



Neutral Citation Number: [2021] EWHC 2546 (IPEC)

Claim No: IP-2020-000054

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
INTELLECTUAL PROPERTY ENTERPRISE COURT

Rolls Building
New Fetter Lane
London

Date: 22 September 2021

Before :

HER HONOUR JUDGE MELISSA CLARKE
sitting as a Judge of the High Court

B E T W E E N :

CLAIRE STONE

Claimant

- and -

ALEXANDRA WENMAN

Defendant

Mr Ben Longstaff (instructed by Brandsmiths) for the Claimant
Mr Christopher Hall (instructed by Briffa) for the Defendant

Hearing dates: 19 and 20 July 2021

JUDGMENT

Her Honour Judge Melissa Clarke:

INTRODUCTION

1. This is a dispute between two spiritual and holistic therapists over use of the trade mark ‘ARCHANGEL ALCHEMY’ to sell metaphysical/spiritual education and coaching courses which aim to connect participants with archangels.
2. The Claimant is a spiritual author and holistic therapist who has been providing spiritual coaching and education services for over 20 years, both in person and online via her website. She is the author of a best-selling book “*The Female Archangels*”, published by Hay House Publishing.
3. The Defendant also is a spiritual author and holistic therapist. She is a past editor of, and writer for, ‘*Prediction Magazine*’ (2010 – 2013), which at that time was the longest-running UK magazine in the mind, body, and spirit field with a monthly print circulation of around 15,000, a popular and busy website and a substantial online presence. She has since 2011 also offered and supplied spiritual and holistic education, training and therapy services to the public, mainly in person but also online.
4. The Claimant is the registered proprietor of UK trade mark no. 3433634 for the word mark ARCHANGEL ALCHEMY, registered with effect from 3 October 2019 in respect of “*training course – for soul development – yogic sciences – quantum physics – altered states of awareness – relaxation – holistic health – celestial beings – natural living*” in Class 41 (the “**Trade Mark**”).
5. The Claimant’s case is that she began marketing an online ‘metaphysical education’ course under the brand ‘Archangel Alchemy’ in or around July 2019. This was a 12-month course delivering to participants 13 pre-recorded classes and 13 live online classes with supporting materials and online support (the “**Claimant’s Course**”). She says that the first such Claimant’s Course started on 23 September 2019 and ran until 21 September 2020.
6. It came to the Claimant’s attention that in February 2020 that the Defendant had, the previous autumn, began marketing and offering for sale an online course by reference to the sign ‘ARCHANGEL ALCHEMY’ (the “**Defendant’s Course**”) on the Defendant’s website and on her social media accounts.
7. The Claimant claims that such use infringes the Trade Mark pursuant to section 10(1) of the Trade Marks Act 1994 (the “**Act**”) as it is use in the course of trade, without the consent of the Claimant, of a sign (namely ‘ARCHANGEL ALCHEMY’) which is identical with the Trade Mark in relation to services which are identical to the services in relation to which the Trade Mark is registered. Alternatively, if the services are not identical but merely similar, the Claimant claims infringement pursuant to section 10(2) of the Act as she claims there exists a likelihood of confusion on the part of the public, including the likelihood of association.
8. The Defendant’s case is that she has offered spiritual and holistic education, training and therapy services under and/or by reference to the signs ‘The Archangel Alchemist’ and ‘Archangel Alchemy’ (the “**Defendant’s Signs**”) since around 2010,

such that she has accrued goodwill in each of the Defendant's Signs in relation to spiritual and holistic services. Because of that, she says, the relevant public and trade in the UK have come to rely on the Defendant's Signs when used in relation to spiritual and holistic services as indicating her, and/or her services.

9. The Defendant denies trade mark infringement on the grounds of:
 - i) invalidity of the Trade Mark pursuant to section 5(4) and 5(4A) of the Act;
 - ii) alternatively, that the Defendant's activities complained of amount to use in the course of trade in a particular locality of an earlier right which applies only in that locality, such that she has a defence under section 11(3) of the Act;
 - iii) alternatively, if the Defendant fails to prove any or enough goodwill in the Defendant's Signs sufficient to defeat the Claimant's claim for trade mark infringement, the Defendant says that is because:
 - a) the sign 'Archangel Alchemy' is an indication concerning the kind, quality, intended purpose or other characteristics of the Defendant's spiritual and holistic services, and her use of that sign is in accordance with honest commercial practice affording her a defence pursuant to section 11(2)(b) of the Act and/or invalidating the Trade Mark; and/or
 - b) the Defendant's use of the term 'Archangel Alchemy' is not trade mark use so there is neither an adverse effect on the origin function of the Trade Mark nor any actionable confusion as to trade origin.
10. The Defendant counterclaims for passing off and for a declaration of invalidity pursuant to: section 47(2)(b) of the Act; alternatively section 47(1) of the Act as being registered contrary to sections 3(1)(b) and (c) of the Act or alternatively contrary to sections 3(1)(b) and (d) of the Act.
11. I note here that the Defendant has abandoned her pleaded defence that the sign 'Archangel Alchemy' is customary in the current language or in the bona fide and established practices of the field of spiritual and holistic services invalidating the Trade Mark.
12. I further note that by the time of trial, the parties were agreed on the identity of their marks, services, markets and potential customers. The real dispute between them is whether the Defendant has sufficient goodwill in the Defendant's Signs and can show misrepresentation by use of the Trade Mark to defend on the basis of an earlier right under the law of passing off. If she can prove sufficient goodwill and misrepresentation then the Claimant offers no defence to damage, the Trade Mark will be invalid and the counterclaim in passing off will succeed.

