

**O/0565/24**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3859710  
IN THE NAME OF CLIQUE PAYMENT TECH LIMITED  
IN RESPECT OF THE TRADE MARK**

**clique.**

**IN CLASSES 9, 36 & 42**

**AND**

**THE OPPOSITION THERETO UNDER NO. 439707  
BY LO IP SA**

## **Background and pleadings**

1. Clique Payment Tech Limited (“the applicant”) applied to register the trade mark no. 3859710 for the mark shown on the cover page of this decision in the UK on 15 December 2022. It was accepted and published in the Trade Marks Journal on 13 January 2023 in respect of goods and services in classes 9, 36 and 42. These are set out in full at paragraph 16 below.

2. On 13 March 2023, LO IP SA (“the opponent”) opposed the trade mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This is on the basis of its earlier International Registration no. 1539990 designating the UK for the mark CLIC (“the earlier mark”). All the services are relied upon, namely those registered in class 36 as set out at paragraph 16 below. The earlier mark was granted protection in the UK on 1 October 2020, and it claims priority from an earlier Swiss registration with a priority date of 9 January 2020. This registration therefore constitutes an earlier mark in accordance with section 6 of the Act.

3. The opponent argues that the respective goods and services are identical or highly similar and that the marks are highly similar, and that as such, there is a likelihood of confusion between the marks. The applicant filed a counterstatement denying the claims made.

4. Neither side filed evidence in these proceedings. Both sides filed written submissions which will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.

5. Both parties are represented in these proceedings. The applicant is represented by Clarion Solicitors Limited. The opponent is represented by Baker & McKenzie LLP.

6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK’s withdrawal from the EU.

## **Proof of use**

7. As the earlier mark had been granted for less than five years prior to the date on which the opposed application was filed, there is no requirement for the opponent to prove use of the mark in accordance with section 6A of the Act. The opponent may therefore continue to rely upon all of its services in class 36.

## **Decision**

### **Section 5(2)(b)**

8. Section 5(2)(b) of the Act is 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 on the part of the public, which includes the likelihood of association with the earlier trade mark”.

9. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

## **The Principles**

10. 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 great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

### **Comparison of goods and services**

11. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, 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”.

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

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

(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.

13. 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."

14. 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") there is complementarity where:

“...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”.

15. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the 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”.

16. With the above in mind, the goods and services for comparison are as follows:

<b>Earlier services</b>	<b>Contested goods and services</b>
Class 36: Financial affairs; monetary affairs; real estate affairs; financial services; financial services, namely financial management and asset management; consultant services relating to asset investment in securities, precious metals, funds and real estate; investment services; management of securities portfolios; securities transactions; investment fund management; provision of financial information; asset management via the Internet; fund management; mutual funds; investment services in the field of financial securities; brokerage; carrying out financial transactions, including online financial transactions.	Class 9: Computer software; computer and mobile software applications; computer software platforms; platform software; credit cards; debit cards; virtual credit cards; virtual debit cards; magnetic credit and debit cards; encoded credit and debit cards; credit and debit cards with a magnetic strip; software for facilitating secure credit and debit card transactions; computer and mobile software applications to allow customers to access bank account information and transact bank business; computer and mobile software applications for facilitating secure credit and debit card transactions; banking software; computer and mobile software applications for banking; banking software for businesses; online banking software; mobile banking software; payment software; payment software for businesses; online payment software; mobile payment

