

O/787/22

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NUMBER 3739855

BY AASIM IJAZ

TO REGISTER THE FOLLOWING TRADE MARK:



IN CLASS 43

AND

AN OPPOSITION THERETO UNDER NUMBER 600002281

BY D ET VE ET ÜRÜNLERİ GIDA PAZARLAMA TİCARET ANONİM ŞİRKETİ

## BACKGROUND AND PLEADINGS

1. On 5 January 2022, Aasim Ijaz (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 28 January 2022 and registration is sought for the following services:

*Class 43 Take-out restaurant services; Carry-out restaurants; Restaurant services; Restaurants; Provision of food and drink in restaurants; Providing restaurant services; Grill restaurants; Serving food and drink for guests in restaurants; Providing food and drink for guests in restaurants; Providing food and drink in restaurants and bars; Take-away fast food services; Preparation of food and drink; Provision of food and drink in restaurants; Serving food and drinks; Providing food and drink in bistros; Serving food and drink for guests in restaurants; Providing food and drink for guests in restaurants; Preparation and provision of food and drink for immediate consumption.*

2. On 22 March 2022, D ET VE ET ÜRÜNLERİ GIDA PAZARLAMA TICARET ANONİM SİRKETİ (“the opponent”) filed a fast track opposition opposing the application in full based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon UK trade mark number 916271975 (“the earlier mark”), which has a filing date of 20 January 2017 and a registration date of 20 June 2017. The representation of the mark is shown below.



3. For the purposes of the opposition the opponent relies upon the following services:

Class 43 *Services for providing of food and drink; restaurants, self-service restaurants, cafeterias; cafés, canteen services, cocktail lounges, snack bars, catering, pubs; rental of food service equipment used in services providing food and drink; Arranging temporary housing accommodations, namely hotels, motels, holiday camps, boarding houses, rental of tents, youth hostel services, room reservation services; reservation of temporary accommodation, rental of banquet and social function facilities for special occasions, namely, wedding receptions, conferences and meetings; providing day care centers.*

4. The opponent claims that the marks are highly similar and that the services are identical and highly similar, resulting in a likelihood of confusion.

5. The registration procedure for the earlier mark was completed less than five years prior to the filing date of the contested application. Therefore, it is not subject to proof of use pursuant to section 6A of the Act.

6. The applicant filed a defence and counterstatement denying a likelihood of confusion on the basis of a lack of similarity between the marks.

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

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

8. The effect of this Rule is to require parties to seek leave in order to file evidence in fast track oppositions. Further, Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken.

9. In these proceedings the applicant made a request to file evidence and to be heard orally. The registrar deemed it unnecessary for evidence to be filed or for a hearing to be held. The applicant subsequently filed submissions in lieu, but the opponent did not. This decision is therefore taken following a careful consideration of the papers.

10. The opponent is represented by Forresters IP LLP; the applicant represents itself.

## **PRELIMINARY ISSUES**

11. The applicant has made a number of submissions in its counterstatement and submissions in lieu that I intend to address. I will explain why, as a matter of law, these points have no bearing on the outcome of this opposition.

12. The applicant, in its counterstatement, refers to section 10 of the Act and submits:

“2. The test for infringement under both s.10(2) and s.10(3) of the Trade Marks Act 1994 is through the eyes of an ‘average consumer’ who is well informed and reasonably observant.”

13. Section 10 of the Act refers to infringement, a matter irrelevant to these proceedings. The relevant section of the Act in this opposition is section 5(2)(b) which relates to a likelihood of confusion. I do however agree that the test for a likelihood of confusion is from the perspective of the average consumer of the relevant services, a point I will address later in this decision.

14. The applicant submits that the opponent primarily sells prime beef steak whereas the applicant sells burgers. What the applicant claims the parties are actually selling in the market is not relevant to the decision I am required to make, which is a notional assessment based on the specifications as registered or as applied for. I will make that assessment later in this decision.

