

**O/767/18**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF REGISTRATION 2463745**

**IN THE NAME OF ROS GRIFFITHS**

**FOR THE TRADE MARK**



**IN CLASSES 38 AND 41**

**AND**

**THE APPLICATION FOR A DECLARATION OF INVALIDITY THERETO**

**UNDER NUMBER 501480 BY**

**BRIXTON SPLASH LTD**

## Background



1. Ros Griffiths applied for the trade mark (number 2436745) on 9 August 2007 in classes 38 and 41 for the following services:

*Class 38: Telecommunications, Internet portal services, providing access to MP3 web sites on the Internet, providing access to digital music web sites on the Internet, providing Internet chatrooms.*

*Class 41: Education; providing of training; entertainment; sporting and cultural activities; organising events for cultural purposes, organising events for entertainment purposes, organising of entertainment and social events, arranging of festivals for entertainment purposes, arranging of musical entertainment, entertainment in the form of live musical performances (services providing-), entertainment services in the form of concert performances, fetes (organisation of-) for entertainment purposes, festivals (organisation of-) for entertainment purposes, information relating to entertainment or education, provided on-line from a computer database or the Internet, live entertainment, organising of entertainment and social events, organising of shows for entertainment purposes, production of live entertainment, promotions [entertainment], information relating to entertainment or education, provided on-line from a computer database or the Internet.*

2. The application was published on 16 November 2007 and achieved registration on 22 February 2008. On 5 December 2017, Brixton Splash Ltd (“the applicant”) applied for a declaration that the trade mark is invalid under sections 47(1)/3(6) and 47(2)/5(4)(a) of the Trade Marks Act 1994 (“the Act”). The applicant claims that the following signs were first used in the UK on 11 May 2006 in Brixton, in London:

(i) Brixton Splash



(ii)

3. The applicant claims that the signs have been used in relation to “Classes 38 and 41 namely: Education; providing of training; entertainment; sporting and cultural activities, telecommunications and merchandise.” The applicant states that Ms Griffiths was aware that “Brixton Splash from infamous to famous” was already in use in the UK prior to the date on which the contested application was filed. The applicant states that Ms Griffiths is no longer a Director of “Brixton Splash”, having resigned in 2011. It states that she has not yet used the mark, but that if she did so, it would indicate an association with the applicant and its signs which is not true. The applicant states that such use would constitute passing off (section 47(2)/5(4)(a) of the Act).

4. The applicant’s ground under section 47(1)/3(6) of the Act is reproduced below:

The Registrant was aware when making the application that the applicants were using the mark Brixton Splash from infamous to famous. The Registrant was not the proprietor of the mark and did not have the proprietors permission. Further, the Registrant had a relationship with the applicants. The filing of the application was part of a concerted practice and constituted an act of bad faith contrary to Sections 3(6) 47(1) and 48(1) of the Trade Marks Act 1994.

In the alternative, the Registrant was aware when making the application that the applicants were using the mark and the Registrant attempted to pre-empt the applicants from registering their mark in the United Kingdom, this constituting an act of bad faith contrary to Section 3(6) and 47(1) of the Trade Marks Act 1994.

In the alternative, the Registrant rushed to register the mark Brixton Splash from infamous to famous by improper and unfair means by taking unfair advantage of the peer relationship she enjoyed with the other organisers, granting her knowledge which allowed her to utilise inside information regarding the unregistered status of the mark, this is also constituting an act of bad faith contrary to Section 3(6) and 47(1) of the Trade Marks Act 1994.

In the alternative, the Registrant filed the application without any intention of making bona fide use of the mark Brixton Splash from infamous to famous, this is also constituting an act of bad faith contrary to Section 3(6) and 47(1) of TRA

5. Ms Griffiths filed a defence and counterstatement, denying the claims. I have reproduced this below in full as she has provided little material in these proceedings:

This counterstatement confirms that I (Ros Griffiths) disagree with Brixton Splash Ltd (applicant) based on the following:

I have attached letter (14-Oct-16) from the applicant, which clearly states and recognise my ownership of the trademark.

2006, I pioneered and delivered one of South London's largest street events in Brixton (Brixton Splash) to engage the local community and enable regeneration and support to be offered. Grew the event from 2000 people in Year 1 into a 15000-people event in Year 5. Liaised with key stakeholders and secured funding streams each year to enable the event to happen. Worked with and engaged local businesses to promote their community involvement and assess their social impact. Set up training and development programmes to leave a blueprint for an event.

2009, I incorporated Brixton Splash into limited company (07071661) and recruited ten directors to serve on the board. To date, none of the original directors are currently serving on the board. The current board have taken Brixton Splash from an event beneficial to the community into the opposite direction and allowed its footprint to become a negative one.

2016, Lambeth Council turned down an application from the applicant to hold the annual Brixton Splash event, due to some concerns, which include public safety and poor organisation.

The applicant recent online and social media campaign was designed to smear my name and my work with Lambeth Council, which is bordering on libel. It is my view that the motivation for the cancellation of my trademark is malicious and to further disrupt my personal and working life.

The applicant should provide legally proof, which supports their claim that I allegedly required consent to register 'Brixton Splash from infamous to famous'.

6. I will refer later in this decision to the letter mentioned by Ms Griffiths in her counterstatement.

7. Both parties have represented themselves throughout these proceedings. The applicant filed evidence in the form of a witness statement and exhibits (two of the exhibits are also witness statements), and Ms Griffiths filed written submissions in reply. I say more about the status of her submissions below. Neither party chose to be heard and neither filed written submissions in lieu of a hearing. I make this decision after a careful reading of all the material that has been submitted by both parties.

### **Procedural decision**

8. I held a case management conference ("CMC"), which both parties took part in by telephone, on 19 December 2017. Following the CMC, I allowed a period of time for the parties to attempt mediation as an alternative to litigation. Unfortunately, mediation did not take place.

9. The issue which caused the CMC to be held in the first place was Ms Griffiths' objection to the re-serving of the form TM8 and resetting of the period for the applicant to file its evidence, due to non-receipt of the originals (by the applicant). I

decided that the proceedings could continue and that the applicant was to be permitted a period to file its evidence, it not having received the original letter which set out the timescale for filing evidence. My letter of 28 February 2018 said:

There is some doubt as to who signed for the post, sent from the IPO to the applicant, on 13 May 2017. The applicant is sure that it was not one of the applicant's directors, 'Kelly', even though the Royal Mail tracking document states the item was signed for by 'Kelly'. The applicant maintains that the signature is not that of 'Kelly', and that the most probable explanation is that the item was signed for by a neighbour at 4b Trevelyan Road, rather than the applicant's staff at 4a Trevelyan Road. The Royal Mail tracking document says that the item was "delivered to your address or a neighbour". There is, therefore, ambiguity as to what exactly happened.