THE ISSUES

13. The claim was issued on 22 May 2020. On 20 November 2020 His Honour Judge Hacon conducted a case management conference. He ordered a split trial of liability and quantum, made directions, and set out in the schedule to the CMC order a list of issues for determination at the liability trial as follows:

Validity of the Trade Mark

- i) On what date did the Claimant begin marketing or offering for sale the Claimant's Course;
- ii) Were the Defendant's services carried on under and/or by reference to the Defendant's Signs prior to that date sufficient to generate goodwill in the Defendant's Signs that subsisted as at that date;
- iii) Would the ordinary and fair use in the UK of the Trade Mark be liable to represent to the relevant public in the UK, contrary to the fact, that the user was or was commercially connected to, and/or that the use was carried on by or commercially connected to, the Defendant;

If goodwill and misrepresentation are established, damage and invalidity under s5(4)(a) of the Act are admitted.

- iv) Does the Trade Mark consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, intended purpose or other characteristics of the services for which it is registered, such that it was registered contrary to sections 3(1)(b) or (c) of the Act;
- v) [Issue 5 has fallen away with the abandonment of the defence that the sign 'Archangel Alchemy' is customary in the current language or in the bona fide and established practices of the field];

Defendant's counterclaim for passing off

- vi) Is the Claimant's Course liable to represent to the relevant public in the UK, contrary to the fact, that the Claimant is or is commercially connected to, and/or that the Claimant's Course is operated by or commercially connected to, the Defendant?

If goodwill and misrepresentation are established, damage and liability under the law of passing off are admitted

Infringement of the Trade Mark

The Defendant admits that, if the Trade Mark is valid, the Defendant has used a sign that is identical to the Trade Mark in relation to services identical with those for which the Trade Mark is registered. The only issues that remain to be determined are:

- vii) Does the Defendant's use of the sign 'Archangel Alchemy' give rise to a likelihood of confusion or have any other adverse effect on the origin function of the Trade Mark?
- viii) Do the Defendant's activities amount to use in the course of trade in a particular locality of an earlier right which applies only in that locality such that the Defendant is afforded a defence under section 11(3) of the Act?
- ix) Does the Defendant's use of the sign 'Archangel Alchemy' amount to use of an indication concerning the kind, quality, intended purpose or other characteristics

of the Defendants spiritual and holistic education, training and therapy services and is the Defendant's use of that sign in accordance with honest practices in industrial and commercial matters, such that the Defendant is afforded a defence under section 11(2)(b) of the Act?

14. I note here that prior to the issue of the claim, on 14 April 2020, the Defendant applied to the UKIPO to invalidate the Trade Mark pursuant to section 47(2)(b) and section 5(4)(a) of the Act (i.e. earlier unregistered rights said to be owned by the Defendant in respect of the Trade Mark) under Cancellation Action No. 503096 (“**the Cancellation**”). The parties have since agreed that the Cancellation will be withdrawn, and the invalidity attack run as part of these proceedings instead.

WITNESSES

15. The Claimant Ms Stone relies on her own evidence. She filed a witness statement dated 5 March 2021. She attended the trial remotely over video and was cross-examined and re-examined. I found her, generally speaking, to be a straightforward, forthright witness who I believe came to court to give honest evidence to the best of her ability. Mr Hall also accepted that she was an honest witness in his closing submissions. Ms Stone accepted that there were some mistakes in her witness statement in relation to dates, when they were put to her. She also accepted that the evidence that she had put forward as supporting her case that she had used the sign ‘Archangel Alchemist’ in August 2019 in fact did not show such use, as it referred to “Angel Alchemist”. Those were, she agreed, careless mistakes. I found her to be credible and, subject to those mistakes, generally reliable.
16. The Defendant Ms Wenman relies on her own evidence and was also given permission at the CMC for four further witnesses addressing only Issue (ii). She relies on the witness evidence of three of her customers (Ms Francesca Cairns, Ms Jane Alexander and Ms Lorraine Flaherty) and one colleague from Prediction Magazine who later became a customer (Ms Gemma Birss). Each have filed a witness statement. The Claimant only wished to question Ms Wenman and Lorraine Flaherty. Both attended the trial remotely over video and were cross-examined and in Ms Wenman's case, re-examined. I have read and take into account the undisputed evidence of the other witnesses of fact.
17. Ms Wenman made at least one expansive claim in her witness statement and oral evidence which was not supported by the documentary evidence before the court. She sought to explain the lack of evidence by saying that she was not good at updating her website, or that she was not good at filing, but it did not seem to me that administrative failures were the cause. In particular, she said that she had been working on her book called “*Archangel Alchemy*” consistently in 2018, 2019 and 2020, in particular after she sent her manuscript to potential publishers in 2019, and provided a screen shot of the folder on her computer to support that contention. However that showed, as she accepted in cross-examination, that the last modification of the folder as a whole had been in July 2019 and her manuscript had not been modified since 2018. She airily said that she had “*manuscripts here, there and everywhere*” but if she had better evidence of later work on her book, I think it is more likely than not that she would have disclosed it. I think that showed a lack of precision in her evidence rather than a lack of honesty, however. I do think she came to court to provide honest evidence, but I am careful to submit some of her

wider claims to scrutiny and seek corroboration from the documentary evidence, other witnesses or the inherent probabilities.

18. The Defendant's witness Ms Flaherty made a lot of bold, general statements about the Defendant's use of the brand "Archangel Alchemy", but when it was put to her that the evidence of the Defendant and the Defendant's own expert did not show very much use of that mark on her website she became defensive and argumentative. Mr Longstaff submits that she identified too closely with the Claimant, and I think that is right. She is a close friend of the Defendant and said others described them as "being joined at the hip". In my judgment she sought to advocate by arguing that where there was reference to Ms Wenman being an 'alchemist' on her website or in documents, the sign "Archangel Alchemy" was "*implied*". She said that it was present in one form or other in all of the documents that she was shown because "*everybody knows that she [Ms Wenman] works with angels*". Her evidence was clearly exaggerated, saying that her calling herself the Archangel Alchemist "*was in all her descriptions who she is and what she does, whether on her website, in the magazines, on her banner, a banner she took with her to events, in the description of events, in the talks and workshops she did*". This is overstating the position, as the evidence before me makes clear. However, it seemed to me that the exaggeration and advocacy was borne out of a genuine sense of aggrievement that Ms Stone had trespassed on Ms Wenman's brand. Her evidence that 'Archangel Alchemy' was an integral part of Ms Wenman's work since at least 2012, and that "*she would bring her Archangel Alchemy work and share it with both her one-to-one clients, with groups, with workshops that she did, it was mentioned in talks, so in my awareness, yes, absolutely it was present in everything*" was, in my judgment, her honestly held belief, honestly given and I give it appropriate weight.
19. The Defendant also obtained permission to rely on the evidence of an expert in web analytics in relation to issue 2. Her expert is Patrick Findlay and his report is dated 5 March 2021. It is of assistance as far as it goes, which is not very far. That is no criticism at all of Mr Findlay but rather is a comment on the limited web activity that he discovered. I will come back to his report later.

