

O-390-11

TRADE MARKS ACT 1994

IN THE MATTER OF INTERNATIONAL REGISTRATION NO 977380

OF THE TRADE MARK

HEAL YOUR LIFE

IN THE NAME OF

HAY HOUSE, INC

IN CLASS 41

AND

THE REQUEST FOR PROTECTION THEREOF

IN THE UNITED KINGDOM

AND

THE OPPOSITION THERETO

UNDER NO 977380

BY

GILLIAN ANN BOWLES

1) Hay House, Inc (Hay) is the holder of the international registration for the trade mark HEAL YOUR LIFE (the trade mark). It is registered for the following services:

educational seminars in the field of psychology, spirituality and self improvement.

The above services are in class 41 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended. The United Kingdom was designated to grant protection to the registration on 5 August 2008. Hay claims an international priority date, from the United States of America, of 5 March 2008.

2) The registration was published for opposition purposes on 27 February 2009. On 7 April 2009 Gillian Ann Bowles filed a notice of opposition to the granting of protection of the registration.

3) Ms Bowles claims that granting protection to the registration would be contrary to sections 3(1)(a), (b), (c) and (d), 3(6) and 5(4)(a) of the Trade Marks Act 1994 (the Act). Section 3(1) of the Act states:

“3. - (1) The following shall not be registered –

(a) signs which do not satisfy the requirements of section 1(1)

(b) trade marks which are devoid of any distinctive character,

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade:

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

Section 1(1) of the Act states:

“(1) In this Act a “trade mark” means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.

A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.”

Section 5(4)(a) of the Act states:

“4) 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”.

The principles of the law of passing-off were summarised by Lord Oliver in *Reckitt & Colman Products Ltd v. Borden Inc* [1990] RPC 341 at page 406:

“The law of passing off can be summarised in one short, general proposition: no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. ... Thirdly he must demonstrate that he suffers, or in a *quia timet* action that he is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.”

Section 3(6) of the Act states:

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

4) Ms Bowles claims that the trade mark is in widespread commercial use and is not capable of distinguishing goods or services of one undertaking from those of other undertakings. She claims that the trade mark is devoid of any distinctive character as it is a combination of common English words with no additional fanciful or imaginative elements and is in common parlance. Ms Bowles claims that the trade mark describes a characteristic of the services for which it is registered. She claims that the trade mark is essential to describe the workshops and products in the field of self-help/self-improvement and should be free for all to use. Ms Bowles claims that the self-help/self-improvement field “is necessarily to do with ‘healing’ and with ‘life’ and these terms are required to designate the characteristics of goods and services in this category”. Ms Bowles claims that the trade mark consists exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade. She claims that the trade mark is widely used. Ms Bowles claims that “[a] high number of enterprises and “Heal Your Life” teachers use the mark in their marketing or to name or describe their products within the self-help/self-improvement sectors”.

5) Ms Bowles claims that Hay has sought protection of the registration in the United Kingdom to gain control of the market and gain advantage over competitors and other legitimate enterprises in the sector. She claims that giving protection to the trade mark would give Hay a monopoly over a large segment of the self-help market. Ms Bowles believes that this behaviour represents an unfair practice, is an abuse of the United Kingdom trade mark system and is an act of bad faith.

6) Ms Bowles states that she was trained by Hay as a “You Can Heal Your Life” teacher in two teacher training courses in 1999 and 2001, shortly before Hay “abandoned this segment of the market altogether”. Ms Bowles states that she has been running “You Can Heal Your Life” and, from 2003, “Heal Your Life” workshops “ever since”. She states that Hay trained, certified and actively encouraged her and other trainees into business on the basis of that training. Ms Bowles states that on completion of the training she was under no contractual obligations to Hay. Ms Bowles claims that for Hay “[t]o then subsequently act against our interests by attempting to prevent our use of the mark we were expressly certified to use and expropriate the goodwill and reputation built up by myself and others in a sector the Applicant had abandoned is not ethical and falls well below the level of acceptable behaviour in commerce”. Ms Bowles states that on 19 February 2009 she received an e-mail sent by Heart Inspired Presentations LLC. She states that the e-mail claims that Hay has a worldwide trade mark for Heal Your Life and that teachers are not legally permitted to use the term without the permission of Hay, signing a licence and paying a licence fee of \$99 per annum. Ms Bowles states that the e-mail deliberately and falsely claimed registered trade marks and used the ® symbol to indicate registered trade marks that are not registered. Ms Bowles states that both actions are illegal in the United Kingdom and as such this behaviour falls below the level of

acceptable behaviour in commerce. Ms Bowles describes the contents of the e-mail as “dishonest” and “a form of commercial fraud”.

7) Ms Bowles claims that Hay has a clear duty to inform those it had trained as “You Can Heal Your Life” teachers about its intentions to apply for the trade mark Heal Your Life and how it might affect them. She claims that Hay was aware that the trade mark was and is in extensive use in the United Kingdom and she is a proprietor of earlier rights in relation to Heal Your Life in the United Kingdom. Ms Bowles believes that the application for protection of the trade mark in the United Kingdom is an attempt to expropriate the goodwill and reputation she has developed over the last 10 years “and as such is an anti-competitive and unfair practice and that this behaviour is not the intended purpose of a trademark and that therefore this Application has been made in “Bad Faith””.

8) Ms Bowles states that on 5 March 2008 Hay’s United States attorney signed an application form for trade mark no 77414014, from which the United Kingdom application derives. She states that the application contained the following declaration:

“to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive;”

Ms Bowles states that she is the largest provider of Heal Your Life courses in the United Kingdom and has been running these courses since 2003. She states that Hay should have been aware of her United Kingdom business and of the teachers that it had trained and certified as “You Can Heal Your Life” teachers prior to 2000. She states that it is also clear that Hay was aware that confusion might arise because its licensee had sent an e-mail to all the teachers informing them that they could no longer use the trade mark. Ms Bowles considers that Hay showed wilful blindness when signing the above declaration and failed to show the level of candour and honesty expected from a trade mark applicant and that this may represent a fraud on the United States Patent and Trade Mark Office.

9) Ms Bowles states that she has been using the trade mark in the United Kingdom to “differentiate my workshops from others in the field”. She states that she has established substantial goodwill and reputation in these workshops, attracting customers from all over the United Kingdom and abroad. Ms Bowles states that in 2004 she produced the *Heal Your Life – Chants and Meditations* CD to support her workshops, and those of other teachers in the field. She claims that granting protection to the trade mark would allow Hay to expropriate the goodwill and reputation she has established over the previous 6 years. Ms Bowles claims that it would allow Hay to pass-off their services as hers and

“allow them to infiltrate into and obtain a free ride on my long term marketing and product lines”. She claims that use of the trade mark would confuse the public which associates Heal Your Life workshops with her services through her marketing, web presence and advertising.

10) Hay filed a counterstatement. Hay denies the grounds under section 3(1) of the Act. Hay states that it will show that it coined the trade mark and that it has used it in a bona fide manner since Louise Hay, the founder of Hay, wrote the book *You Can Heal Your Life* in 1984. It states that since that time 40 million copies of the book have been sold worldwide. Hay denies each and every one of the claims made by Ms Bowles in relation to bad faith. It states that there is no bad faith or dishonesty in seeking to monopolise a name, term or trade mark that used been used in a bona fide manner by a party for many years. Hay denies that the grounds of opposition under section 5(4)(a) of the Act have any merit.

11) Hay states that it will show that the international registration was acquired in good faith and has been used by it, and/or its predecessor in title, for many years. It states that the trade mark has acquired a significant level of distinctiveness through the use it has made of it.

12) Hay states that the grounds of opposition have no foundation. It states that if they are pursued by Ms Bowles it will seek additional costs off the usual scale.

13) Both parties filed evidence. Neither party requested a hearing. Hay furnished written submissions.

Witness statement of Ms Bowles of 2 November 2009

14) The statement of Ms Bowles contains a mixture of evidence of fact and submissions. In this summary only the evidence of fact will be covered. However, the submission elements are borne in mind in coming to a decision.

15) Ms Bowles states that she is a Heal Your Life teacher and author. She states that she is the largest provider of Heal Your Life workshops in the United Kingdom and that she has been “operating in this field” since 1999. Ms Bowles states the Heal Your Life workshops that she runs are designed to teach individuals self-help techniques and ideas and “provide a safe space for them to practice”. She states that the techniques allow the participant to experience emotional healing and to “release the issues that may be sabotaging their life or causing ill health”. Ms Bowles states that the techniques and philosophies used were developed by many metaphysical teachers. She states that many of these techniques and philosophies are the same ones that Louise Hay adopted and popularised in her books.

16) Ms Bowles exhibits at GB-14 what she describes as a general background and time line. In this exhibit she writes that in 1984 Louise Hay wrote the best

seller *You Can Heal Your Life*. The book was about how Ms Hay cured herself of cancer by using techniques that she had learnt from various metaphysical and spiritual teachers. Ms Bowles writes that on the back of this success Hay House Inc was founded, which now acts for the business interests of Ms Hay. In 1986 Ms Hay developed a teacher training programme based on the philosophies in her book. Dr Crane and others ran teacher training courses on behalf of Hay House. In 1999 Ms Bowles was trained by Hay as a You Can Heal Your Life and a Love Yourself, Heal Your Life teacher. This training was organised by Dialogues (a company based in the United Kingdom) and the course was run in Ireland. Exhibited at GB-6.1 is a copy of the certificate that Ms Bowles received. The course ran from 31 October – 7 November 1999 in County Meath, Ireland. The certificate is signed by Patricia Crane, Norma Jarvis and Ms Hay. From 11 – 17 September 2000, Ms Bowles attended advanced Louise L Hay teacher training in San Diego, California. Exhibited at GB-6.2 is a copy of the certificate that she received for attending the training. It is signed by Ms Hay, Patricia Crane and Heather Williams. In exhibit GB-14 Ms Bowles writes that in 2000, after a “serious legal issue”, Hay “completely abandoned this segment of the market and publicly disassociated themselves from Dr. Crane and her training company”. Ms Bowles writes that Dr Crane continued to run a separate teacher training course based on the philosophy of Ms Hay called Healing Lives, Achieving Dreams. Ms Bowles writes that in 2000 and 2001 she ran three You Can Heal Your Life workshops in the United Kingdom. She writes that in early 2003 she decided to market her courses on a national basis and to differentiate her courses from others by adopting the term Heal Your Life as a brand. Ms Bowles writes that in December 2003 she “commissioned” the website aplaceforthehear.com and in 2004 aplacefortheheart.co.uk and started marketing her workshops online. Exhibited at GB-2.2 is a print from archive.org for aplacefortheheart.com. The following appears:

“Louise Hay Courses and workshops

Created by Louise Hay & Patricia Crane Ph.D these highly successful courses have been run worldwide. They are designed to identify clear out, long held anger, hurt and emotions that maybe be creating health, relationship or other problems in our lives but that we are unaware of.

Heal Your Life – Louise Hay Weekend Workshop

You Can Heal Your Life – Louise Hay 10 Week Study Course

Heal Your Life Advanced – Louise Hay 1 Day Workshop”

Exhibited at GB-2.3 is a print from archive.org for aplaceforthehear.co.uk. Included in the print is the following:

“Louise Hay Courses and Workshops

These courses are based on the work of Louise Hay. If you come on one of these courses BE PREPARED FOR CHANGE, they are very powerful and transform your life completely. If you are looking to heal your life or just to rediscover its joy.... take a look at the courses below. 1 you want to understand why a workshop is so important read here

Heal Your Life – Louise Hay Weekend Workshop

Heal Your Life – Louise Hay 5 Day Course

Heal Your Life – Louise Hay 5 Week Course

You Can Heal Your Life – Louise Hay 10 Week Study Course

Heal Your Life Advanced – Louise Hay 1 Day Workshop”

17) Ms Bowles writes that she actively marketed her Heal Your Life workshops in the national and local press and online. She writes that she used the services of an experienced SEO* consultant to assist in the development and on-line marketing of her website. Ms Bowles writes that in 2004 she produced the *Heal Your Life – Chants & Meditations* CD to support her workshops and those of other teachers in the field. She writes that by 2005 her website was no 1 on Google and other major search engines for the term Heal Your Life Workshops and on the first page for the term Heal Your Life. She writes that in 2007 she was the largest provider of Heal Your Life “type courses” in the United Kingdom. She writes that she also ran courses abroad. Ms Bowles writes that she believes that the workshops represent at least 30% of the entire Heal Your Life workshop market in the United Kingdom. She writes that her CD is sold worldwide.

18) Ms Bowles writes that in 2008 she completed development of a new teacher training course for her Heal Your Life workshops and started marketing it through a new website: healyourlifeteachertraining.com. Exhibited at GB-2.4 is a print of a page from the website, there is no indication as to the date that the print was made. There is no mention of Ms Hay or Dr Crane on the print exhibited.

19) Ms Bowles writes that in late 2008 Dr Crane of Heart Inspired Presentations LLC changed the “focus” of the marketing and site content from Achieve Your Dreams, Heal Your Life to Heal Your Life. She writes that on 20 November 2008 she received a letter on behalf of Hay about her website healyourlifeteachertraining.com; exhibited at GB-7.2. The letter claimed ownership of the trade mark Heal Your Life. It stated that any use of Heal Your Life on the website of Ms Bowles was an infringement of Hay’s trade mark. It requested the transfer of the domain name to Hay. Exhibited at GB-7.3 is Ms Bowles’ letter in response, which rejects the claims of Hay.

