

O-421-20

TRADE MARKS ACT 1994
IN THE MATTER OF
TRADE MARK APPLICATION NO. 3416211
BY TRIDENT CORPORATE SERVICES (SINGAPORE) PTE LIMITED AS
TRUSTEE FOR THE HARDHAT UNIT TRUST
TO REGISTER

HARDHAT

AS A TRADE MARK IN CLASSES 9 AND 42

AND

OPPOSITION THERETO
UNDER NO. 600001287
BY TIARA SOFTWARE CONSULTANTS LIMITED

Background and pleadings

1. On 24 July 2019, Trident Corporate Services (Singapore) Pte Limited as trustee for The Hardhat Unit Trust (“the applicant”) applied to register the trade mark shown below under number 3416211:

HARDHAT

2. The application was published for opposition purposes on 4 October 2019. Following the division of the application originally filed, the current application only covers the goods and services shown below:

Class 9 Application software; Computer programmes (programs) and recorded software distributed online; Computer programs (downloadable software); Computer software; Computer software (programs); Computer software (recorded); Computer software applications (downloadable); Computer software designed to estimate costs; Computer software downloaded from the internet; Computer software for accounting systems; Computer software for analysing address files; Computer software for analysing market information; Computer software for authorising access to data bases; Computer software for business purposes; Computer software for processing address files; Computer software for processing market information; Computer software packages; Computer software products; Computer software programs; Computer software programs for database management; Computer software programs for spreadsheet management; Data communications software; Data processing software; Downloadable software applications (apps); Computer apparatus for remote billing; Computer programs for financial management; Computer programs for use in database management; Training guides in electronic format; Training manuals in electronic format; Computer documentation in electronic form; Data recorded electronically; Databases (electronic publications).

Class 42 Computer software consultancy; Computer software design; Computer software development; Computer software engineering; Design of computer software; Development of computer software; Development of computer software application solutions; Development of software; Hosting of software as a service (SaaS); Maintenance of computer software; Online provision of web-based software; Provision of online non-downloadable software (application service provider); Rental of computer software; Repair of computer software; Software as a service (SaaS); Platform as a service [PaaS]; Software creation; Software engineering; Updating of computer software; Upgrading of computer software; Writing of computer software; Providing temporary use of on-line non-downloadable software; Recovery of computer data; Consultancy, information and advisory services relating to all of the aforesaid.

3. Tiara Software Consultants Limited (“the opponent”) filed a notice of opposition on 31 December 2019 on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all the goods and services in the application.¹

4. The opponent relies upon all goods and services covered by the following UK trade mark registration :

Mark: Hard Hat

UK registration no. 3343359

Filing date: 4 October 2018

Registration date: 21 December 2018

Goods and Services:

Class 9 Software applications; Software applications for mobile devices; Software applications for use with mobile devices; Software for smartphones; Software for tablet computers; Application software; Application software for cloud computing services; Application software for mobile devices; Software.

¹ TM7F was filed prior to the division of the original application which covered goods and services in Classes 9, 35, 41 and 42. Therefore, on the form TM7F, the opponent has indicated that it intends to oppose only the goods and services covered by Classes 9 and 42 in the original application.

Class 42 Software (Rental of computer -); Software as a service; Software as a service [SAAS] services; Software as a service [SaaS].

5. The applicant filed a counterstatement denying the grounds of opposition.

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

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

7. The effect of the above is to require parties to seek leave in order to file evidence (other than the proof of use evidence which is filed with the notice of opposition) in fast track oppositions. No leave was sought in respect of these proceedings.

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 applicant is represented by CMS Cameron McKenna Nabarro Olswang LLP and the opponent is a litigant in person. A hearing was neither requested nor considered necessary. Only the opponent filed written submissions. I make this decision after a careful reading of all the papers filed by the parties.

DECISION

Section 5(2)(b)

10. The opposition is based upon section 5(2)(b) of the Act, which read as follows:

“5. (2) 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 of the part of the public, which includes the likelihood of association with the earlier trade mark”.

11. An earlier trade mark is defined in s. 6 of the Act, the relevant parts of which state:

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

(a) a registered trade mark, international trade mark (UK) or 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”.

12. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As this trade mark had not completed its registration process more than five years before the application date of the opposed application, it is not subject to the proof of use provisions under section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods and services it has identified.