THE LAW

20. Section 5(4) of the Act provides that 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, where the condition in subsection (4A) is met.
21. The condition in subsection 5(4A) of the Act is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.
22. The principles of passing off are well known. 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. In this case if the Defendant satisfies the court of goodwill and misrepresentation, the Claimant accepts that damage results.

23. It is only if the Defendant does not succeed in satisfying the Court of goodwill or misrepresentation that I will go on to consider the other defences. I will set out the applicable law if it comes to that.

DETERMINATION OF ISSUES

Issues relevant to the validity of the Trade Mark

Issue (i) - On what date did the Claimant begin marketing or offering for sale the Claimant's Course?

24. Section 5(4)(a) of the Act provides that a trade mark shall not be registered if its use in the United Kingdom is liable to be prevented by the law of passing off. Mr Hall reminds me that the Supreme Court confirmed in *Starbucks (HK) Limited v British Sky Broadcasting Group PLC* [2015] 1 WLR 2628 at [16] that “*a claimant in a passing off action has to establish its claim as at the inception of the use complained of*” and so it follows that the relevant date to assess the state of the Defendant's goodwill is the date of the Claimant's first activity that would have given rise to an action for passing off, namely the first public marketing or offering for sale of the Claimant's Course.
25. In her written evidence, the Claimant says this was “*in around July 2019*”. However, the documentation that she relies on to support this assertion, namely a screenshot of a video she posted on YouTube of 27 August 2019 and her promotion of the course on her Facebook and Instagram accounts on 27 and 28 August 2019 respectively: (i) do not date back as far as July 2019; and (ii) do not promote the course by reference to ‘ARCHANGEL ALCHEMY’ but to the sign ‘Angel Alchemy’. She eventually accepted in cross-examination that her written evidence was wrong for these reasons.
26. It is not until 7 September 2019 that I can see the first use by her of ‘ARCHANGEL ALCHEMY’ in her promotional messages on each of her Facebook and Instagram pages, which state that the “*Archangel Alchemy online enrolment*” is “*officially open*” and directing the public to her website address for bookings. Accordingly, although I am not satisfied on the evidence before me that the Claimant was using the phrase “Archangel Academy” in the period up to 28 August 2019, I am satisfied on the balance of probabilities that by 7 September 2019 she was using it, and that was the name of the Claimant's Course for which she then began to solicit bookings.
27. The Claimant was clear and convincing in cross-examination, in my opinion, that she enrolled 300 people on that course and that it started on 23 September 2019 with a live online session, but that she had sent out pre-course materials a couple of weeks before that date, and those had used the sign ‘ARCHANGEL ALCHEMY’ as the course name. I accept her evidence on this point.
28. Accordingly I find that the first public marketing or offering for sale of the Claimant's Course under the name ‘ARCHANGEL ALCHEMY’ was on 7 September 2019 and continued after this time.

Issue (ii) - Were the Defendant's services carried on under and/or by reference to the Defendant's Signs prior to that date sufficient to generate goodwill in the Defendant's Signs that subsisted as at that date?

29. The Claimant does not dispute that the Defendant used the name "Archangel Alchemy" for her series of articles in Prediction Magazine, nor that she wrote over 30 of those articles from 2010 to 2013 (when the magazine then folded), nor (it follows) that the Defendant has used the Defendant's Signs since 2010. Her case is that:
- i) Such use was not trade mark use or use in the course of trade;
 - ii) Alternatively the Defendant's trade was not on a sufficient scale to generate goodwill;
 - iii) alternatively any goodwill that may have subsisted at some point had dissipated or been abandoned by the middle of 2019.
30. That raises the legal question of the level of goodwill required to sustain a claim in passing off.

Law

31. The Claimant draws my attention to Chapter 8 section B of Wadlow, *The Law of Passing Off* (5th Ed.) where Professor Christopher Wadlow writes at 8-9:
- "A mark can only become distinctive by user, though there is no rule of law as to what kind or amount of user is necessary or sufficient to found the action. What is in issue is whether there has been a material misrepresentation, which in turn depends on whether the mark has become distinctive to a sufficient proportion of the public. In general, the claimant's case will be strengthened by user which has lasted a long time and been on a large scale, although neither is essential. Cases in which the claimant has failed solely because of inadequate user have been rare in modern times."
32. Lord Neuberger at [47] of *Starbucks* confirmed that such goodwill must be "*actual goodwill in this jurisdiction, and... such goodwill involves the presence of clients or customers in the jurisdiction for the products or services in question*".
33. The Defendant relies on the authorities of *Stannard v Reay* [1967] FSR 140, *Lumos Skincare Ltd v Sweet Squared Ltd* [2013] EWCA Civ 590 and *Boxing Brands Ltd v Sports Direct International Plc* [2013] ETMR 48 to illustrate that even a small or modest level of trade is sufficient to attract the protection of a claim in passing off. The Claimant accepts that low-level use can suffice to create goodwill, but submits that there must be a level below which the use is so *de minimis* as to be unable to found a case in passing-off, per David Richards J in *Knight v Beyond Properties Pty Ltd* [2007] FSR 34 (the *MYTHBUSTERS* case), who held that:
- "A reputation on a relatively small scale will still attract the protection of a claim in passing off, but at some point the reputation may exist among such a small group of people that it will not do so. The minimum size of goodwill

required for this purpose is a matter of fact and degree. A claim in passing off cannot be sustained to protect goodwill which any reasonable person would consider to be trivial: *Sutherland v V2 Music Ltd* [2002] E.M.L.R. 28 at [22] per Laddie J.”

