TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION NUMBER 2628288
BY ELITE OCAKBASI RESTAURANTS LTD
TO REGISTER THE FOLLOWING TRADE MARK
IN CLASS 43:

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Background

1. On 12 July 2012, Elite Ocakbasi Restaurants Ltd ('the applicant') applied to register trade mark application number 2628288 consisting of the words 'Best Mangal' for the following services in class 43:

   Services for providing food and drink; restaurant and catering services

2. On 28 July 2012 the examiner at the UK Intellectual Property Office ('IPO') raised objection to the application under sections 3(1)(b) and (c) of the Trade Marks Act 1994 ('the Act') stating that the mark consists exclusively of the words 'Best' and 'Mangal', where 'Mangal' means a type or style of Turkish or Middle Eastern barbecue cuisine. The words 'Best' and 'Mangal' combine then to designate the kind or quality of the services, e.g. superior quality restaurant services providing cuisine in the style of 'Mangal'.

3. An extension of time in which to respond to the examination report was requested and granted, taking the relevant period to 7 March 2013. The attorney responsible, Dr Michael Spencer of Bromhead, apparently responded by filing submissions going to the *prima facie* case, as well as evidence in support of a plea of acquired distinctiveness. For the record, the case was erroneously refused in the belief that no reply had been filed by the applicant, but this was later rescinded when it was appreciated that a reply to the original examination report *had* been sent and received by the Registrar.

4. The reply by the attorney included evidence in the form of a Witness Statement dated 2 May 2013 from Gursel Gurgur, Managing Director of the applicant. This statement says that BEST MANGAL restaurant was first opened in 1996 at 104 North End Road, West Kensington, London W14, and that it was set up as a restaurant/takeaway and run as a sole trader by Mr Gurgur's father, Hidir. In 2005 a second restaurant was opened at 66 North End Road, near the location of the first restaurant, primarily in order to meet high demand in the first restaurant. Both restaurants traded under the BEST MANGAL name. In 2009, a third restaurant was opened at 619 Fulham Road, Fulham, London SW6. It is my understanding, then, that despite some company ownership technicalities, all three restaurants have been trading under the name 'BEST MANGAL' since each opened. The turnover, in all three, has been given as follows:

2004	£237,932
2005	£259,921

2006	£286,758
2007	£317,018
2009	£437,124
2009	£560,649
2010	£572,737
2011	£419,714

Mr Gurgur says that around £5,000 per year is invested in advertising, although much of the trade is through word-of-mouth recommendation.

Exhibits GG 1-5 comprise press articles taken from restaurant reviews published at www.standard.co.uk (LONDON EVENING STANDARD) showing that the BEST MANGAL restaurants are highly regarded in relation to Turkish cuisine, and there are similar endorsements in TIME OUT's published guides (2003 and 2007) for good places to eat out in London.

5. Nonetheless, the examiner was not persuaded by the attorney's arguments and the case for acquired distinctiveness which, in a letter dated 30 May 2013, she assessed as follows:

> I have carefully considered the evidence but regret that I am unable to waive the objection raised against this mark. The mark in question is laudatory in that it describes the best of a particular kind of cuisine and for such a mark to proceed on the basis of distinctiveness acquired through use the evidence would need to show use throughout the UK and unfortunately this is not the case. The mark has been used since 1996 but this initial use related to one restaurant in the West Kensington area of London. Two further restaurants followed in 2005 and 2009 but again these were situated reasonably close to the original restaurant in one of the central regions of London. The turnover figures are good but advertising of the mark was limited to London based papers and did not appear in a national paper nor was there any evidence to show a national exposure of the mark. I would refer you to the *Europolis* decision (C-108/05)[1] which stated that a mark must be used throughout the whole of the territory for which registration is sought and although I would confirm that a reputation exists I have carefully considered the evidence but regret that I am unable to waive the objection raised against this mark. The mark in question is laudatory in that it describes the best of a particular kind of cuisine and for such a mark to proceed on the basis of distinctiveness acquired through use the evidence would need to show use throughout the UK and unfortunately this is not the case. The mark has been used since 1996 but this initial use related to one restaurant in the West Kensington area of London. Two further restaurants followed in 2005 and 2009 but again these were situated reasonably close to the original