Section 5(2)(b) – case law

13. The following principles are gleaned from the judgments of the European Union (“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 C3/03, *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 the 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 goods and services

14. When making the comparison, all relevant factors relating to the goods and services in the specification should be taken into account. In *Canon*, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment:

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

15. Guidance on this issue has also come from Jacob J. (as he then was) in *British Sugar Plc v James Robertson & Sons Ltd* (the Treat case), [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

16. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

17. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) 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”.

18. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court (“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”.

19. 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 are 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., sitting as the Appointed Person, noted in *Sandra Amelia 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”,

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”.

20. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the General Court (“GC”) stated:

“29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

21. The respective goods and services covered by the contested mark and the earlier mark are set out below:

Opponent’s goods and services	Applicant’s goods and services
Class 9: Software applications; Software applications for mobile devices; Software applications for use with mobile devices; Software for smartphones; Software for tablet computers; Application software; Application software for cloud computing services; Application software for mobile devices; Software.	Class 9: Application software; Computer programmes (programs) and recorded software distributed online; Computer programs (downloadable software); Computer software; Computer software (programs); Computer software (recorded); Computer software applications (downloadable); Computer software designed to estimate costs;

Class 42: Software (Rental of computer -); Software as a service; Software as a service [SAAS] services; Software as a service [SaaS].

Computer software downloaded from the internet; Computer software for accounting systems; Computer software for analysing address files; Computer software for analysing market information; Computer software for authorising access to data bases; Computer software for business purposes; Computer software for processing address files; Computer software for processing market information; Computer software packages; Computer software products; Computer software programs; Computer software programs for database management; Computer software programs for spreadsheet management; Data communications software; Data processing software; Downloadable software applications (apps); Computer apparatus for remote billing; Computer programs for financial management; Computer programs for use in database management; Training guides in electronic format; Training manuals in electronic format; Computer documentation in electronic form; Data recorded electronically; Databases (electronic publications).

Class 42: Computer software consultancy; Computer software design; Computer software development; Computer software engineering; Design

	of computer software; Development of computer software; Development of computer software application solutions; Development of software; Hosting of software as a service (SaaS); Maintenance of computer software; Online provision of web-based software; Provision of online non-downloadable software (application service provider); Rental of computer software; Repair of computer software; Software as a service (SaaS); Platform as a service [PaaS]; Software creation; Software engineering; Updating of computer software; Upgrading of computer software; Writing of computer software; Providing temporary use of on-line non-downloadable software; Recovery of computer data; Consultancy, information and advisory services relating to all of the aforesaid.
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22. The applicant has made only a general denial of the identity or similarity between the respective goods and services. For its part, the opponent has made the following submissions:

“All of the goods in the Applicant’s class 9 are included within the specification of the Opponent’s class 9 specification. All of the services in the Applicant’s class 42 are included within the specification of the Opponent’s class 42 specification. Accordingly, we would therefore consider the goods and services

contained within the Application to be either the same or confusingly similar to those of the Earlier Rights.”²

23. The opponent further submits:

“The Opponent’s Hard Hat software product supports pro-active health and safety management, covering elements such as incident/accident records, staff training, risk assessments and action tracking.

We note from the Applicant’s website (hardhat.com) that their product description lists several functions, under a heading of “Health and Safety”, which are directly comparable to those offered by the Opponent’s software.”

24. In *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C- 533/06, the CJEU stated, at paragraph 66 of its judgment, that when assessing the likelihood of confusion under section 5(2) it is necessary to consider all the circumstances in which the mark applied for might be used if it were registered. It is not clear to me from the opponent’s submissions what “several functions” the applicant has listed on their website which may be directly comparable to the opponent’s software. I can make a comparison of the respective goods and services notionally and objectively based on the applicant’s goods and services, as applied for on the trade mark application, and the opponent’s goods and services, as registered.³ Even if any product descriptions or functions are listed on the applicant’s website, they are irrelevant to the issues under consideration unless any such goods and services are included in or apparent from the applicant’s specification. Accordingly, I make the following comparison of the respective goods and services:

25. *Application software, computer software; computer programs, computer software (programs) and computer software programs* in the application are alternate ways of describing the terms software and software applications covered by the opponent’s specification. The respective goods are identical.

² See the opponent’s written submissions dated 11 June 2020, page 4.

³ See *Roger Maier v ASOS* ([2015] EWCA Civ 220 at paragraphs 78 and 84.