	<p>software; computer and mobile software applications for payments; computer software for facilitating payment transactions by electronic means; computer and mobile software applications for facilitating payment transactions by electronic means; software for processing electronic payments to and from others; computer and mobile software applications for processing electronic payments to and from others; computer software for enabling users to retrieve account balance and transaction information using mobile phones, smart phones, and mobile telecommunication networks; computer and mobile software applications for processing electronic payments and transferring funds to and from others; computer and mobile software applications enabling users to pay others with electronic payments, wire transfers, credit cards, debit cards, virtual credit cards and virtual debit cards; software for card readers; computer and mobile software applications relating to financial history; downloadable computer software for managing currency and currency transactions; computer programs and computer software for electronically trading traditional and virtual currency; downloadable software, namely virtual cryptocurrency; downloadable software, namely virtual coins, virtual chips, virtual tokens and virtual coupons; downloadable digital assets; downloadable digital shares; electronic currency convertors; downloadable software, namely virtual currency; downloadable computer software for managing cryptocurrency transactions using blockchain technology; downloadable cryptographic keys for receiving and spending crypto assets.</p> <p>Class 36: Financial services; financial affairs; monetary affairs; credit services; financial management; personal and business financial</p>
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	<p>management services; financial services relating to credit and debit card services; financial services for businesses; banking services; electronic banking services for businesses banking; computerised information services relating to financial, banking and payment matters; issuance of credit and debit cards; online banking; online banking services; mobile banking services; provision of banking services via a website; provision of banking services via a mobile app; electronic banking services; financial banking services for the deposit of money; money transfer services; transaction management services; banking services in relation to the electronic transfer of funds; banking services enabling users to pay others with electronic payments, wire transfers, credit cards, debit cards, virtual credit cards and virtual debit cards; banking services provided for paying bills by telephone and online; expenses tracking and management; payment processing and administration services; payment processing and administration services for businesses; credit and debit card payment services; providing an online website for the provision of financial, banking and payment services; providing a mobile app for the provision of financial, banking and payment services; providing a mobile app for managing money and funds; computerised information services relating to banking matters; foreign exchange transactions; foreign exchange information services; virtual currency exchange; financial exchange of crypto assets; services related to cryptocurrency, virtual and digital money; providing electronic transfer and trading services for a virtual currency; electronic financial trading, namely trading in the field of digitised assets such as bitcoins, cryptocurrency, digital tokens, virtual currency and digital currency; financial services, namely investments of funds</p>
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	<p>for others and advisory services for investment in the field of cryptocurrency markets; financial services, namely, providing for the buying, selling and exchanging of cryptocurrencies via the internet; financial consultation in the field of cryptocurrency; secure cryptocurrency trading and online commerce facilitated by cryptocurrency; financial information regarding financial marks and instruments; financial analysis; financial analysis and research services; financial consulting; virtual currency services; issuance of tokens for value; issue of tokens, coupons and tokens of value; provision of prepaid tokens; providing information relating to the issuance of tokens of value; token redemption services; information, consultancy and advisory services in connection with all of the aforesaid; including all the aforesaid services provided online, via the Internet, interactive computer services, electronic links, databases or platforms.</p> <p>Class 42: Platform as a Service [PaaS]; IT services; IT services relating to finance; IT consultancy, advisory and information services; design, development and maintenance of computer and mobile application software; design, development and maintenance of computer and mobile application software for financial, banking and payment services; provision of computerised transactions; design, development and maintenance of information systems relating to financial, banking and payment services; providing temporary use of online non-downloadable software; providing temporary use of on-line non-downloadable computer software for performing financial transactions; providing temporary use of online non-downloadable software for financial, banking and payment services; providing temporary use</p>
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	<p>of online non-downloadable software enabling users to pay others with electronic payments, wire transfers, credit cards, debit cards, virtual credit cards and virtual debit cards; hosting of websites for the provision of financial, banking and payment services; providing online non-downloadable computer software for use in blockchain technology; electronic storage of data; providing online non-downloadable software for use in managing currency and currency transactions; providing temporary online use of non-downloadable software for use in trading, clearing, confirmation, and financial trading risk management for exchange market transactions in the field of digitised assets such as bitcoins, cryptocurrency, digital tokens, virtual currency, and digital currency; transmission of virtual currency and digital currency via electronic communication networks; electronic transmission of currency via computer terminals and electronic devices; information, advisory and consultancy services to all of the aforesaid services.</p>
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Class 9

*Computer software; computer and mobile software applications; computer software platforms; platform software*

17. The opponent’s services include financial services in class 36. The applicant’s goods above all relate to general computer software. I consider this will include computer software for use in various financial services. The applicant argues that “[i]t is widely accepted that there is no similarity between *software* in Class 9 *financial services* in Class 36”. In this respect, I note the comments made by Thomas Mitcheson QC (as he then was) sitting as the Appointed Person in MFS AFRICA.<sup>1</sup> When

