

Neutral Citation Number: [2021] EWHC 1482 (IPEC)

Claim No. IP-2019-000137

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INTELLECTUAL PROPERTY ENTERPRISE COURT (Ch.D)

B E T W E E N:

ALYSSA SMITH JEWELLERY LIMITED

Claimant

- and -

ALISA GOODSTONE T/A ALYSSA JEWELLERY DESIGN

Defendant

Nicole Bollard (instructed by **Howes Percival LLP**) for the Claimant
The Defendant in person

Hearing date 9 April 2021

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 on 9 June 2021.

Miss Recorder Amanda Michaels:

Introduction

1. The Claimant company designs, produces and sells jewellery, and is named after its founder and sole director, Ms Alyssa Smith. These proceedings, which are for passing off, arise out of the adoption by the Defendant of the trading name 'Alyssa Jewellery Design' for her own jewellery business.

Background

2. Ms Smith has a degree in Applied Arts and Marketing and specialised in jewellery design. She appears to be a talented silversmith and designer. She started to make her own jewellery in about 2009. At first, she operated as a sole trader, selling at local events, and in late 2009 she launched a website at www.alyssa-smith.com. A webpage from April 2010 was in evidence which described the business as selling stylish and unique handmade jewellery, incorporating sterling silver, gemstones, pearls and Swarovski crystals. At that stage, Ms Smith made all of the jewellery herself.
3. It appears that Ms Smith was very conscious of the potential power of social media to build her business and she succeeded in attracting a good deal of media attention for the business, even whilst it was in its infancy. In her evidence, she explained that she had enjoyed considerable success virtually from the outset, with her jewellery being worn by celebrities and featured in the national press, and she and the business had won numerous awards.
4. In February 2010 she set up a Twitter account which she gave the handle @AlyssaJewellery. She attracted some attention in the press during 2010. In about May 2010 one of her designs attracted the attention of Marie Claire magazine and was featured in a "Hot List" in the magazine. Another item was featured with a selection of other jewellery in Vogue magazine. Items of her jewellery (whether given as gifts or purchased – Ms Smith could not recall) were worn by various TV presenters on air in 2010. Her evidence was that the business expanded significantly between 2010 and

2011, with turnover increasing significantly, but remaining modest (less than £10,000 for 2010-2011).

5. In early 2011, Ms Smith set up a Facebook page for the business, and in April 2011 she set up a new website with the domain name www.alyssasmith.co.uk. Her marketing efforts continued to bring media attention to the business despite its modest turnover. For example, one of her designs was featured in Company Magazine in July 2011 and in October 2011 she was featured in an article in The Guardian newspaper about digitally savvy businesses.
6. In 2012, media attention increased. For example, her designs were featured in Ultimate Wedding Magazine in early 2012. In an article in The Sunday Express in February 2012 Gail Porter referred to Ms Smith's bestselling 'tweetie bird' necklace. Ms Smith was nominated for or won a number of awards in 2012, such as 'Star of the Future' award at the Specsavers Everywoman in Retail Awards, The Federation of Small Business Award for 'Real Life Entrepreneur' of the year 2012, and 'Best Accessories Designer of the Year' 2012 at The Drapers Fashion & Footwear Awards. Additional press coverage followed. Doubtless as a result of that kind of publicity, the business's turnover increased significantly to around £44,000 for the year to 31 March 2012.
7. On 4 July 2012, the Claimant company was incorporated with a view to taking over the existing business. It has continued to design, make, and sell jewellery by retail. A confirmatory assignment of Ms Smith's pre-existing goodwill was entered into on 22 May 2019. Ms Smith continued to promote the business and points to an article in which she featured in Closer magazine in January 2013. In that article she mentioned having 7000 Twitter followers.
8. Turnover figures were given in the Particulars of Claim, rising each year. For instance, the Claimant had turnover of £43,074 from incorporation to March 2013, £78,268 for the year ending March 2015, £191,000 for the year ending March 2016, and £339,000 for the year ending March 2018. Until the year ending March 2016 expenditure upon advertising and promotion was minimal, but in that year it rose to some £21,000 and has risen again since then.

