

O-196-17

TRADE MARKS ACT 1994

**IN THE MATTER OF THE APPLICATION UNDER NO. 3160221
BY AMPM INTERNATIONAL PRIVATE LIMITED
TO REGISTER THE TRADE MARK:**

T W E L V E

A M : P M

IN CLASS 25

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 600000496
BY DUF LTD**

BACKGROUND AND PLEADINGS

1. On 19 April 2016, AMPM International Private Limited (“the Applicant”) applied to register the figurative trade mark shown on the front of this decision in class 25 for “*clothing, headgear for wear; footwear*”.
2. The application was published for opposition purposes in the Trade Marks Journal on 15 July 2016. It is opposed by DUF LTD (“the Opponent”). The Opponent is the proprietor of a UK trade mark registration (No. 3086604) for the figurative trade mark shown below, applied for on 18 December 2014 and registered on 15 May 2015.



3. Since the Opponent’s registered trade mark has a date of application for registration earlier than that of the Applicant’s trade mark it is an “earlier trade mark” under Section 6(1)(a) of the Trade Marks Act 1994 (“the Act”).
4. The opposition, brought under the fast-track opposition procedure, is based on section 5(2)(b) of the Act and is directed against all of the Applicant’s goods. The Opponent claims that the application is for a mark similar to the Opponent’s earlier mark and is for goods that are identical with or similar to those specified in the Opponent’s earlier registration.
5. The Opponent has indicated in its Notice of Opposition (Form TM7F) that it relies on the whole of its registration, which comprises goods in classes 3, 9, 14, 18 as well as in class 25. The detail of that registration is set out below.

Class	Opponent's registered goods & services
3	Soaps; perfumery, essential oils, articles for body and beauty care; hair lotions.
9	Sunglasses, sunglasses with lenses without any optical sight correction function, spectacles, spectacle frames, spectacle cases, including spectacles for cycling; goggles, lenses for goggles, all being in the nature of protective eyewear; face masks and face shields; helmets, including cycle helmets; protective eyewear, headgear and men's bodywear; men's protective clothing for cycling.
14	Precious metals and their alloys; jewellery; ornaments; rings, earrings, ear clips, brooches, chokers, necklaces, pendants, chains, bracelets; precious stones, pearls; horological and chronometric instruments, in particular small clocks, wrist watches, parts for clocks and watches, clock faces, housing for clocks and watches, clockworks, parts for clockworks; parts and fittings for the aforesaid goods, included in class 14.
18	Leather and imitations of leather; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery; parts and fittings for the aforesaid goods, included in class 18.
25	Men's clothing, headgear; parts for the aforesaid goods, included in class 25.

6. Since the Opponent's earlier mark had been registered for less than five years when the Applicant's mark was published for opposition, the earlier mark is not subject to the proof of use provisions under section 6A of the Act. Consequently, the Opponent is able to rely on all of the above goods protected by its earlier mark without having to prove use.
7. While Rules 20(1)-(3) of the Trade Marks Rules ("TMR") (the provisions that provide for the filing of evidence) do not apply to fast-track oppositions, Rule 20(4) TMR does apply. 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"*. In other words, parties in fast-track oppositions are required to seek leave from the registrar if they wish to file evidence.¹ Neither party has sought leave to file evidence in respect of these proceedings.

¹ The exception to this is that in cases where proof of use evidence is required, it is filed with the notice of opposition.

8. Rule 62(5) (as amended) states that arguments in fast-track proceedings shall be heard orally only if the registry requests it, or if 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. A hearing was neither requested nor considered necessary in this case.
9. The Applicant filed a counterstatement in which it denies the grounds of opposition and has provided written submissions in lieu of a hearing. I bear these in mind and shall refer to them in this decision where necessary.
10. The Opponent made a few short points in its Notice of Opposition and has also provided written submissions in lieu of a hearing. Those submissions included (i) profile information about the Applicant's fashion business and (ii) images of timepieces and of a t-shirt bearing a watch face, said to relate to the Opponent's business. However, as noted above no leave to submit evidence has been sought or given in this case. I therefore disregard that information and take account only of the submissions properly made. (For the sake of completeness, I have reviewed the attachments to the submissions and am of the view that, even if they had been admitted, they would not have assisted the Opponent's case.)
11. The Applicant is represented by Squire Patton Boggs (UK) LLP, while the Opponent represents itself in these proceedings. I take this decision based on the papers as indicated and taking into account relevant jurisprudence.

