks are similar. The Applicant disputes however any identity or similarity between the goods and services.

5. Neither party is represented and neither party filed submissions other than those contained within the original TM7F and TM8 pleadings. Neither party applied for leave to file evidence and the matter has therefore proceeded in accordance with the Fast Track procedure.<sup>1</sup> This decision is taken following a careful perusal of the papers.

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<sup>1</sup> Rule 20(4) Trade Mark Rules 2008

## Decision

6. The opposition is based on section 5(2)(a) or in the alternative 5(2)(b) of the Act, which state:

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.”

7. An earlier trade mark is defined in section 6 of the Act, which states:

“6. - (1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

8. In these proceedings, the Opponent is relying upon its UK trade mark registration, which qualifies as an earlier mark under section 6 of the Act. As this earlier mark has been registered for less than five years at the date the application was filed it is not subject to the proof of use provisions contained in section 6A of the Act. Consequently, the Opponent is entitled to rely upon its mark in relation to all the goods and services of its registrations, as specified, without having to establish genuine use.

9. 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.

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 greater 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 to mind the earlier mark, 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 the marks**

10. In order for a claim under section 5(2)(a) of the Act to succeed, the respective marks are required to be identical.

11. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, the Court of Justice of the European Union (“CJEU”) held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

12. The Opponent's mark consists of the word Shoptimised whereas the Applicant's mark is the word SHOPTIMIZED. I take note that a word trade mark protects the word itself irrespective of font, capitalisation or otherwise and therefore a trade mark in capitals covers use in lower case and vice versa.<sup>2</sup> I do not consider that the variance in casing will make any material difference to my assessment and therefore I have not taken this into account. The marks are identical save for the Applicant's mark being spelt with a "z" as opposed to a "s". The issue as far I see it is whether this variation in spelling is so insignificant that it would go unnoticed by the average consumer. UK consumers are accustomed to seeing words misspelt or American variations, where traditionally words ending in "ised" are spelt "ized". Since greater emphasis is placed at the beginning of words, I consider that the difference in spelling, positioned towards the end of the word is so insignificant that it will go unnoticed by the average UK consumer. Consequently, I consider that the marks are identical for the purposes of section 5(2)(a). If, however I am wrong in this assessment then I will also consider the level of similarity between the marks for the purposes of section 5(2)(b) of the Act.

13. 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 Court of Justice of the European Union ("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."

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<sup>2</sup> *Bentley Motors Limited v Bentley 1962 Limited* BL O/159/17

14. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to consider what features contribute to the overall impressions created by the marks.

15. Although both marks are presented as one word they will be seen as being devised from two recognisable words “Shop” and “optimised/optimized”. Neither mark has any other element to contribute to the mark and therefore the overall impression of each mark lies in the respective conjoined word itself.

### **Visual, Aural and Conceptual comparison**

16. Visually and aurally both marks consist of an eleven-letter word which have the same structure, length and syllables. Visually the marks only differ in their ninth letter a “z” in the Applicant’s mark as opposed to a “s” in the Opponent’s. As a general rule, beginnings or words tend to have more visual and aural impacts than their ends<sup>3</sup>, and since the letters s and z are visually similar I consider the marks to be similar to a high degree. Aurally the marks will be identical as they will both be pronounced as “shop-tim-ized” irrespective of the difference in spelling. I recognise however that there may be a slight difference in how the “ised” is pronounced, as in the word “promised” in which case rather than being identical the marks will be aurally similar to a high degree.

17. Neither party has chosen to provide any explanation as to the meaning of their marks. Consumers attribute meanings to words they recognise and will perceive the respective marks as a combination of the words “shop” and “optimise”. Although I do not consider that the average consumer will necessarily dissect the individual components of the respective marks to any great degree, both marks allude to an enhanced/optimal shopping experience. For a conceptual message to be relevant however it must be immediately grasped by the average consumer<sup>4</sup> in which case at the very least the marks will be seen as something to do with shopping or shops. The difference in spelling will not alter the conceptual perception of the marks which means that they are conceptually identical.

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<sup>3</sup> *El Corte Inglés, SA v OHIM, Cases T-183/02*

<sup>4</sup> *Ruiz Picasso v OHIM* [2006] e.c.r.I-643; [2006] E.T.M.R.29

## Comparison of the goods and services

18. When conducting a goods and services comparison, all relevant factors should be considered as per the judgment of the CJEU in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc.* Case C-39/97, where the court 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”.

19. I am also guided by the relevant factors for assessing similarity identified by Jacob J in *Treat*, [1996] R.P.C. 281 namely:

- (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.

20. In addition, in *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J stated that:

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

21. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court ("GC") stated that:

"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 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 *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court 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".