Whilst I appreciate that the handling of this case has lacked complete consistency, the Registry has endeavoured to be fair to both parties. Weighing all the circumstances, I have decided that the fairest and most proportionate response is to allow the proceedings to continue. There is a real issue to be tried, and it is in the public's interest (particularly the Brixton community) that the proceedings are resolved. I bear in mind that refusing to allow the proceedings to continue is likely to result in a fresh application for cancellation being made by the applicant.

The Registry re-served the TM8 on the applicant on 10 November 2017 and allowed the applicant two months to file evidence. The registered proprietor's objection to this, the case management conference and the hiatus whilst the parties considered the option of

mediation has had a suspensive effect, during which time there was no obligation on the applicant to file evidence.

I, therefore, direct that the applicant has two months in which to file evidence to support its case. Evidence must be received by the Registry and copied to the registered proprietor by 1 May 2018. The registered proprietor will then have two months to file evidence.

## **The evidence**

10. The applicant's evidence comes from Shezal Laing, one of the applicant's Directors. Ms Laing's witness statement is dated 22 May 2018. She states that the applicant is a not-for-profit community organisation which hosts an annual community street festival of the same name, attracting thousands of people. She states that the success of the applicant and the event has led to a fight for control between Ms Griffiths, Lambeth Council and the applicant.

11. Ms Laing states that the festival was founded in 2006 by a collection of local community leaders and businesses to change the (then) negative image of Brixton and boost the local economy. The first Brixton Splash festival took place in August 2006. Ms Laing states that there were many people involved in the festival from early on, but the three main founders “are widely accepted” as being Mr Burnett Steve Martin (‘Blacker’), Mr Pat Clark and Miss Rosalind Griffiths. Ms Laing states that the name Brixton Splash and its tagline (from infamous to famous) were thought up by Blacker, Pat Clark and Wojtek Janiki; following which the logo was professionally designed.

12. Ms Laing states that, for the first few years, “Brixton Splash” was run by an unincorporated association, until 2009, when it was officially incorporated into a not-for-profit company limited by guarantee. I note that Exhibit BSE7, a print from a website called brixtonbuzz.com, refers to the first event having been held on 13 August 2006 and that it lasted for 10 years until 2015 (the 2016 event was cancelled).

13. Prior to incorporation, on 9 August 2007, Ms Griffiths applied for the trade mark. Ms Laing states that this was without the knowledge of the other founders in what Ms Laing states was a breach of Ms Griffiths’ fiduciary duty. Ms Laing states that Ms Griffiths made no use of the mark until 2014, following which there is a history of rancour between the parties. This is documented in the next section of Ms Laing’s evidence which concerns what has happened between the parties, and also Lambeth Council, since 2015. Whilst I will not summarise this section of the evidence here, I will return to it, later in my decision.

14. Ms Laing refers to two witness statements which are exhibited to her witness statement. They are from Mr Burnett Steve Martin (Exhibit BSE10) and Pat Clark (Exhibit BSE11).

15. Mr Martin’s witness statement is dated 20 May 2018. He states that he was the person who came up with the original idea of a one-day street festival in Brixton. Mr Martin refers to his reasons for wanting to start the festival. He states that he contacted a fellow trader, Tony Fabusiwa, who had an off-licence in the same area



as his own music shop, in Brixton, and the two men agreed the festival was a good idea. They contacted other local businesses including Pat Clark from The Prince Albert pub. Mr Martin states that he then had a conversation in his shop with Ms Griffiths. After this, he contacted the local police and a team was put together to take the idea forward. He states that the team came up with the name 'Brixton Splash from infamous to famous'. The team secured funding to ensure the first Brixton Splash festival could take place in 2006. Mr Martin states that, after three successful events, in 2009 the committee decided to officially incorporate into a private company, limited by guarantee. Mr Martin states that the Trustees consisted of the original committee members and a few new people.

16. Mr Martin states that he had no idea that Ms Griffiths had registered the name "Brixton Splash – from infamous to famous" in her own name. He states that she should not have done this in a personal capacity; that she had never raised the issue with the Board of Trustees; and had never sought its permission. Mr Martin states that no such permission would have been given. In his view, registering the trade mark was a decision to be taken by the Board of Trustees, not by any individual.

17. Mr Clark's witness statement is dated 23 May 2018. Mr Clark was, in 2006, the landlord of The Prince Albert pub in Brixton. Mr Clark, like Mr Martin, sets out his sadness about the image of Brixton at this time and his feelings that he wanted to improve its image and sense of community. He does not give dates, but states that a group of locals (which included him) held its first meeting about creating a local event at the local community police station. He states that Ms Griffiths was at that first meeting. Mr Clark states that it wasn't to be called a carnival or festival. He states that one of his employees, Wojtek Janiki, came up with the idea of a pool of water with splashes and this was the origin of the Brixton Splash logo, but he does not exhibit the logo.

18. Exhibit BSE12 to Ms Laing's statement is a print of the comments on a local community online chat forum about the setting up of the first event, in 2006. Ms Laing states that the first post is by Mr Clark ("passpat"). In his post, dated 8 May 2006, Mr Clark refers to "us" and "we": "we are looking for any [sic] who is willing to give a bit of time for free". Mr Clark asks for help from locals in getting the event off

the ground, including thinking of a name for the event. There are several suggestions from different members of the forum. Exhibit BSE13 is a continuation of the forum posts. In a post, dated 11 May 2006, Mr Clark says “Its now being called The Brixton Splash.. flyers will be posted throughout the area explaining things.. stewards will br [sic] required for the day.. the response has been magnificent.. I would like to thank one and all..if anyone would like to help..have an arts stall etc.. please mail me.”

19. Exhibit BSE16 is a copy of an open letter from Lambeth Council dated 15 February 2016, posted online at [www.futurebrixton.org/towncentre/brixton-splash-open-letter](http://www.futurebrixton.org/towncentre/brixton-splash-open-letter). The first paragraph says:

“It is due to the inspiration and commitment of Pat Clark, former landlord of the Prince Albert pub on Coldharbour Lane, social entrepreneur Ros Griffiths and reggae producer Blacker Dread that Brixton Splash came into being. We are keen to retain this spirit of community celebration and are heartened by the number of organisations who want to work together to put on another brilliant Splash event.”

20. The letter concludes with the names and positions of eight people, as a list of signatories. The first is “Lib Peck, Leader of Lambeth Council”. The second name on the list is “Ros Griffiths, Former founder member of Brixton Splash”.

21. Ms Laing has included a reference to a Youtube clip about Brixton Splash from 2007 which she states features both Mr Martin and Ms Griffiths. I have not looked at this because it is not the responsibility of the Tribunal to investigate internet evidence: only content put before the Tribunal can be considered. Internet links may have become inaccessible or their content changed. They are not durable, reliable evidence<sup>1</sup>.