* It is assumed, from the context, that the acronym means search engine optimiser.

20) Ms Bowles writes that on 11 December 2008 Hay filed a statement of use at the United States Patent and Trademark Office claiming a first use of the trade mark in commerce on 1 April 2008.

21) Ms Bowles writes that she filed observations with the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) in relation to Hay's application for the registration of Heal Your Life as a Community trade mark. OHIM took no action upon the observations.

22) Ms Bowles states that the Community trade mark is the subject of an application for cancellation by her. (Since the writing of this witness statement her application has been rejected.)

23) Exhibited at GB-1.1 and GB-1.2 are details of the United States basic application, for which protection has been requested in the United Kingdom. At page 3 of GB-1.2 the date of first use in commerce of the trade mark is given as 1 April 2008.

24) Ms Bowles states that the use of the trade mark in the United Kingdom was not with the consent or under licence from Hay. Ms Bowles states that exhibit GB-3 consists of a list of over 43 different products and services available in the United Kingdom that use Heal Your Life in their product name. Twenty four of these are the titles of books eg *Past Lives and Soul Retrieval: Remove Psychic Debris and Heal Your Life*. Seven of them are the titles of audio products eg *Heal Your Life One Chakra at a Time*. (One of the audio products is the CD of Ms Bowles.) Twelve are the titles of workshops, three of which are run by Ms Bowles. A radio programme is also listed.

25) Ms Bowles states that prior to her dispute with Hay she had received no communications indicating the existence of any kind of terms and conditions on the use of Heal Your Life. She states that it was made absolutely clear in her training that she would be running her own business. Ms Bowles states that she was informed, at her advanced teacher training in 2000, that Hay had abandoned that "kind of training" and that the certificates were the last that would be signed by Ms Hay.

26) Ms Bowles states that she has been marketing and running Heal Your Life workshops as an independent enterprise in the United Kingdom since 2003. In support of this she refers to exhibits GB-2 (see above) and GB-9 to GB-12. Exhibited at GB-9.1 is a copy of a booking form for a Heal Your Life weekend workshop on 25 and 26 October 2003. The payment is to be made to Gillian Bowles Consultancy & Training. Exhibited at GB-9.2 is a copy of classified advertisements from *The Lady* for 4 to 10 November 2003. The following advertisement appears under the heading of educational courses:

“HEAL YOUR LIFE – Louise Hay transformational weekend workshop 25/26th November. £120. – Tel. Gillian, 029 20705627, www.aplacefortheheart.com”

Exhibited at GB-10.1 is a map of the United Kingdom showing where Ms Bowles states that she has “sold” workshops. Ms Bowles writes in GB-10.2 that participants to her Heal Your Life workshops have come from Switzerland, Qatar, Spain, the Netherlands and Singapore. She writes that she has also run Heal Your Life workshops in Kuwait. Exhibited at GB-11.1.2 is a copy of a galley proof for a classified advertisement for the *Daily Mail* for 10 February 2005. The advertisement reads:

“HEAL YOUR LIFE Experiencing bad relationships, poor health or just unhappy? Attend this Louise Hay workshop and change your life. Call Gillian 029 207 10744 www.aplacefortheheart.co.uk”

At GB-11.1.3 is an advertisement order for *Paradigm Shift* magazine of 19 July 2004. The copy for the advertisement reads:

“Louise Hay “Heal Your Life” Weekend Workshops 18th/19th September and 6th/7th November, Cardiff. Make those changes now! Tel: Gillian 029 20705627. www.aplacefortheheart.co.uk”

At GB-11.2.1 is a copy of a Google® search for Heal Your Life which shows at the top of the page a sponsored link for a Louise Hay workshop with the domain name www.aplacefortheheart.co.uk. The first two hits are from Amazon.co.uk and relate to books by Ms Hay. The fifth and sixth hits relate to aplacefortheheart.co.uk. The eighth hit is for a Louise Hay Heal Your Life workshop in Dinas Powys. Another Google® search, for Heal Your Life Workshops, exhibited at GB-11.2.2 has a hit for a placefortheheart.co.uk at the top. The second hit is for a Louise Hay Heal Your Life workshop in Dinas Powys. A third Google® search for heal your life teacher training is exhibited at GB-11.2.3. The first hit is for a Louise Hay Heal Your Life workshop in Dinas Powys. The sixth and eighth hits emanate from trainingpages.co.uk and healthypages.co.uk. The fifth hit emanates from aplacefortheheart.co.uk. All of the searches were conducted on 1 December 2008 (after the date of the request for protection in the United Kingdom) and were limited to pages from the United Kingdom. All but one of the hits specifically identified by Ms Bowles makes reference to Ms Hay. Exhibit GB-12 is entitled “Evidence of UK Sales”. With the exception of a booking form, which is also exhibited at GB-9.1 (see above), the exhibit consists of notifications from PayPal. The earliest is for 17 December 2004 (and is duplicated) and the latest 8 April 2009 (after the date of the request for protection in the United Kingdom). All but one of the notifications that emanate prior to the international priority date, advise (where the purpose of the payment is given), that the payment is for a Heal Your Life weekend workshop; the exception is for a Heal Your Life Connect & Rejuvenate workshop.

27) Ms Bowles states that between 2000 and 2008 she was the only undertaking in the United Kingdom running workshops using the trade mark Heal Your Life consistently. She states that, however, other teachers adopted terms similar to Heal Your Life.

28) Exhibit GB-4 is entitled "Examples of Common Parlance and Descriptive Use". The exhibit consists of examples of use of Heal Your Life from various websites. There is no indication as to the date when Heal Your Life was used on the websites. Certain of the websites have indications that they relate to use in the United Kingdom eg co.uk as part of the domain name. Examples of the use include:

"I use a mind, body and spirit approach to coaching and believe that through coaching, you can face your obstacles, heal your life and move forward."

(from banbury-cross.co.uk)

"You really CAN heal your life!"

(from elyxir-holistic.co.uk)

Ms Bowles states that the examples given in the exhibit cover over 29 different self-help therapies.

29) Ms Bowles states that there are over 650 Heal Your Life teachers in Europe, "who have been trained by various sources in the philosophies adopted and popularised by Louise Hay". Ms Bowles states that central lists of Heal Your Life teachers are held by various undertakings. Exhibit GB-5.1 is a page from the Internet relating to a directory of teachers. The course leader for the workshops is identified as Patricia Crane. The directory is of "teachers trained through Dialogues all the teachers have completed the 'Heal Your Life, Achieve Your Dreams' Teacher Training Course". Exhibited at GB-5.2 is a print of a webpage accessed from archive.org. The page emanates from 2007 and is from achieveyourdreamsteacher.com. The page relates to a general directory listing all qualified Heal Your Life workshop and study group leaders in the United Kingdom and Ireland. Ms Bowles states that use of Heal Your Life is so widespread that several insurance companies have a category dedicated to Heal Your Life courses. Exhibited at GB-5.3 is a page relating to IPTI approved list of treatments and therapies. There is no indication as for what IPTI stands. Included in the list is Heal Your Life.

30) Ms Bowles states that Heal Your Life indicates that a product or service relates to healing of life issues. She states that those who have been exposed to publicity and marketing generated by herself and other Heal Your Life teachers

will immediately understand that the product is based on the philosophies adopted and popularised by Louise Hay.

31) Ms Bowles states that on 18 February 2009 she and other Heal Your Life teachers received an e-mail from Heart Inspired Presentations LLC, stating that Hay had trade marked the term Heal Your Life and that it had received an exclusive licence in relation to the use of the trade mark. Exhibited at GB-7.4 and GB-7.5 are copies of e-mails sent to Ms Bowles in relation to the licensing of use of the trade mark. Exhibited at GB-8 is a copy of a licensing agreement. The licence requires the licensee to fulfil various conditions eg in establishing that it has liability insurance. The annual fee for the licence is \$99.

32) Ms Bowles states that as early as 20 November 2008 (as per GB-7.2) correspondence from Hay included the ® symbol. She states that at that time Hay did not have a registered trade mark in Europe or the United Kingdom. She states that even the United States trade mark was not registered on the principal register until 10 March 2009. Consequently, she states that Hay was in breach of section 95 of the Act.

33) Ms Bowles states that in 2007-2008 she created a new Heal Your Life teacher training course, including the Heal Your Life teacher manual. She states that in 2008 she started marketing the course and registered the website healyourlifeteachertraining.co.uk. Ms Bowles states that she ran the first course in April 2009 (after the date of designation and the date of the international priority claim). Ms Bowles states that her website aplacefortheheart.co.uk receives over 146,000 visitors per annum.

Witness statement of Jeremy B Pennant of 2 February 2010

34) Mr Pennant is a partner in D Young & Co, which is acting for Hay in these proceedings.

35) The majority of Mr Pennant's statement is submission rather than evidence of fact. In this summary only the evidence of fact will be covered. However, the submission elements are borne in mind in coming to a decision.

36) Exhibited at JBP 1 is a declaration made by Cheryl L Hodgson. Ms Hodgson acts as trade mark counsel for Hay in the United States and elsewhere.

37) Ms Hodgson states that on 5 March 2008 Hay filed a United States application to register the trade mark Heal Your Life. She states that later that year a new version of a logo containing the words Heal Your Life and a rainbow heart was filed. The rainbow heart originally appeared on the cover of *Heal Your Life* when it was published in the 1980s.

38) Ms Hodgson states that, on 11 December 2008, her then associate filed a statement of use for Heal Your Life in class 41 for educational seminars in the field of psychology, spirituality and self-improvement. She states that the first use date of 1 April 2008 was incorrect, since this related to the first use of the new logo and not the date of first use of the words on their own. She states that the words on their own had been in use since 1987. Ms Hodgson states that on 23 September 2009 her firm filed a petition to the Director of the US Trademark Office, alleging that the date of first use of the trade mark, anywhere and in commerce, was erroneously entered. The United States Patent and Trademark Office was asked to amend its database as well as the certificate of registration to reflect the date of first use as 1 December 1987; based upon the many years of workshops taught by Ms Hay in the late 1980s and by Dr Patricia Crane since the 1990s. Ms Hodgson states that on 15 December 2009 a certificate of registration which shows the amended date of first use of the trade mark was issued. Exhibited at CCHH1 is a copy of the entry in the service mark principal register. The entry shows first use in commerce as 1 December 1987.

39) Ms Hodgson believes that there was no bad faith on the part of Hay or herself in seeking worldwide trade mark protection. She does not give any examples of trade mark registrations for Heal Your Life that were extant as of 20 November 2008.

40) Ms Hodgson states that the decision to develop a formal licensing programme was motivated, not by bad faith, but to provide a cost effective liability insurance to workshop leaders and to formulate and establish a recognisable uniform brand and logo that all teachers could use, together with a website that Dr Crane would develop for the teachers to promote their workshops worldwide.

41) Exhibited at JBP 2 is a declaration made by Patricia J Crane.

42) Dr Crane states that Heart Inspired Presentations, LLC (HI) is the worldwide licensee of Hay. She states that HI is authorised to grant written sub-licences for use of the trade mark HEAL YOUR LIFE to individuals who have completed a workshop leader training course based upon the teachings of and writings of Louise Hay. Dr Crane states that these individuals are certified to lead Heal Your Life workshops. She states that the training for workshop leaders was originally Louise Hay Teacher Training and later Healing Lives, Achieving Dreams. Dr Crane states that the participants were consistently given certificates stating that they were authorised to lead Heal Your Life workshops.

43) Dr Crane states that in 1989 Louise Hay authorised her to begin leading a two day workshop called Love Yourself, Heal Your Life; Ms Hay had been teaching on this workshop since the early 1980s. In the spring of 1992 Dr Crane travelled to the United Kingdom where she presented the first two day Heal Your Life workshop, to 90 participants. Dr Crane states that she returned several times to teach the same workshop and that approximately 300 people attended

the two day workshops. Dr Crane states that in March 1995, with Ms Hay's permission, she began teaching the Louise L Hay Teacher Training programme. Dr Crane states that the one week intensive programme was essentially to train others to lead the two day workshops that she and Ms Hay had originally taught. Dr Crane states that she offered this workshop leader training "continuously through 2008"[†] in the United Kingdom. Dr Crane estimates that approximately 650 people have been "certified" by her in her programmes in the United Kingdom; about 100 of these have come from outside the United Kingdom.

44) Dr Crane states that Ms Bowles attended a Love Yourself; Heal Your Life workshop leader training course that she taught in Ireland in 1999. Dr Crane states that she and other graduates of the workshops in the United Kingdom received oral or implied consent to use Heal Your Life for authorised Heal Your Life workshops and study groups. Graduates received a certificate like that exhibited by Ms Bowles. Dr Crane states that in addition, since 2001 graduates have received a certificate authorising them to lead Heal Your Life workshops. Exhibited at HH1 is a copy of such a certificate. The certificate is headed Healing Lives, Achieving Dreams Workshop Leader Certification. It is for a course that took place in Birmingham from 27 July to 3 August 2003. The certificate is a blank certificate. The potential signatories of the certificate are Dr Crane and Sharon Shingler; respectively described as course leader and course organiser. Dr Crane states that Heal Your Life is the term consistently used by graduates in the United Kingdom to lead their workshops (this is hearsay evidence).