[1] The full reference is Case C-108/05 *Bovemij Verzekeringen NV v Benelux-Merkenbureau ('Europolis')*. At paragraph 23 of that Case the Court of Justice of the European Union ('CJEU') said:
"Consequently, the answer to the first two questions must be that Article 3(3) of the Directive must be interpreted as meaning that the registration of a trade mark can be allowed on the basis of that provision only if it is proven that that trade mark has acquired distinctive character through use throughout the territory of the Member State or, in the case of Benelux, throughout the part of the territory of Benelux in which there exists a ground for refusal."

restaurant in one of the central regions of London. The turnover figures are good but advertising of the mark was limited to London based papers and did not appear in a national paper nor was there any evidence to show a national exposure of the mark. I would refer you to the *Europolis* decision (C-108/05) which stated that a mark must be used throughout the whole of the territory for which registration is sought and although I would confirm that a reputation exists in the London area, there appears to be no use outside of this area. I note that the applicant has a website but that fact on its own in not sufficient to show use of the mark throughout the UK.

6. The matter then came before me at a telephone hearing on 12 February 2014 with Dr Michael Spencer of Bromhead. At the hearing, I deferred my decision in the *prima facie* case but gave it in writing later on the same day. I also addressed the position with regards to acquired distinctiveness, and Dr Spencer's offer of an unconditional geographical limitation at the hearing to the effect that rights in any resulting registration would be limited to the Greater London area. In this respect, I drew Dr Spencer's attention to the decision in BL O-273-08 *('The Journal')*, a decision of the Appointed Person, which considered at length the uncertainty in the dicta of the *Europolis* case and the prospect, in particular, that a geographical limitation may serve to persuade the Registrar that the *Europolis* case may not exist as an absolute barrier to reliance on acquired distinctiveness in this type of scenario; that is, where it can be shown that a sign had become distinctive in a particular area of the UK and resulting rights limited accordingly to that area.

7. I should say that in *The Journal*, clearly the Appointed Person had some difficulty with the apparent 'blanket' approach taken to acquired distinctiveness having to be shown across the relevant territory and felt that such an approach may have to be more refined or nuanced in certain circumstances. Indeed, he said that he was minded to make a further reference to the CJEU but in the result did not, as the applicant in that case did not countenance such further referral and wanted him, instead, to arrive at his own conclusion. The following is what he said on the matter:

> 21. In my judgment, the law is not entirely clear from *Europolis*. The Court of Justice was not addressing the question which arises in this case, which is whether it is permissible to claim acquired distinctiveness amongst a geographically-restricted class of consumers if the market for the product or service in question is limited to that locality or region. It is conceivable that the Court of Justice might give a different answer to this question, or least a more nuanced answer, than it gave to the questions in *Europolis*. In particular, I think that it is possible that different considerations may apply in the case of a service which is normally provided to a local clientele, such as hair dressing, than to goods. Accordingly, had it not been for the applicant's opposition to a reference, I would have referred a question to the Court of Justice.
>
> 22. Given the applicant's opposition to a reference, however, I shall give my own answer to the question. In absence of further guidance from the Court of Justice, I consider that it is not possible to overcome an objection under section 3(1)(b), (c) or (d) of the 1994 Act by demonstrating that the mark applied for has acquired a

distinctive character within a particular locality or region. The Court of Justice's first ruling in *Europolis* appears to be quite unequivocal on this point: "registration of a trade mark can be allowed on the basis of [Article 3(3) of the Directive] only if it is proven that that trade mark has acquired distinctive character through use throughout the part of the territory of the Member State … where there exists a ground for refusal". Moreover, its reasoning is that the mark must be free from objection throughout the Member State in question. At least in the case of goods, I do not think that it makes any difference if the market for the goods is confined to a particular locality or region, for the following reasons.

23. First, a registered trade mark is a unitary national right. It confers a monopoly throughout the Member State in question. It follows that it must be valid throughout that state and not just in part of it.