22. Following receipt of the applicant’s evidence, the Tribunal invited Ms Griffiths to file evidence or submissions. She responded by filing the following:

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<sup>1</sup> *Kustom Musical Amplification, Inc. v Office for Harmonisation in the Internal Market (OHIM)*, Case T-317/05, General Court of the European Union.



**My counter-statement confirms that I, Ros Griffiths, totally disagree with the recent submission provided by Brixton Splash Ltd (the Applicant).**

**There are number of significant inaccuracies, particularly, the misrepresentation regarding the history of Brixton Splash, the involvement of the MET Police and the role of Burnett Steve Martin, aka Blacker Dread.**

**The Met Police was an integral part of the Brixton Splash committee. All Brixton Splash planning meetings were held at the local police station. Significant information was captured, which included information about the applicant(s) and the premises licence holder. The records will show and confirm that, in the early years, Ros Griffiths was the licence holder and the Chief Organiser for the Brixton Splash events.**

**In addition, Lambeth Council would be able to access records of all Brixton Splash meetings and reports, which, incidentally, includes an unsuccessful application in 2016 by the Applicant to hold the annual Brixton Splash event. This was due to a number of concerns raised pertaining to public safety and poor organisation.**

**To date, the Applicant has not provided any legal documentation which supports their claim that I, Ros Griffiths, required consent to register Brixton Splash from Infamous to famous™.**

23. This was not filed in the form of a witness statement. Instead, Ms Griffiths included the above text in another Form TM8 notice of defence and counterstatement, dated 5 September 2018. Such a form includes a statement of truth, which Ms Griffiths signed, just as she had the original Form TM8 notice of defence and counterstatement, to which she had attached a letter sent to her from the applicant. The question is whether, in the absence of evidence in the form of a witness statement, affidavit or statutory declaration, these two documents (and attached letter) may be considered as evidence in these proceedings. They are the only documents which Ms Griffiths has filed, which is why I have reproduced them in full.

24. Rule 64 of the Trade Marks Rules 2008 (as amended) states (emphasis added):

“(1) Subject to rule 62(2) and as follows, evidence filed in any proceedings under the Act or these Rules may be given—

(a) by witness statement, affidavit, statutory declaration; or

**(b) in any other form which would be admissible as evidence in proceedings before the court.**

(2) A witness statement may only be given in evidence if it includes a statement of truth.

(3) The general rule is that evidence at hearings is to be by witness statement unless the registrar or any enactment requires otherwise.

(4) For the purposes of these Rules, a statement of truth—

(a) means a statement that the person making the statement believes that the facts stated in a particular document are true; and

(b) shall be dated and signed by—

(i) in the case of a witness statement, the maker of the statement,

(ii) in any other case, the party or legal representative of such party.

(5) In these Rules, a witness statement is a written statement signed by a person that contains the evidence which that person would be allowed to give orally.

(6) Under these Rules, evidence shall only be considered filed when—

(a) it has been received by the registrar; and

(b) it has been sent to all other parties to the proceedings.”

25. In *Soundunit Limited v Korval, Inc* (“Simmons”), BL O/468/12, Mr Daniel Alexander QC, sitting as the Appointed Person observed that (as per rule 64(1)(b))

that pleadings (in that case also a counterstatement) were formally admissible as evidence because before “the High Court a pleading verified by a statement of truth may be admitted as evidence (see CPR<sup>[2]</sup> Rule 32)”. Consequently, I will treat the contents of the first counterstatement, the letter attached to it, and the contents of the second counterstatement as evidence in these proceedings.

26. I have already reproduced the contents of the two counterstatements. I will also reproduce here the content of the letter which Ms Griffiths attached to her first counterstatement which she claims “clearly states and recognise [sic] my ownership of the trademark”. The letter is dated 14 October 2016:

Dear Ms Griffiths

Thank you for your recent correspondence dated 07/10/16.

We accept that your correspondence clearly identifies that you registered ‘Brixton Splash from infamous to famous’ in a personal capacity before Brixton Splash was formed as a company. Thus we were mistaken when we asserted that you registered the name when you were an employee of Brixton Splash Ltd. However, it was entered onto the register nearly two years after the first Brixton Splash took place.

In our letter to you dated 05/10/16 we made it very clear that ‘Brixton Splash’ is a registered trademark of Brixton Splash Ltd (trademark registration number: UK00003087750) and asked you to cease and desist with your assertions that you were in some way linked with Brixton Splash Ltd. Your reply to our letter indicates that you still believe you have a right to use the name ‘Brixton Splash’ and it appears you are basing this right on the trademark you have registered. Thus being so and in light of the new information you shared with us, we now demand that you surrender the trademark ‘Brixton Splash from infamous to famous’.

Please understand that we have various grounds available to us to have the trademark you registered invalidated/revoked, your application being made on bad faith, passing off, non use are a few examples.

We are giving you seven days, from the date of this letter, to surrender the trademark ‘Brixton Splash from infamous to famous’. Should you refuse to do so we shall start proceedings to have the trademark revoked/invalidated and hold you liable for application fees (£600) as well as any other costs incurred including legal.

You have until 21/10/16 to advise us of your answer.

We do hope we can finally bring an end to this matter so that we can all move on and focus on more positive matters.

### **Section 5(4)(a) of the Act (“passing off”)**

27. Section 47(2) of the Act states:

(2) The registration of a trade mark may be declared invalid on the ground-

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<sup>2</sup> The Civil Procedure Rules.

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

28. Section 5(4)(a) states:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b)...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

29. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court conveniently summarised the essential requirements of the law of passing off as follows:

“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)."

#### Ownership of goodwill and the relevant date

30. The concept of goodwill was explained in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 223:

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start."

31. The applicant needs to show in its evidence that it had goodwill at the relevant date. An action for passing off under section 5(4)(a) of the Act can only be brought by the owner of an earlier right<sup>3</sup> in respect of a mark published after 30 September 2007. The contested registration was published on 16 November 2007. Therefore, the applicant must be the owner of the earlier right claimed in order to bring the section 5(4)(a) claim. Goodwill is a form of legal property, as distinct from reputation which is non-proprietary, legally. Goodwill must be owned, as per Oliver L.J. in *Anheuser-Busch Inc v Budejovicky Budvar NP* [1984] F.S.R. 413:

"[T]hat, as it seems to me, is to confuse goodwill, which cannot exist in a vacuum, with mere reputation which may, no doubt, and frequently does, exist without any supporting local business, but which does not by itself constitute a property which the law protects".

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<sup>3</sup> The Trade Marks (Relative Grounds) Order 2007, S.I. 2007/1976

32. The evidence shows that, as of 9 August 2007, the present applicant did not exist. Ms Laing states that there was an unincorporated association at this point which had been convened to organise the 2006 and subsequent annual events, until the applicant was incorporated in 2009. Mr Martin states that, after three successful events, in 2009 the committee decided to officially incorporate into a private company, limited by guarantee (the applicant). Mr Martin states that the Trustees consisted of the original committee members and a few new people. A central issue is, therefore, if there was goodwill on 9 August 2007, did the unincorporated association own the goodwill and, if so, did it pass to the applicant?

