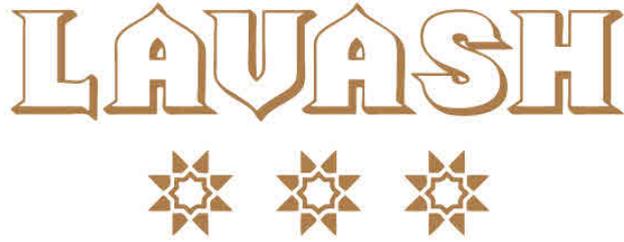


**O/509/21**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF  
TRADE MARK APPLICATION NO. 3458317  
BY CEMAL OZKAHRAMAN  
TO REGISTER:**



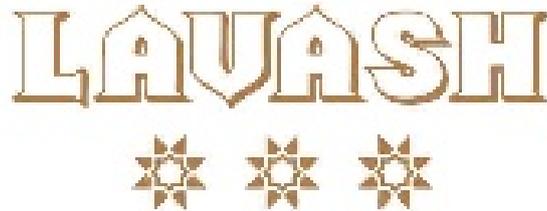
**AS A TRADE MARK  
IN CLASS 43**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 420340  
BY GÜROK TURİZM VE MADENCİLİK ANONİM SİRKETİ**

## Background and Pleadings

1. On 15 January 2020 Cemal Ozkahraman (“the applicant”) applied to register the trade mark shown below in the UK:



The application was accepted and published in the Trade Marks Journal on 27 March 2020 in respect of the following services:

**Class 43** *Agency services for reservation of restaurants; Bar and restaurant services; Booking of restaurant seats; Carry-out restaurants; Carvery restaurant services; Delicatessens [restaurants]; Fast food restaurants; Fast-food restaurant services; Grill restaurants; Hotel restaurant services; Japanese restaurant services; Making reservations and bookings for restaurants and meals; Mobile restaurant services; Providing food and drink for guests in restaurants; Providing food and drink in restaurants and bars; Providing information about restaurant services; Providing restaurant services; Providing reviews of restaurants; Providing reviews of restaurants and bars; Provision of food and drink in restaurants; Provision of information relating to restaurants; Ramen restaurant services; Reservation and booking services for restaurants and meals; Reservation of restaurants; Salad bars [restaurant services]; Self-service restaurant services; Self-service restaurants; Serving food and drink for guests in restaurants; Serving food and drink in restaurants and bars; Spanish restaurant services; Sushi restaurant services; Take-out restaurant services; Tempura restaurant services; Tourist restaurants; Travel agency services for booking restaurants; Restaurant and bar services; Restaurant information services; Restaurant reservation services; Restaurant services; Restaurant services for the provision of fast food; Restaurant services incorporating licensed bar facilities; Restaurant services provided by hotels; Restaurants; Restaurants (Self-service -); Udon and soba restaurant services; Washoku restaurant services.*

2. Gürok Turizm Ve Madencilik Anonim Sirketi (“the opponent”) opposed the application on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed at the application in its entirety. The opponent relies on the European Union Trade Mark (“EUTM”) shown below.<sup>1</sup>

**EU015175821** (“the earlier mark”)



**Filing date:** 3 March 2016.

**Date of entry in register:** 7 December 2017.

**Mark Description/Limitation**

Colour Claimed: Black; Pink; Grey; White.

The mark is registered for a range of goods and services but the opponent relies on the following services only:

**Class 39:** *travel arrangement; transport commission agency services in the nature of arranging excursions for tourists, tourist bureau services in the nature of tourist agency services and tour guide services, making reservations and bookings for transportation and travel and tour tickets, tour organization services.*

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<sup>1</sup> Although the UK has left the EU and the EUTM relied upon by the opponent now enjoys protection in the UK as a comparable trade mark, the EUTM remains the relevant right in these proceedings. That is because the opposition was filed before the end of the Implementation Period and, under the transitional provisions of the Trade Marks (Amendment etc.) (EU Exit) Regulations 2019, I am obliged to decide the opposition on the basis of the right as it existed at the date on which opposition proceedings were launched.

