

O/430/20

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003438087

BY NIKI KHELA TO REGISTER:



(SERIES OF 2)

AS TRADE MARKS IN CLASS 44

AND

IN THE MATTER OF THE OPPOSITION THERETO

UNDER NO. 600001314 BY

DANIELLE QUENAULT

BACKGROUND AND PLEADINGS

1. On 21 October 2019, Niki Khela (“the applicant”) applied to register the series of trade marks shown on the cover of this decision in the UK (“the application”). The application was published for opposition purposes on 1 November 2019 and registration is sought for services set out in **paragraph 15** below.
2. On 3 February 2020, the application was opposed by Danielle Quenault (“the opponent”). The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies on the following trade marks:



(series of 2)

UK registration no. 3424846

Filing date 29 August 2019; registration date 22 November 2019

(“the opponent’s first registration”); and

BrowFixation

BROWFIXATION

(series of 2)

UK registration no. 3437040

Filing date 16 October 2019; registration date 17 January 2020

(“the opponent’s second registration”)

3. Both the opponent's first and second registrations (collectively "the opponent's registrations") have identical specifications. The opponent relies on all goods and services set out in **paragraph 15** below.
4. In her notice of opposition, the opponent submits that the marks are similar and that the goods and services offered by both marks are identical or similar. The opponent also submits that the inclusion of the letters 'FIX' will lead to confusion and the target audience for the goods and services offered by both parties' marks are identical.
5. The applicant filed a counterstatement denying the claims made.
6. 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.”
7. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. No leave was sought in respect of these proceedings.
8. The applicant is represented by Freeths LLP and the opponent is unrepresented. 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; only the opponent filed written submissions in lieu. I have taken these into consideration and will refer to them below where necessary. This decision is taken following a careful perusal of the papers.

DECISION

Section 5(2)(b): legislation and case law

9. Section 5(2)(b) of the Act reads as follows:

“(2) A trade mark shall not be registered if because-

(a) ...

(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 or association with the earlier trade mark.”

10. Section 5A of the Act states as follows:

“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.”

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

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

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

12. Given their filing dates, the opponent’s registrations qualify as earlier trade marks under the above provisions. As the opponent’s registrations had not completed their registration process more than 5 years before the date of the application in issue, they are not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods and services for which the registrations are registered.

13. 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 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.

(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

14. The specifications of the opponent's registrations are identical. Therefore, the same goods and services comparison with the applicant's specification will apply to both.

15. The competing goods and services are set out as follows:

The opponent's goods and services	The applicant's services
<p><u>Class 3</u> Eyebrow colors; Eyebrow colors in the form of pencils and powders; Eyebrow cosmetics; Eyebrow pencils; Eyebrow powder; Eyebrows [false]; Adhesives for affixing false eyebrows; Pencils (Eyebrow -); Self-adhesive false eyebrows; Distilled oils for beauty care; Beauty balm creams; Beauty care cosmetics; Beauty care preparations; Beauty gels; Beauty lotions; Beauty serums; Beauty tonics for application to the face; Permanent wave preparations; Permanent waving lotions; Eyebrow gel; Eyebrow mascara.</p> <p><u>Class 8</u> Hand-operated apparatus for the cosmetic care of eyebrows; Hand tools for use in beauty care; Hand-operated apparatus for the cosmetic care of eyebrows.</p> <p><u>Class 35</u></p>	<p><u>Class 44</u> Advice relating to cosmetics; Advisory services relating to beauty; Advisory services relating to beauty care; Advisory services relating to beauty treatment; Advisory services relating to cosmetics; Beauticians (Services of -); Beauty advisory services; Beauty care; Beauty care for human beings; Beauty care services; Beauty consultancy; Beauty consultancy services; Beauty consultation; Beauty consultation services; Beauty counselling; Beauty information services; Beauty salon services; Beauty salons; Beauty spa services; Beauty therapy services; Beauty therapy treatments; Beauty treatment; Beauty treatment services; Beauty treatment services especially for eyelashes; Body waxing services for hair removal in humans; Body waxing services for the human body; Consultancy relating to cosmetics; Consultancy services relating to</p>