24. Secondly, as the Court of Justice pointed out in *Europolis*, Article 3(3) of the Directive is an exception to Article 3(1)(b),(c) and (d) and must be interpreted accordingly. Article 3(1)(b), (c) and (d) provide objections to registration of trade marks grounded in public policy. Thus Article 3(1)(c) serves the public interest that descriptive signs or indications may be freely used by all: see e.g. Case C-363/99 *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* [2004] ECR I-1619 at [54]-[55]. It follows that Article 3(3) should only "trump" an objection under Article 3(1)(b), (c) or (d) when that public interest no longer applies because the mark has in fact become distinctive throughout the relevant territory.

25. Thirdly, goods may easily circulate outside a particular locality or region, and so may their consumers. Taking the hurling sticks example, London has a substantial population of consumers who are Irish or of Irish descent. I would not be surprised to find that some of them play hurling occasionally. Someone might decide that it was worth their while to set up a small business making and selling hurling sticks in London. Why should not such a person use a descriptive term for hurling sticks without fear of infringement of a United Kingdom registered mark even if it happens to be distinctive in Northern Ireland? It is no answer to say, as the applicant's attorney did, that such a person would have a defence under section 11(1)(b) of the 1994 Act: see Case C-104/01 *Libertel Group BV v Benelux-Merkenbureau* [2003] ECR I-3793 at [57]-[59].

26. Fourthly, the Directive does not expressly contemplate registration of trade marks on the basis of honest concurrent use. While this may perhaps be the effect of the provisions of the Directive in certain circumstances, in the present case it seems unlikely that someone who used one of the marks in issue for similar magazines in a different region, say Cornwall, would succeed in obtaining concurrent registration if the present application were to be accepted. Although the goods would not be identical if specified as "lifestyle regional magazines containing information about and relevant to Cornwall", they would clearly be similar. Unless experience showed to the contrary, one would anticipate a likelihood of confusion, since a consumer who moved from East Yorkshire to Cornwall would be likely to think that the magazines were published by the same or economically-linked

undertakings. But in that case the applicant would acquire a national monopoly on the strength of purely local distinctiveness.

27. Accordingly, I conclude that the marks sought to be registered have not acquired a distinctive character through use, since the applicant's evidence only shows use of them in East Yorkshire.

28. I should add that I am unconvinced that the applicant's evidence in the present case establishes that the marks have acquired a distinctive character even in East Yorkshire. It is a very short statement outlining the use of the marks. It is lacking in detail and wholly unsupported by any independent evidence such as trade or survey evidence. I do not base my decision on this point, however, since the effect of that might be to encourage the applicant to try again with better evidence.

In the same letter as I gave my decision in the *prima facie*, I invited Dr Spencer to address *The Journal* case, specifically on the above.

8. He did so in a letter dated 11 April 2014 as follows;

- The *Europolis* case is not decisive in relation to the question of a claim to acquired distinctiveness based on a geographically-restricted class of consumers if the market for the product or service is limited to that locality or region;

- The mark BEST MANGAL is, in its inherent characteristics, not on a par with *'The Journal'*, i.e. it is not undeniably non-distinctive or descriptive;

- The application is specifically made in relation to services and not goods, and the Appointed Person talked about such a difference as being potentially material in the sense that e.g. goods move around the country in the course of trade in a way that services do not;

- The applicant has proven distinctiveness in the relevant geographical location, something which the applicant had not achieved in *The Journal*;

- The Registrar has already allowed a similar precedent in the case of registration 2296937 for 'CLAY OVEN'.

9. In a letter dated 28 April 2014, I formally refused the application, noting that in my view and with the case law as it currently stands, I did not feel confident that the dicta in *Europolis* can be nuanced in the way requested by the applicant in this case. I also noted that, of the reasons given by the Appointed Person for not allowing the geographical limitation to overcome the section 3(1)(b) and/or (c) objection (paragraphs 23-26 of *The Journal*), only one of those reasons, at paragraph 25, draws any meaningful distinction between goods and services; the remaining reasons make no such distinction.