**Class 43:** *Services for providing food and drink; temporary accommodation; arranging temporary housing accommodations, namely, hotels, motels, holiday camps, boarding houses.*

3. In the TM7 the opponent refers to the service “*arranging temporary housing accommodations, namely, hotels, motels, holiday camps, boarding houses*” as “*arranging temporary housing*” but I will only consider the term as it is registered because shortening the term makes the opponent’s services broader as the wording *namely, hotels, motels, holiday camps, boarding houses* limits the services to those listed.

4 The opponent submits that there is a likelihood of confusion because the contested mark is similar to the opponent’s earlier mark and the respective services are identical or similar.

5. The applicant filed a defence and counterstatement denying the claims made.

6. During the evidence rounds the opponent did not file any evidence or submissions. The applicant filed written submissions dated 5 February 2021. On 9 March 2021 the applicant contacted the Tribunal via email querying the official letter dated 10 February 2021 which stated that as no evidence of fact was filed by the applicant the evidence rounds were concluded. The applicant questioned whether the Tribunal had received the applicant’s submissions sent on 5 February 2021 and requested to add five hyperlinks. In a letter dated 19 March 2021 the Tribunal explained that if the applicant wished for the content of website links to be considered they needed to file a witness statement explaining the reasons why the evidence was not filed earlier and providing the content of the website as exhibits. The applicant confirmed in an email dated 19 April 2021 that technical issues in attaching the documents was the reason why the evidence was not filed earlier and submitted a witness statement with the email.

7. The evidence filed by the applicant consists of the witness statement of Salih Erman Dogu, a freelance marketing consultant for Lavash. Mr Dogu’s witness statement is dated 25 March 2021 and includes five hyperlinks, three of which were provided as screenshots. The aim of Mr Dogu’s evidence, it is stated, is to show that Lavash has

established a significant brand awareness. In particular, Mr Dogu states that the website lavashbrighton.co.uk has been visited 13.3K times in the year before the date of the witness statement and it was searched 13.2K times on Google in the 3 months before the same date. He also states that established restaurant bloggers have visited Lavash and published reviews online about the restaurant. The three screenshots attached to the witness statement show the following: two graphs, one illustrating the frequency the Lavash website was visited and one indicating the number of customers who searched Lavash on google and images which are said to be from a blogger who visited the Lavash restaurant. Whilst I have read this evidence, the facts stated within it have no play in the assessment of the likelihood of confusion, and, as such I will say no more about it.

8. The opponent is represented by HGF Limited and the applicant represents itself. No hearing was requested, and no submissions were filed in lieu of a hearing. The decision is taken following a careful perusal of the papers.

## **Decision**

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

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

10. An earlier trade mark is defined in Section 6 of the Act, the relevant parts 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.”

11. The opponent's mark qualifies as an earlier mark within the meaning of Section 6(1) of the Act because it has an earlier filing date than the contested application. The earlier mark completed its registration less than five years before the application date of the contested mark and, as a result, is not subject to proof of use provisions.

12. Although the UK has left the EU, Section 6(3)(a) of the European (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 Trade Marks Act relied on 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) - Case law**

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 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 impression created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

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

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

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

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

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

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

### Comparison of services

14. The services to be compared are as follows:

Applicant's services	Opponent's services
<p><u>Class 43</u></p> <p><i>Agency services for reservation of restaurants; Bar and restaurant services; Booking of restaurant seats; Carry-out restaurants; Carvery restaurant services; Delicatessens [restaurants]; Fast food restaurants; Fast-food restaurant services; Grill restaurants; Hotel restaurant services; Japanese restaurant services; Making reservations and bookings for restaurants and meals; Mobile restaurant services; Providing food and drink for guests in restaurants; Providing food and drink in restaurants and bars; Providing information about restaurant services; Providing restaurant services; Providing reviews of restaurants; Providing reviews of restaurants and bars; Provision of food and drink in restaurants; Provision of</i></p>	<p><u>Class 39:</u></p> <p><i>travel arrangement; transport commission agency services in the nature of arranging excursions for tourists, tourist bureau services in the nature of tourist agency services and tour guide services, making reservations and bookings for transportation and travel and tour tickets, tour organization services.</i></p> <p><u>Class 43</u></p> <p><i>Services for providing food and drink; temporary accommodation; arranging temporary housing accommodations, namely, hotels, motels, holiday camps, boarding houses.</i></p>