<p>Marketing research in the fields of cosmetics, perfumery and beauty products; Online retail store services relating to cosmetic and beauty products; Retail services in relation to beauty implements for humans; Wholesale services in relation to beauty implements for humans; Administration of the business affairs of franchises; Advice in the running of establishments as franchises.</p>	<p>cosmetics; Consultation services in the field of make-up; Cosmetic electrolysis for the removal of hair; Cosmetic facial and body treatment services; Cosmetic laser treatment of unwanted hair; Cosmetic make-up services; Cosmetic treatment; Cosmetic treatment for the face; Cosmetician services; Cosmetics consultancy services; Electrolysis for cosmetic purposes; Eyebrow dyeing services; Eyebrow shaping services; Eyebrow tattooing services; Eyebrow threading services; Eyebrow tinting services; Eyelash curling services; Eyelash dyeing services; Eyelash extension services; Eyelash perming services; Eyelash tinting services; Facial beauty treatment services; Facial treatment services; Microdermabrasion services; Microneedling treatment services; Micropigmentation services; Providing information relating to beauty salon services; Salon services (Beauty-).</p>
<p><u>Class 41</u></p>	
<p>Educational seminars relating to beauty therapy; Teaching of beauty skills; Education; Education and instruction; Education and training.</p>	
<p><u>Class 44</u></p>	
<p>Eyebrow shaping services; Eyebrow tattooing services; Eyebrow threading services; Advisory services relating to beauty treatment; Human hygiene and beauty care; Information relating to beauty; Providing information about beauty; Beauty advisory services; Beauty consultancy; Beauty consultation services; Beauty therapy services; Beauty treatment; Salon services (Beauty -); Salons (Beauty -); Services of a hair and beauty salon; Eyelash perming services; Hair perming services;</p>	

Eyebrow dyeing services; Eyebrow tinting services.	
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16. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. 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 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”.

17. 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.

18. The General Court (“GC”) confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another or (vice versa):

“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”.

19. “Advisory services relating to beauty treatment”, “beauty therapy services”, “beauty treatment”, “eyebrow dyeing services”, “eyebrow shaping services”, “eyebrow tattooing services”, “eyebrow threading services”, “eyebrow tinting services”, “eyelash perming services” and “salon services (beauty-)” in the applicant’s specification all have direct counterparts in the opponent’s specifications. These services are identical.

20. “Advisory services relating to beauty”, “Beauty salons”, “beauty salon services” and “beauty treatment services” in the applicant’s specification also have direct counterparts in the opponent’s specifications, although expressed in slightly different terms (“advisory services relating to beauty treatment”, “salons (beauty -)”, “salon services (beauty -)” and “beauty treatment”). These services are also identical.

21. “Advice relating to cosmetics”, “advisory services relating to beauty care”, “advisory services relating to cosmetics” and “beauty advisory services” in the applicant’s specification all fall within the broader category of “advisory services relating to beauty treatment” in the opponent’s specifications. These services are therefore identical under the principle outlined in *Meric*.

22. “Beauty consultancy”, “beauty consultancy services”, “beauty consultation”, “beauty consultation services”, “beauty counselling”, “consultancy relating to cosmetics”, “cosmetics consultancy services”, “consultancy services relating to cosmetics” and “consultation services in the field of make-up” in the applicant’s specification all fall within the broader category of “beauty consultation services” in the opponent’s specifications. These services are therefore identical under the principle outlined in *Meric*.
23. “Beauty information services” in the applicant’s specification falls within the broader category of “information relating to beauty” in the opponent’s specifications. These services are therefore identical under the principle outlined in *Meric*.
24. “Providing information relating to beauty salon services” in the applicant’s specification describes the same services as “information relating to beauty” in the opponent’s specifications. These services will, therefore, be identical under the principle outlined in *Meric*. However, if I am wrong in my finding that these terms describe the same services, I find that they will overlap in user, nature and purpose. These services will therefore be similar to a high degree.
25. “Beauty therapy treatments”, “beauticians (Services of -)”, “beauty care for human beings”, “beauty care services”, “beauty care”, “beauty treatment services especially for eyelashes”, “body waxing services for hair removal in humans”, “body waxing services for the human body”, “cosmetic electrolysis for the removal of hair”, “cosmetic facial and body treatment services”, “cosmetic laser treatment of unwanted hair”, “cosmetic make-up services”, “cosmetic treatment for the face”, “cosmetic treatment”, “cosmetician services”, “electrolysis for cosmetic purposes”, “eyelash dyeing services”, “eyelash extension services”, “eyelash curling services”, “eyelash tinting services”, “facial beauty treatment services”, “facial treatment services”, “microdermabrasion services”, “microneedling treatment services” and “micropigmentation services” in the applicant’s specification are all services that are commonly offered by hair and beauty salons. These services will therefore fall within the broader category of “services of a hair and beauty salon” in the opponent’s specifications. These services are therefore identical under the principle outlined in *Meric*.