45) Dr Crane states that since February 2009 workshop leaders have been offered a written, royalty free licence to use Heal Your Life for the workshops that they have been leading for many years. Hay agreed to provide worldwide trade mark protection for the workshop leaders and a link from the Hay websites to the workshop leader training worldwide. Exhibited at HH2 are screenshots from healyourlife.com and healyourlifeworkshops.com websites. Included in HH2 are details of the current licensed workshop leaders in the United Kingdom; this includes persons from England, Scotland and Northern Ireland. The list was downloaded on 1 February 2010. Dr Crane states that as part of the expanded promotional marketing of the workshops on behalf of the workshop leaders, Hay and HI offered all workshop leaders a royalty free licence for use of the words and the new logo for a fee of \$99 per year. Dr Crane states that in February 2009 Ms Bowles was offered but refused the written licence agreement. Dr Crane states that several months before the licensing programme was announced, Ms Bowles had made other plans to compete with Hay and its training programmes.

46) Dr Crane states that in October 2008 Ms Bowles registered the domain names healyourlifeteachertraining.com and healyourlifeteachertraining.co.uk. She states that shortly thereafter Ms Bowles launched websites offering teacher training in the United Kingdom. Dr Crane states that counsel for Hay requested

[†] This, from the context, as an Americanism that means continuously up to 2008.

the transfer of the former domain name by written notice on 20 November 2008; which Ms Bowles refused. Dr Crane states that Ms Bowles was offering a competitive workshop leader training programme under the trade mark Heal Your Life, marketing this training to graduates of Dr Crane's workshops in the United Kingdom. She states that this was in direct competition with her Hay authorised training. Dr Crane states that the training and course completion of Ms Bowles never included the right to offer training and certification to others to become workshop leaders. She states that Ms Bowles never received any rights in the name Heal Your Life other than the oral permission to lead workshops, not train others to do so. Dr Crane states that she has been the only authorised trainer of workshop leaders in the United Kingdom. Dr Crane states that on 20 April 2009 Ms Bowles was officially terminated as a workshop leader for attempting to mislead the public by offering teacher training, for which she was not authorised, and for infringement of copyright. Exhibited at HH3 is a copy of a letter, dated 20 April 2009, from Ms Hodgson to Ms Bowles. The letter is a cease and desist letter in relation to use of Heal Your Life. The copyright infringement is covered in the following terms:

"You are further advised, that the marketing and distribution of the audio CD entitled, *Heal Your Life Chants and Meditations* is an infringement of the copyright rights in the original work *Songs of Affirmation*, created by Joshua Leeds and Louise Hay in 1986. Joshua Leeds composed the music and Louise Hay wrote the song lyrics and meditations as well as performed the meditations."

Dr Crane states that Ms Bowles is still engaged in this copyright infringement which she continues to advertise and sell without permission or payment.

47) Dr Crane states that on 24 August 2009 WIPO ordered the transfer of healyourlifeteachertraining.com to Hay, case D2009-0878. She states that similar proceedings remain pending with Nominet in relation to healyourlifeteachertraining.co.uk.

48) Dr Crane states that all of Ms Bowles' use of Heal Your Life has been based upon her training with Hay, "about which she makes ado, including her certificates". Exhibited at HH4 are pages downloaded from aplacefortheheart.co.uk on 30 April 2009. On the pages the following appears:

"In 1999 she was certified by Louise Hay to run "Heal Your Life" Courses and a year later received another certificate from Louise when she completed the Advanced Louise Hay Teacher Training Programme in San Diego."

Dr Crane states that Ms Bowles, for over nine years, used Heal Your Life, under oral consent, to lead the Louise Hay workshops. Dr Crane states that Ms Bowles

appropriated the trade mark in order to offer competing services and to cause confusion in the market place.

49) Dr Crane states that Ms Bowles' claim that Hay had abandoned the market from 2000 to 2008 is untrue. She states that Ms Bowles' own evidence shows advertising in search engines for workshops by other United Kingdom Heal Your Life graduates as well as her own workshop leader training in the United Kingdom. Dr Crane refers to the Google® searches exhibited by Ms Bowles at GB-11.2.2. These searches were conducted on 1 December 2008. Dr Crane states that the hits show workshops offered by other authorised workshop leaders who had attended her training courses. She states that her own training course is listed as the fourth entry on the page. The fourth entry emanates from the domain name healing-feeling.co.uk. Dr Crane states that exhibit HH5 is a list of the one week workshops that she has personally offered to workshop leaders in the United Kingdom from 2000 to 2008. Courses, to authorise the participants to lead Heal Your Life workshops, and study groups were held in each year from 2001 to 2008 (inclusive). In 2004 two courses were held. Advanced courses were held in 2001, 2003, 2005 and 2008. Dr Crane states that, in addition, many individual Heal Your Life workshops were offered by graduates of the courses in the United Kingdom. Dr Crane states that exhibit HH6 contains a sample flyer given to workshop leaders to advertise and promote their workshops and flyers for two United Kingdom teachers offering workshops in 2007. The first flyer is headed "Heal Your Life A POWERFUL, LIFE CHANGING WORKSHOP BASED ON THE PHILOSOPHY OF LOUISE HAY". The second flyer is headed "Heal Your Life – Achieve Your Dreams! A life changing workshop based on the philosophy of Louise Hay". The reader is advised that the workshop is led by "accredited workshop leader Dawn Petherick". "Dawn is founder of Appearing Day (www.appearingday.co.uk) and is an accredited Louise Hay trainer, Life Coach, Reiki and Crystal Healer". The flyer is for a course on 22 and 23 September 2007. The third flyer is headed "Love Yourself, Heal Your Life Join us for a powerful, life changing 2 day workshop based on the philosophies of Louise L Hay." The reader is advised that "[t]he next workshop led by Heal Your Life Teacher Jo Jawo is being held at..." The workshop was due to take place on 27 and 28 October 2007.

50) Dr Crane does not claim exclusive rights for Heal Your Life for books, which consist of many of the listed entries in GB-3. She states that the first audio product referred to by Ms Bowles is an infringing CD owned by Hay and reproduced by Ms Bowles without consent. Dr Crane states that the workshops listed in GB-3 are nearly all offered by leaders that she had trained.

51) Exhibited at HH7 is a copy of the licence agreement between Hay and HI. The licence agreement was signed on 29 January 2009. Exhibit 4 to the agreement shows that at the time of the signing there were no registered trade marks anywhere in the world. Section 3 of the agreement has not been

produced and sections 6 and 16 have been identified as being “[i]ntentionally omitted”.

Declaration of Patricia J Crane of 8 February (year not given)

52) Dr Crane states that there were 39 graduates from the course she led in Birmingham in 2003. Exhibited at HH8 is a copy of a certificate issued to Margaret Brace on 5 August 2001 as a result of the training that Dr Crane conducted in Birmingham from 29 July to 5 August 2001. Dr Crane states that there were 38 people who trained on that workshop and received the certificate.

Witness statement of Gillian Bowles of 26 March 2010

53) Ms Bowles’ statement includes submission as well as evidence of fact. In this summary only the evidence of fact will be covered. However, the submission elements are borne in mind in coming to a decision.

54) Ms Bowles states that the Louise Hay Teacher Training run in the United Kingdom between 1995 and 2001 was run by Dialogues, a United Kingdom company that specialises in spiritual training. She states that Hay’s only involvement was the signing of the certificates and “authorization of the students” on the courses. Ms Bowles states that the training run between 2001 and 2009 involving Dr Crane was also run by Dialogues.

55) Ms Bowles states that Hay’s statement that it had been continuously using the trade mark in commerce since 1987 is inconsistent with the statements of the application for a Community trade mark. She states that the details of the registration show that it had not acquired distinctiveness at the date of application, 14 October 2008. Ms Bowles misunderstands the purport of the data that shows no acquired distinctiveness. The only time that an applicant would seek to show acquired distinctiveness is when the examiner had held that the trade mark was without distinctiveness, and so evidence would be filed to overcome this objection.

56) Ms Bowles states that in the early 1990s a Norma Jarvis (deceased) requested that Ms Hay be involved in an event organised by Ms Jarvis’ company, Dialogues, in the United Kingdom. Ms Bowles states that Ms Hay “passed the opportunity on to” Dr Crane. Ms Bowles states that in 1995 Dialogues started running annual Louise Hay Teacher Training and that Dr Crane was brought in to lead these events in her capacity as a Louise Hay teacher. Ms Bowles “understands” that Dr Crane was paid directly for these services by Dialogues. She states that Hay had no commercial involvement and did not provide the services but “merely” endorsed them. Ms Bowles states that the participants paid Dialogues for the course and their contractual relationship was with Dialogues. Exhibited at GB-17 is various material from Dialogues in relation to Louise Hay courses. A blank letter from Dialogues refers to a Healing Lives, Achieving

Dreams course in July 2007. The letter is in the name of Sharon Shingler (see above in relation to evidence of Dr Crane) at Dialogues. Course application material for Healing Lives, Achieving Dreams courses in 2004, 2006 and 2007 is exhibited. Sharon Shingler at Dialogues is the contact point on all of the material. All of the material is headed "Healing Lives, Achieving Dreams Teacher Training Course based on the work of Louise L. Hay". The course leader is identified as Dr Crane. There is nothing in the material identifying Healing Lives, Achieving Dreams as being trade marks. Advertisements from *Healthy* magazine from 2006 and 2007 are both in the same form:

"Teacher Training

Course based on the work of

Louise L. Hay

Healing Lives
Achieving Dreams

**Learn to Teach:
A powerful two-day Workshop,
'Love Yourself, Heal Your Life' and
A 10-week Study Course**

Led by Patricia Crane Ph.D.
22nd -29th July 2007

**Contact: Sharon at Dialogues
01372 460182
Email: sharon@dialogues.co.uk
www.dialogues.co.uk"**

She states that none of the courses had any terms or conditions attached. Ms Bowles states that until 2000 the courses were endorsed by Hay, however, after a "legal issue" this endorsement was withdrawn and Dr Crane changed the name of the workshops to Healing Lives, Achieving Dreams. She states from this date the training materials do not bear any endorsement or signature of Hay. Ms Bowles states that in 2009 Dr Crane established a commercial relationship with Hay, as per the licence agreement exhibited at HH7.

57) Exhibited at GB-18 is a page from the website of achieveyourdream from 5 June 2002 (accessed via archive.org). The page is headed "Workshop Leader Certification Courses". The following appears in relation to Dr Crane:

"Patricia has had the privilege of studying with some of the premier spiritual leaders of our time, including Louise Hay Deepak Chopra, and Marianne Williamson. She began working with Louise Hay in 1986 and has been studying and teaching Louise's philosophy for over 13 years. She has trained and certified more than 800 workshop and study group

leaders in the methods of Louise Hay from at least 42 states in the U.S. and 33 countries around the world. Patricia, a Reiki Master, is considered to be a leader in metaphysical healing modalities, and is a sought after international speaker and workshop leader.

Although Louise is no longer actively involved in the program, Patricia is continuing with a similar powerful program under the title HEALING LIVES, ACHIEVING DREAMS WORKSHOP LEADER CERTIFICATION.”

58) Exhibited at GB-19.1 is a witness statement by Siobhan Therese Wragg nee Nangle. Ms Wragg is a registered nurse, child protection case worker and counsellor.

59) Ms Wragg attended the Louise Hay Teacher Training Course from 31 October to 7 November 1999 in County Meath. Following the completion of the course she received a certificate signed by Ms Hay, Dr Crane and Ms Jarvis. A copy of Ms Wragg’s certificate is attached to the witness statement. At the top of the certificate, around a rainbow heart device, the words Louise L. Hay Teacher Training Course appear. The certificate advises that the holder is an authorised teacher for the You Can Heal Your Life Study Course and the Love Yourself, Heal Your Life Workshop.

60) Ms Wragg states that Ms Jarvis of Dialogues organised the course. The course was led by Dr Crane. She states that there were no special conditions or restrictions attached to the training and she did not sign any contract or licence agreement relating to her delivery of the You Can Heal Your Life Study Course and the Love Yourself, Heal Your Life Workshop. Ms Wragg understood from conversations with Dr Crane, during the course, coupled with the content of the course certificate, that following the completion of the course she was entitled to market herself as a certified Louise Hay teacher and/or an authorised teacher of the Louise L Hay You Can Heal Your Life Study Course and the Love Yourself, Heal Your Life Workshop. Ms Wragg states that the course material included samples of a variety of marketing materials which she could use as models for her own marketing materials, including the ‘expanding heart’ logo. Ms Wragg states that it was made clear to her that as a certified Louise Hay teacher she was entitled to include the ‘expanding heart’ logo on her marketing material. Ms Wragg was encouraged to develop her own style of marketing by reference to her targeted customers and the local market conditions. Ms Wragg states that, following successful completion of the course, she was promised inclusion in Dr Crane’s world directory of certified Louise Hay teachers; located at hylteachers.com. She was also promoted as a certified Louise Hay teacher on the Dialogues’ website.

61) Ms Wragg gives what is clearly hearsay evidence when she states that in 2000 another Louise Hay teacher told her that Dr Crane and Ms Hay had fallen out and that Ms Hay no longer endorsed Dr Crane’s training. This unnamed

colleague did not know the details and Ms Wragg did not gain further information from other sources.

62) On 1 March 2009 Ms Wragg received an e-mail from Susan Mulholland; the e-mail also included an e-mail from Dr Crane and Rick Nichols. The e-mail was addressed to Heal Your Life workshop leaders in Australia and New Zealand. The e-mail from Ms Mulholland describes her as the teacher trainer for Heal Your Life for Australia and New Zealand. The e-mails relate to the licensing agreement from HI in relation to Heal Your Life.