9. Ms Smith said that she had traded when a sole trader by reference to the signs ALYSSA SMITH JEWELLERY, ALYSSA JEWELLERY and @ALYSSAJEWELLERY ("the Claimant's Signs"). Since July 2012 the Claimant has done the same. It claims that as a result of the use of the Claimant's Signs in relation to the jewellery business both pre- and post-incorporation, it has goodwill in each of its Signs when used in relation to jewellery or the retail of jewellery.
10. The Defendant is also talented as a designer and appears to have turned her hand to producing a variety of artistic or craft items over the years. She described herself as a serial entrepreneur. For instance, she ran a wedding business doing wedding hairdressing and making bespoke tiaras and wedding jewellery, as well as running children's craft and cupcake parties, making occasion cupcakes, greetings cards, Christmas wreaths, etc. She said that she sold her goods to friends, relying on word-of-mouth recommendations, or at local craft fairs, and at one point through a shop owned by her mother. The wedding business was, at some stage at least, run under the name "Lisa Stone."
11. The Defendant said that in late 2012 she started making bracelets for friends. She decided to turn this into a business and to call it "Alyssa Jewellery Design." That name has been used in a simple logo form, with a little heart device over the 'y' of Alyssa. The date when she began using that name is a matter of dispute, which I have to decide. In about 2013 the Defendant acquired the domain names www.alyssajewellerydesign.com and www.alyssajewellerydesign.co.uk. In 2014 she launched a website, designed by her husband. She too has used social media to market her business, with accounts on Facebook, Instagram, and Pinterest all under the name Alyssa Jewellery Design, and on Twitter with the handle @Alyssabracelet. In some media, the Defendant has used just the name Alyssa, with the little heart device. I shall call these, together, "the Defendant's Signs."
12. The Defendant also achieved some level of success with her designs, and produced press cuttings from Vogue (December 2016 edition) and Brides Magazine (Jan/Feb 2017 edition) showing her products.

13. The Claimant became aware of the Defendant's activities using the Defendant's Signs in late 2018, when various emails and telephone calls were received from customers who (as the Claimant saw it) had confused it with the Defendant. A letter of claim was sent on 18 January 2019 and the proceedings were issued on 16 August 2019. The Defendant initially employed solicitors to respond to pre-action correspondence, but since at least October 2019, when the Defence was filed, she has acted in person.
14. At the CMC held on 22 April 2020, HHJ Hacon ordered that the following issues were to be determined at the trial:
 - (1) At what date did D commence use of the Defendant's Signs?
 - (2) As at the date at (1), did C have goodwill in each of the Claimant's Signs?
 - (3) Has D's use of the Defendant's Signs caused, or is it likely to cause, the mistaken belief amongst members of the relevant public that D's jewellery business is C's jewellery business or that D's jewellery business is authorised or approved by C or in some other way connected in the course of business with C?
 - (4) Was the misrepresentation intentional?
 - (5) Has C suffered damage in consequence of D's acts complained of?

The witnesses

15. There were two witnesses for the Claimant, Ms Smith herself and an employee, Ms Jade Turner. Both were good witnesses who did their best to help the Court.
16. I heard evidence from the Defendant and from her husband, Mr Gareth Dowdeswell. The Defendant had unfortunately not been in the best of health before the trial, so much so that she had considered applying to adjourn the trial. However, on the day of the hearing she decided to go ahead, and the trial proceeded with a number of brief adjournments during the day. It was plain that the Defendant was unwell, but with the adjournments, as well as a good deal of help and support from her husband throughout the day, I believe that she managed to do herself justice in giving evidence and cross-examining the Claimant's witnesses. I permitted her husband to read out her closing submissions on her behalf. However, even making full allowance for the Defendant's evident difficulties, I did not find her a satisfactory witness. I discuss her evidence about the choice of the Defendant's Signs and the date when she started using them below. Mr Dowdeswell was a better witness and I discuss his evidence below also.

The law

17. In *Discount Outlet v Feel Good UK* [2017] EWHC 1400 IPEC, [2017] ETMR 34, HHJ Melissa Clarke, sitting as a deputy Judge of the High Court, summarised the essential requirements of the law of passing off:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “a substantial number” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).