33. In *John Williams and Barbara Williams v Canaries Seaschool SLU* (“Club Sail”), BL O/074/10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, said this, at [26]:

“I make the general observation that goodwill can be and frequently is built up and acquired by means of economic activities carried out collectively. By using the word ‘collectively’ I am intending to refer to all of the various ways in which alliances may be formed between and among individuals or corporate bodies in pursuit of shared interests and objectives. It is appropriate in this connection to refer to the following observations in the judgment of the Court of Appeal delivered by Hughes LJ in *R v. L(R) and F(J)* [2008] EWCA Crim. 1970; [2009] 1 Cr. App. R 16:

### **Unincorporated associations**

11. There are probably almost as many different types of unincorporated association as there are forms of human activity. This particular one was a club with 900-odd members, substantial land, buildings and other assets, and it had no doubt stood as an entity in every sense except the legal for many years. But the legal description “unincorporated association” applies equally to any collection of individuals linked by agreement into a group. Some may be solid and permanent; others may be fleeting, and/or without assets. A village football team, with no constitution and a casual fluctuating

membership, meeting on a Saturday morning on a rented pitch, is an unincorporated association, but so are a number of learned societies with large fixed assets and detailed constitutional structures. So too is a fishing association and a trade union. And a partnership, of which there are hundreds of thousands, some very large indeed, is a particular type of unincorporated association, where the object of the association is the carrying on of business with a view to profit.

12. At common law, an unincorporated association is to be distinguished from a corporation, which has a legal personality separate from those who have formed it, or who manage it or belong to it. The most numerous species of corporation is the limited liability company, but there are of course other types, such as chartered professional associations, local government bodies and indeed bishops. At common law, as the judge succinctly held, an unincorporated association has no legal identity separate from its members. It is simply a group of individuals linked together by contract. By contrast, the corporation, of whatever type, is a legal person separate from the natural persons connected with it.

13. This is an apparently simple legal dichotomy duly learned by every law student in his first year. But its simplicity is deceptive. It conceals a significantly more complicated factual and legal position.

14. As to fact, many unincorporated associations have in reality a substantial existence which is treated by all who deal with them as distinct from the mere sum of those who are for the time being members. Those who have business dealing with an unincorporated partnership of accountants, with hundreds of partners world-wide, do not generally regard themselves as contracting with each partner personally; they look to the partnership as if it were an entity. The same is true of those who have dealings with a learned society, or a trade union, or for that matter with a large established golf club. Frequently, as Lord Phillips of Worth Matravers C.J. pointed out in *R. v.*



W. Stevenson & Sons (a partnership and others) [2008] EWCA Crim. 273; [2008] 2 Cr. App. R. 14 (p.187) (at [23]) third parties will simply not know whether the organisation being dealt with is a company or some form of unincorporated association.

...

The judgment in that case related to the operation of the general rule that in any enactment passed after 1889 the word '*person*' includes '*a body of persons corporate or unincorporate*' unless the contrary intention appears: Section 5 and Sch. 1, Interpretation Act 1978."

34. In *The Law of Passing-Off* 5<sup>th</sup> Edition, Professor Christopher Wadlow observed at [3-193]:

"Whilst this analysis is helpful for all kinds of unincorporated associations, whether trading or not, it requires two caveats. First, it begs the question of whether a particular association is to be regarded as a trader at all, since if not, there can be no goodwill to own, and the question of who owns it does not arise. This question has to be answered for associations which are at the margins of trading activity as that is understood for passing-off (such as members' clubs, charities, churches and political parties), and for associations which are the channel or outlet for the trading activities of their members. In some such cases it will be obvious whether the relevant goodwill is owned by the association (in the sense of the members owning it collectively according to the rules), or by each member individually."

35. In the present case, individuals in Brixton, who included Ms Griffiths, Mr Martin and Mr Clark, came together in 2006 in the pursuit of the shared interest and objective of holding a community event in Brixton in August 2006. There was no constitution and a fluctuating, casual membership of local people who had a shared enthusiasm for creating a positive image for Brixton. It can be seen from the above that unincorporated associations are collectively capable of owing goodwill. The collection of individuals was akin to a charity. Charities can generate and own

goodwill, as can state schools which do not trade in the usual sense of the word<sup>4</sup>. In *The Law of Passing-Off*, Professor Wadlow writes [3-52] (footnote omitted):

“In contrast to trade and professional associations, charities do not necessarily or typically provide their members, subscribers or supporters with tangible benefits so as to be said to enjoy any goodwill in the provision of services to their members for value. However, charities and other non-profit or non-trading organisations such as churches, political parties and interest groups, do depend on the financial contributions of their members and the general public. To that extent, they may be said to have something corresponding sufficiently closely to the goodwill of trading organisations in so far as they are able to attract money (or money’s worth) which would otherwise have been kept, spent or bestowed elsewhere. It is settled law that even a non-trading charity may maintain a passing-off action against another similar charity and a fortiori any such charity would expect to be protected against exploitation of its reputation by a non-charitable commercial organisation, or an outright fraudster. Although the claimant in the *Diabetic Association* case was principally a self-help charity (analogous in some ways to a members’ club or even a motoring organisation), the implications of the decision extend to every kind of charity, regardless of the extent to which selflessness is combined with self-interest. What is true for charities may be applied with suitable caution to other non-trading organisations dependant on public financial support.

It is common for charities to raise money by trading as well as by seeking donations. The activities for which a charity exists may also involve carrying on a trade or business even though it makes no profit on them. Most universities and public schools, for instance, are run by charities and a charity might charge the public for admission to an historic building it was responsible for preserving. There is no doubt that in its capacity as a trading concern a charity, whether incorporated or not, has as much locus standi in a passing-off action as any other business.”

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<sup>4</sup> *Cranford Community College v Cranford College Limited* [2014] EWHC 2999 (IPEC) at [11].

36. The association organising the Brixton Splash event would have been treated by all who dealt with it as an entity, rather than dealing with individual members acting for themselves (membership being casual and fluid). Taking into account the facts of the present case, together with the authorities, I find that the association which organised the event known as Brixton Splash was capable of holding goodwill.

37. At this point, I will consider whether Ms Griffiths is also the owner of goodwill attached to the event, since she claims in her counterstatement that she owns the trade mark and was responsible for the event's inception and organisation in 2006, a year prior to the application for the contested mark. She has provided no documentary evidence to back the claims made in her counterstatement. She has provided no responsive documentary evidence following the filing of the applicant's evidence. In particular, she has not responded to the applicant's filing of the open letter from Lambeth Council in which three individuals, of which she was but one, were credited with the creation of the Brixton Splash event. Although hearsay, the letter carries evidential weight because i) it corroborates Ms Griffiths assertion that she pioneered the event and ii) it has not been solicited for these proceedings, being a contemporaneous document<sup>5</sup>.