DECISION

12. The Opponent's claim is based solely on section 5(2)(b) of the Act, which states:

"... A trade mark shall not be registered if because-

... (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 following decisions of the EU courts provide the principles to be borne in mind when considering section 5(2)(b) of the Act:

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 are that:

- (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 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 the goods

14. In comparing the respective specifications to assess similarity between the goods concerned, I am required to consider all relevant factors, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*, where the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment “... *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.”

15. Goods are ‘complementary’ according to the General Court in *Boston Scientific Ltd v OHIM* Case T-325 /06 where “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...*”. I note, however, the caution by Mr Daniel Alexander Q.C. as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13 against taking too rigid an approach and regarding the explanation of the concept in *Boston* as akin to a statutory definition. He there observed that “... *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.*”
16. In *British Sugar Plc v James Robertson & Sons Limited* (“Treat”) [1996] R.P.C. 281 Jacob J. (as he then was) identified that the relevant factors in assessing similarity in the specified good/services also include consideration of their respective users and of the trade channels through which the goods or services reach the market.
17. The same ruling further held that factors also included “*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*”. It further elaborated that it is relevant to consider “*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.*”
18. The earlier mark is not subject to proof of use, which means my task of comparing the goods must be made on the basis of notional and fair use of the goods in the parties’ respective specifications.² When assessing the likelihood of confusion under section 5(2) it is necessary to consider all the circumstances in which the mark

² See *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchin L.J. at paragraph 78

applied for might be used if it were registered;³ consideration of likelihood of confusion is prospective and not to be restricted to the current marketing or trading patterns of the parties.⁴

19. As noted at paragraph 5 above, the Opponent has indicated that in opposing the application to register the contested mark in class 25 for “*clothing, headgear for wear; footwear*”, the Opponent relies not only on its registration in class 25 for “*men's clothing, headgear*”, but on the whole of its registration, which also includes goods in classes 3, 9, 14 and 18. However, for efficiency, I shall compare the class 25 goods as these seem to offer the Opponent its best chance of similarity.
20. In *Gérard Meric v Office for Harmonisation in the Internal Market (OHIM)*, the General Court stated⁵ that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category designated by the trade mark application, or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark.
21. I find the Applicant’s specification of “*headgear for wear*” to be identical to the Opponent’s registration for “*headgear*” on the basis of the principle outlined in *Meric*.
22. I take account of the Applicant’s submissions that the Opponent’s registration for “*men's clothing*” does not include womenswear (or footwear) and that “*these goods are distinct as consumers are accustomed to purchasing these types of goods from gender-specific shops and specialist footwear shops.*” Nonetheless, a sub-set of the clothing covered by the application is identical to the Opponent’s registration for “*men’s clothing*” so again I find identity based on the principle in *Meric*.
23. I recognise that “*clothing*” could also cover goods that are not articles of men’s clothing. However, the Applicant has not provided a fall-back specification to limit to such goods and, in any event, such goods would still be highly similar: the respective clothing goods are anyway similar in nature, purpose, method of use and may be sold in the same shops. Moreover, clothing is not consistently segregated on

³ See *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06, CJEU at paragraph 66

⁴ See *Oakley v OHIM* (Case T-116/06) at paragraph 76

⁵ Case T- 133/05 at paragraph 29 of that judgment

gender-specific lines – items are often unisex and others may commonly be worn both by men and women.

24. The Applicant submits that there is a “negligible” degree of similarity between its specification of “footwear” and the Opponent’s registered goods.
25. In *El Corte Inglés SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T- 443/05*, the CJEU held:

“49 Goods such as shoes, clothing, hats or handbags may, in addition to their basic function, have a common aesthetic function by jointly contributing to the external image (‘look’) of the consumer concerned.

