

O/032/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003359678

BY KERTEN UNLIMITED COMPANY

TO REGISTER THE FOLLOWING TRADE MARK:

THE HOUSE CAFE

IN CLASS 43

AND IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 415843

BY THE HOUSE CAFE TURİZM VE TİCARET ANONİM ŞİRKETİ

BACKGROUND AND PLEADINGS

1. On 10 December 2018, Kerten Unlimited Company (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. A priority date of 12 June 2018 is claimed. The application was published for opposition purposes on 21 December 2018 and registration is sought for the following services:

Class 43 Provision of food and drink; temporary accommodation; café services; cafeteria services; restaurant services.

2. On 21 March 2019, the THE HOUSE CAFE TURİZM VE TİCARET ANONİM ŞİRKETİ (“the opponent”) opposed the application based upon sections 5(2)(b) and 3(6) of the Trade Marks Act 1994 (“the Act”). However, the section 5(2)(b) ground of opposition was based upon a trade mark (IR designating the UK no. 1112146) which was revoked prior to the application date for the mark in issue. Consequently, it was not an earlier right within the meaning of section 6 of the Act and this ground of opposition was struck out on 8 November 2019. The opposition proceeds based upon the section 3(6) ground only.

3. For the purposes of its opposition based upon section 3(6), the opponent claims that the applicant and the partners of the opponent were previously business partners in a company called “Ev Emlak”. The opponent states that ownership of the applied-for mark was regulated by an agreement between Ev Emlak and the opponent, of which the applicant was aware. By applying to register the mark in issue, the opponent states that the applicant is acting in contravention of that agreement which amounts to bad faith.

4. The applicant filed a counterstatement denying the grounds of opposition.

5. Only the opponent filed evidence in chief. The applicant filed written submissions during the evidence rounds. A hearing took place before me on **23 November 2020**, by video conference. The applicant was represented by Mr Paul Kelly of FRKelly, European Patent and Trade Mark Attorneys. The opponent elected not to attend the

hearing, but filed written submissions in lieu. Mr Kelly filed a skeleton argument in advance of the hearing.

EVIDENCE AND SUBMISSIONS

6. The opponent filed evidence in the form of two witness statements of Ferit Baltacioglu dated 26 April 2019 and 21 February 2020. The exhibits that accompanied the first witness statement were re-filed with the second. In total, the second witness statement was accompanied by 11 exhibits. Mr Baltacioglu is the CEO of the opponent.

7. The opponent's evidence was accompanied by written submissions and, as noted above, the opponent also filed written submissions in lieu of attending the hearing.

8. The applicant filed written submissions during the evidence rounds dated 29 September 2020.

9. Whilst I do not propose to summarise the evidence and submissions here, I have taken them into consideration in reaching my decision and will refer to them below where necessary.

DECISION

10. Section 3(6) of the Act states:

“(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

11. The relevant case-law covering trade mark applications made in bad faith can be found in the following cases: *Chocoladefabriken Lindt & Sprüngli*, CJEU, Case C-529/07, *Malaysia Dairy Industries*, CJEU, Case C-320/12, *Koton*, CJEU, Case C-104/18P, *Sky v Skykick*, CJEU, Case C-371/18, *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited* and others, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16), *Trump International Limited v DDTM*

Operations LLC, [2019] EWHC 769 (Ch), *Copernicus-Trademarks v EUIPO*, General Court of the EU, Case T-82/14, *Daawat Trade Mark*, The Appointed Person, [2003] RPC 11, *Saxon Trade Mark*, [2003] EWHC 295 (Ch), *Mouldpro ApS v EUIPO*, General Court of the EU, Case T-796/17, *Alexander Trade Mark*, The Appointed Person, BL O/036/18, *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch) and *Sky v Skykick* [2020] EWHC, 990 (Ch).