Evidence

34. The Defendant’s case is that her business is a small but profitable business which has evolved over the years under various signs, but that she has consistently and continually, since 2010, used the Defendant’s Signs as descriptors of herself and the services that she provides. It is her case that by 7 September 2019 she had established in the UK protectible goodwill in those signs arising from her business of providing holistic spiritual education and training.
35. Her evidence can be found in the Defence and Counterclaim, her witness statement, the supporting statements from customers and a colleague, and the evidence from her web analytics expert Patrick Findlay. In his skeleton argument, as Mr Longstaff has acknowledged, Mr Hall has helpfully listed the key activities which the Defendant says have given rise to goodwill in these signs. I do not consider it necessary to address every single category or piece of evidence in detail in this judgment but I have considered them all. A summary of the key evidence follows.

2010 – 2013: Regular “Archangel Alchemy” column in Prediction magazine

36. The Defendant’s evidence is that she wrote 33 monthly full-page columns for Prediction Magazine entitled “Archangel Alchemy” between September 2010 and June 2013 and contributed to a larger Christmas 2012 8-page spread. I have seen copies of these columns. It does not appear to be disputed that the UK circulation of the magazine during this time was around 10,000 to 15,000 and the online magazine had about 8,000 unique users.
37. The explanatory heading to each column says, “*Each month, Predictions’ angel expert Alexandra Wenman introduces you to an Archangel, showing you how to connect with these ancient beings of light*”, or similar wording as it may have changed over the years. The Defendant describes each column as setting out in writing the different processes for channelling or meeting different angels, which she says she created and wrote. She calls these her “Archangel Alchemy processes”, and in cross-examination said they remained the same from 2010 all the way up to 2019 when she was contacted by the Claimant. This evidence does not appear to be disputed.
38. On each column is a paragraph which directs readers to the Defendant’s website address at that time: “*For more info on Alexandra’s Angelic Reiki workshops visit angelic-intervention.co.uk*”. The Defendant accepted in cross-examination that there was no reference to ‘Archangel Alchemy’ in that paragraph. However her evidence is that the popularity of the “Archangel Alchemist” columns provided her with a platform from which to promote her private angel and healing work, and she began calling herself the Archangel Alchemist and providing courses under the sign ‘Archangel Alchemy’. She said, “*My Archangel Alchemy column in the magazine was a great way to advertise my private work and I had quite a few people book sessions and courses via the magazine*”. To support this she has disclosed an email

from a reader in February 2011 saying that she had seen her Archangel Alchemy column in the January 2011 edition of Prediction and asking to book a session or workshop with her.

2011 onwards: Teaching ‘Archangel Alchemy’

39. The Defendant says that her Archangel Alchemy processes were so popular that she included Archangel Alchemy in every workshop that she ran from 2011 onwards. In every workshop and sessions from then on, she said she would “*open the place energetically and then do Archangel Alchemy*”. She estimated that the Archangel Alchemy modules would take up about one to two hours a day in a two to three day workshop which she loosely estimated made up about 25% of the content. In cross-examination she said “*As part of my opening of the space, which I do for pretty much every session, I use Archangel Alchemy. It is my process that I use. It is also a distinctive term for that process because that process is very unique in my experience and in my knowledge to what other angel healers and angel teachers are doing*”.
40. The fact that she used Archangel Alchemy in almost every workshop and session is one of the wide claims which I have subjected to anxious scrutiny. However, it was supported by her other witnesses, including Ms Cairns (who had completed several workshops with her and said that they always included Archangel Alchemy channelling and attunement) and Ms Flaherty. I have already stated that I consider Ms Flaherty’s evidence on this point to be honestly given.
41. In my judgment there is also documentary evidence to support what the Defendant and her witnesses say on the point, which includes:
 - i) a Precious Wisdom workshop itinerary (which the Defendant says she taught from 2012 albeit the itinerary before the court dates from 2016), which references a section entitled “*Archangel Alchemy attunement: Angels and Masters of the ascension flames*” within level 1 of that course. The Defendant’s evidence is that this course was regularly delivered to customers from as early as 2012 through to 2019. Ms Cairns confirms she attended this course in 2019 and I have seen an email from July 2019 sent by the Defendant to six participants (including Ms Cairns) headed “*Precious Wisdom Level 1 this weekend*”. I have also seen repeated references to this course in the name of the files on her computer and in other of her witnesses’ evidence. On balance I accept her evidence that it was a course regularly delivered over that period;
 - ii) a reference to Archangel Alchemy in the itinerary for a retreat in Turkey in 2014, where it can be seen in that document that on Day 7 she led a session entitled “*Gateway to success – Archangel Alchemy into the future and trance trancing*”;
 - iii) a flyer giving the timetable for a session provided by the Defendant at the 2016 “*Healing Ibiza*” retreat in Ibiza. This was entitled “*Precious Wisdom and Archangel Alchemy with Alexandra Wenman*” and of the five timetabled sessions, four of them are titled with reference to ‘Archangel Alchemy’; and

- iv) a 2017 Precious Wisdom retreat in Ibiza where the itinerary disclosed by the Defendant shows a day-long module also called “*Archangel Alchemy into the future and trance dancing*”.
42. As I say, this is not a comprehensive list. The Defendant’s evidence is that the Turkey and Ibiza courses, and other courses abroad including in Greece and Egypt, were attended by UK-based customers. I accept that evidence.
43. The Defendant said that she gave workshops and one-to-one sessions including ‘Archangel Alchemy’ to around 1200 customers at two venues in London, ‘Precious Stones’ in Camden and ‘Stepping Stones’ in Old Street, between 2012 and 2017, and that several of these were repeat customers. She also describes many events with the London College of Spirituality in 2016, 2017 and 2019 and a number of other events in the UK and internationally, which are set out in her witness statement from paragraphs 103 to 108. She also worked with customers from home. I have seen Ms Wenman’s tax returns from 2015 to 2020 and these disclose income of between £28,000 and £40,000 per year. Her evidence is that such income comes from her spiritual and holistic business activities which were her full time activity at this time, of which ‘Archangel Alchemy’ courses and sessions are an integral part.