10. I also said in my letter that, notwithstanding that the examiner had acknowledged that the applicant had a 'reputation' in London, on reflection, a finding that acquired

distinctiveness had been shown in the Greater London area may be generous. As in *The Journal* (paragraph 28), the only available evidence to support the plea of (limited) acquired distinctiveness is a single witness statement, this time by the Managing Director, and bearing in mind the legal principles set out in cases such as *Vibe Technologies Application* (BL O/166/08) at paragraph 62 and following, a finding of acquired distinctiveness, even based in the limited area of Greater London, would be generous. I did, however, say in my letter that the evidence on file presents a credible starting point on the question but not necessarily as an overwhelmingly convincing case. For example, there is a lack of market share figures to put the application into context. Nor is it clear just how many readers the publications of TIME OUT and the LONDON EVENING STANDARD have actually reached within the geographically limited area. However, I concluded in my letter that I would *not* reject this case out of hand on the basis that acquired distinctiveness has not even been shown in Greater London. By this I meant that, should the applicant appeal, there will be inevitable benefit for the Registrar and third parties in terms of having the quandary highlighted in *The Journal* considered again and determined. There would be a danger that no such consideration would be deemed necessary if either I or an appeal body were to conclude, on the evidence, that there was not even acquired distinctiveness throughout the limited geographical area.

11. In response to my formal refusal of 28 April 2014, the applicant has filed a Form TM5 asking for a full statement of reasons for my refusal and which I now give. In light of submissions made by Dr Spencer, and especially the absence of any concession as far as the *prima facie* position is concerned, I will need to consider the *prima facie* position first.

Decision

12. The relevant parts of section 3 of the Act read as follows:

> "3.-(1) The following shall not be registered –
>
> (a) …
>
> (b) trade marks which are devoid of any distinctive character,
>
> (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,
>
> (d) ...
>
> Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it."

Underlying legal principles

13. The CJEU has repeatedly emphasised the need to interpret the grounds for refusal of registration listed in Article 3(1) and Article 7(1), the equivalent provision in Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark, in the light of the general interest underlying each of them (Case C-37/03P *Bio ID v OHIM* para 59 and the case law cited there and, more recently, Case C-273/05P *Celltech R&D Ltd v OHIM*).

14. The general interest to be taken into account in each case must reflect different considerations according to the ground for refusal in question. In relation to section 3(1)(b) (and the equivalent provisions referred to above) the Court has held that *"...the public interest... is, manifestly, indissociable from the essential function of a trade mark"* (Case C-329/02P SAT.1 *Satelliten Fernsehen GmbH v OHIM*). The essential function thus referred to is that of guaranteeing the identity of the origin of the goods or services offered under the mark to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin (see para 23 of the above mentioned judgment). Marks which are devoid of distinctive character are incapable of fulfilling that essential function.

15. Section 3(1)(c), on the other hand, pursues an aim which reflects the public interest in ensuring that descriptive signs or indications may be freely used by all (see Case C-191/0P *Wm Wrigley Jr v OHIM 'Doublemint'* at para 31).

16. In terms of the relationship between sections 3(1)(b) and (c), a sign which is subject to objection under section 3(1)(c) as designating a characteristic of the relevant goods or services will, of necessity, also be devoid of distinctive character under section 3(1)(b) - see to that effect para 86 of Case C-363/99 *Koninklijke KPN Nederland NV v Benelux-Merkenbureau ('Postkantoor')*. But plainly, and given the public interest behind the two provisions, they must be assessed independently of each other as their scope is different, that is to say that section 3(1)(b) will include within its scope marks which, whilst not designating a characteristic of the relevant goods and services, may nonetheless fail to serve the essential function of a trade mark in that they will be incapable of designating origin.

17. The relationship between sections 3(1)(b) and (c) has also been commented upon at National Court level. For example, in the case of BL O/313/11 *'Flying Scotsman'*, the Appointed Person notes the following at para 19:

> "Since there is no obligation to rule on the possible dividing line between the concept of lack of distinctiveness and that of minimum distinctiveness when assessing the registrability of a sign under Section 3(1)(b), see Case C-104/00 P *Deutsche Krankenversicherung AG v OHIM* ('Companyline')[2002] ECR I-7561 at para [20], it is not necessary to dwell on the question of how far Section 3(1)(b) may go in preventing registration beyond the scope of section 3(1)(c). It is sufficient to observe that a sign may be:

(1) distinctive for the purposes of section 3(1)(b), with the result that it cannot be regarded as descriptive for the purposes of section 3(1)(c) and must be unobjectionable on both bases; or

(2) neither distinctive for the purposes of Section 3(1)(b), nor descriptive for the purposes of Section 3(1)(c), with the result that it must be objectionable on the former but not the latter basis; or

(3) descriptive for the purposes of Section 3(1)(c), with the result that it cannot be regarded as distinctive for the purposes of Section 3(1)(b) and must be objectionable on both bases.