12. The law appears to be as follows:

- (a) While in everyday language the concept of 'bad faith' involves a dishonest state of mind or intention, the concept of bad faith in trade mark law must be understood in the context of trade: *Sky CJEU*.
- (b) Applying to register a trade mark without an intention to use it is not bad faith *per se*. Therefore, it is not necessary for the trade mark applicant to be using, or have plans to use, the mark in relation to all the goods/services covered by the specification: *Sky CJEU*.
- (c) The bad faith of the trade mark applicant cannot, therefore, be presumed on the basis of the mere finding that, at the time of filing his or her application, that applicant had no economic activity corresponding to the goods and services referred to in that application: *Sky CJEU*.
- (d) However, where the trade mark application is filed without an intention to use it in relation to the specified goods and services, and there is no rationale for the application under trade mark law, it may constitute bad faith. Such bad faith may be established where there are objective, relevant and consistent indications showing that the applicant had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark: *Sky CJEU*.

- (e) This may be the case where the exclusive right was sought as part of a strategy of using widely cast trade mark registrations as legal weapons for use against others in opposition proceedings and/or for the purposes of blocking applications by third parties: *Sky EWHC* and *Copernicus-Trademarks v EUIPO*.
- (f) A trade mark may be applied for in good faith in relation to some of the goods/services covered by the application, and in bad faith as regards others: *Sky CJEU*.
- (g) This may be the case where the trade mark applicant has included a specific term in the specification, such as 'computer games', with no intention of using the mark in relation to any such goods, simply to obstruct third parties from using or registering the same mark, or similar marks. It may also be the case where the applicant has included a broad term, such as 'computer software', with the intention of using the mark in relation to a particular sub-category of such goods/services, but no intention of using the mark in relation to all the other (sometimes very different) sub-categories of goods/services covered by the broad term, with the objective of obstructing third parties from using or registering the mark in relation to such goods/services: *Sky EWHC*.
- (h) In deciding whether there was a rationale for registering the trade mark in relation to any particular term, it is necessary to bear in mind that trade mark proprietors have a legitimate interest in seeking protection in respect of goods or services in relation to which they may wish to use the trade mark in future (even if were no plans to use the mark in relation to the goods/services at issue at the time of filing the application): *Sky EWHC*. It is therefore relevant to consider whether the goods/services in the contested application are related to those for which the mark has been used, or for which the applicant had plans to use the mark.

13. The following points are apparent from the pre-*Sky* case-law about registering trade marks in bad faith:

- (a) Although it may be a relevant factor, the mere fact that the trade mark applicant knew that another party was using the trade mark in another territory does not establish bad faith: *Malaysia Dairy Industries*.
- (b) Similarly, the mere fact that the trade mark applicant knew that another party used the trade mark in the UK does not establish bad faith: *Lindt, Koton* (paragraph 55). The trade mark applicant may have reasonably believed that it was entitled to apply to register the mark, e.g. where there had been honest concurrent use of the marks: *Hotel Cipriani*.
- (c) However, an application to register a mark is likely to have been filed in bad faith where the trade mark applicant knew that a third party used the mark in the UK, or had reason to believe that it may wish to do so in future, and intended to use the trade mark registration to extract payment/consideration from the third party, e.g. to lever a UK licence from an overseas trader: *Daawat*, or to gain an unfair advantage by exploiting the reputation of a well-known name: *Trump International Limited*.
- (d) An application may also have been filed in bad faith where the trade mark applicant acted in breach of a general duty of trust as regards the interests of another party, including his or her own (ex) company or (ex) partners, or a party with whom there is, or had recently been, a contractual or pre-contractual relationship, such as a licensor, prospective licensor or overseas principal: *Saxon, Mouldpro*; or where a legal agreement prohibits such a filing.

14. The correct approach to the assessment of bad faith claims is as follows. According to *Alexander Trade Mark*, the key questions for determination in such a case are:

- (a) What, in concrete terms, was the objective that the trade mark applicant has been accused of pursuing?
- (b) Was that an objective for the purposes of which the contested application could not be properly filed? and

(c) Was it established that the contested application was filed in pursuit of that objective?

15. The trade mark applicant's intention (i.e. objective) is a subjective factor which must be determined objectively by the competent authority. An overall assessment is required, which must take account of all the factual circumstances relevant to the particular case: *Lindt*.