63) Ms Wragg states what really worried her about the e-mails was the following sentence:

“Please understand that in order to continue using the term Heal Your Life® or the new logo, you must be licensed with us.”

Ms Wragg states that she felt betrayed. She wrote to Dr Crane on 13 March 2009 objecting to the licensing agreement. Ms Wragg states that Dr Crane agreed to keep her on the Dialogues world list of United Kingdom/Irish trained Louise Hay teachers but she is not listed on the new American website nor Ms Mulholland’s website.

64) Exhibited at GB-19.2 is a witness statement from Tina Stone. Ms Stone is a workshop leader. She states that her website is louisehaycourses.co.uk. Ms Stone runs a bookshop and therapy centre at the Light Awareness Centre, Westbourne, Dorset.

65) Ms Stone was trained by Dialogues in 2006 in Birmingham. Exhibited at TS1 is a copy of her certificate. The certificate states that Ms Stone is an authorised leader of Heal Your Life groups based on the philosophy of Louise Hay. The certificate is signed by Dr Crane of HI and Ms Shingler of Dialogues. The certificate is headed: “Healing Lives, Achieving Dreams Workshop Leader Certification”. Ms Stone states that no terms or conditions were attached to her training and at no time, before or during her training, was she made aware of any contractual agreements, licences or “consents” by Dr Crane or Dialogues. Ms Stone states that she was told that she could freely use all of the materials in the manual that was provided at the course.

66) Ms Stone states that on or around 18 February 2009 she received an e-mail from Dr Crane informing her of a new licensing agreement for which she had to pay an annual fee or she would not be able to use the term Heal Your Life and would not be listed as a trained teacher. Having paid £1,600, Ms Stone felt outraged that more money was being demanded from her.

67) Ms Stone states that Heal Your Life is a very common term. She states that in her bookshop she often uses the expression and often hears it from customers in relation to the general self-help category of books.

68) Exhibited at TS2 is a copy of a promotional leaflet that Ms Stone received prior to attending the course. The leaflet is entitled "Healing Lives, Achieving Dreams Teacher Training Course based on the work of Louise L. Hay". The contact details are for Ms Shingler at Dialogues. Exhibited at TS3 is a copy of a letter from Ms Shingler confirming Ms Stone's place on the course. Exhibited at TS4 is a copy of a marketing guide that Ms Stone received as part of the course. The guide states, inter alia:

"Your business card can simply have your name, phone number, and a title such as "Transformational Workshop Leader" or "Heal Your Life, Achieve Your Dreams Workshops and Groups" on it. Carry them with you everywhere and hand them out as often as possible!"

"You will be listed on the website, www.adyteachers.com and www.dialogues.co.uk. However, we encourage you to get your own website..."

"I was recently certified to lead transformational Heal Your Life Workshops, and I think your customers would be very interested in the principles for creating the life they want."

"Certified Heal Your Life, Achieve Your Dreams Workshop Leader, will be presenting a workshop (or group)..."

69) Exhibited at GB-19.3 is a copy of a witness statement by Jackie Turner. Ms Turner is a personal development trainer, counsellor and life coach. She runs the website Positivelyme.co.uk.

70) Ms Turner states that in October 1995 she received a Louise L Hay teacher training certificate, signed by Ms Hay, following her attendance at a course run by Dialogues. Ms Turner paid Dialogues for the course. The teacher was Dr Crane.

71) Ms Turner states that Dr Crane was asked to bring Ms Hay's "work" to Birmingham by Ms Jarvis of Dialogues. (This is clearly hearsay evidence.) "Some two years later" Ms Turner was asked by Ms Jarvis if she would become an assistant to Dr Crane for the courses in the United Kingdom. Ms Turner "jumped at the chance" and assisted on the courses for approximately 12 years. Ms Turner built up a good and close friendship and working relationship with Dr Crane. Ms Turner states Dr Crane told her that Ms Hay had said that if she knew someone who could not afford one of her tapes Ms Hay was happy for them to be copied free of charge. Ms Turner states that Ms Bowles produced a far superior CD of the songs used on the course and Dr Crane was happy to have

these CDs for sale on the courses and went out of her way to bring them to the notice of students.

72) Ms Turner states that in the twelve years during which she supported Dialogues and Dr Crane in running the courses in the United Kingdom, students were not made aware of any terms and conditions relating to the course.

73) Ms Turner states that on or around 18 February 2009 she received an e-mail from HI relating to trade marks and licensing agreements. The contents of the e-mail astounded her.

74) Ms Turner states that some years previously Hay had made it known that it was severing all connections with Dr Crane and her company Health Horizons, “following an unfortunate incident on one of Patricia Crane’s training courses in the U.S.A., which involved legal action being taken against Patricia’s company Health Horizons. This was eventually settled out of court.” Ms Turner states that after this, Dialogues continued running Louise Hay teacher training but Dr Crane changed the name of her course to Healing Lives, Achieving Dreams and to Ms Turner’s knowledge Hay had no further involvement with the training.

75) Ms Turner states that when people did their training they were receiving a certificate for life.

76) Ms Bowles states that, as far as she is aware, Dr Crane has never been employed by Hay or been in any formal legal or contractual relationship with Hay until 2009.

77) Ms Bowles states that the Heal Your Life workshops that she started running in 2003 were substantially different from those of Hay and embraced a broader set of philosophies and techniques. She states that in 2003 she started concentrating on marketing her own Heal Your Life workshops. In 2008 Ms Bowles started her Heal Your Life teacher training programme.

78) Ms Bowles states that she is not breaching Hay’s copyright with her *Heal Your Life – Chants and Meditations* CD. She states that Hay knows that she holds “the appropriate permissions” in relation to the CD. Ms Bowles states that the letter exhibited is an entire fabrication and that virtually every statement in it is untrue and an example of “false legal threats” that she has had to endure from Hay.

79) Ms Bowles states that she has not appealed against the WIPO decision but has made a complaint against it as the pleadings did not specify the United States trade mark as the basis of the complaint. She states that in the United Kingdom, Nominet found that her domain name registration was made in good faith, a matter that was confirmed on appeal.

80) Exhibited at GB-20 is material from various websites. An extract from hayhouse.com advertises *You Can Heal Your Life – Box Set!*. A description of the product includes the following: “Louise has helped millions of people by showing them how to heal their lives – and these incredible works will help you heal yours”. The publication date of the box set is September 2009 but there is no indication as to when the description was written. A screen shot of a Louise Hay study course video on YouTube is exhibited. The video includes the words:

“I think you’ll find that this tape gives you a wonderful opportunity to learn more about yourself and to begin to heal you life”.

There is no indication as from when the video emanates. The video also bears sub-titles in Castellano. An extract from youcanhealyourlifemovie.com, where Hay describes the cinematographic film *You Can Heal Your Life*. Included in the description of the product is the following: “helping you apply Louise’s affirmations and groundbreaking wisdom to heal your own life and the challenges that you face today.....so they, too, can learn to heal their lives”. There is no indication as to the date of the extract. An undated extract from the website healyourlife.co.nz is exhibited. The address on the extract is Wellington, New Zealand.

81) Exhibited at GB-22 is material from the Internet (the pages do not bear the dates of download):

- An undated page from healyourlifenow.net in relation to the book *Heal Your Life Now* by Dr Kandis Blakely. There is no indication as to from whence the book emanates.
- An extract from amazon.co.uk showing the book *Free to Live Heal Your Life*. The book was published on 14 December 2005, there is no indication as to where it was published.
- An extract from jesus4usall.com showing the book *Jesus wants to heal your life*”. There is no indication as to where and when the book was published.
- An extract from amazon.co.uk showing the book *60 Ways to Heal Your Life*. The book was published on 4 January 2001, there is no indication as to where.
- An extract from amazon.co.uk showing the book *The Complete Guide to Magic and Ritual: Using the Energy of Nature to Heal Your Life*. The book was published in April 2001, there is no indication as to where.
- An extract from amazon.co.uk showing the book *The Gift of Depression: How Listening to Your Pain Can Heal Your Life*. The book was published on 31 October 2006 by a United States publishing house.
- An extract from amazon.co.uk showing the book *Compassionate Coaching: How to Heal Your Life and Make Miracles Happen*. The book was published on 3 June 2004, there is no indication as to where.

- An extract from amazon.co.uk showing the book *Angelic Healing: Working with Angels to Heal Your Life*. The book was published in November 1994, there is no indication as to where.
- An extract from amazon.co.uk showing the book *Wheel of Life Cycles: The Power of Love to Heal Your Life*. The book was published on 2 April 2006 by a Californian publisher.
- An extract from amazon.co.uk showing the book *Beauty and the Soul: The Extraordinary Power of Everyday Beauty to Heal Your Life*. The book was published on 20 August 2009, there is no indication as to where.
- An extract from amazon.com (the United States website) showing the book *The Complete Book of Flower Essences: 48 Natural and Beautiful Ways to Heal Yourself and Your Life*. It was published on 19 September 2002.
- An extract from amazon.co.uk showing the book *Heal Your Life with Home Remedies and Herbs*. It was published by Hay in April 1998.
- An extract from amazon.co.uk showing the book *Dreamscape: Creating New Realities to Transform and Heal Your Life*. The book was published on 2 March 1998 by Simon & Schuster Ltd.
- An extract from amazon.co.uk showing the book *Hello Darkness, My Old Friend: Embracing Anger to Heal Your Life*. The book was published on 1 June 2003, there is no indication as to where.
- An extract from amazon.com (the United States website) showing the book *Out of Your Mind and Into Your Heart: Using Love Energy to Heal Your Life*. The book was published on 10 October 2001.
- An extract from amazon.com (the United States website) showing the book *Healing is a Choice Journal (Choose to heal your life and start your journey now)*. The book was published in 2005.
- An extract from amazon.co.uk showing the book *From Cancer to Power: Five Steps to Heal Your Life*. The book was published on 8 April 2008, there is no indication as to where.
- An extract from amazon.com (the United States website) showing the book *Affirmations to Change and Heal Your Life*. It was published on 15 July 2008.
- An extract from amazon.com (the United States website) showing the book *Journalution: Journaling to Awaken Your Inner Voice, Heal Your Life and Manifest Your Dreams*. It was published on 10 May 2005.
- An extract from amazon.co.uk showing the book *The Great Heart Way: How to Heal Your Life and Find Self-Fulfillment (sic)*. The book was published on 28 February 2007 by a United States publisher.
- An extract from amazon.co.uk showing the book *The Gift of Betrayal: How to Heal Your Life When Your World Explodes*. The book was published by Hay in May 2009.
- A web page showing the book *Jesus Can Heal Your Life*. The book was published in 1992, there is no indication as to where.

- An extract from amazon.com (the United States website) showing the book *Using Your Chakras: A New Approach to Healing Your Life*. The book was published on 29 May 2009.
- An extract from amazon.co.uk showing the book *Reiki The Ultimate Guide Vol 4 Past Lives & Soul Retrieval Remove Psychic Debris & Heal Your Life*. The book was published on 15 September 2007, there is no indication as to where.
- A page from the website mindeze.com advertising the book *Free Your Spirit, Heal Your Life!*.
- An extract from amazon.co.uk showing the CD *Healing Your Life – Chants and Meditations*.
- A page from aplacefortheheart.co.uk advertising a CD/MP3 entitled *Healing Your Life One Chakra at a Time*.
- A page from the United States website ronroth.com which includes an advertisement for the CD set *How to Heal Your Life with Living Prayer*.
- A web page which was last modified on 30 April 2008 showing the audio cassette *Heal Your Life! Consciousness & Energy Medicine*.
- An extract from amazon.com (the United States website) showing the audio book *Heal Your Life and Honor Your Soul's Intention*. It was published in March 1998.
- An extract from amazon.com (the United States website) showing the audio cassette *Create Miracles and Heal Your Life*. It was published in July 2000.
- A page from the United States website learnoutloud.com for the audio download and CD *Create Miracles and Heal Your Life*. It was published in May 2006.
- A page from the United States website learnoutloud.com for the audio cassette *Art Can Heal Your Life*.
- Two pages from aplacefortheheart.co.uk. The pages relate to Louise Hay courses and workshops run by Ms Bowles. The pages give details of courses and workshops entitled *Heal Your Life*, *Heal Your Life – Louise Hay*, *You Can Heal Your Life* and *Heal Your Life Advanced*.
- A page from healyourlifeteachertraining.co.uk. The page relates to a *Heal Your Life* teacher training certificate offered by Ms Bowles.
- A page from reading.floodlight.co.uk relating to *Heal Your Life* courses run by Dawn Bradley in Reading.
- A page from angelic-creations.net. It relates to a workshop entitled *Love yourself, Heal Your Life and Achieve Your Dreams*. The workshop is based upon Ms Hay's book *You Can Heal Your Life*.
- A page from diamondoflight.com relating to *Heal Your Life* Chakra work groups.
- A page from meetup.com relating to a *You Can Heal Your Life with Colour* workshop in Ontario on 24 July 2008.
- A page from mysticfaryre.co.uk which includes details of *Heal Your Life with Linda & the Angels* workshop in Cornwall on 30 April 2006.