57. The Defendant relies on *The National Guild of Removers and Storers Limited v Bee Moved Limited, Nicholas Anthony Burns and Oliver Christopher Robert Sampson* [2016] EWHC 3192 (IPEC) in which Douglas Campbell QC sitting as a deputy Judge of the High Court considered “... *the difficulties of distinguishing between mere confusion, which is not enough to establish misrepresentation, and deception, which is*” He concluded that: “*The real distinction between the two lies in their causative effect, but is not a complete statement of the position... The more complete statement focuses on whether the conduct complained of is “really likely” to be damaging to the Claimant’s goodwill or divert trade from him. This emphasis on “really likely” echoes Lord Fraser in Advocaat [1980] RPC 31 at p 106 line 3. It is implicit in this test that if the conduct complained of is not “really likely” to be damaging then it will be mere confusion.*”

18. Whether or not the Defendant’s signs are likely to deceive the public (or a substantial portion of the public) is a question of fact which I must assess in the light of all the surrounding circumstances. In *Phones 4u Ltd v Phone4u.co.uk. Internet Ltd* [2007] RPC 5, Jacob LJ considered the distinction between confusion and deception. He said:

“16. The next point of passing off law to consider is misrepresentation. Sometimes a distinction is drawn between “mere confusion” which is not enough, and

“deception,” which is. I described the difference as “elusive” in *Reed Executive Plc v Reed Business Information Ltd* [2004] R.P.C. 40. I said this, [111]:

“Once the position strays into misleading a substantial number of people (going from ‘I wonder if there is a connection’ to ‘I assume there is a connection’) there will be passing off, whether the use is as a business name or a trade mark on goods.”

17. This of course is a question of degree—there will be some mere wonderers and some assumers—there will normally (see below) be passing off if there is a substantial number of the latter even if there is also a substantial number of the former.

18. The current (2005) edition of *Kerly* contains a discussion of the distinction at paragraphs 15–043 to 15–045. It is suggested that:

“The real distinction between mere confusion and deception lies in their causative effects. Mere confusion has no causative effect (other than to confuse lawyers and their clients) whereas, if in answer to the question: ‘what moves the public to buy?’, the insignia complained of is identified, then it is a case of deception.”

19. Although correct as far as it goes, I do not endorse that as a complete statement of the position. Clearly if the public are induced to buy by mistaking the insignia of B for that which they know to be that of A, there is deception. But there are other cases too—for instance those in the *Buttercup* case. A more complete test would be whether what is said to be deception rather than mere confusion is really likely to be damaging to the claimant’s goodwill or divert trade from him. I emphasise the word “really.”

19. Intention is not a necessary element of the tort of passing off, so that a claimant need not prove that a Defendant had an intention to deceive. However, if an intent to deceive is found, the Court may find that the Defendant has achieved that aim. This is explained in Wadlow *The Law of Passing Off* (5th Ed, 2016) at 5-57:

“There is ample authority that it does not lie in the mouth of a fraudulent defendant to say that his fraudulent purpose has failed. An intention to deceive the public is strong evidence that deception will occur. However, this is not a rule of law but one of common sense: every element of the tort must still be made out.

“No court would be astute when they discovered an intention to deceive, in coming to the conclusion that a dishonest defendant had been unsuccessful in his fraudulent design. When once you establish the intent to deceive, it is only a short step to proving that the intent has been successful, but it is still a step, even though it be a short step. To any such charge there must be, however, two conditions. The first is that it ought to be pleaded explicitly so as to give the defendant the opportunity of rebutting the accusation of intent. The second is that it must be proved by evidence.” [per Lord Loreburn LC in *Ash (Claudius) & Sons Ltd v Invicta Manufacturing Co Ltd (1911) 28 R.P.C. 597, 475 HL.*]

20. In *Harrods Ltd v Harrodian School Ltd* [1996] RPC 697 at p.706, Millett LJ said:

“Deception is the gist of the tort of passing off, but it is not necessary for a plaintiff to establish that the defendant consciously intended to deceive the public if that is the probable result of his conduct. Nevertheless, the question why the defendant chose to adopt a particular name or get up is always highly relevant. It is "a question which falls to be asked and answered": see *Sodastream Ltd. v. Thorn Cascade Co. Ltd.* [1982] R.P.C. 459 at page 466 per Kerr L.J. If it is shown that the defendant deliberately sought to take the benefit of the plaintiff's goodwill for himself, the court will not "be astute to say that he cannot succeed in doing that which he is straining every nerve to do": see *Slazenger & Sons v. Feltham & Co.* (1889) 6 R.P.C. 531 at page 538 per Lindley L.J.”