These considerations point to the overall importance of establishing that a sign is free of objection under Section 3(1)(b)."

Section 3(1)(c)

18. A fuller expression of the legal principles involved in an objection under section 3(1)(c) can be stated as follows:

- The words 'may serve in trade' include within their scope the possibility of future use even if, at the material date of application, the words or terms intended for protection are not in descriptive use in trade (see, to that effect, CJEU Cases C-108/97 and C109/97 *Windsurfing Chiemsee Produktions und Vertriebs GmbH v Boots and Segelzubehor Walter Huber and others*;

- As well as the possibility of future use, the fact there is little or no current use of the sign at the date of application is also not determinative in the assessment. The words 'may serve in trade' are to be interpreted as meaning, 'could' the sign in question serve in trade to designate characteristics of the goods/services, see e.g. BL O/096/11 *'Putter Scope'*, a decision of the Appointed Person at para 11;

- There must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods or services in question or one of their characteristics, see CJEU judgment C-468/01 P to C-472/01 P, 'Tabs', para 39, and General Court judgment T-222/02, *'Robotunits'*, para 34;

- The assessment of a sign for registrability must be made with reference to each discrete category of goods or services covered by an application for registration, see Case C-239/05 *BVBA Management, Training en Consultancy v Benelux-Merkenbureau* [2007] ECR I-1455 at paras 30 to 38; Case C-282/09 P *CFCMCEE v OHIM* [2010] ECR I-00000 at paras 37 to 44;

- It is also a well-established principle these days that the Registrar's role is to engage in a full and stringent examination of the facts, underling the Registrar's frontline role in preventing the granting of undue monopolies, see e.g. CJEU Case C-51/10 P, *Agencja Wydawnicza Technopol sp. z.o.o. v. OHIM* [2011] ECR I-1541.

19. In my opinion, the words 'BEST MANGAL' would be perceived by the relevant consumer (the general public in this case) as a laudatory designation of quality and type of cuisine on offer. I should say that I assume the relevant public is the general public at large, based on the services being non-specialist, provision of food and drink, such as that type of service provided by restaurants. The examiner said in the original examination report that 'mangal' is a type of Middle Eastern cuisine. Whilst there may be regional or national variants, it is generally understood to denote, e.g. meats or vegetables cooked on a barbeque. By 'regional or national variants', I recognise that the word 'mangal' may be nuanced in different areas or regions in order to describe, in effect, the same type of cooking. But these differing regional nuances do nothing to detract from the underlying descriptive message; it is the same *type* of cuisine. By way of further explanation and in support of this, I have annexed a WIKIPEDIA explanation of the word 'mangal'. In this particular case, the word 'mangal' is the Turkish word for this type of cuisine, which as I have said, would be available throughout the Middle East, and including former Soviet Union countries. I should also say that the word 'mangal' does not appear then, to refer to a specific *type of barbecue*, but rather, to a type or style of cuisine, although the meaning of the word may be more expansive than that. That is to say, especially to those brought up with this cuisine, the word 'mangal' may also have wider connotations, relating to the *manner in* which the food is eaten, namely that, usually, of a social gathering of friends or family. However, even accepting the wider meaning of the word, it would still be my contention that the word would be understood descriptively and therefore could very plausibly designate a characteristic of the services. It was expressly *not* contended by Dr Spencer, for example, that for the bulk of people in the UK, the word 'mangal' would not mean anything at all. Had that been contended, and for the benefit of any doubt, I would have rejected that contention on the basis that those, at the very least, of Middle Eastern origin or having other connections with the area (not an insubstantial number in the UK) would inevitably have known the meaning of the word, and in such a case there is a clear need to keep the word free for others to use.

20. Of course, I recognise the word 'mangal' is preceded by the word 'best'. This word is, of course, laudatory in nature. To my mind then, the combination, 'best mangal' designates a high quality mangal experience, and must then be subject to a section 3(1)(c) objection in the *prima facie*. To the extent that section 3(1)(c) applies, so too, and inevitably, will section 3(1)(b) also.