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<sup>1</sup> BLO/531/22

considering a finding of no similarity between software goods and financial services in classes 9 and 36 decision, he stated:

*“[...] I disagree with the conclusion that there are no similarities between computer software and mobile applications and the financial services in the Opponent’s specification. The supportive/complementary nature of the former is apparent and that is sufficient in my mind to render the goods/services as having a low degree of similarity.”*

18. It is my view that this reasoning will apply in this case to the general computer software goods above. These will include computer software goods relating to finance and will be both important or essential to the opponent’s financial services offering, and in my view will be considered by the consumer as likely to derive from the same entity in many instances. I therefore find a level of complementarity between the goods, in addition to shared users and trade channels. There may also be a degree of overlap in end purpose, in that both the goods and services are ultimately for the purpose of assisting users with managing their finances. Whilst I note the difference in factors such as nature and method of use, I consider these goods to be similar to the opponent’s earlier financial services to at least a low degree.

*Software for facilitating secure credit and debit card transactions; computer and mobile software applications to allow customers to access bank account information and transact bank business; computer and mobile software applications for facilitating secure credit and debit card transactions; banking software; computer and mobile software applications for banking; banking software for businesses; online banking software; mobile banking software; payment software; payment software for businesses; online payment software; mobile payment software; computer and mobile software applications for payments; computer software for facilitating payment transactions by electronic means; computer and mobile software applications for facilitating payment transactions by electronic means; software for processing electronic payments to and from others; computer and mobile software applications for processing electronic payments to and from others; computer software for enabling users to retrieve account balance and transaction information using mobile phones, smart phones, and mobile telecommunication networks; computer and mobile*

*software applications for processing electronic payments and transferring funds to and from others; computer and mobile software applications enabling users to pay others with electronic payments, wire transfers, credit cards, debit cards, virtual credit cards and virtual debit cards; software for card readers; computer and mobile software applications relating to financial history; downloadable computer software for managing currency and currency transactions; computer programs and computer software for electronically trading traditional and virtual currency*

19. The above goods are all computer software related specifically to finance. These goods will share users and trade channels. They will also be complementary to the opponent's general categories of financial services, in the sense that the offering of financial computer software such as the above is at least important to the offering of financial services and vice versa, and the consumer is likely to assume they are offered by the same undertaking. Again, the nature and method of use will differ, but there will be a degree of overlap in their end purpose. For the same reasons I have found the broader categories of computer software to the opponent's financial services similar to at least a low degree, I also find these specific types of financial software similar to at least a low degree.

*credit cards; debit cards; virtual credit cards; virtual debit cards; magnetic credit and debit cards; encoded credit and debit cards; credit and debit cards with a magnetic strip*

20. Again, I will compare the applicant's goods above to the opponent's general financial services. It is my view this will include services such as banking. The users of these types of services and the applicant's goods will be shared, as will the trade channels. Further, the above goods will be important if not essential to this type of service offering (and vice versa) and the shared users are likely to assume that the goods and services will be offered by the same entities. There will to some extent be an overlap in purpose, in that the goods and services will all be for the purpose of helping consumers manage their finances, for example to withdraw funds or gain credit. However, the nature and method of use will differ. Overall, I consider the above goods to be similar to the opponent's financial services to at least a low degree.

*downloadable software, namely virtual cryptocurrency; downloadable software, namely virtual coins, virtual chips, virtual tokens and virtual coupons; downloadable software, namely virtual currency; downloadable computer software for managing cryptocurrency transactions using blockchain technology; downloadable cryptographic keys for receiving and spending crypto assets; electronic currency convertors*

21. The above goods are all software related to various types of virtual currency and virtual currency transactions. It is my view that the opponent's financial services will include financial services related to virtual currency, and that the same logic applies in relation to these goods and the opponent's services as set out at paragraph 19. I consider these will be complementary, will share users and have an overlap in purpose to some extent, but the same differences in nature and method of use will be present. I consider these goods to be similar to the opponent's services to at least a low degree.