<p><i>information relating to restaurants; Ramen restaurant services; Reservation and booking services for restaurants and meals; Reservation of restaurants; Salad bars [restaurant services]; Self-service restaurant services; Self-service restaurants; Serving food and drink for guests in restaurants; Serving food and drink in restaurants and bars; Spanish restaurant services; Sushi restaurant services; Take-out restaurant services; Tempura restaurant services; Tourist restaurants; Travel agency services for booking restaurants; Restaurant and bar services; Restaurant information services; Restaurant reservation services; Restaurant services; Restaurant services for the provision of fast food; Restaurant services incorporating licensed bar facilities; Restaurant services provided by hotels; Restaurants; Restaurants (Self-service -); Udon and soba restaurant services; Washoku restaurant services.</i></p>	
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15. 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 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

16. Guidance on this issue has also come from Jacob J. (as he was then) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

(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.”

17. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the General Court (“GC”) stated:

“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 the trade mark application (Case T-388/00 Institut für

Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark”

18. In *Kurt Hesse v OHIM* (Case C-50/15 P), the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, (Case T-325/06), the GC stated that “complementary” means:

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

19. The opponent’s specification in class 43 includes *Services for providing food and drink*; this is a very broad category and encompasses the following services in the applicant’s specification: *Bar and restaurant services; Carry-out restaurants; Carvery restaurant services; Delicatessens [restaurants]; Fast food restaurants; Fast-food restaurant services; Grill restaurants; Hotel restaurant services; Japanese restaurant services; Mobile restaurant services; Providing food and drink for guests in restaurants; Providing food and drink in restaurants and bars; Providing restaurant services; Provision of food and drink in restaurants; Ramen restaurant services; Salad bars [restaurant services]; Self-service restaurant services; Self-service restaurants; Serving food and drink for guests in restaurants; Serving food and drink in restaurants and bars; Spanish restaurant services; Sushi restaurant services; Take-out restaurant services; Tempura restaurant services; Tourist restaurants; Restaurant and bar services; Restaurant services; Restaurant services for the provision of fast food; Restaurant services incorporating licensed bar facilities; Restaurant services provided by hotels; Restaurants; Restaurants (Self-service -); Udon and soba restaurant services; Washoku restaurant services.* These services are identical on the principle outlined in *Meric*.

20. *Agency services for reservation of restaurants; Travel agency services for booking restaurants; Making reservations and bookings for restaurants and meals; Reservation and booking services for restaurants and meals; Reservation of*

restaurants; Restaurant reservation services; Booking of restaurant seats. Although *Services for providing food and drink* in the opponent's specification will inevitably include as part of the service the opportunity to make a reservation, it is not in my experience, provided as a separate identifiable service by the undertaking concerned but merely as an addition to its principle activity. Simply contacting a restaurant to reserve a table does not constitute a reservation service. Such a service is likely, instead, to be provided by a third party to a restaurant provider, with the average consumer contacting the service provider to make a reservation which will be taken on the restaurant provider's behalf. However, notwithstanding the above, as there is an element of complementarity, I find that the services are similar to a medium degree.

21. Providing information about restaurant services; Provision of information relating to restaurants; Restaurant information services in the applicant's specification and *tourist bureau services in the nature of tourist agency services and tour guide services* in the opponent's specification may coincide in the relevant public, distribution channels and purpose, as the opponent's services can include the provision of information about restaurants i.e. suggestions for local restaurants. There is therefore an element of competitiveness, although the services are not complementary. Therefore, I find the services similar to a medium degree.