16. The matter must be judged at the relevant date, which is the date of the application for registration: *Lindt*. In this case, the relevant date is 10 December 2018. Whilst at the hearing Mr Kelly noted that there is a priority date for the applicant's mark, for the avoidance of doubt, it remains the filing date which is the relevant date for my assessment. That is because it is on that date that the act complained of occurred.

17. It is necessary to ascertain what the trade mark applicant knew at the relevant date: *Red Bull*. Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: *Hotel Cipriani*.

18. A statement on the application form that the mark is in use, or there is a *bona fide* intention to use it may, if untrue, provide evidence supporting a bad faith case, but is not sufficient by itself to justify the refusal or cancellation of the registration: *Sky CJEU*.

19. An allegation of bad faith is a serious allegation which must be distinctly proved, but in deciding whether it has been proved, the usual civil evidence standard applies (i.e. balance of probability). This means that it is not enough to establish facts which are as consistent with good faith as bad faith: *Red Bull*.

20. In its Notice of opposition, the opponent states:

"The Applicant and the partners of the Opponent were previously business partners in the company Ev Emlak ("the Company") on the basis of the agreement attached at ANNEX 1, EXHIBIT 1.

Ownership and use of THE HOUSE brands were regulated between the Company and the Opponent in the protocol at ANNEX 1, EXHIBIT 2 (paragraph (iii)), clearly stating that the Opponent is “the sole right owner” of THE HOUSE trade mark in the food and beverage sector. This was reflected in the agreement at ANNEX 1, EXHIBIT 2 where THE HOUSE CAFÉ is clearly excluded from the marks owned by the Company at article 3.9 (page 9) and from the definition of “Brand” (page 27).

Furthermore, the Applicant was expressly made aware of these facts by the Opponent by way of the letter at ANNEX 1, EXHIBIT 3 (par. 6, pages 7-8).

In light of the above, the Applicant clearly knew at the time of filing that the Opponent is the owner of the applied-for mark.

As the agreements between the parties made clear that the applied-for mark is owned by the Opponent for the food and beverage sector, by applying to register the applied-for mark for services related to the provision of food and beverage, the Applicant is acting in defiance of the above agreements, with the effect of preventing the Opponent from using its trade mark for its business. As a consequence, the actions of the Applicant fall short of the standards of acceptable commercial behaviour.”

21. In its Counterstatement, the applicant denied that the application had been made in bad faith and stated that the opponent’s claim was “misleading and factually incorrect”.

22. In its written submissions filed during the evidence rounds, the opponent states:

“9. The Opponent and the Applicant were business partners in the company Ev Emlak (“the Company”). Their relationship was set out in the agreements submitted as EXHIBIT FB1, namely the Shareholders Agreement of 2010 (pages 4-16) and the Optional and Conditional Agreement of 2 June 2016 (pages 27-43). In these agreements the Opponent’s partners are referred to as

“Shareholders” and “Turkish Partners”, while the Applicant is referenced as either “Kerten” or “Induco”.

23. In its written submissions in lieu, the opponent states:

“14. The Applicant is part of the Kerten group of companies, referred to as “Kerten Group” at EXHIBIT FB1, page 31, which includes also Kerten Investments Unlimited Company (“Kerten Investments”, details of which are provided at EXHIBIT FB1, page 44) and Induco Holdings S.a.r.l. (“Induco”). These companies all have Michael O’Shea directly or indirectly as the controlling or majority shareholder. Both the Irish companies Kerten Unlimited Company and Kerten Investments Unlimited Company have their address as 221-223 Lower Rathmines Road, Dublin 6, D06A582, Ireland. The evidence shows that these companies are connected and part of the same group.”

24. The opponent goes on to state that “the Opponent’s shareholders and the Applicant’s Kerten Group’s business relationship is apparent from the agreements submitted [...]”.

25. It seems to me that the opponent’s position has changed throughout this case. In its Notice of opposition, its pleaded case was that the applicant and the opponent (or its partners) were both business partners in a company called “Ev Emlak”. However, in its written submissions in lieu, the opponent claims that the applicant is part of a group of companies and that there is a connection between that group of companies and the opponent’s shareholders. For the avoidance of doubt, it is not appropriate for parties to wait until their written submissions in lieu to clarify their position. Nonetheless, I will consider both scenarios in reaching my decision.

