O-0724-24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003851107
BY HASAN AYHAN TO REGISTER:

27 EHL-I ANTEP

AS A TRADE MARK IN CLASS 30

AND

IN THE MATTER OF A FAST TRACK OPPOSITION THERETO
UNDER NO. 600002844 BY ERKAN KAYA

Background & Pleadings

1. On 18 November 2022, Hasan Ayhan ("the applicant") applied to register the trade mark "27 Ehl-i Antep" in the United Kingdom. The applicant seeks registration for the following goods in class 30:

Bakery desserts and bakery goods; Baklava; Cakes. Turkish delight; sweets. Acanthopanax tea (Ogapicha); Achar pachranga (fruit pickle); Acid drops [confectionery]; Adlay flour for food; Aerated beverages [with coffee, cocoa or chocolate base]; Aerated chocolate; Aerated drinks [with coffee, cocoa or chocolate base]; Agave syrup for use as a natural sweetener; Agave syrup [natural sweetener]; Alimentary pasta; Alimentary paste [dough]; Alimentary seasonings; Allspice; Almond cake; Almond confectionery; Almond flavorings, other than essential oils; Almond paste; Almond pastries; Almonds covered in chocolate; Angelica; Aniseed; Aperitif biscuits; Apple flavoured tea [other than for medicinal use]; Apple fritters; Apple pies; Apple tarts; Aromatic preparations for cakes; Aromatic preparations for candies; Aromatic preparations for food; Aromatic preparations for ice-creams; Aromatic preparations for making non-medicated infusions; Aromatic preparations for making non-medicated tisanes; Aromatic preparations for pastries; Aromatic teas [other than for medicinal use]; Artichoke sauce; Artifical coffee; Artificial coffee; Artificial coffee and tea; Artificial rice [uncooked]; Artificial tea; Baking spices; Baking-powder; Banana fritters; Barley-leaf tea; Barm cakes; Bars based on wheat; Beverages based on coffee; Beverages based on coffee substitutes; Beverages based on tea; Beverages consisting principally of chocolate; Beverages consisting principally of cocoa; Beverages consisting principally of coffee; Beverages containing chocolate; Beverages made from chocolate.

The application was published for opposition purposes on 3 February 2023.

2. On 17 April 2023, Erkan Kaya ("the opponent") opposed the application in its entirety under section 5(2)(b) of the Trade Marks Act 1994 ("the Act") using the fast track opposition procedure. For the purpose of the opposition, the opponent relies upon the following mark and all goods for which it is registered, as laid out below:

United Kingdom Trade Mark ("UKTM") 3845173

Ehli antep

Filing date: 2 November 2022
Registration date: 20 January 2023

Class 30: *Baklava; cakes*

3. In its Notice of Opposition, when asked to explain why it considers there to be a likelihood of confusion, the opponent replied as follows:

> "The trademark name of the applicant namely, 'Ehl-i Antep' is similar to the opponent's which is Ehli Antep. It is the same name and meaning in Turkish, except that the applicant has tried to use the trademark name by including the dash symbol. However, it is still the same trademark name."

4. In its counterstatement admitted on 18 April 2024, the applicant denied the claim to a likelihood of confusion and states as follows:

> "…I cannot understand why they're appealing against a name (Ehl-i Antep) that's totally different than their business name. …
>
> …The opponent Erkan Kaya has no active business, he is not producing any products. Currently, I do not accept my goods and services are identical."

5. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008 but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

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

6. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. No such leave was sought to file evidence in the present proceedings.

7. 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. A hearing was neither requested nor considered necessary and neither party elected to file written submissions in lieu. This decision is taken following a careful perusal of the papers.

8. The opponent is represented by Morgan Has Solicitors, whilst the applicant is unrepresented.

9. 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.

Decision

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

> "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."

11. Under the provisions laid out in section 6 of the Act, the opponent's trade mark clearly qualifies as an earlier mark. In accordance with section 6A of the Act, as it had not completed its registration procedure more than five years prior to the filing date of the applicant's mark, it is not subject to the proof of use requirements. As a consequence, the opponent can rely upon its earlier mark and all goods for which it is registered without providing evidence of use.