*downloadable digital assets; downloadable digital shares*

22. The opponent's services include *asset management via the Internet* and *investment services* in addition to the general categories of financial services. I consider that downloadable digital assets and downloadable digital shares will be important to if not essential for the offering of these services, and it is likely the consumer will assume they will be offered by the same entities. I consider the goods and services to be complementary to a degree and it is my view that users will be shared, namely those using asset and investment management services wishing to access their downloadable digital assets and shares. However, I do not consider the other relevant factors, including method of use or nature to be shared. Overall, I consider these to be similar to at least a low degree.

### Class 36

*Financial services; financial affairs; monetary affairs; credit services; financial management; personal and business financial management services; financial services relating to credit and debit card services; financial services for businesses; banking services; electronic banking services for businesses banking; computerised information services relating to financial, banking and payment matters; issuance of*

*credit and debit cards; online banking; online banking services; mobile banking services; provision of banking services via a website; provision of banking services via a mobile app; electronic banking services; financial banking services for the deposit of money; money transfer services; transaction management services; banking services in relation to the electronic transfer of funds; banking services enabling users to pay others with electronic payments, wire transfers, credit cards, debit cards, virtual credit cards and virtual debit cards; banking services provided for paying bills by telephone and online; expenses tracking and management; payment processing and administration services; payment processing and administration services for businesses; credit and debit card payment services; providing an online website for the provision of financial, banking and payment services; providing a mobile app for the provision of financial, banking and payment services; providing a mobile app for managing money and funds; computerised information services relating to banking matters; foreign exchange transactions; foreign exchange information services; virtual currency exchange; financial exchange of crypto assets; services related to cryptocurrency, virtual and digital money; providing electronic transfer and trading services for a virtual currency; electronic financial trading, namely trading in the field of digitised assets such as bitcoins, cryptocurrency, digital tokens, virtual currency and digital currency; financial services, namely investments of funds for others and advisory services for investment in the field of cryptocurrency markets; financial services, namely, providing for the buying, selling and exchanging of cryptocurrencies via the internet; financial consultation in the field of cryptocurrency; secure cryptocurrency trading and online commerce facilitated by cryptocurrency; financial information regarding financial marks and instruments; financial analysis; financial analysis and research services; financial consulting; virtual currency services; issuance of tokens for value; issue of tokens, coupons and tokens of value; provision of prepaid tokens; providing information relating to the issuance of tokens of value; token redemption services; information, consultancy and advisory services in connection with all of the aforesaid; including all the aforesaid services provided online, via the Internet, interactive computer services, electronic links, databases or platforms*

23. The opponent's earlier services cover broad services including *Financial affairs; monetary affairs and financial services*. It is my view these broad services are either

self-evidently identical to the services covered by the applicant in class 36 above, or are identical in accordance with the principles set out in *Meric*.

#### Class 42

*provision of computerised transactions; providing temporary use of on-line non-downloadable computer software for performing financial transactions; providing temporary use of online non-downloadable software for financial, banking and payment services; providing temporary use of online non-downloadable software enabling users to pay others with electronic payments, wire transfers, credit cards, debit cards, virtual credit cards and virtual debit cards; hosting of websites for the provision of financial, banking and payment services; providing online non-downloadable software for use in managing currency and currency transactions; providing temporary online use of non-downloadable software for use in trading, clearing, confirmation, and financial trading risk management for exchange market transactions in the field of digitised assets such as bitcoins, cryptocurrency, digital tokens, virtual currency, and digital currency; transmission of virtual currency and digital currency via electronic communication networks; electronic transmission of currency via computer terminals and electronic devices; information, advisory and consultancy services to all of the aforesaid services*

24. The above services all concern the provision of software as a service relating to various aspects of finance. It is my view that similar reasoning will apply to these services as applied in relation to the applicant's computer software. It is my view that these types of software as a service will be important or essential to the opponent's financial services offering, as the provision of software as a service in relation to finance will be required and/or offered alongside online financial services via various banking and trading websites for example. In my view, these will also be considered by the consumer likely to derive from the same entity. I, therefore, find a level of complementarity between the services, in addition to shared users and trade channels. There may also be a degree of overlap in intended purpose, in that both sets of services are for the purpose of assisting users with managing their finances. Whilst I note difference in factors such as nature and method of use, I consider these services to be similar to at least a low degree.