23. The competing goods and services are set out as follows:

Applicant's services	Opponent's services
	<p>Class 9: Software (Computer -), recorded; Software and applications for mobile devices; Software applications; Software applications for mobile devices; Software applications for use with mobile devices; Software for commerce over a global communications network; Software for computers; Software for designing online advertising on websites; Software for diagnostics and troubleshooting; Software for embedding online advertising on websites; Software for evaluating customer behaviour in online shops; Software for mobile phones; Software for operating an online shop; Software for processing digital images; Software for processing images, graphics and text; Software for renting advertising space on websites; Software for searching and retrieving information across a computer network; Software for tablet computers; Software; Business management software; Business technology software; CMS software [Content management system].</p>
<p>Class 41: Business training, namely, training in the field of e-commerce.</p>	<p>Class 35: Advertising agencies; Advertising agency services; Advertising analysis; Advertising and advertisement services; Advertising and marketing; Advertising and marketing consultancy;</p>

	<p>Advertising and marketing services;  Advertising and marketing services provided by means of blogging;  Advertising and marketing services provided by means of social media;  Advertising and marketing services provided via communications channels;  Advertising and promotion services;  Advertising and promotion services and related consulting; Advertising and promotional services; Advertising and publicity; Advertising and publicity services; Advertising copywriting;  Advertising for others; Advertising in the popular and professional press;  Advertising of business web sites;  Advertising on the Internet for others;  Advertising particularly services for the promotion of goods; Advertising planning; Advertising research;  Advertising research services;  Advertising services; Advertising services for the promotion of e-commerce; Advertising services provided over the internet; Advertising services provided via a data base;  Advertising services provided via the internet; Advertising; Advertising services relating to the sale of goods;  Advertising space (Rental of - );Advertising space (Rental of -) on the internet; Advertising the goods and services of online vendors via a</p>
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	<p>searchable online guide; Advertising through all public communication means; Advertising via electronic media and specifically the internet; Advertising via the Internet; Advertising, including on-line advertising on a computer network; Advertising, marketing and promotion services; Advertising, marketing and promotional consultancy, advisory and assistance services; Advertising, marketing and promotional services; Advertising, promotional and marketing services; Advertising, promotional and public relations services; Online advertisements; Online advertising network matching services for connecting advertisers to websites; Online advertising on a computer network; Online advertising services; Online advertising via a computer communications network</p>
<p>Class 42: Software as a Service (SAAS) services featuring software to allow users to perform electronic business transactions via a global computer network.</p>	<p>Class 42: Software as a service; Software as a service [SAAS] services; Software as a service [SaaS]; Software authoring; Software consultancy services; Software consulting services; Software creation; Software customisation services; Software design; Software design (Computer-); Software design and development; Software design for others; Software development; Software development in</p>

	the framework of software publishing; Software development services; Software development, programming and implementation; Software engineering; Software engineering services; Software engineering services for data processing programs; Software installation; Software maintenance services; Software research.
	Class 45: Software licensing.

24. The Opponent makes no specific representations in relation to the similarity or identity of the goods and services, whereas the Applicant submits as follows:

“the applicant registered his trade mark with class 41 of business training, namely, training in the field of e-commerce, while the opponent’s goods or services did not include class 41 at all. Neither did the opponent include business training, namely training in the field of e-commerce or any similar goods or services in the classes 09, 35, 42 and 45 when he registered his trademark number UK00003274396.

“...the opponent’s earlier application is in class 42 related to software as a Service (SAAS), but he did not mention that software as a Service (SAAS) is featuring software to allow users to perform electronic business transactions via a global computer network like the applicant’s goods or services.”

Class 42

25. The Applicant’s “*Software as a Service (SAAS) services featuring software to allow users to perform electronic business transactions via a global computer network*” falls within the broader category of the Opponent’s “*Software as a service; Software*

as a service [SAAS] services; Software as a service [SaaS]”. These services can therefore be considered as identical on the principles outlined in *Meric*.

#### Class 41

26. The Applicant’s “*Business training, namely, training in the field of e-commerce*” would involve training in relation to conducting commercial transactions online, namely the buying and selling of products over the internet. I consider that these services would differ in nature and purpose to the Opponent’s class 9 goods, the one being training services and the other being goods. Furthermore, the method of use is different, and the goods and services are not in competition. However, whilst there is a degree of complementarity between them in so far as the training may include instruction on how to use the software associated with e-commerce, I do not consider that one is necessarily indispensable to the other as per the decision in *Boston*. There may however be an overlap in the producers and distribution channels of the respective products since those developing the software may also provide the training in its use. I consider therefore that the Applicant’s class 41 services are similar to a low degree with the Opponent’s “*software for evaluating customer behaviour in online shops; Software for operating an online shop*”.