21. As to damage, in *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd.* [1980] R.P.C. 31 Lord Fraser referred to the claimant owning “goodwill in England which is of substantial value” and that the claimant had suffered or was really likely to suffer,

“substantial damage to his property in the goodwill by reason of the defendants selling goods which are falsely described by the trade name to which the goodwill is attached.”

Similarly, in *Harrods*, Millett LJ said at p 715

“In the classic case of passing off, where the defendant represents his goods or business as the goods or business of the plaintiff, there is an obvious risk of damage to the plaintiff's business by substitution. Customers and potential customers will

be lost to the plaintiff if they transfer their custom to the defendant in the belief that they are dealing with the plaintiff.”

22. Proof of actual damage is not required. It is clear from the judgment of Jacob LJ in *Phones4U* at paragraphs 11-14 that there is no requirement for special proof of damage where confusion is likely to occur.

Merits of the claim

23. *Cadbury Schweppes Pty Ltd v Pub Squash Co. Pty. Ltd.* [1981] RPC 429 establishes that the question of whether the Claimant can bring a claim in passing off against the Defendant depends on whether the Claimant had goodwill prior to the date when the Defendant started to use the Defendant’s Signs. Hence, the first issue identified by HHJ Hacon was the date when the Defendant started trading as “Alyssa Jewellery Design” and the further permutations of that name.
24. The Defendant was very unclear as to when the Defendant’s Signs were first used. In answer to a Part 18 Request, the Defendant claimed to have started trading under the name Alyssa Jewellery Design in December 2012. However, there was no documentary evidence to support that claim.
25. The Defendant said that she started making silver bracelets on elasticated bands for family and friends in December 2012 and I have no reason to doubt that was the case. However, it was not clear to me whether that amounted to a business at that stage, or was just a hobby, especially as the Defendant said in cross-examination that the business was *still* ‘more of a hobby.’ More importantly, the Defendant was quite unable to tell me clearly when it was that she decided to call the business Alyssa Jewellery Design and began to use that name. In cross-examination she accepted that her logo was not designed until March 2013, but there was no evidence to support that date. The Defendant did not seem to know when her website was launched, and relied on her husband’s evidence that he thought it was in 2014. She thought that she had set up Twitter and Instagram accounts around the same time and Facebook possibly in 2013 (she thought the latter had been ‘migrated’ onto a new page in 2014, but there was no documentary evidence of that). Both she and her husband accepted that the first Mailchimp mailing they did was in 2016. Her disclosure documents did not show any

evidence of any turnover under the Defendant's Signs from December 2012 to 2018; the only sales figures were for the year January 2019 to January 2020 (£5,710).

26. Overall, the Defendant's evidence about the date when she started to use the Defendant's Signs was extremely vague and tentative. It was so unsatisfactory that I do not consider that I should rely upon her references to dates unless supported by documentary evidence, which was sparse. She said she had started out selling at financial institutions and craft fairs, but there was no documentary evidence of such sales. However, she did produce a single advertisement for what appears to be a pop-up 'boutique' greetings card shop, at which a range of the Defendant's jewellery was to be sold under the name Alyssa Jewellery Design, on 23 September 2013. The advertisement shows the name used in the form of the logo and features a photograph of a multi-strand bead or pearl bracelet with silver charms. As far as I could tell, there were no other documents disclosed showing use of the Defendant's Signs any earlier than that, nor any documents showing that from September 2013 onwards there was regular use of the name.
27. In the circumstances, I am not persuaded that the Defendant started using the Defendant's Signs as early as December 2012, even if that is when she started to make bracelets for friends and family. It seems to me from her evidence about the logo design that she more probably did not start using the Defendant's Signs until sometime in 2013. On balance, and taking into account the advertisement for the pop-up shop, I find that the Defendant started to use the Defendant's Signs during 2013 and by September 2013 at the latest.
28. That leads on to the question of whether the Claimant had goodwill in the Claimant's Signs prior to the Defendant commencing the uses of which complaint is made. I have concluded without hesitation that it did. As explained above, Ms Smith had traded in a modest way using the Claimant's signs from 2009 to July 2012, and the Claimant had continued such use after that date. Turnover was not very high from 2009 to the end of 2012 (£54,574 to the year ending March 2013) but the level of interest in the business was disproportionately high. By late 2012/early 2013, Ms Smith had managed to generate a high degree of interest in her business and in her designs although her expenditure on advertising and PR was minimal. Her social media presence was