82) Exhibited at GB-23 is material that Ms Bowles describes as “Common parlance & Descriptive Use (unless indicated there is no indication of date or jurisdiction):

- A page from drshila.com headed “Talking To Your Emotions: How To Heal Your Life Quickly”.
- A page from NaturalMatters.net The UK’s Natural Life Directory. An article is headed “Hypnotherapy can heal your life”. The article is dated 12 April 2007.
- A page from belmonthypnotherapycentre.co.uk which has a heading Heal Your Life.
- A page from practicalmiracles.com which advertises the book *Compassionate Coaching How to Heal Your Life and Make Miracles Happen*.
- A page from cam.net.uk. Included on the page is the following: “If you want to improve your life, you have to heal your life.”
- A page from the United States website audible.com advertising the audio book *The Power of Joy: How the Deliberate Pursuit of Pleasure Can Heal Your Life*. The product bears a copyright date of 2008 and is published by Hay.
- A page from johnglostersmith.com. The page bears a copyright date of 2010 and an address in the United Kingdom. In a section on life coaching the following appears: “it is an opportunity to heal your life and discover that you can utilise the energy...”
- A page from silvamethodtraining.co.uk relating to a course in the United Kingdom. Included in the details of the course is: “Learn How to harness the power of your mind to heal your life!”.
- A page from london-therapy.com in relation to journey therapy. The page makes reference to the “Ways Journeywork can heal your life”.
- A page from drjplowman.co.uk headed “HEAL YOUR LIFE...”.
- A page from banbury-cross.co.uk headed Business & Life Coaches. In relation to Clearwater Coach the following appears: “you can face your obstacles, heal your life and move forward”.
- Two pages from fengshuisolutions.co.uk. Reference is made on the pages to harmonising your home and healing your life.
- A page from newage.suite101. An article dated 17 March 2009 is headed “How This Powerful Angel Can Help Heal Your Life”.
- A page from living-with-vision.co.uk. The following appears: “person-centred support to enable you to heal your life”.
- A page from holisticlocal.co.uk. A reference to Janet Kells advises that she offers “long term support enabling you to reflect on & heal your life”.
- A page from alifediscovered.org relates to Wallace Huey who advises that he will coach you to “heal your life”.
- A page from channel4.com in relation to miscarriages of justice. The following appears: “you need to take positive action to heal your life”.

- A page from ntlworld.com. In relation to sound therapy the following appears: “and give you a demonstration can work to heal your life”.
- A page from doctorlisaalove.wordpress.com dated 10 June 2009. The page is headed “Heal Your Emotions, Heal Your Life”. The page advertises a Heal Your Life CD set and advises that this will “heal your life once and for all”.
- A page from bbc.co.uk. In relation to Glastonbury the following appears: “Books to ‘Heal Your Life’ always sell well”.
- A page from spiritplanet.net. The following appears: “Channeling is one the (sic) most powerful tools to transform and heal your life”.
- A page from accessnewage.com. The following appears: “Heal Your Life NOW by Healing Past Lives!”.
- A page from bioenergytherapy.com which emanates from prior to 20 March 2009. The following appears: “things that have happened to you that enables you to heal your life and bring your health to balance”.
- A page from kerryweaverhypnotherapy.com. The following appears: “natural form of therapy that could help you to breakthrough your limitations helping to heal your life”. The website relates to Kerry Weaver who is based in the United Kingdom.
- Sozo News gives notice of a conference in Northamptonshire which will “change & heal your life”.
- A page from Life Force Energy advises that Wilma “can heal your life by utilising the energy available to us”. She is a member of the United Kingdom Reiki Federation.
- A page from thehealingteam.com with a copyright date of 2008 and a location in the United States of America has a strap line “Heal Your Life For a Better Life”.
- A page from circus-gallery.com has a heading “You Can Heal Your Life!”. The page relates to an event taking place from 7 January to 6 February 2007. The following appears:

“You Can Heal Your Life Curated by Emma Gray Opening reception Thursday, January 7, 7 – 9PM Jan 7 – Feb 6, 2010 Circus Gallery is pleased to announce You Can Heal Your Life a group show curated by Emma.”

- A page from lifescapemag.com, which contains an article dated 19 November 2009 and is headed “Heal Your Soul to Heal Your Life”
- A page from lifetransitioncoaching.co.uk with a copyright date of 2008. The following appears in relation to life transition coaching: “Gaining new perspective and self empowerment you can heal your life and create an exciting new future for yourself”.
- A page from atlantiscrystalhealing.com. Prices on the page appear in United States, Canadian, Australian and United Kingdom currencies. The following appears: “You can choose to use the knowledge to enrich and heal your life”.

- A page from shamanism-wales.co.uk. In relation to individual trance dance healing the following appears: “dancing is one of the easiest ways to celebrate and heal your life”.
- A page from lindapenny.com. The following appears: “Knowledge is power... learn how to heal your life with love & joy”.
- A page from simplybyoga.co.uk. The page advertises workshops to “help you expand your consciousness and heal your life”.
- A page from bookshop.blackwell.co.uk. In a review of a book, the following appears: “and finally discover the Creative and Magical Child that can heal your life”. The following review also appears:

“Louise Hay author of “You Can Heal Your Life” Healing is making ourselves whole. Healing our Inner Child is a major part of our recovery. Lucia Capacchione is a master at gently guiding you through this process. Love yourself enough to recover from the past.”

- A page from healpastlives.com. The following appears: “HEAL YOUR LIFE NOW BY HEALING YOUR PAST LIVES You CAN Heal Your Life...NOW!”
- A page from lifehealers.co.uk advertising a one to one healing session which will enable you “to heal your life and become more positive”.
- A page from sevenangels.co.uk in relation to shamanic healing. A ‘headline’ reads: “Heal your life with the wisdom of the Incase, and become who you really are!”.
- A page from ahh-hypnosis.co.uk. The prices charged are in dollars. The page advises that: “Your situation is offering you an opportunity to heal your life”.
- A page from holistic-counselor.com. A copyright date of 2010 appears on the page and the contact details are in Jordan. The reader is advised that “[c]ounseling sessions are a journey to heal your life”.
- A page from bbc.co.uk lists comments by persons in relation to Reiki. Margaret Northway from Brynna writes: “If you feel ready to begin to heal life, on all levels, then why dont you join a class in your area, you wont regret it”.
- A page from meetup.com which has been referred to above.
- A page from theconsciouslife.com. The page is headed: “Heal Your Life with Creative Art-Making”.
- A page from altmd.com. An article dated 20 April 2009 is headed “Draw a picture, heal your life. What is art therapy?” The article is written by a therapist based in Santa Rosa.
- A screen shot of a video that has been on the Internet since 9 May 2009. The heading above the screenshot is: “The fountain of youth to heal your life is hydration & water”.
- A page from ehow.com is headed: “How to Heal Your Life After A Breakup. This appears to be a United States website.

- A page from ezinearticles.com. This appears to be a United States website. The article on the page is headed: "Heal Your Life Or Cure it – The Difference Between Healing and Curing".
- A page from neholistic.com. The page contains an article by Eilis Philpott of Connecticut. The article is headed: "Rebirthing: Take A Breath, Heal Your Life".
- A page from thegiftofbetrayal.com. The following appear: "the importance of letting your female friends help you heal your life"; "there's a personal right path for you to heal your life" and "there is a personal right path for you to heal your life". The page bears a copyright date of 2008.
- A page from hubpages.com. In an article the following appear: "Hear is the way to heal your life", "The solution is to heal your life", "and you will heal your life" and "you will heal your life and time will be your ally".
- A page from uk.answers.yahoo.com. The question "How Can You Heal Your Life?" was posted on the website on 10 January 2010.

Witness statement of Gillian Bowles of 30 June 2010

83) The statement consists solely of submission. Consequently, no summary of the contents appear here. However, the submissions are borne in mind in reaching the decision.

Community trade mark decision

84) Hay has referred to the decision of the Cancellation Division of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) in relation to an action brought by Ms Bowles against Community trade mark registration no 7312192. The Community trade mark registration is for HEAL YOUR LIFE and is in the name of Hay. The grounds of cancellation are effectively the same as the grounds of opposition in this case. The decision, rejecting the application for a declaration of invalidity, has been read. No estoppel arises from a decision of OHIM, consequently, the decision of OHIM cannot influence the findings in this decision.

Material dates

85) The international registration has an international priority date of 5 March 2008 from the United States of America. Section 35 of the Act states:

“(1) A person who has duly filed an application for protection of a trade mark in a Convention country (a “Convention application”), or his successor in title, has a right to priority, for the purposes of registering the same trade mark under this Act for some or all of the same goods or services, for a period of six months from the date of filing of the first such application.

(2) If the application for registration under this Act is made within that six-month period-

(a) the relevant date for the purposes of establishing which rights take precedence shall be the date of filing of the first Convention application, and

(b) the registrability of the trade mark shall not be affected by any use of the mark in the United Kingdom in the period between that date and the date of the application under this Act.”

Article 8(1) of The Trade Marks (International Registration) Order 1996 (which was in force at the time of designation) states:

“The provisions of section 35 (claim to priority of Convention application) apply, subject as mentioned below, so as to confer a right to priority in relation to protection of an international registration designating the United Kingdom as they apply in relation to registering a trade mark under the Act.”

86) The United States of America is a Convention country. The designation was made within the 6 month period. The international priority claim shifts the material date for the purposes of a priority in relation to third party rights.

87) A similar provision to section 5(4)(a) of the Act is to be found in Article 8(4) of Council Regulation 40/94 of December 20,1993. This was the subject of consideration by the General Court (GC) in *Last Minute Network Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Joined Cases T-114/07 and T-115/07, in which the GC stated:

“50 First, there was goodwill or reputation attached to the services offered by LMN in the mind of the relevant public by association with their get-up. In an action for passing off, that reputation must be established at the date on which the defendant began to offer his goods or services (*Cadbury Schweppes v Pub Squash* (1981) R.P.C. 429).

51 However, according to Article 8(4) of Regulation No 40/94 the relevant date is not that date, but the date on which the application for a Community trade mark was filed, since it requires that an applicant seeking a declaration of invalidity has acquired rights over its non-registered national mark before the date of filing, in this case 11 March 2000.”

The reasoning of the GC, *mutatis mutandis*, is followed in relation to the Act. Consequently, Ms Bowles must establish that she had a protectable goodwill at the international priority date, 5 March 2008. However, if there was use of the

offending sign prior to this date, the material date will be the date of the behaviour complained ofⁱ and the consideration of the claim in relation to passing-off will be considered as of this date.

88) The material date for bad faith is the date of the filing of the application for registrationⁱⁱ; or in this case the designation of the United Kingdom, 5 August 2008. Bad faith cannot be cured by some action after the date of the applicationⁱⁱⁱ. Consequently, the issue of bad faith must be considered solely at the date of designation, although action after the date of designation may cast light upon the request for protection.

89) The international priority date gives priority over a third party; it does not have an effect upon the issue of registrability. The section 3(1) objections have to be considered at the date of designation^{iv}, 5 August 2008. As per section 35(2)(b) of the Act, the registrability of the trade mark shall not be affected by any use of the mark in the United Kingdom in the period between the international priority date and the date of designation in the United Kingdom. However, the Court of Justice of the European Union (CJEU), in *Alcon Inc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case C-192/03 P*, held that use after the date of application could be used to draw conclusions as to the position at the date of application^v. In *Telefon & Buch Verlagsgesellschaft mbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-322/03*, the GC took into account documents emanating from four years after the date of application^{vi}. Use after the date of application can also go to the issue of foreseeability in relation to the use of the term^{vii}. The position to be considered, is that in the United Kingdom.

Section 3(1) of the Act

90) In *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd Case C-299/99* the CJEU stated:

“36. It is true that Article 3(1)(a) of the Directive provides that signs which cannot constitute a trade mark are to be refused registration or if registered are liable to be declared invalid.

37. However, it is clear from the wording of Article 3(1)(a) and the structure of the Directive that that provision is intended essentially to exclude from registration signs which are not generally capable of being a trade mark and thus cannot be represented graphically and/or are not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

38. Accordingly, Article 3(1)(a) of the Directive, like the rule laid down by Article 3(1)(b), (c) and (d), precludes the registration of signs or indications which do not meet one of the two conditions imposed by Article 2 of the

Directive, that is to say, the condition requiring such signs to be capable of distinguishing the goods or services of one undertaking from those of other undertakings.

39. It follows that there is no class of marks having a distinctive character by their nature or by the use made of them which is not capable of distinguishing goods or services within the meaning of Article 2 of the Directive.

40. In the light of those considerations, the answer to the first question must be that there is no category of marks which is not excluded from registration by Article 3(1)(b), (c) and (d) and Article 3(3) of the Directive which is none the less excluded from registration by Article 3(1)(a) thereof on the ground that such marks are incapable of distinguishing the goods of the proprietor of the mark from those of other undertakings."

Consequently, in order for a sign to fall foul of section 3(1)(a) of the Act, the international registration will not be capable of registration, as it will fall foul of sections 3(1)(b), (c) and/or (d) of the Act, and it cannot acquire distinctive character through the use made of it. There is nothing inherent in the trade mark that makes it incapable of registration whatever the use made of it. It is to be noted that the Act envisages that even signs which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade can be registered, if they have acquired a distinctive character. Consequently, the opposition under section 3(1)(a) of the Act is dismissed. As the trade mark will also have to fall foul of sections 3(1)(b), (c) and/or (d) of the Act, for it to be excluded under section 3(1)(a) of the Act; this ground of opposition is otiose.

91) In *Biold AG v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case C-37/03 P the CJEU stated that for a term to be viewed as being descriptive of a characteristic of goods:

“there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see Case T-19/04 *Metso Paper Automation v OHIM(PAPERLAB)* [2005] ECR II-2383, paragraph 25 and the case-law cited).”