38. Ms Griffiths appears to consider that the letter sent to her by the applicant, attached to her counterstatement, means that the applicant admits she owns the trade mark. That is an erroneous understanding of what is plainly a cease and desist letter. The letter acknowledges the fact that she registered the trade mark in a personal capacity, but it clearly disputes her entitlement to have done so, referring to the applicant's prospective intention to launch proceedings based on bad faith and passing off. As observed by Mr Hobbs, sitting as the Appointed Person, in *Deakins*, BL O/421/14, at [3]:

“(i) the 1994 Act establishes a system in which title to a protected trade mark arises solely by virtue of an entry in the register identifying the natural or legal person(s) to whom the original certificate of registration is issued on

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<sup>5</sup> Tribunal Practice Notice 5/2009.

completion of a procedure initiated by a simple request for registration filed in the required manner;

(ii) there is no legal or administrative requirement under the Act for a person requesting registration to make an a priori claim to proprietorship of the trade mark he is putting forward for protection, since the present system factors nothing more than the concept of acquiring 'title by registration' into the application stage and leaves it to those who would wish to contend that title has not been validly acquired to object on grounds available for that purpose under the Act;

(iii) ...”

39. The letter acknowledged that Ms Griffiths had acquired a trade mark registration, as per point (i), but denied her right to it, as per point (ii).

40. Ms Griffiths states in her counterstatement that she began Brixton Splash in 2006. She states that she “grew the event from 2000 people in Year 1 into a 15000-people event in Year 5”. She left the applicant in 2011. I infer from this that years 1 to 5 were 2006, 2007, 2008, 2009 and 2010 (which is corroborated by Exhibit BSE7, which refers to the event lasting 10 years before being cancelled in 2016). This means that, prior to incorporation of the applicant in 2009, the unincorporated association was responsible for the event in 2006, 2007, 2008 and in 2009, depending on the date of incorporation in that year. I note that Ms Griffiths calls the event “Brixton Splash”. She states that she incorporated “Brixton Splash” into a limited company 07071661 in 2009 (the applicant). “Brixton Splash” is clearly the name used to refer to the unincorporated association. The Brixton Splash event was the *raison d’etre* for the association. The limited company was intended to be the corporate version of the association in order to continue with the organisation of the annual Brixton Splash event. I find, to the extent that there was goodwill at 9 August 2007, there followed a seamless transition, as a continuum of goodwill from the association to the applicant when it was incorporated. Ms Griffiths was part of the unincorporated association, but this does not mean that she personally owned a protectable goodwill attached to Brixton Splash at that date. Firstly, she has

provided no evidence beyond assertion to substantiate her claims. She states that “records will show and confirm that, in the early years, Ros Griffiths was the licence holder and the Chief Organiser for the Brixton Splash events” and “Lambeth Council would be able to access records of all Brixton Splash meetings and reports”, but has not provided any copies of such records to enable me to assess her version of events. It is the responsibility of parties before the Tribunal, whether professionally represented or not, to provide the evidence upon which they wish to rely.

41. Secondly, Ms Griffiths was part of the unincorporated association. Her position is analogous to that of a member of a music group: the goodwill and rights in the name are owned by the band, as a partnership, not the individual members. In *Burdon v Steel*, BL O/369/13, (The Animals), a case in which one of the ex-members of a band applied to register the band’s name as a trade mark without having any better claim to the name than another ex-band member, Mr Hobbs (sitting as the Appointed Person) found that:

“33. It was, as I have said, open to the opponent as one of ‘the last men standing’ to invoke the law of passing off for the protection of the goodwill and reputation to which they were collectively entitled. The fact that the applicant was also one of ‘the last men standing’ did not enable him to lay claim individually to the whole of the benefit of their goodwill and reputation by registering THE ANIMALS as his trade mark for live and recorded performances. The evidence on file does not show that he was free by virtue of devolution or dissipation or on the basis of any relevant authorisation or consent to apply for registration of the trade mark in this own name.”

42. As Mr Hobbs observed in *Club Sail*, it is only when the membership of an association/partnership/alliance falls below two, that the last man standing becomes entitled to the, hitherto, collectively owned goodwill:

“27. I consider that the starting point for the purposes of analysis in the present case is the general proposition that the goodwill accrued and accruing

to the members of an alliance such as I have described is collectively owned by the members for the time being, subject to the terms of any contractual arrangements between them: *Artistic Upholstery Ltd v. Art Forma (Furniture) Ltd* [2000] FSR 311 at paragraphs 31 to 40 (Mr. Lawrence Collins Q.C. sitting as a Deputy High Court Judge). When members cease to be members of an ongoing alliance they cease to have any interest in the collectively owned goodwill, again subject to the terms of any contractual arrangements between them; see, for example, *Byford v. Oliver (SAXON Trade Mark)* [2003] EWHC 295 (Ch); [2003] FSR 39 (Laddie J.); *Mary Wilson Enterprises Inc's Trade Mark Application (THE SUPREMES Trade Mark)* BL O-478-02 (20 November 2002); [2003] EMLR 14 (Appointed Person); *Dawnay Day & Co Ltd v. Cantor Fitzgerald International* [2000] RPC 669 (CA); and note also the observations of Lord Nicholls of Birkenhead in *Scandecor Development AB v. Scandecor Marketing AB* [2001] UKHL 21; [2002] FSR 7 (HL) at paragraphs [42] to [44]. This allows the collectively owned goodwill to devolve by succession upon continuing members of the alliance down to the point at which the membership falls below two, when 'the last man standing' becomes solely entitled to it in default of any other entitlement in remainder: see, for example, *VIPER Trade Mark* (BL O-130-09; 13 May 2009) (Appointed Person, Professor Ruth Annand)."

43. On 9 August 2007, Ms Griffith's was not "the last man standing". I find that the applicant owns the goodwill originally generated by its previous incarnation, the unincorporated Brixton Splash association, and not Ms Griffiths. This is consistent with the evidence that the association and later the company continued to organise the event, with no suggestion of a trade mark licence or consent from Ms Griffiths. The applicant is entitled, therefore, to bring the section 5(4)(a) claim and Ms Griffiths cannot claim to be a senior user. The relevant date for assessment of the passing off claim is the date on which the contested trade mark application was made, 9 August 2007.

Was there sufficient goodwill at the relevant date?