“50 The perception of the connections between them must therefore be assessed by taking account of any attempt at coordinating presentation of that look, that is to say coordination of its various components at the design stage or when they are purchased. That coordination may exist in particular between clothing, footwear and headgear in class 25 and the various clothing accessories which complement them such as handbags in class 18. Any such coordination depends on the consumer concerned, the type of activity for which that look is put together (work, sport or leisure in particular), or the marketing strategies of the businesses in the sector. Furthermore, the fact that the goods are often sold in the same specialist sales outlets is likely to facilitate the perception by the relevant consumer of the close connections between them and strengthen the perception that the same undertaking is responsible for the production of those goods.”

26. “Footwear” and the Opponent’s “men’s clothing” are both for wear on the person and consequently have the same nature, intended purpose and method of use. It is not uncommon for men’s clothing and footwear to be sold in the same outlets and so have the same distribution channels. There may also be a degree of complementarity, given that the respective goods may be coordinated as part of an outfit or overall ‘look’. I consider that there is a medium degree of similarity between “footwear” and “men’s clothing; headgear.”

27. Little purpose would be served in comparing the Opponent's goods in classes 3, 9, 14, and 18 as they are clearly less similar to the Applicant's goods than those I have considered in class 25.

The average consumer and the purchasing process

28. It is necessary to determine who the average consumer is for the goods in question and to consider how the goods are likely to be selected and purchased.

29. In *Hearst Holdings*⁶, Birss J. described the average consumer:

“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 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...”

30. Here, the average consumer is a member of the general public since clothing, headgear and footwear are general consumer items bought by a diverse and wide cross-section of the general public.

31. In *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs)* Joined Cases T-117/03 to T-119/03 and T-171/03 the General Court stated:

“43 .. the average consumer's level of attention may vary according to the category of goods or services in question ... As regards the clothing sector, the Court finds that it comprises goods which vary widely in quality and price. Whilst it is possible that the consumer is more attentive to the choice of mark where he or she buys a particularly expensive item of clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector ...”.

⁶ *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)

32. Just as items of clothing will vary greatly in price, the same applies to footwear and headgear. Generally speaking, I would expect the average consumer to pay a reasonable level of attention when selecting the goods at issue, taking account of factors such as fit, style and size. The same case comments on the purchasing process:

“50 ... Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion.”

33. The purchasing act will be mainly visual since the goods are likely to be selected by the average consumer after perusal of racks/shelves in retail establishments, or from photographs on Internet websites or in catalogues. However, I do not discount that aural considerations may also play a part.

Comparison of the marks

34. It is clear from *Sabel*⁷ 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 in *Bimbo*⁸ 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.”

⁷ *Sabel BV v Puma AG*, Case C-251/95, particularly paragraph 23

⁸ Case C-591/12P *Bimbo SA v OHIM* at paragraph 34 of the judgment

35. It would therefore be wrong to artificially dissect the trade marks, but it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features that are not negligible⁹ and therefore contribute to the overall impressions created by the marks. The marks to be compared are:

	
Opponent's earlier trade mark	Applicant's contested trade mark

36. The Opponent's figurative mark consists of the numeral 12 framed by a square, under which is the word TWELVE in block capitals. The box device contributes to the overall impression, although not to the extent that it dominates the mark. The overall impression that would strike the average consumer would be the notion of 'twelve' – mutually reinforced as a word and numeral. As for the Applicant's mark, I find that the dominant component contributing to the overall the impression is the word "TWELVE." The inclusion of "AM:PM" is distinctive and is certainly not negligible, but since it is much smaller than the word "TWELVE", I find it secondary to that word, which dominates.

Visual similarity

37. The marks of both parties are figurative. The marks are visually similar in that each prominently features the word TWELVE. There are differences in the presentation of

the word itself - for example the Applicant's presentation of the word includes flat bottoms to the valleys of the W and V and has expanded spacing between its letters. However, these are minor differences and likely to be overlooked by the average consumer: in both marks the word TWELVE is in upper case and seemingly in bold.