In *JanSport Apparel Corp v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-80/07 the GC gave a helpful summary of the considerations to be taken into account in relation to article 7(1)(c) of the regulation, the equivalent of section 3(1)(c) of the Act:

“18 Under Article 7(1)(c) of Regulation No 40/94, ‘trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service’ are not to be registered. In addition, Article 7(2) of Regulation No 40/94 (now Article 7(2) of Regulation No 207/2009) states that, ‘paragraph 1 shall apply notwithstanding that the grounds of non-registrability obtain in only part of the Community’.

19 By prohibiting the registration of such signs, that article pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the characteristics of goods or services in respect of which registration is sought may be freely used by all. That provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (Case C-191/01 P *OHIM v Wrigley* [2003] ECR I-12447, paragraph 31).

20 Furthermore, the signs covered by Article 7(1)(c) of Regulation No 40/94 are signs regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or services, thus enabling the consumer who acquired the product or service to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (Case T-219/00 *Ellos v OHIM (ELLOS)* [2002] ECR II-753, paragraph 28, and Case T-348/02 *Quick v OHIM (Quick)* [2003] ECR II-5071, paragraph 28).

21 The signs and indications referred to in Article 7(1)(c) of Regulation No 40/94 are thus only those which may serve in normal usage from a consumer’s point of view to designate, either directly or by reference to one of their essential characteristics, goods or services such as those in respect of which registration is sought (see the judgment of 9 July 2008 in Case T-323/05 *Coffee Store v OHIM (THE COFFEE STORE)*, not published in the ECR, paragraph 31 and the case-law cited). Accordingly, a sign’s descriptiveness can only be assessed by reference to the goods or services concerned and to the way in which it is understood by the relevant public (Case T-322/03 *Telefon & Buch v OHIM– Herold Business Data (WEISSE SEITEN)* [2006] ECR II-835, paragraph 90).

22 It follows that, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see Case T-19/04 *Metso Paper Automation v*

OHIM(PAPERLAB) [2005] ECR II-2383, paragraph 25 and the case-law cited).

In *Telefon & Buch Verlagsgesellschaft mbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-322/03 the GC stated:

“49 Article 7(1)(d) of Regulation No 40/94 must be interpreted as precluding registration of a trade mark only where the signs or indications of which the mark is exclusively composed have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought (see, by analogy, Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraph 31, and Case T-237/01 *Alcon v OHIM – Dr. Robert Winzer Pharma (BSS)* [2003] ECR II-411, paragraph 37). Accordingly, whether a mark is customary can only be assessed, firstly, by reference to the goods or services in respect of which registration is sought, even though the provision in question does not explicitly refer to those goods or services, and, secondly, on the basis of the target public’s perception of the mark (*BSS*, paragraph 37).

50 With regard to the target public, the question whether a sign is customary must be assessed by taking account of the expectations which the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, is presumed to have in respect of the type of goods in question (*BSS*, paragraph 38).

51 Furthermore, although there is a clear overlap between the scope of Article 7(1)(c) and Article 7(1)(d) of Regulation No 40/94, marks covered by Article 7(1)(d) are excluded from registration not on the basis that they are descriptive, but on the basis of current usage in trade sectors covering trade in the goods or services for which the marks are sought to be registered (see, by analogy, *Merz & Krell*, paragraph 35, and *BSS*, paragraph 39).”

To fall foul of section 3(1)(d) of the Act HEAL YOUR LIFE “must have become customary in the current language or in the bona fide and established practices of the trade to designate the goods” for which protection is sought. In *Stash Limited v Samurai Sportswear Ltd* BL O/281/04 Professor Annand, sitting as the appointed person, stated:

“33. In the event, I do not believe this issue of the interpretation of section 3(1)(d) is central to the outcome of the appeal. “Customary” is defined in the Oxford English Reference Dictionary, 1995 as: “usual; in accordance with custom”. In my judgment, the Opponent has failed on the evidence to prove that at the relevant date STASH contravened section 3(1)(d) as

consisting exclusively of signs or indications which have become customary either in the current language or in trade practices for the goods concerned.”

Mere use of a term does not make it customary ie usual or the usage general^{viii}.

92) The position has to be considered at the date of the request for protection, though, as stated above, the law allows for use after this date to be taken into consideration if it casts light on the issue at the material date. The issue must be considered in relation to the services for which protection has been sought: *educational seminars in the field of psychology, spirituality and self improvement*. In considering the matter, in relation to sections 3(1)(c) and (d) the purpose of the prohibition is to be borne in mind: the need to leave the sign free for other undertakings to use.

93) Use by others of a term as a brand name does not give rise, per se, to an upholding of an objection under section 3(1) of the Act:

“29. Whilst the use by other traders of the brand name NUDE in relation to perfume may give those traders relative rights to invalidate the mark, it does not give those rights to any defendant. I am not at this stage persuaded that this evidence has a bearing on any absolute ground of invalidity. It certainly does not go as far as establishing ground 7(1)(d) - customary indication in trade. Ground 7(1)(b) is concerned with the inherent character of the mark, not with what other traders have done with it. The traders in question are plainly using the mark as a brand name: so I do not see how this use can help to establish that the mark consists exclusively of signs or indications which may serve to indicate the kind or quality or other characteristics of the goods, and thus support an attack under 7(1)(c).”

(Nude Brands Limited v Stella McCartney Limited and others [2009] EWHC 2154 (Ch) Floyd J.)

94) A term might not be widely known in a market as a whole but may be used in part of that market or might be descriptive of part of that market. In such cases, the need to leave free requires the refusal of the granting of protection of the trade mark. Consequently, for many in the field of psychology HEAL YOUR LIFE may have no meaning but a part of the field of psychology may know what it means and will have an interest in keeping it free. (A party has the option of limiting a specification so that the goods or services do not cover a particular niche.)

95) HEAL YOUR LIFE is not a term that falls within the parameters of normal usage of English. Wounds heal, time heals, but lives are not normally considered to be capable of being healed. Without any evidence, the term does not appear

to be descriptive. However, Ms Bowles has filed evidence to seek to establish that the term is both customary in the current language or in the bona fide and established practices of the trade and descriptive of the services of the international registration.

96) How a sign has been used may be instructive of the nature of the sign and how the relevant public will perceive that sign. In this case the relevant public will be those interested *educational seminars in the field of psychology, spirituality and self improvement*. This will include persons interested in what may be described as 'alternative' therapies and ideas. In this case, the nature of the use shown relates to these alternative therapies and ideas.

97) Advertisements from *Healthy* magazine from 2006 and 2007 are both in the same form:

“Teacher Training

Course based on the work of

Louise L. Hay

Healing Lives

Achieving Dreams

Learn to Teach:

A powerful two-day Workshop,

‘Love Yourself, Heal Your Life’ and

A 10-week Study Course

Led by Patricia Crane Ph.D.

22nd -29th July 2007

Contact: Sharon at Dialogues

01372 460182

Email: sharon@dialogues.co.uk

www.dialogues.co.uk”

The use of “Healing Lives” and “Heal Your Life” is in such a form that the reader would be expected to understand the meaning. There is nothing to suggest that there is any trade mark significance and no reason that the reader would

perceive any trade mark significance. Exhibited at TS4 is a copy of a marketing guide that Ms Stone received as part of the course. The guide states, inter alia:

“Your business card can simply have your name, phone number, and a title such as “Transformational Workshop Leader” or “Heal Your Life, Achieve Your Dreams Workshops and Groups” on it. Carry them with you everywhere and hand them out as often as possible!”

“You will be listed on the website, www.adyteachers.com and www.dialogues.co.uk. However, we encourage you to get your own website...”

“I was recently certified to lead transformational Heal Your Life Workshops, and I think your customers would be very interested in the principles for creating the life they want.”

“Certified Heal Your Life, Achieve Your Dreams Workshop Leader, will be presenting a workshop (or group)...”

The use of Heal Your Life again is indicative of a type of course and a type of therapy. The nature of the use again suggests that the reader will be expected to understand this. Ms Stone states that Heal Your Life is a very common term. She states that in her bookshop she often uses the expression and often hears it from customers in relation to the general self-help category of books. There has been no challenge to the statement of Ms Stone and, therefore, it must be taken at face value. Ms Stone does not identify when she first heard Heal Your Life used in this manner but it would be exceptionally difficult for someone to think back and identify a particular time when they were first aware of the use. The extract from hayhouse.com at GB20 advertises *You Can Heal Your Life – Box Set!*. A description of the product includes the following: “Louise has helped millions of people by showing them how to heal their lives – and these incredible works will help you heal yours”. The publication date of the box set is September 2009 but there is no indication as to when the description was written. A screen shot of a Louise Hay study course video on YouTube is exhibited. The video includes the words:

“I think you’ll find that this tape gives you a wonderful opportunity to learn more about yourself and to begin to heal your life”.

Ms Hay and Hay are using Heal Your Life in a manner that assumes that the potential customer will understand the meaning. There is nothing to suggest to the relevant consumer that there is any trade mark significance. Dr Crane states

that exhibit HH6 contains a sample flyer given to workshop leaders to advertise and promote their workshops and flyers for two United Kingdom teachers offering workshops in 2007. The first flyer is headed "Heal Your Life A POWERFUL, LIFE CHANGING WORKSHOP BASED ON THE PHILOSOPHY OF LOUISE HAY". The second flyer is headed "Heal Your Life – Achieve Your Dreams! A life changing workshop based on the philosophy of Louise Hay". The reader is advised that the workshop is led by "accredited workshop leader Dawn Petherick". "Dawn is founder of Appearing Day (www.appearingday.co.uk) and is an accredited Louise Hay trainer, Life Coach, Reiki and Crystal Healer". The flyer is for a course on 22 and 23 September 2007. The third flyer is headed "Love Yourself, Heal Your Life Join us for a powerful, life changing 2 day workshop based on the philosophies of Louise L Hay." The reader is advised that "[t]he next workshop led by Heal Your Life Teacher Jo Jawo is being held at..." The workshop was due to take place on 27 and 28 October 2007. This again is use that presumes an understanding of the meaning of Heal Your Life, again there is nothing that would suggest that it is anything other than descriptive use with no trade mark significance.

98) The evidence of Ms Bowles shows use of Heal Your Life in the United Kingdom for books published prior to the material date eg: the books *Free to Live Heal Your Life*, *The Complete Guide to Magic and Ritual: Using the Energy of Nature to Heal Your Life* and *60 Ways to Heal Your Life*. (There is, however, no indication as to when the books were first available in the United Kingdom.) The page from NaturalMatters.net, a United Kingdom website, advises that "Hypnotherapy can heal your life". Dr Crane states that exclusive rights have not been claimed for Heal Your Life for books; it may be viewed that this is an admission that the term is descriptive in a book title. It is noted that Hay have, in fact, claimed exclusive rights in relation to books for Heal Your Life; via its Community trade mark.

99) Taking into account the use that has been shown, including use after the material date, Ms Bowles has established that in relation to *educational seminars in the field of psychology, spirituality and self improvement* the trade mark consists exclusively of a sign which has become customary in the current language or in the bona fide and established practices of the trade. **Consequently, granting of protection to the international registration would be contrary to section 3(1)(d) of the Act.**

100) The finding under section 3(1)(d) of the Act is linked, in this case, to the objection under section 3(1)(c) of the Act. Ms Bowles states that Heal Your Life indicates that a product or service relates to healing of life issues. In *Score Draw Limited v Alan James Patrick Finch* [2007] EWHC 462 (Ch) Mann J stated:

“39. The words "other characteristics of goods or services" are obviously more general than the more specific words which precede it. They demonstrate that the preceding words are not the only way in which the provisions of the subsection can be fulfilled. It is therefore open to Score Draw to seek to demonstrate that the badge operates so as to be descriptive of some characteristic of goods other than those enumerated in the section. It seeks to do so by saying that the badge identifies the Brazilian football team nature of the goods to which it is applied. Mr Reed found it hard to articulate the precise characteristic involved, but it was of that general nature. By way of a parallel, Mr Reed relied on *Linkin Park LLC's Application, Case O-035-05* [2006] ETMR 74.

40 In that case the appointed person (Mr Richard Arnold QC) had to consider whether the name of a pop group (Linkin Park) was descriptive under head (c) when applied to posters and books. He held that the term "other characteristics" did not have to be construed *ejusdem generis* with the other characteristics referred to, and in paragraph 44 said:

"I see no reason why subject matter should not qualify [as a characteristic]."

He said that in order to deal with a submission that subject matter should indeed not qualify. He was implicitly accepting the suggestion that the expression "Linkin Park" in its context did indeed amount to a description of subject matter. He observed in paragraph 42:

"By the application date the Mark was no longer meaningless, but on the contrary had acquired a well-established meaning of denoting the Group."

41. I find this analysis, and the parallel with the present case, helpful. The mark in this case is not a mark which, in its actual terms, describes subject matter in the same way as the words "Linkin Park" would have described subject matter in the *Linkin Park* case by making those very words descriptive of the characteristics of the goods. However, the effect of the badge, in the eyes of the relevant public is very similar. The CBD badge would, on the evidence, be recognised by them as denoting the clothing as Brazilian team clothing because the badge had been part of that clothing for many years, had in particular been part of the clothing of more modern successful teams, and since the mid-90's had been sold as a necessary and integral part of replica kit. It does not say "Brazilian National Club" in terms, but it would mean that to the relevant public even if (as seems likely) they do not know the Portuguese words for which the initials stand. I consider that in the circumstances the badge is descriptive of a characteristic of the clothing which bears it in the sense that it connotes that the clothing is, or has an association with, the historic Brazilian national team."