substantial, for instance, she had 7,000 followers on Twitter by the start of 2013. She had generated a good deal of press publicity (with numerous examples in evidence from 2012) and celebrity endorsements and had won awards of various kinds. The Defendant questioned whether some of those awards had been paid for rather than won, but Ms Smith denied it, and I accept her evidence on that point. But in any event, the awards would have raised the profile, and thus the goodwill, of the business. Whether the Defendant started trading sometime in 2013, or, as she claimed, started the business under the Defendant's Signs in December 2012, matters not. In my judgment, the Claimant had goodwill before December 2012.

29. I should add that whilst the majority of the examples of use of the Claimant's Signs in the trial bundle showed use of the full name Alyssa Smith, a smaller but substantial number of examples showed use of the name (or handle) Alyssa Jewellery or @alyssajewellery. The name Alyssa appears to me plainly the most distinctive element of all of the Claimant's Signs, especially as 'jewellery' in context is wholly descriptive. I conclude that the Claimant had goodwill in each of the Signs by December 2012.
30. The next issue is whether use of the Defendant's Signs in relation to the Defendant's business and goods amounted to a misrepresentation that the Defendant's goods were those of the Claimant or were connected to the Claimant.
31. The Claimant alleged that the Defendant had chosen the name Alyssa Jewellery Design because she was aware of the Claimant's Signs and wished to take advantage of their reputation by misrepresenting the source of her goods. The Claimant pointed in particular to the Defendant's regular use of just the name Alyssa (with the little heart over the 'y', as a heart device is used sometimes for the dot over an 'i') in publicity such as photos on Instagram, which, it was alleged, showed an intent to make a misrepresentation.
32. The Defendant and her husband were cross-examined about the reasons for her choice of the name. They said that the Defendant's wish was to use a name other than her own name, to maintain her privacy, but that she wanted to use a name which was close to her own name. Alyssa was, they said, a known variation of Alisa. And the initials of Alyssa Jewellery Design were the same as their daughter's initials.

33. The Defendant and her husband were unable to explain why she would have been identified by use of her own first name, Alisa, but not by Alyssa, or why that mattered for this business. The Defendant was taken to an advertisement for wreaths which she had been selling in support for a hospice, which showed her name Alisa and mobile telephone number, which suggested that she was not always unwilling to make use of her own name for business purposes. Mr Dowdeswell also gave evidence that when she had used a different name for a business in the past, she had used “Lisa Stone,” plainly another variant of Alisa Goodstone. They did not explain why she could not just as well have used Lisa or Lisa Stone, as she had done previously, for this business.
34. It was put to the Defendant that she must have been aware of the Claimant’s Signs, given their social media profile and especially given the Defendant’s interest in the wedding industry, but although she agreed that she had carried out some research, she denied having found the Claimant’s business. She also denied that the pre-existing social media accounts used by the Claimant had limited her own choices of social media names, etc. The Claimant submitted that the Defendant must have become aware of its business when choosing her Twitter handle in (she thought) 2013. She chose @Alyssabracelet, when the more obvious handle, @Alyssajewellery, was not available to her because it was in use by the Claimant. There is some force in that point.
35. Mr Dowdeswell said that he had carried out a trade mark search before the name was chosen, but denied having done internet searches at that stage. He accepted that one might find it far-fetched that the name was not chosen because of the success of the Claimant’s business.
36. I found both the Defendant’s and Mr Dowdeswell’s evidence about the choice of name to be unsatisfactory. The Defendant gave confused and contradictory evidence about what if any research she had done, whilst he admitted to carrying out trade mark searches but nothing else. In this digital age, I find it surprising that they would have carried out no other online research, especially as Mr Dowdeswell was knowledgeable enough to build the Defendant’s website, and the Defendant signed up to Instagram, Facebook, and Twitter in 2013 and has successfully promoted the business on social media since 2016.