38. As to the Opponent's mark the Applicant's counterstatement contends that the "*numeral is visually more dominant than the word in view of its size, position and combination with a square box.*" I agree that the size, position and framing of the numeral gives it a visual prominence, but I find that the presence of the numeral 12 reinforces the word TWELVE (and vice versa). The presence of the word "TWELVE" in large print, common to both marks, remains striking. The Applicant's mark has no box or numeral, and has "AM:PM" underneath the word TWELVE. The letters and colon are notably smaller than the word TWELVE, which I consider the dominant visual component of the Applicant's mark. I find the marks share a reasonable degree of visual similarity.

Aural similarity

39. I find that the Opponent's mark would realistically be spoken as "twelve" – again the numeral 12 reinforcing the word TWELVE (and vice versa) such that only one will be voiced. It is possible that the mark could be spoken as "twelve, twelve" but it seems to me less likely that it would be said that way. It is my view that the Applicant's mark would be spoken as "twelve" (given the prominence of that component) or possibly with the additional voicing of the four letters "AM", "PM." It is possible therefore that the marks may be spoken identically but they are in any case aurally similar to a reasonable degree.

Conceptual similarity

40. A concept is only relevant if it is capable of immediate grasp by the average consumer¹⁰. The mark both of the Opponent and the Applicant would signal the number twelve, so the marks share that clear conceptual similarity.

¹⁰ See Case C-361/04 P *Ruiz-Picasso and Others v OHIM* [2006] ECR I-00643; [2006] E.T.M.R. 29

41. The inclusion of AM:PM in the Applicant's mark tends to frame that concept in the context of time (to put it in general terms) and this would likely be perceived by the average consumer. Indeed, members of the public would tend to know that twelve A.M. (ante meridiem) is midnight, and that twelve P.M. (post meridiem) is midday. With regard to the Opponent's mark, it is my view that the average consumer would perceive only the number / word 'twelve', without a temporal reference equivalent to that present in the Applicant's mark. Overall, I find the marks share a reasonable degree of conceptual similarity.

Distinctive character of earlier trade mark

42. In *Lloyd Schuhfabrik*¹¹ 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 ...

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 ..."

43. As the Opponent filed no evidence in these proceedings, I have only the inherent position to consider. The Applicant makes various submissions on the distinctive character of the earlier mark. It argues that the level of distinctive character of the earlier mark is low "*because the word "TWELVE" and numeral "12" are commonplace in respect of clothing, particularly when considering its widespread use to denote*

¹¹ *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* Case C-342/97

clothing size. As a result, the ability of the mark to denote trade origin is questionable and the scope of protection afforded to the mark is minimal.”

44. The Applicant goes on to refer to the Trade Marks Manual:

“Letters or numerals which designate characteristics of the goods/services, and/or which are customary in the trade, are excluded from registration by section 3(1)(c) and/or (d). Numbers/letters which may be used in trade to designate... size, e.g. XL for clothes, 34R for clothing... Such signs will be subject to objection under section 3(1)(b)(c) and/or (d) of the Act. Two digit numerals may be devoid of any distinctive character because they are commonly used in the trade as descriptions or else have become customary in the language...”

45. I note the extracts from the Trade Marks Manual cited by the Applicant. . A registered trade mark must be assumed to have at least some distinctive character¹² and the effect of section 72 of the Act is that the registration is prima facie evidence that the mark is valid. It is not, therefore, open to me to find that the mark is devoid of distinctive character. For a minority of the registered goods (such as men’s socks), the mark may be allusive of a characteristic and so have a lower than average degree of distinctive character. For the remaining goods, I find the earlier mark to have a reasonable degree of inherent distinctive character. For women’s clothing, use of the number twelve, expressed either as a word or as a numeral, commonly denotes a particular clothing size, but I do not find that to be generally to be the practice for the Opponent’s registered goods of “*men’s clothing; headgear.*”

¹² See CJEU ruling in *Formula One Licensing BV v OHIM* Case C-196/11P paragraphs 41 – 44.