26. “Beauty spa services” in the applicant’s specification describes a wide range of services that are offered at spas. Spa services will commonly include massages, facial treatments, manicures and pedicures. While most of the services offered will be the same as beauty and hair salons, they will differ somewhat in that a spa service may also offer other services such as the use of a swimming pool, hot tub, sauna or steam room. These services will overlap in trade channels with “services of a hair and beauty salon” in the opponent’s specifications as it is not uncommon for spas to also provide salon services. I also find that there will be an overlap in user and purpose between these services. These services will also have a competitive relationship in that a consumer may choose to visit a spa that offers beauty services over a standalone beauty salon, or vice versa. I therefore find that these services are similar to a medium degree.

The average consumer and the nature of the purchasing act

27. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties’ goods and services. I must then decide the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. 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.”

28. Given my findings above regarding the similarity of the goods and services, it is only necessary for me to consider the average consumer of the parties’ class 44

services. I do not have any submissions in respect of the average consumer save for the fact that the opponent has submitted that the target audience of the goods and services is the same.

29. I find that the average consumer for the services will be members of the general public. The services are most likely to be provided through beauty and/or hair salons and spas. I also find that some of the services may be provided at consumers' homes by way of house calls. The services on offer will be displayed on the premises frontage, a treatment list or on a display board in salons where they will be viewed and selected by the consumer. The services provided may also be displayed on websites, where a similar process will apply in that the consumer will be able to view a list of treatments and book an appointment directly through the website. The purchasing process will be predominantly visual. However, I acknowledge that there will be a significant aural component in the form of word of mouth recommendations or advice sought from a beautician or cosmetician. While visual considerations are likely to be most important, I do not discount aural considerations playing a part in the selection process.

30. The services at issue will range in price but are likely to be fairly low in cost. The purchase of the services is likely to range from frequent to fairly infrequent. When selecting the services, the average consumer is likely to consider such things as the qualifications held by the staff, the range of treatments offered and the suitability of those treatments for the user. The average consumer is, therefore, likely to pay a medium degree of attention to the selection of the parties' services.

Distinctive character of the earlier registrations

31. 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).”

32. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or 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 made of it.

33. The opponent has not pleaded that the distinctive character of her registrations have been enhanced by virtue of the use made of them, nor has she filed evidence to suggest that this is the case. Consequently, I have only the inherent position to consider.

The opponent's first registration

34. The opponent's first registration consists of the word 'BROWFixation'. It is presented in a white stylised font on a blue background in the first mark in the series and a black stylised font on a white background in the second. Despite being presented as one conjoined word, the word itself will be viewed by the average

consumer as two separate words, being 'BROW' and 'Fixation'. The words are conjoined in a unique way in that the 'W' and 'F' are stylistically attached together.

35. I am of the view that 'BROW' will be seen as a reference to eyebrows and 'Fixation' will be taken to mean a pre-occupation or obsession with something. When taken together the words are likely to be seen as a reference to an obsession or pre-occupation with eyebrows or eyebrow treatments. In the context of the services, the words may be seen by the average consumer as alluding to an entity that specialises in eyebrow treatments. However, the use of the word 'fixation' remains a fairly unusual choice of words in this context. While some services in the opponent's specifications do not relate to eyebrow treatments, I am of the view that eyebrow treatment services are so closely associated with other services offered by hair and beauty salons, the average consumer is still likely to make the connection between them. I consider the word 'BROWFixation' to be inherently distinctive to between a low and medium degree.

36. I do not consider the use of colour in the marks to be particularly significant. The stylisation of 'BROWFixation' will increase the registration's distinctive character to a small degree. Overall, I consider the opponent's first registration to have a medium degree of inherent distinctive character.

The opponent's second registration

37. The opponent's second registration consists of two marks, being the word marks 'BROWFixation' and 'BROWFIXATION'. I have found above that the word 'BROWFixation' will be allusive of the services offered by the opponent, although remains a fairly unusual choice of words. Overall, I consider that the opponent's second registration will have between a low and medium degree of inherent distinctive character.