*providing temporary use of online non-downloadable software*

25. I find that these services will encompass the applicant's services set out in the paragraph above, and I find these to be similar to the opponent's services to at least a low degree for the reasons previously stated.

*IT services relating to finance; IT services*

26. I consider that IT services are broad and will include a wide range of services in this class including those such as the provision of the types of software as a service set out in the paragraphs above. I therefore consider these services to be similar to the opponent's earlier financial services to at least a low degree.

*Platform as a Service [PaaS]*

27. The applicant's broad services above will include the provision of finance platforms, for example online platforms to assist in banking or for trading. I consider again that these services are often important to, if not essential for the provision of the opponent's financial services. Further, the consumer is likely to believe that where these types of platforms relate to finance, they will be offered by the same entities offering financial services. There is, therefore, a level of complementarity between the services. There will also be shared users and trade channels in this respect, and to an extent a shared purpose, that being to assist the consumer with the management of its finances. I consider there may also be a level of competition between these services, with the consumer choosing to either use a financial platform for managing their finances, or to engage someone offering financial services to manage these on their behalf. I note the method of use and nature of the services will differ. Overall, I find these services similar to the opponent's earlier financial services to at least a low degree.

*design, development and maintenance of computer and mobile application software for financial, banking and payment services; design, development and maintenance of information systems relating to financial, banking and payment services*

28. I consider these are all services for the design, development and maintenance of software for use with financial services for third parties, rather than the offering of the software as a service itself. In the absence of any submission or evidence to consider on this point, it is my view that a party offering financial services is unlikely to also offer software design, development and maintenance services to third parties, even if they do offer software or software as a service itself. I consider the nature, trade channels and specific intended purpose of the services to differ, although I note there may be an overlap in end purpose on the basis that these services are ultimately for the purpose of creating and maintaining a software to help with financial services. I do not consider the services to be complementary or in competition, and I consider users may be shared only at a fairly general level. Overall, I consider the services above at best to be similar to a very low degree to the opponent's earlier financial services in class 36.

*design, development and maintenance of computer and mobile application software*

29. I consider these services will encompass design, development and maintenance of computer and mobile application software relating to finance. My findings above therefore also apply here.

*IT consultancy, advisory and information services*

30. Unlike the earlier 'IT services' which I found to include services such as software as a service, I consider these to be consultancy, advisory and information services relating to IT. These will be services offered by parties for providing advice and assistance with IT matters to other parties. I do not consider these to be similar to any of the opponent's earlier services. I see no reason for trade channels to be shared, nor do I consider the services to share a purpose. Whilst I note the nature of both services may be similar in the sense they are both advisory or consultancy services for example, I find this to be true for a huge range of services, many of which will evidently bear no similarity to each other. I do not find they will be complementary or in competition. Whilst there may be shared users at a very general level, I do not consider this sufficient to render the services similar. Overall, I find the above services to be dissimilar to the opponent's earlier services.

*providing online non-downloadable computer software for use in blockchain technology*

31. The applicant's services above relate to a specific type of software for use in blockchain technology. The opponent has provided no particular submissions explaining why these services should be found similar to those relied upon in class 36. In the absence to any plausible argument from the opponent, I see no reason to find these services similar. They do not appear to me to share a nature or purpose, to be in competition or be complementary, or to share trade channels. Whilst I note there may be an overlap in terms of users at a very general level, I do not consider this sufficient to render these services similar. Overall, I find the applicant's services above to be dissimilar to those covered by the opponent.

*electronic storage of data*

32. Again, the opponent has advanced no specific argument as to why I should find services for the electronic storage of data to be similar to its earlier services. Whilst I note that those offering financial services will undoubtedly store data to a certain extent, I do not consider that they will be offering the electronic storage of data as a service to third parties per se. I do not consider that the nature or purpose of the services will be shared. Further, I do not consider they will be in competition with the opponent's services, nor do I believe the consumer would consider it likely an entity offering electronic data storage as a service would also likely offer financial services, or any of the services covered by the opponent's class 36. Whilst there may be a general overlap in users, I do not consider this sufficient to render the services similar. Overall, I consider these services to be dissimilar to those relied upon by the opponent.