15. The applicant also refers to the areas of the country in which the parties’ services are offered. In making an assessment as to the likelihood of confusion between the trade marks, the geographical location of the parties’ businesses is not relevant. This

is because a business decision to offer its services in a particular region is temporary and may change over time. In addition, the applicant's application and the opponent's registration are for UK trade marks, i.e. their intended protection is the UK as a whole and not particular regions within it. As such, this submission by the applicant is not a factor I can take into account.

16. In its counterstatement, the applicant has requested the opponent provides proof of actual confusion. This is not a requirement of the opponent in these proceedings. The assessment under section 5(2)(b) is whether there is a likelihood of confusion; whether there has already been confusion in the marketplace or not is irrelevant to my assessment.

## **DECISION**

### **Relevance of EU law**

17. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

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

18. 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.”

## Relevant law

19. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) 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 services**

20. In comparing the respective specifications, all relevant factors should be considered, as per *Canon*, where the CJEU stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended

purpose and their method of use and whether they are in competition with each other or are complementary.”

21. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited* (“*Treat*”) [1996] R.P.C. 281 for assessing similarity between goods and services also include an assessment of the channels of trade of the respective goods or services.

22. Further, in *Kurt Hesse v OHIM*,<sup>1</sup> the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods/services. In *Boston Scientific Ltd v OHIM*,<sup>2</sup> the General Court (“GC”) stated that “complementary” means:

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

23. In *Gérard Meric v OHIM*, the GC confirmed that even if goods/services are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):<sup>3</sup>

“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”.

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<sup>1</sup> Case C-50/15 P

<sup>2</sup> Case T-325/06

<sup>3</sup> Case T-133/05



24. I bear in mind that it is permissible to group goods/services together for the purposes of assessment: *Separode Trade Mark*:<sup>4</sup>

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

25. The competing services are shown in the table below:

Earlier mark	Contested mark
<p>Class 43 <i>Services for providing of food and drink; restaurants, self-service restaurants, cafeterias; cafés, canteen services, cocktail lounges, snack bars, catering, pubs; rental of food service equipment used in services providing food and drink; Arranging temporary housing accommodations, namely hotels, motels, holiday camps, boarding houses, rental of tents, youth hostel services, room reservation services; reservation of temporary accommodation, rental of banquet and social function facilities for special occasions, namely, wedding receptions, conferences and meetings; providing day care centers.</i></p>	<p>Class 43 <i>Take-out restaurant services; Carry-out restaurants; Restaurant services; Restaurants; Provision of food and drink in restaurants; Providing restaurant services; Grill restaurants; Serving food and drink for guests in restaurants; Providing food and drink for guests in restaurants; Providing food and drink in restaurants and bars; Take-away fast food services; Preparation of food and drink; Provision of food and drink in restaurants; Serving food and drinks; Providing food and drink in bistros; Serving food and drink for guests in restaurants; Providing food and drink for guests in restaurants; Preparation and provision of food and drink for immediate consumption.</i></p>

26. The opponent’s mark is registered for *restaurants*. Either because of their identical wording, or because of the principle outlined in *Meric*, the opponent’s *restaurants* are identical to the applicant’s: *take-out restaurant services; carry-out restaurants; restaurant services; restaurants; providing restaurant services; grill restaurants*.

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<sup>4</sup> BL O/399/10

27. The opponent's registration also covers *services for providing of food and drink*. I consider this to be identical to the applicant's: *provision of food and drink in restaurants; providing food and drink for guests in restaurants; providing food and drink in restaurants and bars; provision of food and drink in restaurants; providing food and drink in bistros; providing food and drink for guests in restaurants*.

28. In the context of food and drink I consider 'serving' and 'providing' to be interchangeable: both services result in the consumer being presented with food and drink. As such, I find the opponent's *services for providing of food and drink* to also be identical to the applicant's: *serving food and drink for guests in restaurants; serving food and drinks; serving food and drink for guests in restaurants*.