Comparison of marks

38. It is clear from *Sabel 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 the trade marks, bearing in mind their distinctive and dominant components.

39. 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.”

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

41. The respective trade marks are shown below:

The opponent's registrations	The application
 <p data-bbox="383 1724 614 1848">BROWfixation</p> <p data-bbox="430 1892 606 1937">(Series of 2)</p> <p data-bbox="279 1948 758 1993">("the opponent's first registration")</p>	 <p data-bbox="981 1736 1173 1769">THE BROW RESTORERS</p>

<p style="text-align: center;">BrowFixation BROWFIXATION (Series of 2) ("the opponent's second registration")</p>	 <p style="text-align: center;">(Series of 2)</p>
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42. The opponent has submitted that:

"I acknowledge that visually, in terms of colour and design, the two logos are distinguishable. However, aurally they are undeniably similar with the first two syllables (and first 7 letters) being identical posing the issues currently under scrutiny when clients find either brand on the internet or are told about either brand word-of-mouth. Conceptually both trademarks are almost identical in terms of marketing and the services both brands will be offering."

Overall Impression

The application

43. The application consists of a series of two marks. Both marks consist of the words 'BROW' and 'FIX' placed around the word 'UK'. 'BROW' and 'FIX' are displayed in a standard black typeface and will be taken as a reference to an entity that specialises in fixing eyebrows. For the same reasons set out in paragraph 35 above, I find that 'BROW FIX' will be allusive of all of services in the applicant's specification. 'UK' is displayed larger and in a standard grey typeface. This will be seen as an indication of the geographical location of the undertaking. These words are surrounded by a black corner border/frame device. I find that the border/frame device has very little impact on the overall impression of the application. The words 'THE BROW RESTORERS' sit in a smaller font at the bottom of the mark and given their size, location and purpose as a descriptive tag line, will have a lesser impact on the application's overall impression. The only difference between the marks in the application is that 'BROW FIX UK' and the border/frame device are rotated 90

degrees clockwise in the second mark. I, therefore, make the following finding in respect of both marks.

44. I find that the overall impression of the application lies in the words 'BROW FIX UK' with the words 'THE BROW RESTORERS', the arrangement of the words and the shading and device playing a lesser role.

The opponent's first registration

45. The opponent's first registration consists of the word 'BROWFixation' displayed in a stylised font. The word 'BROWFixation' plays the greater role in the overall impression, with the use of stylisation and colour playing a lesser role.

The opponent's second registration

46. The opponent's second registration consists of a series of two marks each consisting of the word 'BrowFixation' which are presented as 'BROWFixation' and 'BROWFIXATION'. There are no other elements to contribute to the overall impression, which lies in the word itself.

Visual Comparison

The opponent's first registration and the application

47. Visually, the registrations coincide with the word 'BROW' and the letters 'F-I-X'. The marks differ in the letters 'A-T-I-O-N' that are present in the opponent's first registration but are absent in the application. The marks also differ in that the words 'UK' and 'THE BROW RESTORERS' are present in the application but absent in the opponent's first registration. There is a further difference in the presentation and typefaces used in the marks. I have found that the colour used in the first mark of the opponent's first registration plays a lesser role and, given that the application is registered in black and white, it will be covered for use in different colours. The second mark in the opponent's series of marks is also presented in black and white and covers use of the mark in different colours.

48. While I have found that the words 'THE BROW RESTORERS', shading, stylisation and arrangement of the words, as well as the border/frame device element all play lesser roles in the overall impression of the application, they still constitute a visual difference between the marks. Taking all of the above into account, I find that there is only between a low and medium degree of visual similarity between the registrations.

The opponent's second registration and the application

49. Visually, the marks share the same similarities as described above. While the above differences in stylisation of the marks will not apply to this comparison, the differences between the word elements will. The differences in the arrangements of the words will also remain a difference between the marks. I note that the opponent's second registration is a word only mark and can be used in any standard typeface. Taking all of this into account, I find that the registrations are visually similar to no more than a medium degree.