Section 3(1)(b) only

21. My formal refusal also, however, raised the prospect that section 3(1)(b) may also, independently and separately, apply, in the event I may be wrong about the application of section 3(1)(c). This is especially because the word 'best' may not be taken to be precise enough to *designate* a particular quality of cuisine; it is simply, but inevitably vaguely, laudatory. So, in the event I am wrong that section 3(1)(c) applies, I would nonetheless make a separate and alternative finding, under section 3(1)(b) only, that the words 'BEST MANGAL' would inevitably be seen as devoid of distinctive character by the relevant consumer and in relation to these services. That is to say, the words simply state, in a purely promotional sense, that the undertaking is responsible for serving 'mangal' cuisine of the best quality.

Conclusion in the *prima facie*

22. For the reasons given, the words BEST MANGAL are, in my opinion, and in the *prima facie*, objectionable under section 3(1)(c) and (b), or section 3(1)(b) alone. I would add, finally, that I have considered whether there are any services in relation to which the objection would not apply but find that this is not the case. The only further comment I would make is to observe that, carrying my analysis forward into the question of acquired distinctiveness, I can understand and agree with Dr Spencer's submission that the words 'BEST MANGAL' are far from being a hopeless case as far as the prospects of acquired distinctiveness are concerned. I say this for three main reasons. Firstly, I have been forced to be cautious in my findings under section 3(1)(b) and/or (c). Had I been certain about which ground to apply, the prospects for acquired distinctiveness may have been bleaker. Secondly, I have talked about the precise meaning of the word 'mangal', in particular its wider meaning, bringing in the fact that it may include the type of 'gathering', in addition to, the type of cuisine. Without undermining my *prima facie* conclusion, this may support the proposition that 'mangal' may not be the *most* obvious term that other traders in the UK would wish to use. That is to say, it might be more of an obvious and natural choice to adopt use of a term such as 'TURKISH RESTAURANT'. Thirdly, it recognises that, for some people in the UK, the term 'mangal' will have no meaning whatsoever, and this complete linguistic unfamiliarity can be said to be factor in the consideration of acquired distinctiveness, if not the prima facie case.

Acquired distinctiveness

23. The legal principles behind acquired distinctiveness can be stated as follows:

- Mere evidence of use, even if substantial, does not make the case for acquired distinctiveness;

- A significant proportion of the relevant consumers need to be educated that the words have acquired distinctiveness;

- If, to a real or hypothetical individual, a word or mark is ambiguous in the sense that it may be distinctive or descriptive then it cannot comply with the requirements of the Act for it will not provide the necessary distinction or guarantee;[2]

- It follows that, with regard to the acquisition of distinctive character through use, the identification by the relevant class of persons of the product or service as originating from a given undertaking must be as a result of the use of the mark as a trade mark. The expression 'use of the mark as a trade mark' in section 3 refers solely to

[2] Both the first two principles are stated in Bach and Bach Flower Remedies Trade Marks [2000] RPC 513, paras. 49 and 45 respectively

use of the mark for the purposes of the identification, by the relevant class of person, of the product as originating from a given undertaking;[3]

- The mark must have acquired distinctiveness through use throughout the territory of the UK (*Europolis*);

- In assessing whether a trade mark has acquired a distinctive character the competent authority must make an overall assessment of the relevant evidence, which in addition to the nature of the mark may include (i) the market share held by goods bearing the mark, (ii) how intensive, geographically widespread and long-standing the use of the mark has been, (iii) the amount invested by the proprietor in promoting the mark, (iv) the proportion of the relevant class of persons who, because of the mark, identify the goods or services as emanating from the proprietor, (v) evidence from trade and professional associations and (vi) (where the competent authority has particular difficulty in assessing the distinctive character) an opinion poll. If the relevant class of persons, or at least a significant proportion of them, identifies goods or services as originating from a particular undertaking because of the trade mark, it has acquired a distinctive character;[4]

- The position must be assessed at the date of application, being 13 July 2012.

Application of the principles

24. Since the words BEST MANGAL have not acquired distinctiveness 'throughout the UK' this application cannot be said to have met the above requirements, irrespective of any assessment as to the other criteria above; the geographical limitation does not cure the problem either. I will, though, make some additional, purely explanatory comments to those already made in correspondence in this regard.