Section 5(2)(b) - Case law

12. The following principles are gleaned from the decisions of the courts of the European Union 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

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

(i) mere association, in the strict sense that the later mark brings 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 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

13. The goods to be compared are laid out at paragraphs 1 and 2 to this decision.

14. *Baklava* and *cakes* are present in both parties' specifications and are self-evidently identical.

15. In *Gérard Meric v Office for Harmonisation in the Internal Market*[1], the General Court ("GC") stated that:

> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut fur 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. Applying the reasoning set out in *Meric*, I find the applicant's *almond cake* and *barm cakes* identical to the opponent's *cakes*.

17. I further find that the opponent's goods are encompassed by the applicant's *bakery desserts and bakery goods* and, consequently, these are to be considered identical.

18. In my comparison of the remaining goods, I will consider factors including their nature, intended purpose, method of use and whether they are in competition or are complementary.[2]

19. In *Kurt Hesse v OHIM*,[3] , the Court of Justice of the European Union ("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)*[4], the GC stated that "complementary" means:

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

[1] Case T- 133/05
[2] *Canon*, Case C-39/97
[3] Case C-50/15 P
[4] Case T-325/06

20.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.

21. For the purpose of a comparison it is permissible to group goods together, where appropriate.[5]

Acanthopanax tea (Ogapicha); Aerated beverages [with coffee, cocoa or chocolate base]; Aerated drinks [with coffee, cocoa or chocolate base]; Apple flavoured tea [other than for medicinal use]; Aromatic teas [other than for medicinal use]; Artifical coffee; Artificial coffee; Artificial coffee and tea; Artificial tea; Beverages based on coffee; Beverages based on coffee substitutes; Beverages based on tea; Beverages consisting principally of chocolate; Beverages consisting principally of cocoa;

[5] *Separode Trade Mark* BL O-399-10 (AP)

Beverages consisting principally of coffee; Beverages containing chocolate; Beverages made from chocolate; Barley-leaf tea

22. The above selection of goods comprises a variety of beverages, or the basis of beverages. When considered against the opponent's foodstuff goods, other than both being consumables, the goods do not share a use; they meet different consumer needs. The users of the goods are likely to be the same but only insofar as both sets of goods are purchased by members of the general public. The goods' physical nature will be distinct and, whilst there may be a small degree of overlap in the goods' trade channels, they are unlikely to be sold from the same shelves. I do not consider the goods to be in competition nor are they complementary. In *Monster Energy Company v OHIM,*[6] the GC upheld the finding of the OHIM Board of Appeal that there was no similarity between coffee-based beverages and confectionery/sweets. The court rejected the Appellant's argument that similarity was established by the fact the goods were sold in the same premises and share the same distribution channels. I apply much of the same reasoning here. The goods are dissimilar.

Turkish delight; sweets. Acid drops [confectionery]; Aerated chocolate; Almond confectionery; Almonds covered in chocolate; Bars based on wheat; Almond pastries; Apple fritters; Apple pies; Apple tarts; Aperitif biscuits; Banana fritters

23. The goods listed above share a use with those relied upon by the opponent insofar as each are foodstuffs which will be consumed for either nutrition or pleasure. The goods are likely to be purchased by the same consumers and, though not exclusively, there may be some broad opportunity for similarity in the goods' physical properties (though mostly these will be distinct). I find it likely that the goods will reach the market via the same trade channels and be sold from the same retail establishments and, in some circumstances, it is possible that the parties' goods will be available to select from the same aisle. The goods are not indispensable for one another but, given their nature, it seems likely that they could occupy competitive roles. I find at least a medium degree of similarity.

[6] Case T-736/14

Aromatic preparations for cakes; Adlay flour for food; Agave syrup for use as a natural sweetener; Agave syrup [natural sweetener]; Alimentary seasonings; Allspice; Almond flavorings, other than essential oils; Almond paste; Angelica; Aniseed; Baking spices; Alimentary paste [dough]; Aromatic preparations for candies; Aromatic preparations for food; Aromatic preparations for ice-creams; Aromatic preparations for pastries; Baking-powder