Aural Comparison

50. The aural elements of the opponent's first and second registrations are identical. Therefore, the aural comparison of the registrations will apply to both. Aurally, the opponent's registrations contain four syllables that will be pronounced 'BROW-FIKS-A-SHUN'. I do not consider that the words 'THE BROW RESTORERS' in the application will be pronounced given that they are merely as tag line. The application will therefore consist of four syllables that will be pronounced 'BROW-FIKS-YOU-KAY'. Overall, I find that the registrations are aurally similar to a medium degree.

51. If I am wrong in my finding that the average consumer would not pronounce the word 'THE BROW RESTORERS', then I find that the registrations are aurally similar to between a low and medium degree.

Conceptual Comparison

52. The only elements of the opponent's registrations that will convey a conceptual meaning are the word elements. Therefore, the following conceptual comparison will apply to both of the opponent's registrations.
53. Conceptually, the word BROW will be seen in all of the marks as a reference to eyebrows. However, there will be a conceptual difference between the marks in that the words 'Fixation' (in the opponent's registrations) and 'Fix (in the application) have different meanings. The word 'UK' in the application will convey the geographical location of the services. The words 'THE BROW RESTORERS' in the application will be seen as a reference to eyebrow treatment services. Overall, I find the marks to be conceptually similar to between a low and medium degree.

Likelihood of confusion

54. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where 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 services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade marks, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact 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 that he has retained in his mind.

55. I have found the services to vary from being identical to similar to a medium degree. I have found the average consumer to be a member of the general public. I have found that the visual component will dominate the selection process of the services, however, the aural component will also be a factor. I have concluded that a medium degree of attention is likely to be paid in the selection process of the services. I have taken these factors into account in my assessment of the likelihood of confusion between the marks.
56. I have found the registrations to be aurally similar to a medium degree (or between a low and medium degree depending on whether the words 'THE BROW RESTORERS' are pronounced) and conceptually similar to between a low and medium degree. In respect of the visual comparison, I have found that the application is visually similar to between a low and medium degree to the opponent's first registration and visually similar to no more than a medium degree with the opponent's second registration. The opponent's first registration has a medium degree of distinctive character while her second has between a low and medium degree of distinctive character.
57. The low degree of inherent distinctive character of the opponent's registrations is a factor that goes in favour of the applicant. However, I bear in mind that a weak distinctive character of the earlier trade mark does not preclude a likelihood of confusion.¹
58. Notwithstanding the principle of imperfect recollection, and taking all of the above factors into account, I consider that the differences between the marks will be sufficient to enable the consumer to differentiate between the parties' marks, even on services that I have found to be identical. This is particularly the case in circumstances in which the consumer will be paying at least a medium degree of attention when selecting the services at issue. In my view, the different presentations and differences between "fixation" and "fix" will not be overlooked. I do not, therefore, consider that there is a likelihood of direct confusion.

¹ *L'Oréal SA v OHIM*, Case C-235/05 P

59. I will now consider whether there is a likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10.

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

60. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., 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.

61. I must now consider whether average consumers would believe that there is an economic connection between the registrations or that they are variant registrations from the same undertaking as a result of the shared common elements of the registrations. In my view, if the consumer recognises the difference between the registrations, I see no reason why the average consumer would assume that the marks come from the same or economically linked undertakings. The common element between the marks is the word ‘BROW’, which will be seen to be a reference to ‘eyebrows’. The consumer would have no reason to believe that only one undertaking would use this word in relation to the type of services offered by the parties, being beauty and hair salon services. The consumer is more likely to view the addition of the different words ‘Fixation’ and ‘Fix’ to indicate

different undertakings specialising in the same type of services rather than indicating that the marks originate from the same or linked undertakings. Further, I do not consider that the words 'Fix' and 'Fixation' would be considered an extension or shortening of the other. I do not, therefore, consider there to be a likelihood of indirect confusion between the parties' registrations, even on services that are identical.

CONCLUSION

62. The opposition has been unsuccessful and the application may proceed to registration.

COSTS

63. As the applicant has been successful, she is entitled to a contribution towards her costs based upon the scale published in Tribunal Practice Notice 2/2015. In the circumstances, I award the applicant the sum of **£200** as a contribution towards her costs. The sum is calculated as follows:

Considering the notice of opposition and filing a counterstatement:	£200
Total:	£200

64. I therefore order Danielle Quenault to pay Niki Khela the sum of £200. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 10th day of September 2020

A COOPER
For the Registrar