2012-2014: Meditation CDs and the Hale Clinic

44. During this period, the Defendant collaborated with a composer, John Levine, on a series of meditation CDs. I have seen evidence in the form of a flyer that she promoted herself in the following terms: “*Alexandra Wenman is a holistic therapist, Archangel Alchemist and founder of the cutting-edge new healing and empowerment system, Precious Wisdom™*” The flyer stated that she was available for Skype readings and private healing sessions and directed people to her websites at precious-wisdom.com and angelic-intervention.co.uk for more information.
45. The Defendant says she also delivered an Archangel Alchemy meditation to around 100 customers at the Hale Clinic in Regent’s Park in 2014, advertising herself as “The Archangel Alchemist”.

2013-2014: “The Archangel Alchemist” publicity and Mind/Body Soul/Spirit exhibitions

46. The Defendant’s evidence, which does not appear to be disputed, is that she exhibited at several significant Mind Body Spirit Festivals: in London in 2013 (which she says had a footfall of around 25,000 to 30,000 people); and in Manchester in 2013 and 2014 (footfall 27,000 and 25,000 respectively) and other smaller festivals in various locations around the UK.
47. I have seen evidence that she promoted herself under the Defendant’s Signs at this time, including at these shows. In particular, I have seen a February 2014 flyer in which she advertises “*Angelic communication coaching packages*” and “*Precious Wisdom empowerment packages*” under the heading “*The Archangel Alchemist Alexandra Wenman*”. Those set out prices: one hour at £111 (reduced from £155); 3 hours at £222 (usually £266); and 5 hours at £333 (usually £377). This provides me with an indication of the sort of fees that her activities were generating at that time. I have also seen the computer file showing that document was last edited on 27 February 2014. I have seen a photograph of several printed flyers in similar terms,

which she says were left over from one of those shows, and I accept that evidence. I have also seen a photograph of Ms Wenman at the Manchester 2014 show, standing at her show unit beside a very large advertising banner. The banner comprises her photograph and a prominent strapline below it saying “*Alexandra Wenman ‘The Archangel Alchemist’*”. She says that she ran three days of back-to-back ‘Archangel Alchemy’ workshops at this event. I have seen documentary evidence to support that she was speaking and holding Archangel Alchemy one-to-one sessions at those events, including a sign-up sheet for one of the days of the London 2013 event exhibited to Ms Cairns witness statement. She explains that she was assisting Ms Wenman at that event. The sign-up sheet shows that of those booked for sessions, about two-thirds were attending an ‘Archangel Alchemy’ session and the remainder were attending a ‘Precious Wisdom’ session (signified by ‘AA’ or ‘PW’ against each name).

Further activities in 2014: The “Archangel Alchemist” podcast

48. The Defendant says that she recorded regular shows on the ‘Everyday Connection’ podcast, which were also available on YouTube, under the name ‘Archangel Alchemist’. I have seen YouTube screenshots which show that the title of the podcast hosted on the ‘Everyday Connection’ channel is “The Archangel Alchemist” followed by the name of the angel that particular podcast relates to, and the front title of the image includes the words prominently placed: “*The Archangel Alchemist Alexandra Wenman introduces [name of angel]*”. Some of the podcasts on YouTube have only 400-600 downloads, but one has over 8000. The podcasts are also available from podbay.fm, owltail.com and blogtalk-radio.com under the heading “*Alexandra Wenman – Archangel Alchemist*”. Podbay.fm also hosts a biography of the Defendant which describes her prominently in the strapline in the same terms. The Defendant’s evidence is that these podcasts also caused customers in the UK to contact her and book training courses.

2014: The Archangel Alchemist book pitch to publishers

49. The Defendant says that she developed her ‘Archangel Alchemy’ processes and columns into a book entitled “*The Archangel Alchemist*” and submitted it to several publishers between February – June 2014, although she was not successful in gaining a publication contract. I have seen copies of those submissions and some responses. She relies on these as indicating that she was known by and carrying on an established business under that name but does not rely on those private communications as giving rise to goodwill in the Defendant’s Signs.

2016: New website

50. In 2016 the Defendant launched a new website at alexandrawenman.com. Mr Longstaff brought the Defendant to her biography on the 2016 archive of her new website, and she accepted that the Defendant’s Signs were not mentioned anywhere in her biography page on the website, unlike another mark which she used at this time and had been developing since 2012, ‘Precious Wisdom’. However, she said: “*It [Archangel Alchemy] is part of my work and also as part of Precious Wisdom level 1, it is included as one of the attunements that I do as part of the Archangel attunement, and for a time I was incorporating it into Precious Wisdom, because I have been developing it over the years and trying to figure out the best way of*

bringing it forward. So I have used it in numerous ways both as a distinctive brand, an element of the alchemy work that I do with Archangels, and trying to figure out exactly which part that fits under, but I think it fits under all of them. It is one of my titles, the Archangel Alchemist, who does Archangel Alchemy. I do that either as stand-alone or as part of sessions with clients and also as a module within all my courses. To me it sets me apart from what other Angel healers are doing, and that is why I incorporated it into these other courses.”