24. I consider the above against the opponent's *cakes*. The above goods are generally, to my knowledge, ingredients which are used to create or enhance sweet treats or baked goods. The purpose or context of some of these goods (*baking spices*, for example) seems fairly broad, whereas others are specific as to which foodstuff they are intended for*; aromatic preparations for cakes* or *for pastries*, for example. The use, therefore, of the respective goods is ultimately the same, but not immediately so; the applicant's goods are used to create a particular dish whereas the opponent's goods are already fit-for-consumption. Both sets of goods are likely to be purchased by members of the general public, though the applicant's will also likely be purchased by professional undertakings such as bakers. The goods' physical nature is distinct and, whilst there may be some coincidence in the goods' trade channels, they will not necessarily be sold alongside one another, or even in the same aisle, of a supermarket, for example. The goods are not competitive but I accept that, in certain circumstances, the applicant's goods will be used as a component of the opponent's. Whilst that may mean that there is a degree of complementarity in the sense that the goods are important for one another, I would not necessarily expect the average consumer to consider it likely that the goods originate from a shared or related undertaking. Though I acknowledge that I have found some opportunity for coincidence in the relevant factors, I must apply due weight. I also keep in mind that one good being an ingredient of another good is not sufficient to reach a finding of similarity[7]. On balance, I find the goods are not similar.

Aromatic preparations for making non-medicated infusions; Aromatic preparations for making non-medicated tisanes

[7] [7] *Les Éditions Albert René v OHIM*, Case T-336/03

25. As I understand it, the above goods are components of beverages, rather than foodstuffs, so there is a greater distance between these goods and those of the opponent. The goods' use is not the same though there may be some broad overlap in the respective users. The goods' physical nature is not the same. Any coincidence in trade channels will be fairly artificial and the goods are unlikely to be sold in any real degree of proximity. There is no competitive relationship between the goods, nor do I consider them complementary. I find the goods are dissimilar.

Alimentary pasta; Artificial rice [uncooked]; Artichoke sauce; Achar pachranga (fruit pickle)

26. The above goods coincide with those relied upon by the opponent to the extent that they are consumable items which will be purchased for purposes of nourishment. The users are likely to be shared and, broadly speaking, there may be some overlap in the goods' respective trade channels. It seems unlikely that there will be any meaningful degree of similarity in the goods' physical nature and I do not consider them to be complementary nor competitive; the average consumer would not substitute a cake for pasta, for example. Applying due weight to the relevant factors, I do not consider the goods to be similar.

27. As some degree of similarity is necessary to engage a likelihood of confusion[8], the opposition must fail at this juncture in respect of the goods I have found to be dissimilar. The opposition therefore proceeds only in relation to the goods which I have found similar to some extent.

The average consumer and the nature of the purchasing act

28. 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 in question[9]. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc,*

[8] *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA
[9] *Lloyd Schuhfabrik Meyer*, Case C-342/97

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."

29. The average of consumer of the goods which remain at issue is a member of the general public. The goods are typically self-selected by the consumer from the shelves of the relevant retail establishment such as a supermarket or bakery. The marks' visual impact is therefore likely to carry the greatest weight in the selection process, though I do not discount the relevance of the marks' aural impression as recommendations may be made by peers or in-store assistants, for example. To my knowledge, the goods are purchased fairly frequently and are generally low in cost. That said, the consumer is likely to be alive to factors such as quality and nutritional value whilst approaching its selection. It may also be considerate of the specific ingredients used in the respective goods. Weighing all factors, I find the average consumer is likely to apply between a low and medium degree of attention.

Comparison of trade marks

30. 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 trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM,* Case C-591/12P, that:

> "34. ...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."

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

32. The trade marks to be compared are displayed in the table below:

Opponent's mark	Applicant's mark
Ehli Antep	**27 Ehl-i Antep**

33. The opponent's mark comprises two words of four and five letters, respectively. Neither word is more dominant than the other; rather, I find the mark's overall impression to lie in the unit created by the two words it comprises.

34. The applicant seeks to register a word-only mark which combines both number and letter elements, beginning with the number "27". What follows is presented as two words, though the first word is hyphenated (Ehl-i). In terms of the impression the mark creates, the average consumer may lean more heavily on the marks' word elements rather than the preceding number though, on the whole, the mark's overall impression resides in the combination of all its elements.