29. The applicant's *take-away fast food services* are services that provide food and drink to consumers and are therefore identical to the opponent's *services for providing of food and drink*.

30. The applicant's remaining services – *preparation of food and drink* and *preparation and provision of food and drink for immediate consumption* – require slightly more consideration: they involve the preparing of food and drink rather than the providing of it to consumers. In the relevant industry the preparation of food and drink is a step which precedes the providing of it. They are nevertheless services which very much overlap. Firstly, the preparation and subsequent provision of food and drink are services that are important for one another to the extent that consumers are likely to believe they are provided by the same undertaking; they are complementary. The way in which the services are executed differs (one involves making food and drink whereas the other involves someone physically handing over food and drink to a consumer), but they share the purpose of someone consuming the food and drink. The users of these services overlap, as do the channels of trade through which they reach those users. Overall, I consider these services to be highly similar.

### **The average consumer and the nature of the purchasing act**

31. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' services. I must then determine the

manner in which the services are likely to be selected by the average consumer. 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.”

32. The services at issue are those related to the preparation and provision of food and drink, for which the average consumer is a member of the general public. The selection of the services is predominantly visual: they may be chosen after seeing shop fronts, signage and advertising material such as flyers and menus. Word-of-mouth recommendations also play a role and so there is an aural element to the selection.

33. The services are used fairly frequently by the general public and vary in price according to the establishment in which the services are offered and the food and drink offered by those establishments. Consumers will consider factors such as the type of food and drink provided and its suitability for any dietary preferences, as well as the cost. Overall, I consider that a medium degree of attention will be paid during the purchasing process.

### **Comparison of marks**



34. It is clear from *Sabel* 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 the trade marks, bearing

in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo*, 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 relevant 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.”

35. 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 trade 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.

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

Earlier mark	Contested mark
	

37. The opponent has made no submissions relating to the comparison of the marks other than its initial pleadings claiming they are highly similar. I will refer to the applicant’s submissions, where relevant, throughout my comparison.

38. The earlier mark is figurative and comprises the word element ‘SaltBae’ and, to its left, an image of a person wearing glasses and sprinkling something, presumably salt given the word element. These two elements are on a black, rectangular background.

The word element is in a standard typeface in white and I am of the view it would be seen as the two words 'Salt' and 'Bae' conjoined. The image of the person is in black, white and grey, and is much larger than the word element; I consider it also to be quite unusual. Accordingly, the image dominates the mark with the word element playing a slightly lesser role. The black background is purely decorative and plays a minor role in the overall impression.

39. The contested mark is also figurative. It contains the words 'BURGER BAE' in a standard typeface in white; positioned below these words and in a smaller but stylised, white font are the words 'Love at first bite'. The tittles on the two, lowercase letter 'i's have each been replaced with a small, orange heart device. To the right of the word elements is an orange burger device. All the aforementioned elements are on a black, rectangular background. Given their size and position I consider the words 'BURGER BAE' to hang together and be dominant in the mark, with the remaining words playing a lesser role. The burger device plays an even lesser role given its lack of distinctiveness in relation to the services. Again, the black background is purely decorative and plays a minor role in the overall impression.

#### Visual comparison

40. Visually, the only similarities between the marks are the black background and the word 'Bae/BAE'. The earlier mark also consists of the word 'Salt' and the person device, which have no counterparts in the contested mark. Similarly, the contested mark contains the words 'BURGER' and 'Love at first bite' as well as a burger device, none of which have counterparts in the earlier mark. Overall, I consider the marks to be visually similar to a low degree.

#### Aural comparison

41. When the marks are considered as wholes, the aural comparison is between the two syllables 'SALTBAE' and the seven syllables 'BURGER BAE LOVE AT FIRST BITE'. The common element 'BAE' is in the same position in the marks when articulated, but that is the extent of the aural similarity. The remaining words in both marks are points of aural difference given none of them are similar. I consider the

marks to be aurally similar to a low degree. In the event that the contested mark is referred to as 'BURGER BAE' with the remaining words not being articulated, there would be a medium degree of aural similarity between 'BURGER BAE' and 'SALTBAE'.