Is there any evidence that the parties were both shareholders in the company called “Ev Emlak”?

26. The document referred to as “Annex 1, Exhibit 1” in the Notice of opposition consists of two documents: 1) a Shareholder’s Agreement dated 2010 (“the

Shareholders Agreement”) and 2) an Option and Conditional Amendment Agreement dated 2 June 2016 (“the Option Agreement”).¹

27. The parties to the Shareholders Agreement are Mr Baltacioglu, four other individuals, a company called Induco Holdings S.a.r.l (“Induco”) and a company called Ev Emlak Yatirim İnşaat ve Turizm Ticaret Anonim Şirketi (“Ev Emlak”). As Mr Kelly submitted at the hearing, the applicant is not a party to that agreement. Consequently, I do not consider that it proves that the opponent (or its partners) and the applicant were both shareholders in Ev Emlak.

28. The opponent refers to the fact that, in the Shareholder’s Agreement, Induco is defined as “Kerten”. Whatever definition the parties to that agreement chose to give the company called Induco does not change the fact that Induco Holdings S.a.r.l. and the applicant are clearly separate entities.

29. Similarly, the parties to the Option Agreement are Mr Baltacioglu, three other individuals, Induco, Ev Emlak, Bir Konaklama Otelcilik ve Turizm Ticaret Anonim Şirketi, Yeni Otelcilik Turizm ve Ticaret Anonim Şirketi and Kasa Marka Kiralama Turizm ve Ticaret Anonim Şirketi. Again, the applicant is not a party to that agreement. Consequently, I do not consider that it proves that the applicant and the opponent (or its partners) were both shareholders in Ev Emlak.

30. Taking all of this into account, I do not consider that the opponent has demonstrated that the applicant and the opponent (or its partners) were shareholders in Ev Emlak. On the basis of the opponent’s case as pleaded in its Notice of opposition, it has failed to demonstrate any connection between the parties.

31. As the opponent has also submitted that it is connected with the applicant by virtue of the “group” of which the applicant is a part, I will now consider whether there is any evidence of the applicant’s involvement in that alleged group.

¹ Exhibit FB1

Is there a relationship between Induco/ Kerten Investments Unlimited Company/ Michael O'Shea and the applicant?

32. The opponent submits that because Induco is defined as "Kerten" in the Shareholder's Agreement that this is evidence of a business connection between t and the applicant. To my mind, a definition given in an agreement is not evidence of a relationship between two legal entities. The parties are free to choose whichever definition they consider appropriate. Whilst the common use of the word "Kerten" might suggest some link, I do not consider this alone to be sufficient to prove that there is a relationship between Induco and the applicant.

33. The opponent also points to one of the definitions in the Option Agreement which defines "Kerten Group" as:

"[...] any and all present, including Induco, and future companies to be established, in which Michael Gerard O'Shea or Black Screen Sarl (of which Michael Gerard O'Shea is directly or indirectly the controlling shareholder), or holds at least 51% of the shares, or in which Michael Gerard O'Shea or Black Screen Sarl is the controlling shareholder."

34. I note that the final page of that document includes information about a company called Kerten Investments Unlimited Company ("Kerten Investments"). That page confirms that Mr O'Shea is the founder of that company and confirms the company address. Mr Baltacioglu also claims that Mr O'Shea is a partner in the applicant (a claim that is challenged by the applicant).

35. I note that the company address for Kerten Investments is the same as the address of the applicant. Mr O'Shea is listed as "the founder" of Kerten Investments which may mean that, at the time of that agreement, he also had some connection with the applicant if they share a common address. However, no explanation is provided by the opponent regarding this connection. The opponent simply states that in light of this evidence, the applicant's claim that the parties are not connected is "untenable".