27. It is my view that this represents the Opponent’s best case and accordingly I need not consider assessing the Applicant’s services against the Opponent’s remaining goods and services as it will not place the Opponent in any better position.

#### **Average Consumer**

28. When considering the opposing marks, I must determine first of all who the average consumer is for the goods and services and the purchasing process. The average consumer is deemed reasonably informed and reasonably observant and circumspect. For the purposes of assessing the likelihood of confusion the average consumer’s level of attention is likely to vary according to the category of goods and services in question.<sup>5</sup>

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<sup>5</sup> Lloyd Schuhfabrik Meyer, case c- 342/97.

29. 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.”

30. The goods and services of the Opponent’s mark covers a broad range of computer related items and advertising services from the design and development of the software for example to the software itself. The average consumer will therefore also vary from members of the general public who have an interest in computer-based technology to specialist business purchasers requiring specific programmes to run their businesses. The level of attention for either category would therefore be reasonably attentive to high taking into account the goods and services on offer. The purchasing process is likely to be primarily visual with consumers purchasing the goods and services online through websites and internet search engines to locate the providers of such goods and services. However, I do not ignore the fact that an aural process may factor through recommendations. Similarly, the Applicant’s consumers are either those providing the services or those receiving the instruction which would equally include professionals as well as members of the general public. It is likely that the purchasing process is a careful thought out process involving research into the cost and reputation of the service provider and therefore would also involve a reasonably high level of attention. Overall, I consider that the level of attention for both parties’ goods and services to be reasonably high.

### **Distinctiveness**

31. 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).”

32. The degree of distinctiveness of the earlier mark is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark the greater the likelihood of confusion. Since the proceedings commenced by way of the Fast Track procedure the Opponent has not claimed that its mark has acquired enhanced distinctive character nor filed any evidence to support such a claim. I must therefore consider the matter on inherent characteristics.

33. I have already found that the earlier mark consists of the conjoined word “Shoptimise” which will be regarded as having an allusive association with shopping and therefore be low in distinctiveness for online shopping services. For the Opponent’s other goods and services, however, the mark will be more distinctive but no more than a medium degree.

## Likelihood of confusion

34. When considering whether there is a likelihood of confusion between the two marks I must consider whether there is direct confusion, where one mark is mistaken for the other or whether there is indirect confusion where the similarities between the marks lead the consumer to believe that the respective goods or services originate from the same or related source.

35. 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 recognised 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, I conclude that it is another brand of the owner of the earlier mark.”

36. In determining whether there is a likelihood of confusion there are a number of factors to bear in mind. The first is 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 goods or services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the Opponent’s trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must consider that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

37. I have found the marks to be identical or alternatively highly similar as a result of my assessment regarding the visual, aural and conceptual similarities that exist between them. I consider that the purchasing process will be primarily visual but not discounting aural considerations. I consider the level of attention paid in the purchasing process to be reasonably high with the average consumer being specialists or general members of the public with an interest in computer-based technology. I consider that the earlier mark possesses between a low to medium degree of distinctive character depending on the goods and services at issue. I have found the Applicant's services in class 42 to be identical and in class 41 to be similar to a low degree to the Opponent's goods and services.

38. Bearing in mind the principle of imperfect recollection, the conceptual identity that exists between the marks and the identical or highly similar visual and aural similarities, I consider that consumers will not remember the difference in spelling that exists in the respective marks and mistakenly recall one for the other. I recognise that for some of the Opponent's goods and services its mark has a low degree of distinctiveness however this does not prevent a finding of a likelihood of confusion.<sup>6</sup> Even for those services that I found to be similar to a low degree, I consider that the average consumer will mistake one for the other leading to a likelihood of direct confusion. The difference in spelling is not sufficient for consumers to differentiate between them even where a reasonably high level of attention is undertaken in the purchasing process.

39. The opposition succeeds in full, subject to any appeal, the application is refused.

## **Costs**

40. As the Opponent has succeeded it would ordinarily be entitled to an award of costs. For Fast Track opposition proceedings costs are normally capped according to Tribunal Practice 2/2005. However, since the Opponent has not instructed solicitors it was invited by way of letter dated 19 December 2019 to indicate whether it intended

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<sup>6</sup> *L'Oréal SA v OHIM*, Case C-235/05 P

to make a request for an award of costs, including accurate estimates of the number of hours spent on a range of given activities relating to defending the proceedings. It was made clear by that letter that if the pro-forma was not completed, no costs would be awarded. No response was received nor the pro forma returned and therefore other than the issue fee of £100 no additional costs are awarded to the Opponent.

41. I order Mr Bradley Long to pay Shoptimised Ltd the sum of £100 to be paid within twenty one days of the expiry of the appeal period or within twenty one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 5<sup>th</sup> day of March 2020

Leisa Davies  
For the Registrar