2016 – date: Offering pdf Archangel Alchemist mini e-courses on the Defendant’s website

51. In 2016 the Defendant turned her ‘Archangel Alchemy’ material into a series of PDF mini e-courses, each featuring a different Archangel, downloadable from her website for a price of £10. As Mr Findlay identified, she also provided some free ‘taster’ versions to customers. He identified that she sold 4 courses and gave two away for free, but she says that there were more downloads than that. She has provided evidence of the names and order details of customers from the website. She says that some seventeen customers of the mini e-courses, whether they paid a fee or had a free download, did go on to book training sessions with her and so the mini e-courses drove trade. The mini e-courses can be seen in the 2017 and 2018 archived versions of her website obtained by Mr Finlay from the Wayback machine, but not on the 2016 archived version. The Defendant says she believes they were on the new version of her website from shortly after launch in 2016 and I think she is more likely than not to be right. Her evidence is that the content of those mini E-courses is essentially identical to the Defendant’s Course which is the subject of this claim. They remained available for download from her website until early 2021.
52. The Claimant in her Part 18 Responses accepts that the Defendant’s mini e-courses amount to the supply of a service under or by reference to the sign ‘Archangel Alchemy’. In cross-examination she said that this activity by the Defendant would infringe the Trade Mark if they were being sold today, but accepted that Ms Wenman’s activity began a long time before she started using the sign ‘Archangel Alchemy’. I will come back to that.

2017-2018: YouTube videos

53. Ms Wenman uploaded a series of videos on the angels onto YouTube in 2017 and 2018. In the first one, which has had 2,250 views, she orally advertised her Archangel Alchemy courses. In cross-examination, Ms Wenman agreed that she did not use the mark “Archangel Alchemy” on her YouTube channel title, which was called “The Alexandra Wenman Show”. Mr Finlay’s analysis of that video shows that on average they were watched for less time than it would take to get to the part where she advertised the courses, so it is unclear how many viewers that advertisement reached.

2019: Archangel Alchemy online course first advertised on 24 September 2019

54. Ms Wenman says that she met with a branding consultant who was also a customer of hers in 2017 and they had meetings to produce and discuss her business plan in 2018 and 2019. She said that the consultant advised her to focus on a few key parts of her offering, including Archangel Alchemy, although it is clear from the plan itself that:

- i) The consultant advised her to rebrand herself as “Alexander Wenman Speaker Author Alchemist” and not “Archangel Alchemist”
- ii) She identified 5 areas for her commercial focus, being Spiritual Science, Emotional Alchemy, Archangel Alchemy, Work/Life Alchemy and Aspirational Alchemy.

55. The Defendant said as part of the renewed focus on Archangel Alchemy she upgraded her PDF mini e-courses into a video and/or interactive course on Archangel Alchemy in 2018, and this was the course which she began to advertise on 24 September 2019. Ms Stone accepted that Ms Wenman first advertised her online course on 24 September 2019, and I have seen a print out from Ms Wenman’s website evidencing that date.

Submissions and Determination

56. Mr Longstaff for the Defendant submits

- i) **In relation to the columns in Prediction magazine, any goodwill arising from the use of Archangel Alchemy would have accrued to the magazine proprietor and not Ms Wenman and the column is entirely distinct for the purposes of use of the mark in the course of trade.** This does not accord with Ms Wenman’s evidence that her columns were drivers to her personal business. If Prediction magazine had not been happy for Ms Wenman to grow her personal business on the back of the columns, then I think it is a safe assumption they would not have publicised her personal website on each column in the magazine. I have seen one email from a reader of the magazine asking to become a customer of Ms Wenman. Ms Wenman says there were others who sent emails to the magazine and became customers of hers, but she has had no access to those emails since the magazine folded. I accept it is likely that she did. I have also seen evidence that well after the magazine folded, Ms Wenman circulated copies of her columns as part of her marketing efforts, putting them on chairs at events, for example. I am satisfied on the balance of probabilities that the columns in Prediction magazine contributed to Ms Wenman’s reputation as The Archangel Alchemist who carried out Archangel Alchemy, and this was a springboard from which she grew her own business.
- ii) **To the extent that the articles are linked to her personal business, there is no reference to Archangel Alchemy and so the use of Archangel Alchemy is not use in the course of Ms Wenman’s trade.** I have dealt with this above. The fact that the few lines pointing to Ms Wenman’s personal website did not reference Archangel Alchemy is not significant, in my judgment, in circumstances where those lines were contained on a page prominently branded with ‘Archangel Alchemy by Alexandra Wenman’. Ms Cairns’ evidence is that she met Ms Wenman at a course, became interested in her work, completed some Angelic Reiki courses with her (which she says included Archangel Alchemy, as is Ms Wenman’s evidence), and only then discovered that Ms Wenman had a column in Prediction magazine. She says at that point she started buying copies of the magazine. The Defendant did not wish to question Ms Cairns and so this evidence is undisputed. In my judgment that is a clear example of Ms Wenman’s use of Archangel Alchemy in the course of her trade, which in fact drove her customer to also become a customer of the magazine.

- iii) **There is very little documentary support for Ms Wenman's claims about how she was offering her services and it is impossible to discern exactly what that amounted to in terms of trade mark use.** I have set out above a summary of some, but not all, of the documentary support, and support of other witnesses, for Ms Wenman's claims. Mr Longstaff submits that the question is how consumers perceived her activity in relation to the mark, and I agree. I have witness evidence from three customers, and one ex-colleague who was also a customer. Ms Cairns says *"I have participated on courses with Alexandra in which she taught Archangel Alchemy, and was familiar with Alexandra's Archangel Alchemy column in the mainstream publication Prediction magazine and considered her to be an Archangel Alchemist from our first meeting in 2011. I have always viewed the Alexandra as the Archangel Alchemist"*. Ms Birss worked with Ms Wenman as her deputy editor at Prediction magazine, but also attended several of her courses. She described her as *"a very popular teacher"* whose courses were *"always full"*. She said *"I have associated Alexandra with her column Archangel Alchemy for so long, I naturally relate those words to her. I do view Alex as the Archangel Alchemist delivering her Archangel Alchemy"*. Ms Alexander said, *"I do not know what others refer to Alexandra as specifically, but those introducing Alexandra and her work, and other professionals absolutely would refer to her as the Archangel Alchemy"*. Mr Longstaff in closing criticised this evidence as being subjective, but subjective evidence from a customer about Ms Wenman's use of the Defendant's Signs is valuable evidence of reputation, or *"that attractive force that brings in custom"*, namely goodwill.
- iv) **Ms Wenman seriously exaggerated the scope of her Archangel Alchemy work. There is a disparity between her professed use of the mark as a brand and what Mr Longstaff described as the "almost total absence on her website" of the Defendant's Signs and what is found in contemporaneous documents. In particular, he submits (a) that the creation of a new website at AlexandraWenman.com in 2016 did not bill her as the Archangel Alchemist; (b) the Claimant's web search of 'Archangel Alchemist' before she filed her application for the Trade Mark did not return any results relating to the Defendant; and (c) that Mr Findlay in his report was not able to show any meaningful web presence that supports the necessary goodwill.** This was a particular focus of Mr Longstaff's cross-examination of the Defendant. She accepted a number of facts in cross-examination: that her business Facebook page was under the title *"Alexandra Wenman's Precious Wisdom"*, without reference to the Defendant's Signs; that her published book of poetry called *'Poems of Published Wisdom'* contains the 'Precious Wisdom' brand but does not reference the Defendant's Signs; that although there is reference to her being an 'alchemist' on the archived version of her website from January 2019, there is no reference to the Defendant's Signs save in relation to the mini e-courses in the archived versions of her website produced by Mr Finlay from the Wayback machine from 2017 2018 and 2019. There are more examples which I will not repeat here.