26. Opponent's software is a wide term. It covers the applicant's *computer programmes (programs) and recorded software distributed online; Computer programs (downloadable software); Computer software (recorded); Computer software applications (downloadable); Computer software designed to estimate costs; Computer software downloaded from the internet; Computer software for accounting systems; Computer software for analysing address files; Computer software for analysing market information; Computer software for authorising access to data bases; Computer software for business purposes; Computer software for processing address files; Computer software for processing market information; Computer software packages; Computer software products; Computer software programs for database management; Computer software programs for spreadsheet management; Data communications software; Data processing software; Downloadable software applications (apps); Computer programs for financial management and Computer programs for use in database management*. The respective goods are, therefore, identical under the *Meric* principle.

27. In the ordinary and natural meaning, the applicant's *computer apparatus for remote billing* appears to me as a type of computer. The nature, purpose and method of use of computer differs from software in the opponent's specification. Given that software is indispensable for the use of the applicant's goods, I find that there is a complementary relationship between the competing goods and the average consumers may expect that the goods originate from the same undertaking. The users and channels of trade would overlap. The goods, however, do not compete. Considering these factors, I find that the competing goods are similar to a low degree.

Training guides in electronic format; Training manuals in electronic format; Computer documentation in electronic form; Data recorded electronically; Databases (electronic publications).

28. The opponent argues that its goods are included within the applicant's specification and, therefore, the respective goods are either identical or similar. The applicant's goods are, broadly speaking, electronic publications and database that are accessed from a computer while the opponent's goods concern software at large or software used for a specific purpose. Therefore, I do not consider that the applicant's goods fall

within the broad category of software; the competing goods are not identical. However, it does appear to me that there is a correlation between the competing goods. To my understanding, software is indispensable to create, store, manage or extract electronic data and publications covered by the applicant's goods. Accordingly, I find that the respective goods are complementary in the sense described by the case law. Goods differ in nature, purpose and intended use. They do not compete. The users and the channels of trade would overlap. Considering these factors, I find that the respective goods similar to a low degree.

29. *Rental of computer software* and *Software as a Service (SaaS)* in the application are identically contained in the opponent's specification. The respective goods are identical.

30. The opponent claims that the applicant's remaining services, namely, *computer software engineering services; computer software design, computer software development; design of computer software; development of computer software; development of computer software application solutions; development of software; hosting of software as a service (SaaS); maintenance of computer software; online provision of web-based software; provision of online non-downloadable software (application service provider); Repair of computer software; platform as a service [PaaS]; Software creation; updating of computer software; upgrading of computer software; writing of computer software; providing temporary use of on-line non-downloadable software and recovery of computer data* are included within the opponent's SaaS; Software (Rental of computer) services. Neither party has provided an explanation of the term Software as a Service (SaaS). My own understanding of the term is that it is a software distribution model in which the service provider makes SaaS applications available to the customers through the web browser. Given that the opponent's SaaS also concerns the development and hosting of SaaS applications, it is likely that the applicant's services such as developing, hosting or maintaining software may be provided in relation to SaaS. Therefore, I find that the opponent's services are included in the broad terms contained in the application. The respective services are identical under the *Meric* principle.

31. It seems to be likely that the applicant's consultancy, information and advisory services in Class 42 also concerns Software as Service (SaaS), which is covered by the opponent's specification. Accordingly, I find that the respective services are identical under the *Meric* principle.

The average consumer and the nature of the purchasing act

32. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which these goods and services are likely to be selected by the average consumer.

33. 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”.

34. The average consumer of the respective parties' goods and services includes both the general public and the professional users. The goods and services will be selected primarily by visual means, after research conducted on websites, from brochures or catalogues. There may also be an aural aspect to the purchase or selection process if advice is sought from sales representatives or other businesses. Although the public buying the opponent's goods and services may pay only a medium degree of attention, the professional users of the goods and services at issue are likely to pay attention to details such as the technological interface, the functionalities, or costs. Therefore, the level of attention paid will be fairly high by professional users.

Distinctiveness of the earlier mark

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

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

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

36. As the opponent filed no evidence, I have only the inherent position to consider. The earlier mark is “Hard Hat”. The average consumer is likely to see the word Hard as qualifying the word Hat such that the words combine together to mean a hat that is firm and rigid or a protective helmet. The mark has no suggestive or evocative qualities in relation to the opponent's goods and services. Therefore, I conclude that, as a whole, the earlier mark possesses a medium degree of distinctive character.