37. As I have found above, at the time at the Defendant chose her trading name, the Claimant had established goodwill, and, in particular, a social media profile greater than one would have expected for a business of that size. It seems to me that if the Defendant or her husband had carried out any more than the most trivial online research using the name Alyssa in relation to jewellery, they would have been likely to have come across the Claimant's Signs. Her Twitter handle suggests she may well have done so. In all the circumstances, I think it more likely than not that the Defendant was aware of the Claimant's Signs when she chose to call her new business Alyssa Jewellery Design, or soon after making that choice.
38. However, despite my conclusions that it is more likely than not that the Defendant was aware of the Claimant's Signs, I am not persuaded that the Defendant chose that name with the deliberate intention of passing off her business as that of the Claimant. In my view, having had the benefit of seeing the Defendant in the witness box, her behaviour was equally consistent with a rather foolish willingness to "live dangerously" by choosing a name close to the Claimant's. Whether or not I am right on that is immaterial: for the reasons which I give below, it does not seem to me that the Defendant's true intentions when choosing the name Alyssa Jewellery Design are of any great significance.
39. The Claimant submitted that whether or not I found that the Defendant had intended to pass off her business as the Claimant's business or as connected with it, I should find that her use of the Defendant's Signs amounted to a misrepresentation. The Claimant alleged that the Defendant had taken steps designed to lead to passing off, for example by using images on social media in which the only words visible were 'Alyssa Jewellery,' or by using images dominated by the name Alyssa alone, with the Defendant's domain name in much smaller font beneath it, or in which the only name visible was Alyssa, and by selling a 'Signature' collection of jewellery, similar to the Claimant's 'Alyssa Smith Signature Collection,' when both signature collections featured bracelets with charms attached to them. Again, I was not persuaded that these factors pointed to a deliberate attempt to pass off. Most of the uses relied upon as additional evidence of copying appeared to me to be fairly commonplace, and it does not seem to me that adding them together demonstrates an intention to pass off. On the other hand, if I am right in thinking that the Defendant was aware of the Claimant's

business and Signs, she certainly did not take any steps to ensure that she avoided any possible misrepresentation.

40. As I have stated above, in order to establish passing off it is not necessary to prove that the defendant intended to misrepresent his goods as those of the claimant if there is a likelihood that the relevant public has been or is likely to be deceived by the defendant's acts. The Claimant pointed to several factors as showing that passing off would be likely to occur by reason of the Defendant's use of the Defendant's Signs. For example, it relied on the use by the Defendant of 'Alyssa Jewellery,' a sign identical to the Claimant's Alyssa Jewellery sign, and upon the similarity of 'Alyssa Jewellery Design' to all of the Claimant's signs. In my judgment, the Claimant was right to say that 'Alyssa' is the dominant feature in all of its Signs, as the name Smith and the words Jewellery and Design are commonplace and/or descriptive. It seems to me that members of the public would be more likely to recall the relatively unusual name Alyssa than the other elements of the Claimant's Signs. All of the Defendant's Signs use the identical name, and again, any additional material (like 'Jewellery Design' and the minimal design elements of the 'logo') is not intrinsically distinctive, so that the name Alyssa is also the most distinctive part of the Defendant's Signs.
41. Both parties are using the Signs in relation to jewellery businesses. The Defendant argued that the Claimant's goods were very different to hers, that they were higher-end and higher-priced and were hand-made rather than made of bought in parts. She also said that the Claimant concentrated upon goods with a motorsports theme, which she did not. Ms Smith, on the other hand, said that the Claimant sold a range of goods, some at similar price points to the Defendant's and that the motorsports goods were only part of a wider and more general range. Looking at the documents before me, it seems to me that the differences between the parties' respective goods, whether of theme or price point, would not be obvious to the average consumer and would not help a consumer to distinguish between the two businesses. For example, both parties sell moderately priced silver charm bracelets. One has to look with some care at any advertisement to see which are the Claimant's and which the Defendant's goods.