### Conceptual similarity

42. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM*.<sup>5</sup> The assessment must be made from the point of view of the average consumer.

43. The common element between the marks is the word 'BAE', which the applicant claims has a different meaning in each mark. In its counterstatement, the applicant submits:

"5.2. The Opponent's logo has the words 'Salt Bae'. Bae is an English slang term for love. However, the Applicant's logo has the words 'Burger BAE'. BAE is capitalised and is an abbreviation of Before Anything Else which is completely different. Therefore, it is denied by using the word Bae there would be any similarity between the two logos."

44. The word 'bae' is defined as "someone you love; a boyfriend or girlfriend"<sup>6</sup> or "someone you are romantically involved with or in love with"<sup>7</sup> and its word origin is described as "short for 'baby'".<sup>8</sup> The applicant claims that 'BAE' is an acronym for "before anything else", an acronym I was not aware of, but accept some consumers may be. Whether consumers immediately think of 'BAE' as a term of endearment short for 'baby' or as an acronym is unlikely to be dependent on the mark in which the word 'BAE' is present, and more likely a result of how that consumer perceives the word

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<sup>5</sup> [2006] E.C.R. I-643; [2006] E.T.M.R. 29

<sup>6</sup> Cambridge English Dictionary.

<sup>7</sup> Collins English Dictionary.

<sup>8</sup> Collins English Dictionary.

'BAE'. For each consumer, it will have the same meaning in both marks. This therefore creates a conceptual similarity.

45. However, the immediate concept of the marks is not simply 'BAE'. For the earlier mark, there is clear concept of salt, both by the use of the word itself and of the device of a person sprinkling salt. The overall concept of the mark is an unusual combination of the meanings of 'SALT' and 'BAE'. For the contested mark, there is a clear concept of a burger by the use of that word. The concept is reinforced by the burger device and by the words 'Love at first bite', seemingly a reference to someone enjoying eating a burger. Similar to the earlier mark, the contested mark conveys the concept of an unusual combination of the meanings of 'BURGER' and 'BAE'. Overall, I consider there to be a low degree of conceptual similarity between the marks.

46. I also consider that there will be a group of consumers who see the word 'BAE' as invented. For those consumers, there will be no concept associated with the word 'BAE' and the immediate concepts of the marks at issue will be different.

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

47. In *Lloyd Schuhfabrik Meyer* 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).”

48. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods/services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

49. I have no evidence from the opponent from which to make an assessment as to an enhanced distinctive character and so I will assess only the inherent distinctive character of the earlier mark. It consists of the two words ‘Salt’ and ‘Bae’ conjoined and an image of a person sprinkling salt. None of the elements are descriptive of or allusive for the services at issue. The word elements form an unusual combination with the device element. The amalgamation of all the elements creates a mark with a high degree of inherent distinctive character.

### **Likelihood of confusion**

50. In determining whether there is a likelihood of confusion, all of the above factors need to be borne in mind. They must be considered globally (*Sabel*) from the perspective of the average consumer. In making my assessment, I must keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik*). The factors considered above have a degree of interdependency (*Canon*): for example, a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa.



51. I have found the marks to be visually and conceptually similar to a low degree and aurally similar to a low or medium degree, depending on how many words in the contested mark are articulated. For the group of average consumers who see the word 'BAE' as an invented word, the marks are conceptually dissimilar. I have found the earlier mark to have a high degree of inherent distinctive character. I have identified the average consumer to be a member of the general public who, paying a medium degree of attention, selects the services predominantly by visual means, though there will also be an aural element to the selection. I have found the services to either be highly similar or identical.