44. Whilst the law does not protect a trivial goodwill<sup>6</sup>, it protects a small goodwill. In *Lumos Skincare Ltd v Sweet Squared Ltd, Famous Names LLC, Sweet Squared (UK) LLP*<sup>7</sup>, the Court of Appeal upheld a claim for passing off based on the claimant's use of the mark LUMOS for around three years prior to the defendant's use of the same mark, both in relation to anti-ageing products. The claimant's products sold for between £40 and £100 each. Between early 2008 and September 2009, the claimant had achieved a turnover of around £2k for quarter. From the latter date up until the relevant date in October 2010, the claimant's turnover increased to around £10k per quarter. The business remained a very small business with a modest number of sales. Nevertheless, the court was prepared to protect the goodwill in that business under the law of passing off.

45. The applicant has not given any indication of the size of the event in its first year; i.e. the number of people who attended and the number of stall-holders and entertainers. Ms Griffiths, in her counterstatement, states that she grew the event from 2000 people in 2006 to 15000 in year 5 (2010). The applicant has not disputed these figures. It is reasonable to infer from this that the 13 August 2006 event was attended by about 2000 people, but that the numbers increased year-on-year.

46. It is also reasonable to infer from Ms Griffiths' statement that, at the relevant date of 9 August 2007, if a second event had not already occurred that month, it was imminent and would have been planned and publicised. In *Google Inc v Nianti Limited* ("BLINK"), BL O/606/18, Professor Phillip Johnson, sitting as the Appointed Person, considered whether open source software projects can generate goodwill, in the sense that there is an attractive force which draws software developers to contribute to the project. He said:

"In *British Diabetic Association v The Diabetic Society* [1996] FSR 1 at 10-11 Walker J explained how charities compete in the marketplace for donations and legacies:

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<sup>6</sup> *Hart v Relentless Records* [2002] EWHC 1984 (Ch)

<sup>7</sup> [2013] EWCA Civ 590



I conclude, therefore, that the scope of a passing off action is wide enough to include deception of the public by one fund-raising charity in a way that tends to appropriate and so damage another fund-raising charity's goodwill—that is, the other charity's “attractive force” (see Lord Macnaghten in *Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd* [1901] AC. 217, 223) in obtaining financial support from the public. That conclusion raises a number of questions which may have to be explored at some future time (though litigation of this sort will, I sincerely hope, be extremely rare). I will make some tentative comments on points which were raised, but not fully examined, in counsel's submissions.

The wider the scope of passing off, the freer has to be the interpretation of some of Lord Diplock's requirements, especially the reference to “prospective customers of [a trader] or ultimate consumers of goods or services supplied by him” . It is obvious that in the case of many charities, their benefactors are likely to be a class of the public quite different from that of their beneficiaries. In the case of—for instance—the NSPCC or the RNLI the “prospective customers . . . or ultimate consumers” of the charity's services will, with rare exceptions, be different from those whose generosity funds the services.

By contrast the Association (like the average church congregation) seems to be a charity which for its financial needs depends to a high degree on self-help: the evidence suggests that diabetics and their families and friends are a major source (though not, of course, the only source) of subscriptions, legacies, in memoriam gifts (in lieu of flowers) and fund-raising activities. That reinforces my conclusion that (whatever may be the position with charities of a different character) passing off can provide a remedy in a situation such as the present, if misrepresentation is established. The Association's self-help character may also be material to the assessment of the evidence as to reputation and likely deception....

20. As a charity needs to protect its goodwill to maximise its support (financial and otherwise), an open source project must do likewise to keep software developers giving up their time without any direct payment. And like charities, the class of developers who give up their time to code in an open source project will be different from the class of prospective end users (i.e. the beneficiaries of the free labour).”

47. In the present case, the obvious end-users or beneficiaries of the event were those who attended it, who benefited from individuals having contributed their time as stall-holders, entertainers and organisers. The online forum is full of comments from local traders and others who offered their time to make the event a success. Some of these doubtless also benefited from contributing to the event as they would have generated their own custom as a result (stall-holders). Individuals were drawn to give their time to the project, just as the software developers did in *BLINK*, because it had an attractive force. Their contributions would have been part of the run-up to the first 2006 event and also the second event in 2007. In my view, this activity created goodwill in the business (i.e. the Brixton Splash event) attached to the unincorporated association, before the second event actually took place; in particular, because the first event had already taken place. The planning for the 2007 event was not a start-up from scratch, but built upon the legacy of the 2006 event. This fact, together with the attendance figures, was enough to have generated a small, but protectable, goodwill at the relevant date. Although the event was situated in Brixton, this is a heavily populated area and the event’s reach would have extended beyond the immediate vicinity. Localised goodwill drew comment from Miss Recorder Amanda Michaels, in *Student Union Lettings Limited v Essex Student Lets Limited* [2018] EWHC 419 (IPEC) at [50]:

“The impact of regional or localised goodwill is discussed at paragraphs 3-107 to 3-110 of Wadlow’s “The Law of Passing Off,” 5<sup>th</sup> ed. As the learned author points out, some businesses are so “inherently localised” that the geographical extent of their goodwill can be defined with reasonable precision and will be protected only to that limited extent. That was the case for the pizza restaurant business in *Caspian Pizza*, for dental surgeries in *Harding v*

*Smilecare* [2002] FSR 37 and a gym in *Boxing Brands v Sports Direct* [2013] EWHC 2200, [2013] ETMR 48. However, those cases are more likely to be the exception than the rule and Professor Wadlow concludes that "the courts have been reluctant to confine the claimant's remedy to a limited geographical area in all but the clearest cases, and a fairly thin spread of goodwill outside the claimant's main centre of operations is likely to suffice."

48. The Brixton Splash event falls somewhere between the examples of a pizza restaurant, a dental surgery and a gym, and businesses which have a greater geographical reach. Whilst I recognise that goodwill would have spread ever thinner from the event's epicentre, the fact that the event was situated only in Brixton does not detract from my finding that the applicant has established a protectable goodwill at the relevant date in the sign BRIXTON SPLASH for a community event which appears to have had the combined character of a festival, a street party and a local fete. The applicant has not provided any evidence to substantiate its claim to the stylised version (which is the same as the contested trade mark). Mr Clark mentions the design involving splashes, but does not show what the design looked like. It would be speculation on my part to say that the design was the same as the contested registration and, in any event, there is no evidence of it in use.

### Misrepresentation

49. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated that:

"There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is

"is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents' [product]".

50. The contested mark is visually, aurally and conceptually similar to the words BRIXTON SPLASH. The overall impression of the contested mark is dominated by BRIXTON SPLASH, which is the sign relied upon. Goodwill attached to the sign BRIXTON SPLASH has been established for a community festival which included live entertainment, food, cultural activities and stall-holders. Live entertainment and cultural activities are terms in the specification of the registration. The remainder of the services in the class 41 specification are all identical or similar to the services provided by the business to which goodwill is attached, with the possible exception of sporting events, education, provision of training and online information relating thereto. There is no doubt in my mind that the applicant's actual and potential customers (of all types) will be confused by the contested registration, believing the same and similar services to have been organised by and the responsibility of the applicant. I also consider that this extends to education, provision of training and online information relating thereto. There is an overlap between e.g. cultural events and education, (which encompasses training). The online forum which discussed the first event in 2006 referred to activities for children. Events such as the Brixton Splash, being a social, community event or festival of loose composition, commonly include, for example, children's hands-on education and sporting competitions.