101) Heal Your Life equally acts as identifying a type of *educational seminar in the field of psychology, spirituality and self improvement*. A seminar that aims, using the words of Ms Bowles, to deal with healing of life issues. It is clear from the nature of the use made in books, on websites, on recordings and for courses that for the relevant public Heal Your Life designates a characteristic of the services. **Consequently, granting of protection to the international registration would be contrary to section 3(1)(c) of the Act.**

102) In *KPN Nederland NV v Benelux Merkenbureau* the CJEU stated:

“86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 3(1)(c) of the Directive is, on that account, necessarily devoid of any distinctive character with regard to the same goods or services within the meaning of Article 3(1)(b) of the Directive. A mark may none the less be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive.”

Consequently, on the basis of the finding in relation to section 3(1)(c) of the Act, granting of protection to the international registration would be contrary to section 3(1)(b) of the Act.

103) Hay states that the trade mark has acquired a significant level of distinctiveness through the use it has made of it.

104) In *Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Boots- und Segelzubehör Walter Huber and Franz Attenberger* Joined Cases C-108/97 and C-109/97 the CJEU stated:

“51. In assessing the distinctive character of a mark in respect of which registration has been applied for, the following may also be taken into account: the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations.

52. If, on the basis of those factors, the competent authority finds that the relevant class of persons, or at least a significant proportion thereof, identify goods as originating from a particular undertaking because of the trade mark, it must hold that the requirement for registering the mark laid down in Article 3(3) of the Directive is satisfied. However, the circumstances in which that requirement may be regarded as satisfied cannot be shown to exist solely by reference to general, abstract data such as predetermined percentages.”

In *Rautaruukki Oyj v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-269/06 the GC stated:

“43 Article 7(3) of Regulation No 40/94 provides that the absolute grounds for refusal do not preclude the registration of a trade mark if it has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it. In the circumstances referred to in Article 7(3) of Regulation No 40/94, the fact that the sign which constitutes the mark in question is actually perceived by the relevant section of the public as an indication of the commercial origin of a product or service is the result of the economic effort made by the trade mark applicant. That fact justifies putting aside the public-interest considerations underlying Article 7(1)(b) to (d), which require that the marks referred to in those provisions may be freely used by all in order to avoid conceding an unjustified competitive advantage to a single trader (*Shape of a bottle of beer*, paragraph 21 above, at paragraph 41, and *Shape of a sweet*, paragraph 21 above, at paragraph 55).

44 First, it is clear from the case-law that the acquisition of distinctiveness through use of a mark requires that at least a significant proportion of the relevant section of the public identifies the products or services as originating from a particular undertaking because of the mark. However, the circumstances in which the condition as to the acquisition of distinctiveness through use may be regarded as satisfied cannot be shown to exist solely by reference to general, abstract data, such as specific percentages (see *Shape of a sweet*, paragraph 21 above, paragraph 56, and case-law cited).....

46 Third, in assessing, in a particular case, whether a mark has become distinctive through use, account must be taken of factors such as, inter alia: the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the significance of the investments by the undertaking to promote it; the proportion of the relevant class of persons who, because of the mark, identify the goods as originating from a particular undertaking and statements from chambers of commerce and industry or other trade and professional associations. If, on the basis of those factors, the relevant class of persons, or at least a significant proportion thereof, identifies the goods as originating from a particular undertaking because of the trade mark, it must be concluded that the requirement for registering the mark laid down in Article 7(3) of Regulation No 40/94 is satisfied (see *Shape of a sweet*, paragraph 21 above, at paragraph 58, and case-law cited).”

In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 Jacob J stated

“With that in mind I must deal with the evidence – for all depends upon the conclusions to be drawn from that. I begin with the original registration. As I have said I do not have to consider whether the mark was rightly registered under the 1938 Act. By virtue of section 105 of the 1994 Act and Schedule 3 paragraph 18(2) it is section 47 of the 1994 Act which sets out the grounds upon which a mark registered under the old Act can be attacked. I have already described the evidence used to support the original registration. It was really no more than evidence of use. Now it is all too easy to be beguiled by such evidence. There is an unspoken and illogical assumption that “use equals distinctiveness”. The illogicality can be seen from an example: no matter how much use a manufacturer made of the word “Soap” as a purported trade mark for soap the word would not be distinctive of his goods. He could use fancy lettering as much as he liked, whatever he did would not turn the word into a trade mark. Again, a manufacturer may coin a new word for a new product and be able to show massive use by him and him alone of that word for the product. Nonetheless the word is apt to be the name of the product, not a trade mark. Examples from old well-known cases of this sort of thing abound. The Shredded Wheat saga is a good example: the Canadian case is *The Canadian Shredded Wheat Co. Ltd. v. Kellogg Co. of Canada Ltd.* in the Privy Council and the United Kingdom case *The Shredded Wheat Co. Ltd. v. Kellogg Co. of Great Britain Ltd.* in the House of Lords. In the former case Lord Russell said:

“A word or words to be really distinctive of a person's goods must generally speaking be incapable of application to the goods of anyone else.”

It is precisely because a common laudatory word is naturally capable of application to the goods of any trader that one must be careful before concluding that merely its use, however substantial, has displaced its common meaning and has come to denote the mark of a particular trader. This is all the more so when the mark has been used in conjunction with what is obviously taken as a trade mark.

I do not consider that the evidence filed to support the registration was anywhere near enough to support the conclusion that when the mark was registered, it was distinctive. Yes it had been used for about 5 years in conjunction with Silver Spoon, but it was not proved that the public regarded it as a trade mark - a reliable badge of trade origin - on its own. Further the use was only for what was essentially an ice cream topping. It did not cover the full range of goods covered by the registration.

What then of the position now? British Sugar rely upon more extensive evidence. First there is a great deal more use of exactly the same type as went on before. Sales figures went on going up - to nearly £3m p.a. Since introduction in 1986 sales over the 10 year period total about £13m. of which over half have taken place since registration in September 1992. The product has just over 50% of the ice cream topping market sector. Next British Sugar rely upon evidence from Mrs. Nash MBE. She was in public relations at British Sugar. She took telephone inquiries and dealt with letters from the general public. People sometimes complained when a flavour disappeared (blackcurrant did) or wanted information on availability (for instance when the toffee flavour came out, magazines, mainly at British Sugar's instigation, published recipes for making banoffi pie, a dessert made from bananas, toffee and ice cream). She said that customers often referred simply to "your "Treat" range". But of course all the customers concerned, whether writing or telephoning, knew they were dealing with Silver Spoon the manufacturers. I do not think Mrs. Nash's evidence establishes that the general public perceive the word "Treat" to be a badge of trade origin in itself. I think her evidence does show recognition of the word amongst British Sugar customers, but recognition does not necessarily mean recognition as a trade mark."

105) The evidence of Hay is signally deficient in establishing that the trade mark has acquired distinctive character. The actual use that has been shown is often not by Hay and rather than establishing a trade mark character, does the very opposite.

106) Hay has not established that at the material date the trade mark had acquired distinctive character for the services of the registration in the United Kingdom.

Section 3(6) of the Act – bad faith

107) Bad faith includes dishonesty and "some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular field being examined^{ix}". Certain behaviour might have become prevalent but this does not mean that it can be deemed to be acceptable^x. It is necessary to apply what is referred to as the "combined test". It is necessary to decide what Hay knew at the time of making the designation and then, in the light of that knowledge, whether its behaviour fell short of acceptable commercial behaviour^{xi}. Bad faith impugns the character of an individual or collective character of a business, as such it is a serious allegation^{xii}. The more serious the allegation the more cogent must be the evidence to support it^{xiii}. However, the matter still has to be decided upon the balance of probabilities.

108) In *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* Case C-529/07 the CJEU stated:

“40 However, the fact that the applicant knows or must know that a third party has long been using, in at least one Member State, an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought is not sufficient, in itself, to permit the conclusion that the applicant was acting in bad faith.

46 Equally, the fact a third party has long used a sign for an identical or similar product capable of being confused with the mark applied for and that that sign enjoys some degree of legal protection is one of the factors relevant to the determination of whether the applicant was acting in bad faith.

47 In such a case, the applicant’s sole aim in taking advantage of the rights conferred by the Community trade mark might be to compete unfairly with a competitor who is using a sign which, because of characteristics of its own, has by that time obtained some degree of legal protection.

48 That said, it cannot however be excluded that even in such circumstances, and in particular when several producers were using, on the market, identical or similar signs for identical or similar products capable of being confused with the sign for which registration is sought, the applicant’s registration of the sign may be in pursuit of a legitimate objective.

49 That may in particular be the case, as stated by the Advocate General in point 67 of her Opinion, where the applicant knows, when filing the application for registration, that a third party, who is a newcomer in the market, is trying to take advantage of that sign by copying its presentation, and the applicant seeks to register the sign with a view to preventing use of that presentation.

50 Moreover, as the Advocate General states in point 66 of her Opinion, the nature of the mark applied for may also be relevant to determining whether the applicant is acting in bad faith. In a case where the sign for which registration is sought consists of the entire shape and presentation of a product, the fact that the applicant is acting in bad faith might more readily be established where the competitors’ freedom to choose the shape of a product and its presentation is restricted by technical or commercial factors, so that the trade mark proprietor is able to prevent his competitors not merely from using an identical or similar sign, but also from marketing comparable products.

51 Furthermore, in order to determine whether the applicant is acting in bad faith, consideration may be given to the extent of the reputation enjoyed by a sign at the time when the application for its registration as a Community trade mark is filed.”

In *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others* [2008] EWHC 3032(Ch) Arnold J held:

“189. In my judgment it follows from the foregoing considerations that it does not constitute bad faith for a party to apply to register a Community trade mark merely because he knows that third parties are using the same mark in relation to identical goods or services, let alone where the third parties are using similar marks and/or are using them in relation to similar goods or services. The applicant may believe that he has a superior right to registration and use of the mark. For example, it is not uncommon for prospective claimants who intend to sue a prospective defendant for passing off first to file an application for registration to strengthen their position. Even if the applicant does not believe that he has a superior right to registration and use of the mark, he may still believe that he is entitled to registration. The applicant may not intend to seek to enforce the trade mark against the third parties and/or may know or believe that the third parties would have a defence to a claim for infringement on one of the bases discussed above. In particular, the applicant may wish to secure exclusivity in the bulk of the Community while knowing that third parties have local rights in certain areas. An applicant who proceeds on the basis explicitly provided for in Article 107 can hardly be said to be abusing the Community trade mark system.”

In *Canaries Seaschool Slu v John Williams and Barbara Williams* Mr Hobbs QC, sitting as the appointed person, stated:

“51. It seems to have been a matter of administrative convenience that the opposed application for registration was filed in the name of Andrew Williams’ partner, Janet Wills, before being assigned to the Applicant. No argument to the contrary has been raised on its behalf. On the basis of the evidence on file, the knowledge, intentions and motives of Andrew Williams can properly be attributed to the Applicant. They are amply sufficient to invalidate the opposed application in accordance with the principle of prohibition of abuse of law as reflected in the objection to registration on the ground of bad faith provided by Section 3(6) of the 1994 Act. The behaviour of Andrew Williams hence the behaviour of the Applicant towards the Opponents in connection with the filing of the opposed application for registration was, on the view I take of the evidence, tainted by a desire to deprive them of their entitlement to the goodwill appertaining to the verbal and non-verbal elements of the signs in

issue. That appears to me to be unacceptable on any view of what can constitute applying for registration in bad faith.”

109) Ms Bowles claims that the request for protection was made in bad faith for the following reasons:

“1. Falsely claiming registrations they don’t have and using the ® sign to indicate registrations that are not registered, in contravention of Section 95 Trade Marks Act 1995.

2. Making false claims in relation to Trademark rights and using these to demand money for a license from previously trained teachers, thereby committing a commercial fraud.

3. A failure to keep teachers properly informed and active deception in relation to those teachers, falsely informing teachers that the marks were registered or a ‘done deal’ and using legal threats against teachers who opposed them.

4. Attempting to coerce teachers into accepting an unconscionable license agreement.”

110) The basis of the ground is that the application was made in bad faith as it was the intention of Hay, through its licensee, to prevent persons carrying on their business by reference to HEAL YOUR LIFE unless they agreed to take out a licence. This is a normal practice in relation to licensing the use of trade marks. However, what Ms Bowles emphasises is that people had paid for their training on the basis that they could refer to the name of the training in their businesses. She claims that the participants on the courses were encouraged to use HEAL YOUR LIFE and were given carte blanche in relation to this matter. Ms Bowles has filed evidence to attempt to show that HEAL YOUR LIFE is a term in general usage. The evidence does not identify HEAL YOUR LIFE solely with the teachings of Ms Hay. From the evidence it appears that the key part of the training was that it taught the methods of Ms Hay. Consequently, it is the link to the teachings of Ms Hay that is key to the training.

111) Ms Bowles’s own case is that the training in the United Kingdom for many years was not linked to Hay or Ms Hay. She has filed evidence to show that Dialogues was providing the training and she makes hearsay claims as to a rift between Dr Crane and Ms Hay. If Hay was not responsible for the courses, it can hardly be judged to be responsible for what was said to the participants on the courses. This matter becomes somewhat clouded by the fact that the master licensee of Hay is HI and the controlling mind of this organisation appears to be Dr Crane. However, it is still the case that neither HI nor Dr Crane are the owners of the international registration.