42. Moreover, as discussed below, the Defendant has advertised her goods as “Handmade Sterling Silver and Gold Jewellery” which in my judgment would not help a customer distinguish between her goods and the Claimant’s, quite the contrary.
43. As I have said, both parties sell from their websites but also advertise on social media such as Instagram. The Defendant’s view was that the parties’ respective layouts, colouring, images, photography style, logos, fonts and products are completely different, which would prevent confusion. It does not seem to me that either party has an especially striking web design or uses a particularly distinctive style to present its goods, and in my judgment, the average member of the public would not readily identify differences between them, or if differences were discerned, they would not necessarily lead a consumer to think they were looking at a different (as opposed to updated) website. The Defendant suggested that the differing domain names and the “look, feel and customer journey” of online purchases were entirely different, but in my judgment, customers are unlikely to look closely at a domain name, whilst the differences in the purchasing process identified by the Defendant would not lead a consumer to distinguish between the two businesses.
44. The Claimant also relied upon a few instances of alleged actual confusion. Ms Turner gave evidence of some telephone calls she had received in 2018 which were said to evidence confusion between the parties’ businesses. Ms Turner had not kept any details of a number of such calls. However, she received a call from Ms Stephanie Foulkes, who was chasing up a response to emails which she had sent. It transpired that the email communications were with the Defendant, and she had called the Claimant when wishing to speak to the Defendant. Ms Turner thought that Ms Foulkes had simply found the Claimant’s phone number when looking to contact the Defendant. There was nothing to suggest that she had previously been aware of the Claimant or had bought goods from the Defendant believing that she was connected to the Claimant. In December 2018, Ms Densford, an existing customer of the Claimant, contacted the Claimant via Facebook asking ‘Is alyssa jewellery design.com you as well?’ and attaching an advertisement for the Defendant showing a silver charm bracelet and advertising “Fabulous Handmade Sterling Silver and Gold Jewellery.” The Defendant said that Ms Densford was a customer of hers too, who was on her mailing list, hence

the advertisement forwarded to the Claimant, but this does not appear to have prevented Ms Densford from querying whether there was a connection with the Claimant.

45. In addition, the Claimant relied upon its insurer, which accidentally followed the Defendant rather than the Claimant on both Instagram and Twitter, a customer, Ms Amanda Boow-Feeney, who tagged the Defendant in a post about the Claimant's business on Facebook in April 2019, and another of the Claimant's customers who posted about a piece of its jewellery but used a hashtag of the Defendant's: #alyssajewellerydesign. Whether or not this showed confusion between the parties' businesses or simply showed that a wrong address/hashtag had been identified, it is impossible to say, but these examples do reflect the identity/similarity of the parties' Signs.
46. There was, therefore, little evidence of confusion before me and in my view little weight can be placed upon the incidents said to indicate confusion, for the reasons I have given above. However, they cannot be ignored, and I take them into account as part of my assessment of the question of whether the use of the Defendant's Signs amounts to a misrepresentation. The absence of clear evidence of actual confusion is not fatal to the claim, especially as in my judgment this is the kind of case in which instances of confusion might well not have come to the Claimant's attention. People who were confused might not have realised their mistake, given the similarity of the products, or might have had no reason to complain to the parties. Overall, taking into account all of the factors and evidence discussed above, I have no doubt that the Defendant's use of such highly similar signs to the Claimant's Signs, in relation to essentially identical goods sold in very similar ways, amounts to a misrepresentation, and would be likely to lead to confusion and deception.
47. Apart from querying the alleged instances of actual confusion, the Defendant contended that the parties have traded in parallel without any difficulties for over 6 years. I do not think that this argument helps the Defendant. First, there is remarkably little evidence of trading by the Defendant until about 2016 and there are no figures to show the scale of trade prior to 2019. The only figures shown suggest that the scale of the Defendant's trade was extremely small (under £6000 for 2019/20) and at the trial she described the business as 'more of a hobby.' Trading on such a small scale would obviously be less

likely to lead to conflict between the parties than more significant trading might have done. As Jacob LJ put it in *Phones 4U* at [44] “if one has no idea of the extent of side by side user, then the inference of no deception cannot be drawn. You have to show there is a dog who could have barked.” There was wholly inadequate evidence of substantial side by side trading here.

48. For all these reasons, I am satisfied that the Claimant has proved its goodwill in its Signs and shown that the Defendant's use of the Defendant's Signs amounts to a misrepresentation. Moreover, it appears to me that this is a case where it follows that such misrepresentations will lead to damage or the likelihood of substantial damage to the Claimant's property in its goodwill by reason of the Defendant's use of the Defendant's Signs.
49. For these reasons, the claim succeeds.
50. I will hand this judgment down by email only and, if the appropriate form of Order cannot be agreed, will hear argument about the Order at a later date.