51. The opponent's evidence shows that one of the primary ways in which it organised the first event in 2006 was through online chat forums. Ms Griffiths applied for the trade mark to cover not only the services in class 41, but also for telecommunications, Internet portal services, providing access to MP3 web sites on the Internet, providing access to digital music web sites on the Internet, providing Internet chatrooms, in class 38. I consider that there will also be confusion in relation to these services for such a similar mark to the words BRIXTON SPLASH. Ms Griffiths' registration is a national trade mark. If, as would seem to be the situation from both parties' evidence, she used the mark in relation to these services in Brixton, it is inevitable that there would be a misrepresentation that her services were those of the applicant.

52. Considering the high level of similarity between the sign and the contested mark, I find that, at the relevant date, misrepresentation would occur in relation to all the services of the contested mark.

## Damage

53. In *Harrods Limited V Harrodian School Limited* [1996] RPC 697, Millett L.J. described the requirements for damage in passing off cases like this:

“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. But this is not the only kind of damage which may be caused to the plaintiff's goodwill by the deception of the public. Where the parties are not in competition with each other, the plaintiff's reputation and goodwill may be damaged without any corresponding gain to the defendant. In the *Lego* case, for example, a customer who was dissatisfied with the defendant's plastic irrigation equipment might be dissuaded from buying one of the plaintiff's plastic toy construction kits for his children if he believed that it was made by the defendant. The danger in such a case is that the plaintiff loses control over his own reputation.

54. In *Ewing v Buttercup Margarine Company, Limited*, [1917] 2 Ch. 1 (COA), Warrington L.J. stated that:

“To induce the belief that my business is a branch of another man's business may do that other man damage in various ways. The quality of goods I sell, the kind of business I do, the credit or otherwise which I enjoy are all things which may injure the other man who is assumed wrongly to be associated with me.”

55. I find that damage, in particular, loss of permission from the Council for the applicant to hold the event, and loss of control over reputation and/or injurious association, is inevitable. **The section 5(4)(a) (passing off) ground succeeds.**

## **Section 3(6) of the Act (“bad faith”)**

56. Section 47 of the act states:

“(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).”

57. 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.”

58. In *Red Bull GmbH v Sun Mark Ltd & Anr* [2012] EWHC 1929 and [2012] EWHC 2046 (Ch) (“Sun Mark”) Arnold J. summarised the general principles underpinning section 3(6) as follows:

“Bad faith: general principles

130 A number of general principles concerning bad faith for the purposes of section 3(6) of the 1994 Act/ Article 3(2)(d) of the Directive/ Article 52(1)(b) of the Regulation are now fairly well established. (For a helpful discussion of many of these points, see N.M. Dawson, “Bad faith in European trade mark law” [2011] IPQ 229.)

131 First, the relevant date for assessing whether an application to register a trade mark was made in bad faith is the application date: see *Case C-529/07 Chocoladenfabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* [2009] ECR I-4893 at [35].

132 Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd*

[2009] EHC 3032 (Ch), [2009] RPC 9 at [167] and cf. Case C-259/02 *La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 at [31] and Case C-192/03 *Alcon Inc v OHIM* [2004] ECR I-8993 at [41].

133 Thirdly, a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. The standard of proof is on the balance of probabilities but cogent evidence is required due to the seriousness of the allegation. It is not enough to prove facts which are also consistent with good faith: see *BRUTT Trade Marks* [2007] RPC 19 at [29], *von Rossum v Heinrich Mack Nachf. GmbH & Co KG* (Case R 336/207–2, OHIM Second Board of Appeal, 13 November 2007) at [22] and *Funke Kunststoffe GmbH v Astral Property Pty Ltd* (Case R 1621/2006-4, OHIM Fourth Board of Appeal, 21 December 2009) at [22].

134 Fourthly, bad faith includes not only dishonesty, but also “some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined”: see *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 at 379 and *DAAWAT Trade Mark* (Case C000659037/1, OHIM Cancellation Division, 28 June 2004 ) at [8].

135 Fifthly, section 3(6) of the 1994 Act, Article 3(2)(d) of the Directive and Article 52(1)(b) of the Regulation are intended to prevent abuse of the trade mark system: see *Melly's Trade Mark Application* [2008] RPC 20 at [51] and *CHOOSI Trade Mark* (Case R 633/2007-2, OHIM Second Board of Appeal, 29 February 2008) at [21]. As the case law makes clear, there are two main classes of abuse. The first concerns abuse vis-à-vis the relevant office, for example where the applicant knowingly supplies untrue or misleading information in support of his application; and the second concerns abuse vis-à-vis third parties: see Cipriani at [185].



136 Sixthly, in order to determine whether the applicant acted in bad faith, the tribunal must make an overall assessment, taking into account all the factors relevant to the particular case: see *Lindt v Hauswirth* at [37].

137 Seventhly, the tribunal must first ascertain what the defendant knew about the matters in question and then decide whether, in the light of that knowledge, the defendant's conduct is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people. The applicant's own standards of honesty (or acceptable commercial behaviour) are irrelevant to the enquiry: see *AJIT WEEKLY Trade Mark* [2006] RPC 25 at [35]-[41], *GERSON Trade Mark* (Case R 916/2004-1, OHIM First Board of Appeal, 4 June 2009) at [53] and *Campbell v Hughes* [2011] RPC 21 at [36].

138 Eighthly, consideration must be given to the applicant's intention. As the CJEU stated in *Lindt v Hauswirth*:

“41. ... in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration.

42. It must be observed in that regard that, as the Advocate General states in point 58 of her Opinion, the applicant's intention at the relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case.

43. Accordingly, the intention to prevent a third party from marketing a product may, in certain circumstances, be an element of bad faith on the part of the applicant.

44. That is in particular the case when it becomes apparent, subsequently, that the applicant applied for registration of a sign as a Community trade mark without intending to use it, his sole objective being to prevent a third party from entering the market.

45. In such a case, the mark does not fulfil its essential function, namely that of ensuring that the consumer or end-user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those of different origin, without any confusion (see, inter alia, Joined Cases C-456/01 P and C-457/01 P Henkel v OHIM [2004] ECR I-5089, paragraph 48).”

59. Section 3(6) of the Act is an absolute, self-standing ground<sup>8</sup>, independent of the existence of the section 5(4) ground. The relevant date is 9 August 2007. I must decide what Ms Griffiths knew at that date and then decide whether filing the application fell short of acceptable commercial behaviour.

60. The initial burden of presenting a *prima facie* case falls upon the applicant. The pleadings presented four alternative types of bad faith.