22. Providing reviews of restaurants; Providing reviews of restaurants and bars in the applicant's specification and *Services for providing food and drink* in the opponent's specification are dissimilar. In my opinion, unlike the need to book a restaurant to reserve a table and use the restaurant services, there is not a requirement to use a restaurant review in order to utilise restaurant services, so there is no complementarity. Furthermore, those who provide reviews of restaurants do not normally offer restaurant services themselves, and other than targeting the same consumers, the services share no other *Canon* criteria. The services are neither in competition nor complementary. Consequently, I find that they are dissimilar.

23. As some degree of similarity between the services is necessary to engage the test for likelihood of confusion,<sup>2</sup> the opposition must fail in respect of the following services

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<sup>2</sup> eSure Insurance v Direct Line Insurance [2008] ETMR 77 CA

in the applicant's specification that I have found to be dissimilar to the opponent's services:

**Class 43:** *Providing reviews of restaurants; Providing reviews of restaurants and bars.*

### **The average consumer and the purchasing process**

24. As the law above indicates, it is necessary for me to determine who the average customer is for the 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."

25. The average consumer of the services at issue will be a member of the general public. The opponent also submits that the services will be the subject of word of mouth recommendations and that visual considerations will have a lower degree of importance in the circumstances. I disagree. In my opinion, the selection of the services will be primarily visual, following inspection of the premises' frontage on the high street, or as a result of searches on websites, or advertisements in print or online. That said, as such services may also be the subject of, as the opponent submits, word-of mouth recommendations or oral requests, aural considerations must not be forgotten.

26. The opponent submits that the average consumer will apply an average degree of attention but fast food may be purchased with a lower degree of attention. The applicant has not commented on the average consumer or the level of attention s/he will display.

27. The average consumer's level of attention will vary, depending on factors such as the type of food and drink provided, the cost of the service offered and the nature of the establishment (from Michelin starred restaurants to fast food outlets). However, even where the cost is fairly low and purchases are likely to be relatively frequent, a number of factors will be taken into consideration such as the hygiene rating and the type of food offered. I, therefore, consider that a medium degree of attention will be paid during the purchasing process.

28. In respect of the other services in the applicant's specification which I found to be similar to the opponent's services, i.e. reservation and booking of restaurants and providing information about restaurants, I consider that the degree of attention is also medium.

### Comparison of the marks

29. The respective trade marks are shown below:

	
Contested trade mark	Earlier trade mark

30. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural, and

conceptual similarities of trade marks must be assessed by reference to all 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 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.”

31. 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.

### **Overall impression**

32. The contested mark consists of the stylised word “LAVASH” above three sun-like devices in gold. The dominant element is the word element; although the three gold sun devices have a visual impact, the principle that “words speak louder than devices” should be noted. The stylisation and colour of the letters is banal and will have only a weak impact. There are no other elements that contribute to the overall impression which lies in the combination of these elements.

33. The opponent’s mark consists of the black stylised letters “LAV” with the top of the otherwise black “A” appearing pink. The dominant element in this mark is the word element, as the stylisation and colour are banal and will have only a weak impact on the distinctiveness. There are no other elements that contribute to the overall impression which lies in the combination of these elements.

### **Visual similarity**

34. The opponent submits that the contested mark encompasses the whole word element of the earlier mark in its beginning. Whilst as a general rule, the beginning of marks tend to make more of an impact than their endings<sup>3</sup> and whilst there is an obvious point of visual similarity between the marks, insofar as the sequence LAV (which is the only verbal element of the opponent's mark) is reproduced in the beginning of the word LAVASH in the contested mark; the average consumer will perceive both marks as wholes. The sequence LAV is not highlighted in any way in the contested mark and will be seen as part of the word LAVASH, not as a separate element. Further, the presence of three gold sun-like devices and the addition of the letters ASH in the contested mark and the stylisation and colour of the letters in both marks create different overall impressions. In my view, the marks are visually similar to a low degree.

### **Aural similarity**

35. Aurally, the contested mark will be pronounced LAV-ASH and the opponent's mark will be pronounced as LAV. The marks coincide in the pronunciation of "LAV"; however, the suffix of the contested mark "ASH" is a point of aural difference. The devices on the contested mark will not be pronounced. Therefore, I consider the marks to be aurally similar to a medium degree.