*information, advisory and consultancy services to all of the aforesaid services*

33. At the end of its class 42 specification, the applicant includes the term above. This is applied to all of the different elements of the specification as filed. It is my view that where I have found at least a low level of similarity between the services, these services will also share at least a low level of similarity with the same. Where the

services have been found to be dissimilar, I also find these services relating to the same to be dissimilar.

34. For completeness, I note that this becomes slightly complicated where I have found *IT services* to be similar to at least a low degree to the opponent's services, and *IT consultancy, advisory and information services* to be dissimilar. However, it is my view that IT consultancy, advisory and information services will be a particular service offering run by a firm advising and consulting on the technical aspects of software and computing. I find this to hold a slightly different meaning to the offering of a finance platform as software as a service, which I find to be included under the very broad term 'IT Services', and the related consultancy, advisory and information services that may be offered in relation to the offering of that finance platform which may be covered by the initial broad term. However, if I am wrong, and I should consider that the term *IT consultancy, advisory and information services* to have an identical meaning to *IT services; information, advisory and consultancy services to all of the aforesaid services*, then due to the broad meaning of the terms I consider they will both be similar to the opponent's earlier services to at least a low degree.

### **Comparison of marks**

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

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

36. It would be wrong, therefore, to dissect the trade marks artificially, 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.

37. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
CLIC	<b>clique.</b>

38. The earlier mark comprises of the four letter word CLIC. Its overall impression resides in the combination of these four letters and the mark as a whole.

39. The contested mark comprises of six letters forming the word 'clique' in addition to a full stop at the end of the mark. The word clique is the most dominant and distinctive part of the mark, and whilst it is not negligible, it is my view that the use of the full stop at the end of the mark plays only a very small role in its overall impression. I note the limited stylisation of the mark, but I find this contributes very little to the overall impression of the mark as a whole.

#### Visual comparison

40. Visually, the two marks overlap through their use of the same initial three letters CLI. I note the visual similarities are at the beginning of the mark where the consumer tends to place more importance.<sup>2</sup> However, they differ by way of the earlier marks last letter 'C' and the contested marks last three letters 'que'. I note the opponent's submission that the lowercase 'q' includes a 'c' shape and therefore the earlier mark is wholly incorporated within the contested mark, however, I do not agree that consumers would either consciously or unconsciously dissect the letter 'q' and consider this to be the case. They differ in length, with the contested mark being two letters longer than the earlier mark. The full stop in the contested mark also adds to the visual differences, if only to a limited extent. I note the stylisation of the contested

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<sup>2</sup> See *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

mark, however, as the earlier mark is protected as a word mark, I consider it could also be used in a similar font, and I therefore find the stylisation of the contested mark to make little difference visually. Overall, considering their similarities and differences, I find the marks to be similar visually to just below a medium degree.

#### Aural comparison

41. I note that the earlier mark is not strictly a known English word. The opponent submits its earlier mark would be pronounced as 'cleek', although it does not offer an explanation as to why this will be so. I note that in the English language, words ending in 'ic' do not generally cause the consumer to verbalise an 'eek' sound. For example, the words 'music', 'logic', 'basic' and 'clinic' all end with an 'ihk' sound. Further, considering the fact that consumers will look for elements within a made-up mark they recognise, it is my view that 'clic' would be recognised by the consumer as the word 'click' without the 'k'. For these reasons, it is my view that consumers would likely pronounce the earlier mark as 'clihk' ('click').

42. On the other hand, the contested mark will in my view be known by the UK consumer, who will therefore pronounce this mark in the known way, namely as 'cleek'.

43. Overall, I consider the marks both contain one syllable and share the initial 'cl' sound and the final 'kh' sound. However, I note the earlier mark will include an 'ih' sound in the middle whereas the contested mark will include the 'ee' sound in the same place. Considering the similarities and differences, overall I consider the marks to be aurally similar to between a medium and high degree.