The Registrant was aware when making the application that the applicants were using the mark Brixton Splash from infamous to famous. The Registrant was not the proprietor of the mark and did not have the proprietors permission. Further, the Registrant had a relationship with the applicants. The filing of the application was part of a concerted practice and constituted an act of bad faith contrary to Sections 3(6) 47(1) and 48(1) of the Trade Marks Act 1994.

In the alternative, the Registrant was aware when making the application that the applicants were using the mark and the Registrant attempted to pre-empt the applicants from registering their mark in the United Kingdom, this constituting an act of bad faith contrary to Section 3(6) and 47(1) of the Trade Marks Act 1994.

In the alternative, the Registrant rushed to register the mark Brixton Splash from infamous to famous by improper and unfair means by taking unfair advantage of the peer relationship she enjoyed with the other organisers, granting her knowledge which allowed her to utilise inside information regarding the unregistered status of the mark, this is also constituting an act of bad faith contrary to Section 3(6) and 47(1) of the Trade Marks Act 1994.

In the alternative, the Registrant filed the application without any intention of making bona fide use of the mark Brixton Splash from infamous to famous, this is also constituting an act of bad faith contrary to Section 3(6) and 47(1) of TRA

61. The pleadings were sufficiently clear for Ms Griffiths to answer them, which she did in her defence and counterstatement with a series of statements to the effect that she, and only she, was responsible for pioneering and delivering the Brixton Splash event in 2006. The applicant directly answered her defence with evidence, which also supported its pleadings.

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<sup>8</sup> *Melly's Trade Mark Application* [2008] RPC 20.

62. Ms Griffiths chose not to file formal evidence in answer to the applicant's evidence. The only rebuttal of the applicant's evidence by Ms Griffiths was in the form of the few short paragraphs which I have reproduced in the evidence summary and which I have decided to treat as evidence. Apart from the copy of the cease and desist letter, Ms Griffiths has provided no documentary evidence.

63. Having seen the applicant's evidence, Ms Griffiths' reply consists of assertions and denials of the accuracy of the applicant's evidence. She states that the applicant's evidence contains a number of significant inaccuracies without saying what they are and why, beyond one: she states that the MET police were an important part of the committee. This, in fact, supports the applicant's case that the event was organised by the committee and not Ms Griffiths, personally. It is not enough simply to deny the accuracy of the evidence and expect me to reject the applicant's evidence on that basis. There is nothing inherently incredible or internally contradictory about the applicant's evidence. Ms Griffiths has provided no factual narrative explaining her version, or documents in support, despite asserting "records will show and confirm that, in the early years, Ros Griffiths was the licence holder and the Chief Organiser for the Brixton Splash events" and "Lambeth Council would be able to access records of all Brixton Splash meetings and reports". It is for Ms Griffiths to provide such documentation if she wishes it to be considered as evidence.

64. I find that the applicant has presented a *prima facie* case which has been inadequately rebutted. Ms Griffiths' statements do not prove themselves without provision of factual material which justifies those claims or, at the very least, a full narrative explaining her view of events in 2006 and 2007 and an explanation as to why she considers the applicant's evidence to be wrong.

65. Ms Griffiths has provided no evidence about her intentions at the time she made the application, which is a central issue (as per *Lindt*). At a high level, to prevent others using the mark without permission is the intention of every trade mark applicant. I am left to infer from the tone and content of Ms Griffiths' defence that she considered that she had the sole right to the mark because the whole thrust of

her defence and her second submission/evidence is that she “pioneered and delivered the event”, without reference to anyone else.

66. In BL O/094/11 *Ian Adam*, Mr Hobbs, sitting as the Appointed Person, said at [33]:

“The line which separates legitimate self-interest from bad faith can only be crossed if the applicant has sought to acquire rights of control over the use of the sign graphically represented in his application for registration in an improper manner or for an improper purpose.”

67. Trade Marks are a form of legal property. Registering the trade mark in her own name makes the trade mark registration solely the property of Ms Griffiths causing difficulties for the applicant to use it without her permission (as borne out by the rancour between the parties in recent years). However, Ms Griffiths, as shown in the applicant’s evidence, was not the only person involved in bringing the event to fruition in 2006. It is inherently unlikely that Ms Griffiths was solely responsible for the event. This is borne out by the open letter from Lambeth Council which gives credit to Pat Clark, Blacker Dread (Mr Martin) and Ms Griffiths for starting Brixton Splash. Ms Griffiths is one of the signatories to the letter. She has had the opportunity to dispute that Pat Clark and Mr Martin were also pioneers of the event and has not done so, in the face of this letter, to which she is a signatory. She has had the opportunity to explain why, in spite of their collective involvement, that she was, nevertheless, entitled to file trade mark application in her own name. I take into account her silence about all these matters and the paper-thin answers she has given to the applicant’s evidence.

68. There is nothing to show that the situation had changed a year later, at the relevant date. At no point does Ms Griffiths say that she registered the trade mark for the benefit of the association or to protect the name of event for the association. As a member of the association, it would have been normal business practice to have raised the issue before making the application. However, Ms Griffiths made the application unilaterally, without reference to the other members of the association and, furthermore, kept the fact to herself. She knew that she was a member of an

association which collectively was responsible for the event. She knew that making a trade mark application in her own name would make the registration her property and give her a 'negative' right. If it were otherwise, it would be expected that she would have told the other members about her plans for the trade mark application. She has not explained any of this. Taking into account all the circumstances of this case, in applying for the trade mark in her own name, Ms Griffiths' behaviour falls "short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined". This finding relates to the first and third paragraphs of the applicant's pleadings. It is unnecessary to make separate findings about the alternative pleadings of pre-emption and lack of intention to use. **The section 3(6) (bad faith) ground succeeds.**

### **Outcome**

69. The application for a declaration of invalidity on the grounds of bad faith (section 3(6)) and passing off (section 5(4)(a)) succeeds in full. Under section 47(6) of the Act, the registration is deemed never to have been made.

### **Costs**

70. As the applicant has been successful, it would, ordinarily, be entitled to an award of costs in its favour. As it represents itself, at the conclusion of the evidence rounds the tribunal invited it to indicate whether it intended to make a request for an award of costs and, if so, to complete a pro-forma indicating a breakdown of its actual costs. It was made clear that if the pro-forma was not completed "no costs, other than the official fees arising from the action and paid by the successful party...will be awarded". Since it did not respond to that invitation, I award only the official fee of £200 for form TM26(I).

71. I order Ros Griffiths to pay to Brixton Splash Limited the sum of £200 which, in the absence of an appeal, should be paid within fourteen days of the expiry of the appeal period.

**Dated this 29<sup>th</sup> day of November 2018**

A handwritten signature in black ink that reads "Judi Pike". The signature is written in a cursive, flowing style.

**Judi Pike  
For the Registrar,  
the Comptroller-General**