36. No explanation is provided as to what relationship that final page has with the rest of the document. Kerten Investments does not appear to be mentioned in the body of the actual agreement. To my mind, the evidence is far from conclusive about the relationship between Kerten Investments/Michael O'Shea/Induco and the applicant. Given the seriousness of the allegations being made in these proceedings, it seems to me that the evidence falls short of demonstrating any such connection. To my mind, this is a connection that it should have been relatively easy for the opponent to prove or, at least, explain and the evidence filed is far from satisfactory. Further, the Option Agreement is dated 2016. Even if there was some relationship between Kerten Investments/Michael O'Shea/Induco and the applicant at that time, I have no evidence about what the position was some 2 years later at the relevant date. Does Kerten Investments still exist? Does Induco still exist? Is Mr O'Shea still a shareholder? Is Mr O'Shea still a shareholder in the applicant if, indeed, he ever was? Based upon the very limited evidence before me, I am not prepared to infer that there was any connection between the applicant and Kerten Investments/Induco/Michael Gerard O'Shea at the relevant date.

37. However, for the sake of completeness, I will go on to consider the position if I am wrong in my finding and there was in fact a relationship between Induco/Kerten Investments/Michael O'Shea and the applicant at the relevant date.

Was there a relationship between Induco/Kerten Investments/Michael O'Shea and the opponent?

38. In order for any relationship between Kerten Investments/Michael O'Shea/Induco to be of any assistance to the opponent in these proceedings, there must be evidence of a relationship between them and the opponent.

39. As noted above, the only reference to Kerten Investments appears to be on a page attached to the end of the Option Agreement. No context is provided as to why this page is there. I do not consider this alone to be sufficient to conclude that there was any prior relationship between Kerten Investments and the opponent.

40. Mr O'Shea is referenced in the Option Agreement as noted above. At least some of the partners of the applicant were parties to that agreement.

41. Induco was a party to both the Shareholder Agreement and the Option Agreement.

42. The opponent has also filed email correspondence between the partners of the opponent, including Mr Baltacioglu, and various individuals from email addresses which end "@kerten.com".² These include emails from Mr O'Shea. All of these emails are dated 2016 and discuss arrangements in relation to a business called "The House Hotel".

43. The opponent also refers to Board Minutes in relation to a business called The House Hotel Collection, at which Mr O'Shea and the partners of the opponent were in attendance.³ This is dated 2016.

44. Taking all of this into account, I am satisfied that there was a relationship between Mr O'Shea and Induco and the partners of the opponent prior to the relevant date.

45. I must, therefore, consider whether there is any evidence that the opponent had rights to the Contested Mark and, if so, whether the applicant had knowledge of that by virtue of a common connection with Mr O'Shea and/or Induco prior to the relevant date.

Is there any evidence that the opponent owned rights to the Contested Mark?

46. With regard to the opponent's ownership of the Contested Mark, in its written submissions in lieu, the opponent states:

"17. The above agreements included provisions as to the ownership and use by the Company of THE HOUSE family of trade marks, which specifically excluded the applied-for mark "The House Cafe":

² Exhibits FB4, FB5, FB6 and FB8

³ Exhibit FB7

17.1 In the Shareholders Agreement of 2010 “The House Cafe” is excluded from the marks owned by the Company at article 3.9 (page 12);

17.2 In the Optional and Conditional Amendment Agreement of 2 June 2016 “The House Cafe” is excluded from the definition of “Brand” (page 30);

17.3 The provisions above deal with “The House” brand; therefore “The House Cafe” in this context is an obvious reference to the brand. Thus, the Applicant’s claim, in its submissions of 29 September 2020, that the “The House Cafe” in this context would refer to the company rather than the brand is untenable and misleading.

18. The exclusion of the brand is due to the fact that the applied-for mark “The House Cafe” was always intended to be exclusively owned by the Opponent, as agreed between the Opponent and the Company in the Protocol at EXHIBIT FB2, signed in 2016, which clearly and unequivocally states that the Opponent is “the sole right owner” of THE HOUSE trade mark in the food and beverage sector. Due to the parties’ business relationship and the Applicant’s involvement in the Company, it is unlikely that the Applicant did not have knowledge of this Protocol prior to the Filing Date.”