#### Conceptual comparison

44. The opponent submits its mark is an invented word with no meaning in the English language, and as such a conceptual comparison is not possible. I disagree with this statement for two reasons. The first is, as mentioned above, although the earlier mark is not a known word in the English language, it shares the initial four letters with, and will in my view be pronounced identically to, the word 'click'. It is my view that at least a significant portion of consumers will therefore associate the known meaning of click, most commonly that of a short sharp sound or the action of pushing a button or switch, with this mark. However, even if I were to accept the opponent's submission that the

mark will be considered to have no meaning, this does not render a conceptual comparison impossible in cases where the second mark conveys an immediately graspable meaning to the consumer,<sup>3</sup> such as is the case here. The word 'clique' in the applicant's mark is defined by the Oxford dictionary online as below:

"1. A small and exclusive party or set, a narrow coterie or circle: a term of reproach or contempt, applied generally to such as are considered to associate for unworthy or selfish ends, or to small and select bodies who arrogate supreme authority in matters of social status, literature, etc."<sup>4</sup>

45. I consider this meaning to be immediately graspable, and both where the consumer attributes the meaning of the word 'click' or no meaning to the earlier mark, the two marks will be conceptually dissimilar.

46. For completeness, I note the opponent's argument within its written submissions below:

"17. For the sake of argument, however, to the extent that the relevant consumer in the UK might attempt to creatively associate the Opponent's Mark with an English word in the manner propositioned by the Applicant, there is no reason why such a consumer would not see it as being just as synonymous with the phonetically identical English word "clique", rather than the word "click", which has an entirely different sound. In that unlikely scenario (as consumers rarely carry out such convoluted and creative interpretations of marks with no meaning), the marks would be perceived as being conceptually identical."

47. As I have addressed above, I consider the opponent's mark to be phonetically identical with the work 'click', and not, as the opponent has submitted, with the word 'clique'. It is therefore self-explanatory why the opponent's submissions above do not help its case in this regard.

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<sup>3</sup> *The Picasso Estate v OHIM*, Case C-361/04 P

<sup>4</sup> [https://www.oed.com/dictionary/clique\\_n?tab=meaning\\_and\\_use#9131036](https://www.oed.com/dictionary/clique_n?tab=meaning_and_use#9131036) [accessed 31 May 2024]

## **Average consumer and the purchasing act**

48. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

49. 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.”

50. The relevant consumer of the goods in class 9 will include both members of the general public and professionals. In respect of software for use in relation to finance and financial transactions, members of the general public are likely to pay a medium or above degree of attention on the basis that the security of their own personal money may be at stake. Professionals dealing with this software in relation to business accounts are likely to pay a higher level of attention, considering that business transactions may have higher stakes and deal with larger sums of money than personal transactions. I find this to also be the case in relation to the finance related software services in class 42. In relation to the goods such as credit cards and debit cards, both professionals and the general public will consider factors such as benefits, charges and security when obtaining the goods. Again, I consider that the general public would pay a medium or above level of attention to these goods, whereas professional consumers would likely pay a slightly higher level of attention when considering cards for business transactions due to the impact they may have on the

business either immediately or over time. In respect of the finance related services in class 36, I consider that factors such as professionalism and reputation will be considered before engaging these services, and both members of the general public and professionals will likely pay a slightly above medium level of attention when engaging those services.

51. Generally, the goods and services will be purchased visually, with the consumer considering visual advertising and websites. However, I note that there may also be verbal recommendations made and I cannot completely discount the verbal comparison.

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

52. 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).”

53. The opponent has not provided me with any evidence of the use of its mark, and as such I only have the inherent position to consider. The earlier mark is the four letter word CLIC. Whilst I note this word technically has no meaning in the English language, and I do not find it to be descriptive or allusive of the services, as previously mentioned I consider it would convey the meaning of the word ‘click’ to at least a significant portion of consumers. To these consumers, I find that the earlier mark will hold a medium level of distinctive character. However, I accept that should there be consumers who consider it an entirely made-up word, to those consumers the level of distinctive character will appear inherently relatively high.