Comparison of marks

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

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

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

39. The trade marks to be compared are as follows:

Opponent's trade mark	Applicant's trade mark
Hard Hat	HARDHAT

40. The opponent's mark is comprised of the words Hard and Hat presented in an ordinary font. As mentioned earlier, the words form a unit with a meaning. Therefore, neither word dominates the overall impression of the mark.

41. The applicant's mark is presented as a single word "HARDHAT" in capital letters. The mark appears to be a combination of the words "Hard" and "Hat" which the average consumer will readily identify. The overall impression and the distinctiveness of the mark lie in the in this word.

42. Visually, the competing marks consists of seven identical letters. In terms of differences, the opponent's mark is presented as two words while the applicant's mark consists of a single word. Given that the parties marks are word marks, the notional and fair use would entitle them to use the respective marks in different typefaces. That being the case, the typeface difference between the marks is insignificant in my comparison. Considered overall, I find that the marks are visually similar to a high degree.

43. In an aural comparison, the opponent's mark will be pronounced conventionally as two words. Even though the applicant's mark is presented as a single word, given that it is created by the combination of two known words, the average consumer, in the ordinary speech, would take a pause between the words HARD and HAT, and pronounce the mark as two words. That results in an identical pronunciation of the respective marks. The marks are aurally identical.

44. In a conceptual comparison, both marks mean a hat that is firm and rigid or a protective helmet.⁴ Accordingly, the marks are conceptually identical.

Likelihood of confusion

45. In determining whether there is a likelihood of confusion, I need to bear in mind several factors. The first is the interdependency principle, i.e. a lesser degree of similarity between the respective goods and services may be offset by a greater degree of similarity between the trade marks (*Canon* at [17]). It is also necessary for me to bear in mind the distinctive character of the opponent's trade marks, as the more distinctive those trade marks are, the greater the likelihood of confusion (*Sabel* at [24]). I must also keep in mind the average consumer for the goods and services, the nature

⁴ <https://www.collinsdictionary.com/dictionary/english/hard-hat> [accessed 21 July 2020].

of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks, relying instead upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

46. Confusion can be direct (which 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/services down to the responsible undertaking being the same or related).

47. Earlier in the decision, I concluded:

- That the marks are visually similar to a high degree and aurally and conceptually identical;
- The goods and services are identical or similar to a low degree;
- The opponent's mark has a medium degree of distinctive character;
- That the average consumer comprised of general public will pay a medium degree of attention while the professional users will pay a fairly high degree of attention during the selection process.

48. Applying these conclusions, I find that there is a likelihood of direct confusion. Given that the marks are visually similar to a high degree and aurally and conceptually identical, the average consumer who pays a medium degree of attention is likely to mistake one mark for the other. The confusion is still likely even where a fairly high degree of attention is paid to the selection process and where the goods are similar only to a low degree. When factoring in imperfect recollection, the average consumer is likely to misremember the presentational differences (as a single word and two words, respectively) which constitutes the only point of difference between the respective marks. In the absence of any other factors that may assist the average consumer to distinguish between the marks, I find that there is a likelihood of direct confusion for both groups of average consumers.

Conclusion

49. The opposition has succeeded in full. The application will be refused

Costs

50. The opponent has been successful and is entitled to an award of costs. As the opponent is without legal representation, and is therefore 'a litigant in person', the Tribunal invited the opponent to submit a breakdown of the actual costs it has incurred in the proceedings, including accurate estimates of the number of hours spent. The opponent was advised that The Litigants in Person (Costs and Expenses) Act 1975 (as amended) sets the minimum level of compensation for litigants in person in Court proceedings at £19.00 an hour. The opponent claims that it has spent the following amount of time on the proceedings:

Notice of Opposition:	2 hours
Considering the Form TM8 filed by the applicant:	1 hour
Correspondence with the applicant's legal representatives and preparing and filing written submissions:	5 hours
Total:	8 hours

This seems to me to be a reasonable amount of time. I, therefore, award the opponent the sum of **£252** [(£19 x 8) + £100 (official fee)] as a contribution towards the cost of the proceedings.

51. I order Trident Corporate Services (Singapore) Pte Limited as trustee for The Hardhat Unit Trust to pay Tiara Software Consultants Limited the sum of **£252**. This sum is 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 7th September 2020

Karol Thomas

For the Registrar

The Comptroller-General