### **Conceptual similarity**

36. The opponent submits that both marks do not have meaning in relation to the services, and alternatively submits that if any meaning is identified it would not be known to the relevant public. Lavash is defined by the Collins English Dictionary as a "soft and very thin flatbread of Armenian origin".<sup>4</sup> Whilst it is likely that a select number of consumers in the UK will associate the contested mark with this meaning and whilst some consumers might also associate LAVASH with the word "lavish" and the concept of being luxurious or elaborate, in my opinion, most consumers will

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<sup>3</sup> *El Corte Ingles, SA v OHIM*, Case T-184/02

<sup>4</sup> Lavash definition and meaning | Collins English Dictionary ([collinsdictionary.com](https://www.collinsdictionary.com)) accessed

perceive LAVASH as an invented word or an unknown word of foreign origin with no meaning.

37. Conceptually, the applicant submits that “LAV” is a high temperature liquid that occurs during a volcanic eruption, i.e. lava. However, LAV is not known as an abbreviation for LAVA and it is unlikely that it will be perceived as such. The Collins English Dictionary defines “Lav” as British informal short for lavatory.<sup>5</sup> In my opinion, the average consumer will either associate the mark with this definition or, more likely (taking into account the services in the context of which it is used), perceive it as an invented term. Therefore, bearing the above in mind, I find that the marks are either conceptually dissimilar or conceptually neutral if both words are perceived as invented.

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

38. 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-2779, 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

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<sup>5</sup> Lav definition and meaning | Collins English Dictionary (collinsdictionary.com) accessed 9/06/2021

widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant Section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

39. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with a high inherent distinctive character, such as invented words which have no allusive qualities.

40. The opponent has not pleaded that its mark has acquired enhanced distinctive character through use and has not filed evidence in support of such a claim. I have, therefore, only the inherent position to consider.

41. Although the sequence LAV in the opponent’s mark will be perceived as invented, it is a very short word made up of only three letters. As such I do not consider that it is inherently distinctive to a high degree. Further, the stylisation and the colour are banal and do not add much to the distinctiveness. In my view the opponent’s mark is inherently distinctive to a medium degree.

### **Likelihood of confusion**

42. 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 or vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent’s trade mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be mindful 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.

43. Confusion can be direct or indirect. The difference between these two types of confusion was explained 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.

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

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).
- (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

44. I have found the marks to be visually similar to a low degree, aurally similar to a medium degree and conceptually neutral or dissimilar. I have found the average consumer to be members of the general public, who will select the services visually with a medium degree of attention (although I do not discount an aural component). I have found the earlier mark to have a medium degree of distinctive character. I have found the services to vary from identical to dissimilar.

45. Taking the above factors into account, I do not consider that the marks are sufficiently similar to cause any confusion. As regards to direct confusion, the low degree of similarity means that the marks are sufficiently different not to be mistaken for one another. There is no likelihood of direct confusion.

46. As regards indirect confusion, as it will be recalled, both marks will be perceived as wholes and the letters LAV do not have an independent distinctive role in the contested mark because they will be perceived as the first three letters of the word LAVASH, so there is effectively no element in common. As such, I do not see any reason why the average consumer would assume that LAVASH is a brand extension of LAV or that the marks came from the same or economically linked undertakings. There is no likelihood of indirect confusion.

### **Outcome**

47. The opposition has failed. The application will proceed to registration.

### **Costs**

48. The applicant has been successful and would normally be entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Note 2/2016.

49. However, as the applicant is unrepresented, at the conclusion of the evidence rounds the tribunal wrote to the applicant and invited him to indicate whether he intended to make a request for an award of costs. The applicant was informed that, if so, he should complete a cost Pro Forma, providing details of his actual costs and estimates of the amount of time spent on various activities in the opposition. He was informed that “if the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time) may not be awarded”.

50. The applicant did not file a completed Pro Forma. That being the case, I am unable to award the applicant any costs.

Dated this 5<sup>th</sup> day of July 2021

A Klass

For the Registrar,

the Comptroller - General