35. From a visual perspective, all of the marks' letters are the same and appear in the same sequence. In both marks the letters are presented as two distinct words but in

the applicant's mark the first word incorporates a hyphen which is positioned between letters EHL and I and the words are preceded by the number 27. Notwithstanding the differences I have identified, and where the differences are positioned within the marks[10], I find the marks' visual similarity to be of a fairly high degree.

36. To my knowledge, the average consumer will not be familiar with the word elements of either mark. That said, it seems likely that the opponent's mark will be aurally articulated in five syllables, roughly speaking EH-LEE-AN-TEP. The applicant's mark will likely be articulated in eight syllables; roughly TWEN-TEE-SEH-VEN-EH-LEE-AN-TEP. On that basis, the four syllables of which the earlier mark is comprised are identical to the fifth to eighth syllables in the applicant's. Whilst I acknowledge that the marks begin differently, I nonetheless find the aural similarity to be of a medium degree. I should also make clear that I have kept in mind the difference in the marks' hyphenation (or lack thereof) but maintain that the above syllables will be articulated in the same way on account of the identical combination and sequence of letters.

37. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer in the UK.[11] The applicant submits that "I am originally from the City called Antep. The name of Ehl-i Antep describes my ability and where I am from." Whilst I do not dispute the applicant's submission, nor the term's meaning, in my view, both Ehli Antep (in the opponent's mark) and Ehl-i Antep (in the applicant's mark) will likely be perceived as foreign or possibly invented words without any retrievable concept, geographical or otherwise. The number 27 in the applicant's mark, though a point of difference, does not clarify the mark's conceptual position to any extent. Weighing all considerations, I find the marks' conceptual position is neutral.

Distinctive character of the earlier trade mark

38. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to

[10] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02
[11] *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29

the way it is perceived by the relevant public. 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).
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> 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)."

39. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the goods or services for which they are registered, to those with high inherent distinctive character, such as invented words. Dictionary words which do not allude to the goods or services will typically fall somewhere in the middle. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; generally, the more distinctive the earlier mark, the greater the likelihood of confusion. The distinctive character of a mark may be enhanced as a result of it having been used in the market.

40. In *Matratzen Concord AG v Hukla Germany SA*[12], in the context of the assessment of distinctiveness for the purposes of registration, the CJEU held that the distinctive character of a trade mark must be assessed from the perspective of the relevant public in the territory in which registration is sought.

41. Given that the opponent has not made a pleading of enhanced distinctiveness, and in the absence of evidence showing the use made of the earlier mark, I have only its inherent distinctiveness to consider. Earlier in this decision I found that the earlier mark would likely be viewed as a foreign or invented word. Consequently, in the absence of any conceptual indication, the mark can possess no descriptive nor allusive properties. To my mind, the opponent's mark therefore enjoys a fairly high degree of inherent distinctiveness.

Likelihood of confusion

42. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, as the more distinctive it is, the greater the likelihood of confusion.

43. Confusion can be direct or indirect. I take note of the comments made by Mr Iain Purvis Q.C., as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*[13], where he explained that:

> "16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later

[12] Case C-421/04
[13] BL O/375/10

mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark."

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

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

44. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*[14], 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*[15], 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

[14] [2021] EWCA Civ 1207
[15] BL O/219/16

must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

45. To make the assessment, I must adopt the global approach advocated by the case law whilst taking account of my earlier conclusions. I also bear in mind that the average consumer rarely has the chance to make direct comparisons between trade marks and, instead, must rely upon the imperfect picture of them retained in its mind.

46. I begin by considering a likelihood of direct confusion. As the case law suggests, this is a simple matter of the average consumer mistaking one trade mark for the other. Earlier in this decision I found the marks’ visual impression to carry the greatest weight in the purchasing process, though I do not discount the relevance of the marks’ aural impression. The parties’ marks are visually similar to a fairly high degree, aurally similar to a medium degree and the conceptual position is neutral. The goods at issue are similar to either at least a medium degree or they are identical. The average consumer is likely to apply between a low and medium level of attention to its purchase and the earlier mark benefits from a fairly high degree of inherent distinctiveness. Whilst I acknowledge the difference in the beginnings of the respective marks, given that the degree of attention is not of a particularly high degree, and in light of the identical sequence of letters in each mark, I find it likely that the average consumer, even in regard to goods which share a medium degree of similarity, would be susceptible to direct confusion and the effects of imperfect recollection. However, if I am wrong in that regard and instead the marks are sufficiently different for the consumer to readily distinguish between them, I will go on to consider whether there is a likelihood of indirect confusion.