#### **GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion**

54. Prior to reaching a decision under Section 5(2)(b), I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 10 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their mind. I must consider the level of attention paid by the average consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. I must consider that the level of distinctive character held by the earlier mark will have an impact on the likelihood of confusion. I must remember that the distinctiveness of the common elements is key.<sup>5</sup> I must keep in mind that a lesser degree of similarity between the goods and services may be offset by a greater degree of similarity between the marks, and vice versa. I must also consider that both the degree of attention paid by the average consumer and how the

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<sup>5</sup> See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, in which Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar.

goods/services are obtained will have a bearing on how likely the consumer is to be confused.

55. There are two types of confusion that I may find. The first type of confusion is direct confusion. This occurs where the average consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the average consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.<sup>6</sup>

56. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

57. Where I found no similarity between the goods and services, the opposition under section 5(2)(b) must fail.<sup>7</sup>

58. I will now consider the 5(2)(b) claim in respect of the similar goods and services. I found the similarity between the remaining goods to range from similar to a very low degree to identical. I found the marks to be visually similar to just below a medium degree, aurally similar to between a medium and high degree and conceptually dissimilar. I found the relevant consumer will include both members of the general public and professionals paying a medium degree of attention or higher. I found the distinctive character in the earlier mark to be medium, but I accepted that if consumers do not associate it with the English word 'click' then it will be relatively high.

59. I note that in some instances, conceptual differences may counteract visual and aural similarities between the marks. In *The Picasso Estate v OHIM*, Case C-361/04 P, the CJEU found that:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it

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<sup>6</sup> *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10

<sup>7</sup> *esure Insurance Ltd v Direct Line Insurance Plc*, [2008] EWCA Civ 842

can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law.”

60. However, I also keep in mind that this is not a rule and there will be cases where the conceptual differences are not capable of neutralising visual and aural similarities between marks.<sup>8</sup>

61. In this instance, considering all of the factors, and whilst keeping in mind the consumers imperfect recollection, it is my view that the differences between the marks will be sufficient to avoid a likelihood of confusion, even where the goods or services are identical and the lower level of attention is paid. It is my view that the visual differences would in this instance suffice to differentiate the marks, even if there was conceptual neutrality. However, I also find that the conceptual differences go further to assist the consumer in differentiating between the two marks, with the conceptual meaning of the later mark helping it to stick in the mind of the consumer and compound the differences between the two. Overall, I do not believe the marks will be directly confused for one another, even when considering the conditions most favourable to the opponent.

62. For completeness, I will go on to consider the likelihood of indirect confusion. In *L.A. Sugar* (cited above) Mr Iain Purvis Q.C. (as he then was), as the Appointed Person set out three examples of when indirect confusion may occur as below:

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).

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<sup>8</sup> *Nokia Oyj v OHIM*, Case T-460/07

(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).”

63. I note that the examples above were intended to be illustrative and are not exhaustive. However, I also note *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, in which Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

64. Considering again all of the factors in this case, I see no reason or ‘proper basis’ for a finding of indirect confusion in this instance. I do not see any reason that consumers would assume that the goods and services offered by the applicant would come from the same or an economically linked undertaking as the opponent’s services on the basis of the shared initial three letters. Whilst the consumer may notice the similarities, it is my view that these would, in the circumstances, be put down to coincidence. I therefore find no likelihood of indirect confusion between the marks.

### **Final Remarks**

65. The opposition has failed in its entirety, and the application may proceed to registration in respect of all of the goods and services as filed.

### **COSTS**

66. The applicant has been successful and is entitled to a contribution towards its costs in accordance with Tribunal Practice Notice 1/2023. In the circumstances I award the applicant the sum of £600 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering the TM7 and preparing and filing the TM8:	£250
Preparing and filing the written submissions:	£350
Total:	£600

67. I therefore order LO IP SA to pay Clique Payment Tech Limited the sum of £600. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 19<sup>th</sup> day of June 2024**

**Rosie Le Breton**

**For the Registrar**