47. Article 3.9 of the Shareholder’s Agreement, states:

“The Shareholders shall procure that all the intellectual property rights in Turkey with respect to “The House” brand, (excluding The House Café) including but not limited to The House Apart, The House Office, except for the headquarters of The House Cafe, The House Suites, The House Spa, The House Fitness and other “The House” brands in connection with any hospitality business (including but not limited to hotels, lodges, student housing, etc) belong to the Company. As of the Signing Date, the Shareholders caused the Company to make the trademark registration applications only for the trademarks as set forth in Schedule 9 of the Share Subscription Agreement. The House Cafe shall

be permitted to use the name “The House Office” for the headquarters of The House Cafe for as long as the Shareholders continue as shareholders of The House Cafe”. The Shareholders shall not directly or indirectly use or otherwise try to obtain any intellectual property rights internationally concerning any of “The House” brands mentioned above. The Shareholders shall procure that The House Cafe will not object to any intellectual property registration and/or application already made or to be made in the future by the Company with respect to the Business of the Company including all the brands mentioned in this Article.”

48. The opponent is, of course, correct that this article excludes the Contested Mark. However, there is nothing to confirm that that exclusion was present because ownership belonged to the opponent.

49. In the Option Agreement, “the Brand” is defined as:

“The House” trademark, and all other brands deriving from “The House” trademark either currently registered in the name of Ev Emlak (i.e. the house hotel, the house residence, the house apart and the house suites) or will be owned by Ev Emlak in the future (e.g. such as the house tower, the house living, the house loft and etc.), with the exclusion of “the House Cafe”, with respect to apart, hotel, residence projects and any other projects involving substantial residential and/or accommodation elements”.

50. Again, whilst this definition does clearly exclude the Contested Mark, there is no suggestion that this was because the ownership of that mark belonged to the opponent.

51. The Protocol, referred to by the opponent, is between (1) The opponent and Yer Gida Urunleri (defined as “the House Cafe”) and (2) Ev Emlak.⁴ The Protocol states:

⁴ Exhibit FB2

“(iii) THE HOUSE CAFE is registered and sole rights owner of “THE HOUSE” trademark in food and beverage sector. EV EMLAK shall not have business activity in food and beverage sector and shall not attempt to become right owner as well in using of “THE HOUSE” trademark which is given to EV EMLAK by this protocol.”

52. The reference to “THE HOUSE CAFE” in this part of the Protocol is clearly a reference to the parties that have been defined as “the House Cafe” earlier in the document. The mark being referred to is “THE HOUSE” trade mark. However, it is not clear to me that this was intended to be a reference to the Contested Mark.

53. The opponent also points to a number of draft agreements from 2016 which it states reflects its position as owner of the Contested Mark.⁵ I note as follows:

- a. Exhibit FB9 is a draft Option and Amendment Agreement. “The Brand” is defined as “The House” trademark, and all other brands deriving from “The House” trademark either currently owned or will be owned by Ev Emlak in the future, with the exclusion of “The House Cafe””. No explanation is included as to why this mark has been excluded.
- b. Exhibit FB10 is a draft Master License Agreement relating to the territory of Turkey only which states: “The Licensee is willing to use the Trademarks for its hotel business with the exclusion of the “the House Café” trademark, subject to the provisions of this Agreement”. No explanation is included as to why this mark has been excluded.
- c. Exhibit FB11 is a Draft Amendment Protocol. No reference at all is made to the Contested Mark in the body of this document.

54. As the Contested Mark is not referenced at all in Exhibit FB11 this cannot possibly demonstrate ownership on the part of the opponent. Further, whilst Exhibits FB9 and FB10 exclude the Contested Mark from their terms, no explanation for this is provided

⁵ Exhibits FB9 to FB11

and no reference is made to the fact that it is owned by the opponent. Consequently, I do not consider that these documents prove ownership of the Contested Mark on the part of the opponent.

55. It seems to me that if the opponent was, in fact, the owner of the Contested Mark (whether that be in Turkey or some other jurisdiction) that is a fact which should have been easy for the opponent to prove. The Protocol states that “the House Cafe” is the registered rights owner of “THE HOUSE” trade mark. If that is intended to be a reference to the Contested Mark, then the opponent should have been able to produce the corresponding registration certificate. Even if it is not the registered owner, and it is seeking to rely upon unregistered rights, it should have been relatively straightforward for the opponent to provide evidence to support this claim. It is a significant flaw in the opponent’s case that no such evidence has been provided. I am not satisfied that the opponent has proved that it owned or owns the Contested Mark.