Conclusion as to likelihood of confusion

46. I now turn to reach a conclusion as to the likelihood of confusion between the two marks if they were used in relation to the goods specified. Confusion can be direct (which effectively occurs 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/goods down to the responsible undertakings being the same or related). Indirect confusion, was considered by Mr Iain Purvis QC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*,¹³ where he noted that:

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

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

¹³ Case BL-O/375/10

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

47. In making this global assessment of likelihood of confusion I take stock of my findings set out in the foregoing sections of this decision as to: the relevant average consumer; the nature of the purchasing process; the similarity between the specified goods; and the similarity between the conflicting marks, taking account of the degree of inherent distinctiveness of the earlier mark. I also bear in mind the interdependency principle – which is to say that a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the respective goods (and vice versa). (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*).
48. I have found that the relevant average consumer for the goods in question is a member of the general public, who would pay a reasonable level of attention when selecting the goods at issue.
49. I have considered the nature of the purchasing process, in which visual considerations predominate as purchases are likely to be mainly on the basis of self-selection by the consumer.
50. As to the comparison of goods I have found “*headgear for wear*” and “*headgear*”, and “*clothing*” and “*men’s clothing*”, to be identical and a medium degree of similarity between “*footwear*” and “*men’s clothing*.”
51. In comparing the marks I have found that they share a reasonable degree of visual, aural and conceptual similarity such that the marks are reasonably similar overall. I have found that the earlier mark has a reasonable degree of inherent distinctive character in respect of the majority relevant goods (less than average for the minority

of goods in respect of which the number twelve could be considered allusive to a characteristic of size).

52. I take account of the various principles from case law outlined in paragraph 13 of this decision and weighing all factors in the balance, including the degree of similarity of the goods in question, I find in this case that there is a likelihood of confusion. It seems to me that the confusion would be indirect: the word "TWELVE" is likely to fix itself in the mind of the average consumer and act as an important hook in prompting his or her recall of the competing marks. If the average consumer notices the textual addition "AM:PM" it may be seen as a brand extension, conceivably, for example, indicating goods suitable for wear at any time, day or night.
53. Consequently, the opposition succeeds.

Costs

54. The Opponent has been successful and is entitled to a contribution towards its costs. The Opponent has not engaged independent professional representation and as such is a litigant in person. I assess its costs based on the guidance in Tribunal Practice Notice 4/2007 and based on an £18 hourly rate, which is the minimum level of compensation for litigants in person in The Litigants in Person (Costs and Expenses) Act 1975.
55. The Opponent has submitted a Tribunal Costs Pro Forma where it claims £100 reimbursement of the official fees and sets out its time spent in hours dealing with the matter as follows: "Notice of Opposition - two hours"; "Notice of Defence - four hours"; "Preparing evidence / written submissions and considering and commenting on the other side's evidence / written submissions – 2 hours" (the Opponent refers to "11 emails to their agent"). The form seems to claim nothing in respect of "Considering forms filed by the other party." As the form has been completed electronically it may be that the cells are misaligned, or else the Opponent has made an error, as clearly it was the Applicant, not the Opponent, who filed a Notice of Defence, although the Opponent will have considered the form filed by the Applicant.

56. As an unrepresented party, it will have been necessary for the Opponent to familiarise itself with the brief contents of the Notice of Defence and having done so, to research the position and to formulate an appropriate response. This is likely to have taken the Opponent some time and an award on the basis of 4 hours would not be unreasonable, particularly if I factor in consideration of the Applicant's submissions in lieu of a hearing. Since the Opponent's own submissions in lieu consisted very largely of inadmissible evidence, I make no separate award for that.
57. In the circumstances I award the Opponent the sum of £208 (two hundred and eight pounds) as a contribution towards the cost of the proceedings, calculated as follows:

Official fee for Notice of Opposition	£100
Preparing Notice of Opposition	2 hours (£36)
Considering the other side's forms / submissions	4 hours (£72)
Total	£208

58. I therefore order AMPM International Private Limited to pay Duf Ltd the sum of £208 (two hundred and eight pounds) to be paid within fourteen days of the expiry of the appeal period, or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 25TH day of April 2017

**Matthew Williams
For the Registrar,
the Comptroller-General**