The Defendant accepted in oral evidence that she was not very good at marketing herself online or updating her website. In fact, of course, she did produce an entirely new website in 2016. However I accept that the focus of her business development, despite her involvement of a branding consultant in 2019 and 2020, was not her website. It is clear from the evidence before me that the Defendant grew her

business from the start which it received from her columns in Prediction, by word of mouth recommendations, hard copy marketing flyers and appearance at events, shows and retreats.

It is less easy to understand how the Claimant could have searched for ‘Archangel Alchemy’ on Google in late 2019 and not found anyone using it or anything relating to the Defendant. It was put to her in cross-examination that this was perhaps because she searched the name “Angel Alchemy” which she had used as the name of her course in her early publicity, not “Archangel Alchemy”. She said that although she could not remember carrying out the search, nor could she give the exact date when she carried out the search, she was sure had searched for what she registered, namely “Archangel Alchemy”. She said *“I do know that I searched for Archangel Alchemy before I registered it or I would not have attempted it. I would not have wasted my time and money filling out forms on something that is going to get declined”*. I remind myself that the Claimant was also sure that she had used Archangel Alchemy from July 2019 when she had not, and signed pleadings and a witness statement to that effect. I think that is more likely than not to be the reason why she found nothing on her search.

In my judgment, however, the question is not whether Ms Wenman could have made more extensive and better use of the Defendant’s Signs on her website, or why she did not apply for a UK registration of ‘Archangel Alchemy’ as she did for ‘Precious Wisdom’, or whether she should have sought an ‘Archangel Alchemy’ domain name on which to host her website, or whether her branding consultant in 2020 could have focussed more on the ‘Archangel Alchemy’ brand. The question is whether, by 7 September 2019, Ms Wenman had used the Defendant’s Signs in the course of trade on a sufficient scale to generate actual goodwill in the jurisdiction which was more than trivial. This leads me onto the next submission, which overlaps with that relating to Mr Findlay’s report.

- v) **If and to the extent the Court considers that the signs are used as a brand indicator, the trade attributable to use of those signs, and so the goodwill which arises, is de minimis.** Although Mr Findlay only identified the sale of 4 of those Archangel Alchemy mini e-courses (and putting to one side the Defendant’s evidence that there were in fact more), even four sales is trade which gives rise to goodwill. However, I cannot look at the sale of the mini e-courses in isolation, as Mr Longstaff invites me to do. There is ample clear evidence, in my judgment, that the Defendant was very busy, despite her fairly uninformative website, carrying out events and one-to-one sessions, and large shows, and retreats, all of which was, or drove, paid-for trade amounting to between £28,000 and £40,000 per year. Her evidence, supported by documentary evidence and that of her witnesses and which I accept, was that much of that involved her Archangel Alchemy processes and techniques. In oral evidence she estimated that about 15% - 25% of her work related to Archangel Alchemy. Certainly at the 2013 London show over 60% of sessions on the Sunday related to Archangel Alchemy and I have seen that Archangel Alchemy did form significant parts of various retreats for which I have the itineraries, and was prominent on the flyers and other promotional materials advertising such events. It attracted invitations to collaborate with musicians and appear on third party podcasts. As Mr Hall submits, even if she is exaggerating and only 5% or 1% of that work is attributable to Archangel Alchemy (and I consider

it is more likely than not, on the evidence, that it is more than that), in my judgment that is more than trivial and has generated sufficient actual goodwill to be capable of damage by reason of a misrepresentation

vi) **The Defendant's brand is Alexandra Wenman, and the Defendant's Signs are not used by her as brands as an indicator of origin at all, but only as allusive labels for some of her modules or as a label for a technique or method. She uses many descriptors of herself and the techniques she uses, such as cosmic compass, light bringer, channel seer, angelic Reiki, theta healer. References to herself and her processes as 'The Archangel Alchemist' and 'Archangel Alchemy' must be viewed against this context of this use of figurative or poetic language common to much of the field in which the business operates. The Defendant's business is attributable to her own name, and goodwill arising from that business attaches to her own name and not to the Defendant's Signs.** I do not accept this submission, which is not supported on the evidence before me, for the following reasons:

- a) The Defendant was promoting herself and her events by reference to the Defendant's Signs, in flyers, in banners, in podcasts etc. There is ample evidence from witnesses that they consider Ms Wenman to be the Archangel Alchemist practicing Archangel Alchemy; it is clear in the evidence I summarised above that third parties introducing the Defendant do so by reference to "*Archangel Alchemy with Alexandra Wenman*" or "*Alexandra Wenman the Archangel Alchemist*". In my judgment this is trade mark use in the same way, and for the same purpose, and to the same pool of customers, as the Claimant's own use of the Trade Mark.
- b) The Claimant's own evidence at paragraph 36 of her witness statement was that she chose the brand 'Archangel Alchemy' because she wanted "*a name that would enable the course to stand out and be noticed by potential customers*". In cross-examination she said it was a name that would stand out and be noticed "*because it is different*".
- c) To the extent that Mr Longstaff's submission that the Defendant's Signs are merely "*an allusive label for a course primarily in Ms Wenman's own name in big letters at the top of the website*" is one that the use of two marks together (i.e. Alexandra Wenman and the Defendant's Signs) cannot give rise to goodwill in the subsidiary mark, I will address it. It should not need to be said that it is very common to have subsidiary brands to an overarching brand, or a 'house brand' as it was put by Roger Wyand QC sitting as a judge of the High Court at [35] of *Beauty Bay Limited and Dotcom Retail Limited v Benefit Cosmetics Limited* [2019] EWHC 1150, in order to differentiate one product or service offered by the 'house' brand from that of its other products or services. Subsidiary marks are very commonly used in conjunction with another mark and I have no doubt that the Defendant's customers can see both as brands, just as they can see both Alexandra Wenman and 'Precious Wisdom' as brands, when they are used together. The only difference is that 'Precious Wisdom' has been registered as a trade mark and the Defendant's Signs have not. The question is whether the Defendant's

Signs are being used as an indicator of origin when they are used in this way, and in my judgment, for the reasons I have given, they are.

- vii) **If some limited goodwill did attach to the Defendant's Signs in 2013-2014 which was the high point of the Defendant's activity (and the Claimant does not accept it did), then it was extinguished by 7 September 2019.** I do not consider that this submission is supported by the evidence and the findings I have made. The Claimant relies on the Defendant's book "languishing" since 2018, but the book was never taken up by publishers and so none of the goodwill I have identified can be attributed to the book. She relies on there being few sales of the 'Archangel Alchemy' mini e-courses, but there was a sale in October 2019, and I have seen evidence of a customer seeking to purchase one as late as 2021 even after the decision to remove them from the website had been taken. There is no evidence before me that the Defendant's other commercial activities provided under the Defendant's Signs had waned: indeed her income was rising each year from 2015 and the international retreats were continuing in 2016, 2017 and beyond. I accept Mr Hall's submission that the suggestion that the Defendant is no longer interested in the Defendant's Signs sits uncomfortably with the fact that she is defending this case in court. Her oral evidence is that the Defendant's Signs really matter to her, are integral to her business identity and she wishes to keep using them. I accept her evidence.

57. For all those reasons, I am satisfied that the Defendant's services were carried on under and/or by reference to the Defendant's Signs prior to 7 September 2019 were sufficient to generate goodwill in the Defendant's Signs as at that date.

Issue (iii) - Would the ordinary and fair use in the UK of the Trade Mark be liable to represent to the relevant public in the UK, contrary to the fact, that the user was or was commercially connected to, and/or that the use was carried on by or commercially connected to, the Defendant?

58. At paragraph 15 of the Particulars of Claim in support of her own case for trade mark infringement, the Claimant asserts that there will be confusion in the market because the services that both parties provide are identical being provided to "*the exact same market to the exact same customers*" and because the marks are identical. In cross-examination the Claimant clarified that when she referred to "*the exact same customers*" she was not saying that she and the Defendant had individual customers in common, but that they both had the same potential customer base.
59. The Defendant repeats those facts and matters in her plea in respect of misrepresentation at paragraph 24(b) of the Defence and Counterclaim.
60. The Claimant in her Defence to Counterclaim denies the allegations "*for the reasons set out at paragraphs 3-7 herein above*" which relate to goodwill and not misrepresentation.
61. Thus it appears, as was Mr Hall's assumption in his skeleton argument, that The Claimant does not defend the allegation of misrepresentation. However Mr Longstaff points out, correctly, that misrepresentation remains HHJ Hacon's list of issues for trial. He relies on the Claimant's oral evidence that, for the kinds of potential customers that both she and the Defendant were seeking, the identity,

personality and reputation of the person who is delivering the course is very important to submit that nobody familiar with the Defendant's services would be liable to think that the Claimant was the Defendant, or was delivering her services. However this submission is contrary to the Claimant's own evidence. She volunteered in her cross-examination, when discussing the common potential customer base shared with the Defendant, that because of the identity of both the marks and the services of both parties, any confusion would be likely to work in both directions: the Defendant's customers looking for her services or courses might find the Claimant's Course and get confused, and the Claimant's customers looking for her course might find the Defendant's Course and get confused. It seems to me inevitable in these circumstances that if someone who had been to one of the Defendant's Courses told another person she had been to an excellent Archangel Alchemy course without providing Ms Wenman's name, that person doing her own research might find the Claimant's course marketed under the Trade Mark and attend it, assuming that it must be, or be connected with, the Defendant's Course attended by the original attendee. This would amount to a misrepresentation.

62. For those reasons, I am satisfied that the answer to Issue (iii) is 'yes', and for the same reasons, the answer to Issue (vi) is also 'yes'.

Issue 4 - Does the Trade Mark consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, intended purpose or other characteristics of the services for which it is registered, such that it was registered contrary to sections 3(1)(b) or (c) of the Act?

63. This is an alternative defence which only has relevance if the Court accepts the Claimant's case that the Defendant had no goodwill in the Defendant's Signs. I have found that she does and so will not consider this further.

Conclusion in relation to validity of the Trade Mark and the Defendant's counterclaim in passing off

64. My determinations of Issues (i) – (iii) and (vi) together mean that goodwill and misrepresentation are established. In that case, the Claimant admits damage and invalidity under section 5(4A) of the Act and further admits liability under the law of passing off. For that reason I will not go on to consider the other issues identified at the CMC.
65. I will declare that the Trade Mark is invalid pursuant to section 47(2)(b) of the Act.
66. The Counterclaim in passing off succeeds.
67. It follows that the Claim for infringement of the Trade Mark fails and shall be dismissed.