Can the applicant have known of the opponent’s alleged ownership?

56. Even if “THE HOUSE” trade mark referred to in the Protocol was intended to refer to the Contested Mark, I do not see how any ownership conferred on the opponent by that document could have been known by the applicant prior to the relevant date. As submitted by Mr Kelly at the hearing, neither the applicant nor Mr O’Shea, Kerten Investments or Induco were a party to that document. Indeed, no reference is made to them at all.

57. The opponent submits that the applicant was ‘reminded’ of its ownership of the Contested Mark by letter on 17 October 2018.⁶ However, the document referred to does not appear to be a letter; rather, it is described as “Our responses to the notice (“Notice”) sent from Besiktas 6th Public Notary, dated 21.09.2018, numbered 32828”. Neither the applicant nor Mr O’Shea, Induco or Kerten Investments are listed as an addressee. I do not, therefore, consider that this assists the opponent.

⁶ Exhibit FB3

58. Taking all of this into account, I am not satisfied that, even if the Protocol was intended to confer ownership of the Contested Mark on the opponent, that the applicant can be said to have had knowledge of that ownership at the relevant date.

59. In reaching my decision, I have also considered whether there is anything in the emails and Board Minutes filed by the opponent which might indicate that the applicant had knowledge of the opponent's alleged ownership of the Contested Mark prior to the relevant date. The Board Minutes relate to "the House Hotel" and do not reference the Contested Mark. Consequently, I do not consider this assists the applicant. The only reference to the Contested Mark in the emails is in the email addresses of Mr Baltacioglu and his associates i.e. "@thehousecafe.com". Whilst Mr O'Shea is involved in those emails, even if there is a connection between him and the applicant, I do not consider a reference to the Contested Mark in an email address sufficient to infer that he had any knowledge of who owned that trade mark.

Conclusions

60. In reaching my decision, I have taken the evidence as a whole into account. I am also mindful of the case law set out above, which makes it clear that an allegation of bad faith is a serious one and one that must be distinctly proved. It seems to me that the evidence filed by the opponent (which has been challenged by the applicant) falls short of demonstrating a prima facie case of bad faith. It should have been relatively straightforward for the opponent to prove that there had been a prior business relationship between the applicant and the opponent if, indeed, there was one. However, the evidence is far from clear and I find myself unable to make such an inference. Even if I proceed on the basis that there was a prior relationship between the parties by virtue of a common connection with Mr O'Shea and his companies, the evidence falls short of proving that the opponent had any ownership of the Contested Mark even if another jurisdiction and of demonstrating that Mr O'Shea (and consequently the applicant) could have had any knowledge of that prior to the relevant date. As noted above, it should not have been difficult for the opponent to produce evidence of ownership of the Contested Mark. It is not sufficient for the opponent to prove facts which are as consistent with good faith as bad faith. I do not consider that the evidence proves that the applicant's conduct in filing the Contested Mark falls short

of the standards of acceptable commercial behaviour judged by ordinary standards of honest people.

61. Consequently, the opposition based upon section 3(6) of the Act is dismissed.

CONCLUSION

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

COSTS

63. As the applicant has been successful, it is entitled to a contribution towards its costs. At the hearing, Mr Kelly confirmed that costs were claimed on the usual scale i.e. the scale set out in Tribunal Practice Notice 2/2016. In making the following award, I have taken into consideration that the hearing was less than half an hour in length. In the circumstances, I award the applicant the sum of **£1,850** calculated as follows:

Considering the Notice of opposition and preparing a Counterstatement	£300
Filing submissions and considering the opponent's evidence	£900
Preparing for and attending hearing	£650
Total	£1,850

64. I therefore order THE HOUSE CAFE TURİZM VE TİCARET ANONİM ŞİRKETİ to pay Kerten Unlimited Company the sum of £1,850. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 13th day of January 2021

S WILSON

For the Registrar