52. Confusion can be direct or indirect. The difference between these two types of confusion was explained in *L.A. Sugar Limited v By Back Beat Inc.*, BL O/375/10, where Iain Purvis QC, sitting as the Appointed Person, explained that:

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

53. I bear in mind that the beginnings of marks tend to have more visual and aural impact than the ends<sup>9</sup> and that the marks begin with entirely different words. I accept that the marks share the common word ‘BAE’ but remind myself of the numerous additional elements in both marks. For me to conclude that the marks may be recalled as one another would require me to find that the average consumer would forget the word ‘Salt’ and the person device in the earlier mark or forget the words ‘BURGER’ and ‘Love at first bite’ and the burger device in the contested mark. Given that direct confusion involves no process of reasoning, I find it highly unlikely that the average consumer would mistake one mark for the other. Even accounting for the earlier mark’s high degree of distinctive character and the highly similar or identical services, I do not consider there to be a likelihood of direct confusion.

54. I turn now to indirect confusion. The opponent has not provided an explanation as to why it considers the average consumer will put the similarity between the marks (the word ‘BAE’) down to the responsible undertakings being linked.

55. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, 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

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<sup>9</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02.

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.

56. In order to find indirect confusion in this case, it would be necessary to conclude that the average consumer will see the word ‘BAE’ and conclude that the presence of this word in the contested mark must mean that it is brand of the owner of the earlier mark, or vice versa. The earlier mark is highly distinctive, but that distinctiveness is a result of a combination of all the elements; the distinctiveness of the mark is not solely in the word ‘BAE’ which, by itself, is not allusive but is not highly distinctive either (at least for those consumers who understand ‘BAE’ as a dictionary-defined word, as per paragraph 44, above). The marks are visually quite different; replacing any of the other elements in the earlier mark for those in the contested mark, or vice versa, is not logical with a brand extension, sub-brand or re-branding. Even for those consumers who see ‘BAE’ as an invented word with a high distinctive character, I do not consider ‘BAE’ to be so strikingly distinctive that consumers would assume any undertakings incorporating the word in their mark must be related, particularly given that the multiple differing elements in both marks have distinctiveness in their own right. I do not envisage a scenario, either falling into one of the three categories identified in the case law above or otherwise, whereby consumers see the word ‘BAE’ in both marks and assume the undertakings are linked. It is far more likely that consumers would see it as a coincidence that two undertakings use ‘BAE’ in their mark rather than assuming an economic connection. Taking everything into consideration, even for identical services, I do not consider there to be a likelihood of indirect confusion.

## **CONCLUSION**

57. The opposition under section 5(2)(b) has been unsuccessful and the application may proceed to registration.

## **COSTS**

58. The applicant has been successful and is entitled to a contribution towards its costs. Awards of costs in fast track proceedings are governed by Tribunal Practice

Notice 2/2015, which caps awards at £500, comprising up to £200 for filing and considering forms and up to £300 for filing written submissions. As the applicant is unrepresented, on 28 July 2022 it filed a costs pro-forma, claiming it has spent the following amount of time on these proceedings:

Notice of Defence	10 hours
Considering forms filed by the other party	5 hours
Written submissions, annexes & research	35 hours
<b>Total</b>	<b>50 hours</b>

59. The Litigants in Person (Costs and Expenses) Act 1975, the Civil Procedure Rules Part 46 and the associated Practice Direction set the amount payable to litigants in person at £19 per hour. Accordingly, the time claimed by the applicant would total £950, which is excessive and above the £500 cap.

60. I consider the amount claimed by the applicant to be high and will adjust the award in accordance with the guidance referred to above. In the circumstances, I award costs to the applicant on the following basis:

Notice of Defence	£100
Considering forms filed by the other party	£50
Preparing written submissions	£200
<b>Total</b>	<b>£350</b>

61. I therefore order D ET VE ET ÜRÜNLERİ GIDA PAZARLAMA TICARET ANONİM SIRKETİ to pay Aasim Ijaz the sum of £350. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the final determination of the appeal proceedings.

**Dated this 13th day of September 2022**

**E FISHER (née VENABLES)**  
**For the Registrar**