25. Firstly, I have looked carefully at the Appointed Person's reasons for rejecting *The Journal* case on the offer of a geographical limitation. It is very true that the Appointed Person drew a distinction between goods and services in his analysis. But, in relation to his key reasons for rejecting geographical limitation, being: the registration of a national right; the fact that granting such a right should only be justified where the public interest no longer applies and the absence, in such a case, of the Directive making express or even implied provision for honest concurrent use; all these other reasons make no distinction between goods and services.

26. Secondly, I note, in this specific case, that the distinction drawn by the Appointed Person between goods and services is, in any event, blurred in this case somewhat by the fact the geographical limitation is to Greater London. Goods are said, by the Appointed Person, to move around the country, in contrast to services, which may be

[3] See, e.g. *Societe des produits Nestlé SA v Mars UK Ltd*, (C-353/03 *('Nestlé')*); *Philips Electronics NV v Remington Consumer Products Ltd* (C-299/99); *Henkel KGaA v Deutsches Patent – und Markenam* (C-218/01) and also see Case BL O/166/08 *Vibe Technologies* to which I drew attention at the hearing (Para 60 onwards).
[4] *Windsurfing*; Case C-342/97 *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [1999] ECR I-1318 at [23], *Philips v Remington* at [60]-[62], *Libertel v Benelux-Merkenbureau* at [67], *Nestlé v Mars* at [31] and C-25/05P *August Storck KG v Office for Harmonisation in the Internal Market (Storck II)* [2006] ECR I-5719 at [75].

apt to serve a particular locality. But, to what extent can Greater London be said to be such an area where, in large measure, the area is serviced by commuters from a considerable distance away? Goods move, as the Appointed Person says, but so too, do people. This case would inevitably raise then, the inherent difficulty in assessing what exact constituency, in terms of numbers of people, would constitute a significant proportion of relevant consumers for the purposes of assessing acquired distinctiveness - residents of Greater London, or both residents and commuters?

27. Thirdly, I did not understand Dr Spencer to be contending that the Greater London area would, on its own, have enough residents and/or commuters to comprise the requisite significant proportion of relevant consumers in the UK. Had he done so, and for the avoidance of any doubt, I would have rejected that contention. Accepting that Greater London is very densely populated, the relevant consumers in this case (the specification being unlimited) must comprise virtually the *whole* of the general public in the UK. Against that overall figure, the population of Greater London, even including commuters, cannot be said to represent a significant proportion of *all* relevant UK consumers.

28. For the reasons given, I do not believe this case gives me any clear opportunity to depart from the rationale in *The Journal* by accepting that a geographical limitation overcomes the section 3(1) objections.

29. I would just add, finally, that what the Registrar may have done in respect of other cases, such as the cited 2296937 CLAY OVEN case, are not binding on me and ought not to be taken as generally expressive of a practice which appears to run counter to existing CJEU guidance.

30. In conclusion, the application must be refused in its entirety. In this statement of grounds I have taken account of the papers on file and submissions made.

Dated this 18th day of November 2014

Edward Smith
For the Registrar
The Comptroller General

Annex

Article Talk Read Edit View history

Mangal (barbecue)

From Wikipedia, the free encyclopedia

Mangal (Azerbaijani: *manqal*, Turkish: *mangal*, Armenian: Մանղալ, Persian: منقل, Hebrew: מנגל, Russian: мангал) is the Middle Eastern name for barbecue, referring both to the event and the grilling apparatu itself.

Contents [hide]

Etymology [edit]

The word *mangal* is Turkish, derived from the Arabic word *manqal* (منقل) meaning "portable"[1] and originally referred to portable indoors heaters mostly replaced by Western-type stoves.[2]

Culinary [edit]

The menu always has a kind of meat. A typical mangal meal will consist of grilled vegetables, shish kebabs of various kinds and meatballs named *köfte*. Grilled chicken wings, chicken breasts and offal is also common. Salads and other cold foods accompany the meal. In Turkey, Şalgam or ayran are common drinks.

Sociality [edit]

Beyond just consuming food, mangal often means a family or friends gathering. Generally held in gardens or picnic areas, it stresses the hospitality towards the guests. Accordingly, it resembles braai of South Africa and its local equivalents worldwide.