47. As highlighted above, a finding of indirect confusion must have a “proper basis”. The difference which is most likely to be identified between the parties’ marks, in my view, is the number 27 positioned at the beginning of the applicant’s mark (or absence of in the earlier mark). The difference in the marks’ hyphenation or the layout of the letters is unlikely to be identified. As for the nature of the difference, whilst a numerical distinguisher is not consistent with any of the examples cited in *L. A. Sugar*, I do consider the marks’ shared element to be fairly high in terms of its inherent distinctiveness and, nonetheless, these are not intended to be exhaustive. Keeping in

mind that I have found the number itself will not provide any conceptual clarification or alter the mark's position in that respect, it would seem reasonable for the average consumer to erroneously conclude that the parties' marks originate from at least a related, if not a shared, undertaking. In the absence of any retrievable meaning from either mark, the consumer would likely presume that there was at least a relationship between the two in light of the identical sequence of letters. Whilst I acknowledge that the consumer may not recall the letters identically, it would at least identify that the marks comprise a similar string of letters and, in the absence of a concept from either mark, presume them to be the same when approaching a repeat purchase, for example. I find the same will apply to all degrees of similarity between the respective goods, particularly on account of the fairly high degree of distinctiveness awarded to the earlier mark. In short, I find there is a likelihood of indirect confusion.

Conclusion

48. The opposition has succeeded in respect of the following class 30 goods for which, subject to any successful appeal, the application will be refused:

Baklava; *Cakes*; *Almond cake; Barm cakes; Bakery desserts and bakery goods; Turkish delight; sweets. Acid drops [confectionery]; Aerated chocolate; Almond confectionery; Almonds covered in chocolate; Bars based on wheat; Almond pastries; Apple fritters; Apple pies; Apple tarts; Aperitif biscuits; Banana fritters*

49. The opposition has failed in respect of the following class 30 goods for which, subject to any successful appeal, the application will proceed to registration:

Acanthopanax tea (Ogapicha); Aerated beverages [with coffee, cocoa or chocolate base]; Aerated drinks [with coffee, cocoa or chocolate base]; Apple flavoured tea [other than for medicinal use]; Aromatic teas [other than for medicinal use]; Artifical coffee; Artificial coffee; Artificial coffee and tea; Artificial tea; Beverages based on coffee; Beverages based on coffee substitutes; Beverages based on tea; Beverages consisting principally of chocolate; Beverages consisting principally of cocoa; Beverages consisting principally of coffee; Beverages containing chocolate; Beverages made from chocolate; Barley-leaf tea; Aromatic preparations for cakes;

Adlay flour for food; Agave syrup for use as a natural sweetener; Agave syrup [natural sweetener]; Alimentary seasonings; Allspice; Almond flavorings, other than essential oils; Almond paste; Angelica; Aniseed; Baking spices; Alimentary paste [dough]; Aromatic preparations for candies; Aromatic preparations for food; Aromatic preparations for ice-creams; Aromatic preparations for pastries; Baking-powder; Aromatic preparations for making non-medicated infusions; Aromatic preparations for making non-medicated tisanes; Alimentary pasta; Artificial rice [uncooked]; Artichoke sauce; Achar pachranga (fruit pickle)

Costs

50. Though both parties have achieved a measure of success, the greater portion goes to the applicant. Consequently, the applicant would ordinarily be entitled to a contribution toward its costs. However, as the applicant is unrepresented, at the conclusion of the evidence rounds the Tribunal wrote to the applicant and invited it to complete a pro-forma should it intend to make a request for costs. The official letter read:

> "**What to do if you intend to request costs**
>
> If you intend to make a request for an award of costs you must complete and return the attached pro-forma and send a copy to the other party. Please send these by e-mail to tribunalhearings@ipo.gov.uk on or before 20 May 2024.
>
> If the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time), may not be awarded."

As the applicant failed to return the pro-forma and it did not incur any official fees during the course of the proceedings, I make no award of costs.

Dated this 31st day of July 2024

Laura Stephens
For the Registrar