112) One perspective of the trade mark applications made by Hay is that it simply wanted to put its intellectual property rights into order and to control the use of signs in which it considered that it had rights. There is no doubt that Ms Hay and Hay have made use of HEAL YOUR LIFE in some form for many years; even if the courses in the United Kingdom were not run by Ms Hay or Hay for some years.

113) The first point Ms Bowles raises above has no direct relevance to the issue of seeking protection in the United Kingdom, it is a discrete matter. It is not something that casts any particular light upon the mind of Hay at the date of designation. The second point again does not have direct relevance to the issue. If Ms Bowles considered that she was the subject of groundless threats of infringement proceedings she could have had recourse to section 21 of the Act. Trade mark registrations grant monopolies and those monopolies bring rights, which include the right to grant licences. Hay may have jumped the gun with its presumption that it would be granted trade marks. However, it is difficult to see that this is telling or of itself represents an act of bad faith. Ms Bowles' third point has an anomalous basis; as stated above, it is Ms Bowles's contention that Hay was not involved in the training for many years so for a large part of the time it could hardly have been considered to be misleading attendees of the courses. If Hay considers that persons have infringed its rights, registered or otherwise, it is not unreasonable to take action re this matter. Requiring licences, if consent is given to use of a trade mark, is a norm in business and, of itself is hardly unconscionable. It is difficult to view the terms of the licence as unconscionable.

114) As the CJEU has held, the fact that an applicant knows that third parties have been using HEAL YOUR LIFE for identical services is not sufficient, in itself, to permit the conclusion that the applicant was acting in bad faith. At the time of the filing of the request for protection Hay considered that it had rights in HEAL YOUR LIFE for the services, owing to the work of Ms Hay. The view of OHIM in relation to the observations and cancellation action of Ms Bowles indicates that this was not an unreasonable view. Hay had run courses by reference to the sign in one form or another and wished to control the use of that sign. The action of Hay in seeking protection of the trade mark was a matter of prudent, and common, commercial practice. **The application for protection in the United Kingdom was not made in bad faith; the ground of opposition under section 3(6) of the Act is dismissed.**

Section 5(4)(a) of the Act – passing-off

115) Ms Bowles submits that Hay had abandoned its rights in HEAL YOUR LIFE in the United Kingdom, the courses having been run for some time by Dialogues. The premise of Ms Bowles claim is that she has a superior right to the use of HEAL YOUR LIFE, a right that would allow her to prevent the use of the sign by Hay. Ms Bowles states that the Louise Hay Teacher Training run in the United Kingdom between 1995 and 2001 was run by Dialogues, a United Kingdom

undertaking that specialises in spiritual training. She states that Hay's only involvement was the signing of the certificates and "authorization of the students" on the courses. Ms Bowles states that the training run between 2001 and 2009, involving Dr Crane, was also run by Dialogues. She states that Hay had no commercial involvement and did not provide the services but "merely" endorsed them. Endorsement presumes an element of control. It is not unusual for overseas undertaking to have agency/licence arrangements with undertakings in other jurisdictions. Whether the overseas undertaking has goodwill in relation to such use is a question of fact. The presence of the Louise Hay name and the association with her philosophy means that the case is not on a par with *Medgen Inc v Passion for Life Products Ltd* [2001] FSR 30. There has been a clear connection with Hay and Ms Hay.

116) Mr Geoffrey Hobbs QC, sitting as the appointed person, in *Lee Alexander McQueen v Nicholas Steven Croom* BL O-120-04 held:

"45. I understand the correct approach to be as follows. When rival claims are raised with regard to the right to use a trade mark, the rights of the rival claimants fall to be resolved on the basis that within the area of conflict:

- (a) the senior user prevails over the junior user;
- (b) the junior user cannot deny the senior user's rights;
- (c) the senior user can challenge the junior user unless and until it is inequitable for him to do so."

117) It is Ms Bowles claim that a number of undertakings have been using the sign for the same or similar services. In *Associated Newspapers Limited and others v Express Newspapers* [2003] FSR 51 Laddie J stated:

"25. The jurisprudence to the effect that it is difficult if not impossible to succeed in a passing off action where the mark relied on is descriptive is based on the principle that no trader should be allowed to secure a monopoly over words which customers would regard not as an indication of origin but as merely descriptive of the type of goods or services being offered and which, for that reason, other traders are likely to want to use. Where a mark possesses the ability to convey to the customer an indication of a particular trade origin for goods made available under it, it can be protected by passing off proceedings."

Ms Bowles has run the section 5(4)(a) claim as an alternative to her claims under section 3(1) of the Act; in the event that it is found that the sign is found to be compliant with that section of the Act. Consequently, there is no contradiction in her claim.

118) In the same judgment Laddie J stated:

“28 As Mr Watson implicitly accepts, there is no requirement in the law of passing off that the claimant's reputation has to be exclusive. There have been a number of cases where a claimant has succeeded even though he was not the only trader with a reputation in the mark. A newcomer who adopts a mark employed by more than one competitor and thereby deceives the public harms each of them. There is no reason in principle and no authority which suggests that because a number of proprietors are harmed, none of them can seek to restrain the interference with their trade. Mr Watson also did not put forward any reason why shared reputation could only be protected where there are “very few” traders using the same or similar marks. I can see no reason why this should be so. It may well be that where a number of traders use a similar name as or as part of their trade mark, the public will become more discerning about small differences between them. This may make misrepresentation less easy to prove. But that is quite different to saying that the traders do not have protectable reputations in their marks. It follows that I do not accept this argument. If, as appears to be the case, the claimant has a reputation in *The Mail*, *Daily Mail* and *The Mail on Sunday* as an indication of newspapers from a particular source, the fact that others may have reputations in other newspaper titles which incorporate the word “mail” does not deprive it of the right to protect that reputation.”

Consequently, the claim of Ms Bowles that others are also using the sign does not preclude a claim to passing-off.

119) The abandonment of goodwill was dealt with by Arnold J in *Pavel Maslyukov v Diageo Distilling Ltd And Diageo Scotland Ltd* [2010] EWHC 443(Ch)^{xiv}:

“74. As can be seen from paragraph 132 of the decision, the hearing officer cited Wadlow, *The Law of Passing Off* (3rd ed) at 3-178. Counsel for Diageo drew attention to the fact that this issue is considered further in the Supplement to the 3rd edition, where the author quotes the following passage from the judgment of Lewison J in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch):

"1877. It is clear that, as a matter of law, goodwill can be abandoned. A common case in which abandonment is held to have taken place is where a business is discontinued, with no prospect of restarting, and its assets are broken up and sold: *Pink v. Sharwood* (1913) 30 RPC 725. Mr Purvis submitted that goodwill cannot be abandoned unless the person alleged to have abandoned it knew that he had it and intended to abandon it. However, the requirement of an intention to abandon was rejected in *Norman Kark*

Publications Ltd v Odhams Press Ltd [1962] RPC 163. Mr Wadlow says in his book *The Law of Passing Off* (3rd ed. para. 3-178):

'The better view is that if a business is deliberately abandoned in circumstances which are inconsistent with its ever being recommenced then the goodwill in it is destroyed unless contemporaneously assigned to a new owner.'

1878. I agree. In my judgment when QCL went into liquidation, without any attempt being made to sell any of its assets (still less sell the business and goodwill as a going concern), its goodwill was destroyed."

75. The author also quotes a passage from the decision of Geoffrey Hobbs QC sitting as the Appointed Person in *Mary Wilson Enterprises Inc's Trade Mark Application* [2003] EMLR 14. That case concerned the well-known pop group The Supremes, which had performed with a varying membership between 1961 and 1977. Each of the members of the group, one of whom was Mary Wilson, had a recording contract with Motown Record Corporation. Mr Hobbs found that, as between Mary Wilson and Motown, it had been agreed in 1974 that the worldwide rights in the name THE SUPREMES were owned by Motown, but that the position with regard to other members of the group was far less clear (see [32]-[33]). Professor Wadlow reads the decision as finding that all the goodwill in the name as at 1977 was owned by Motown. I am not sure that this is right, but it does not matter for present purposes. What does matter is that the hearing officer in that case had concluded that the goodwill in the name had been abandoned between 1977 and 1985, and in consequence that the opponents and a third singer, former members of the group who had reformed the group in 1985, had acquired a fresh goodwill under the name thereafter.

76. Mr Hobbs upheld the applicant's appeal on this point, saying:

"62. The goodwill attaching to THE SUPREMES name by virtue of the performances of the various Motown recording artists who had performed together under that name between 1961 and 1977 was a valuable asset. It remained a valuable asset on the basis that sales of Motown recordings of their performances as THE SUPREMES had continued without interruption. The marketing of live and recorded performances delivered by the new group concurrently with the marketing of recorded performances delivered by the old group, all being presented as performances of THE SUPREMES, was apt to augment the pre-existing goodwill because the live and recorded performances were likely to be attributed to a single, continuing business undertaking in the perceptions and

recollections of the average consumer. The pre-existing goodwill could not, in the context of the claims raised in the present proceedings, be regarded as the property of the members of the new group without evidence (which might be evidence of release, waiver or abandonment) sufficient to justify a finding that they became successors in title thereto.

63. The evidence on file is not sufficient to justify such a finding...."

77. Mr Hobbs went on to conclude at [68] that the new group had not acquired an independent or concurrent goodwill in the name THE SUPREMES, but instead had "perpetuated and extended the pre-existing goodwill attaching to THE SUPREMES name in a manner that has merged their contribution to the economic value of it with the contributions of their predecessors".

78. Professor Wadlow comments:

"It is implicit in the decision of the Appointed Person that the Motown-owned goodwill had neither been abandoned in 1977, nor extinguished by 198[5]. This seems correct. In the present case it would be inappropriate to attempt to distinguish between goodwill arising from live performances, and that arising from recordings and broadcasts. Sales of Supremes records continued, there was a loyal fan base, and the name was recognised by the general public. It need make no difference that the then members of the Supremes resolved in 1977 to split up and go their separate ways: they were not in law the owners of the goodwill and their collective state of mind could not prejudice Motown's rights."

79. As I read his decision, Mr Hobbs' reasoning did not depend on any finding that the goodwill generated from 1961 to 1977 was owned by Motown. Subject to that, I agree with Professor Wadlow's analysis. As Mr Hobbs said later in the decision:

"86. The applicant appealed to an Appointed Person under s.76 of the 1994 Act contending in substance that:

...

(2) the hearing officer had mistakenly equated cessation of use with abandonment of goodwill and wrongly concluded that the goodwill in THE SUPREMES name had been abandoned when the old group disbanded in 1977;

(3) the hearing officer wrongly concluded that the activities of the new group between 1985 and 1995 had supplanted the whole of the goodwill attaching to THE SUPREMES name by virtue of the

performances of the various Motown recording artists who had performed together under that name between 1961 and 1977;
...”

120) Goodwill does not immediately disappear following the end of use of a sign. In *Ad-Lib Club Limited v Granville* [1971] FSR Pennycuick VC considered the issue of residual goodwill:

“In support of that statement there is cited the case of *Norman Kark Publications Ltd. v. Odhams Press Ltd.*, [1962] 1 All E.R. 636; [1962] R.P.C. 163 in which the first paragraph of the headnote reads:

"In an action to restrain the use of a magazine or newspaper title on the ground of passing off the plaintiff must establish that, at the date of the user by the defendant of which the plaintiff complains, he has a proprietary right in the goodwill of the name, viz., that the name remains distinctive of some product of his, so that the use of the name by the defendant is calculated to deceive; but a mere intention on the part of the plaintiff not to abandon a name is not enough".

Wilberforce, J. went at length into the principles underlying proprietary right in goodwill and annexation of a name to goodwill and the laws of the right to protection of a name and on the facts of that particular case he held that the plaintiff company had lost its right in respect of the name TODAY as part of the title of a magazine.

It seems to me clear on principle and on authority that where a trader ceases to carry on his business he may nonetheless retain for at any rate some period of time the goodwill attached to that business. Indeed it is obvious. He may wish to reopen the business or he may wish to sell it. It further seems to me clear in principle and on authority that so long as he does retain the goodwill in connection with his business he must also be able to enforce his rights in respect of any name which is attached to that goodwill. It must be a question of fact and degree at what point in time a trader who has either temporarily or permanently closed down his business should be treated as no longer having any goodwill in that business or in any name attached to it which he is entitled to have protected by law.

In the present case, it is quite true that the plaintiff company has no longer carried on the business of a club, so far as I know, for five years. On the other hand, it is said that the plaintiff company on the evidence continues to be regarded as still possessing goodwill to which this name AD-LIB CLUB is attached. It does, indeed, appear firstly that the defendant must have chosen the name AD-LIB CLUB by reason of the reputation which the plaintiff company's AD-LIB acquired. He has not filed any evidence

giving any other reason for the selection of that name and the inference is overwhelming that he has only selected that name because it has a reputation. In the second place, it appears from the newspaper cuttings which have been exhibited that members of the public are likely to regard the new club as a continuation of the plaintiff company's club. The two things are linked up. That is no doubt the reason why the defendant has selected this name."

121) There is no substantiation of the claim of Ms Bowles that Ms Hay or Hay had abandoned its goodwill. Ms Bowles has conflated an allegation that the business had not functioned in the United Kingdom for a number of years with the abandonment of the goodwill. There is nothing to suggest that there was an abandonment of the goodwill. The works of Ms Hay were still available, the philosophy of Ms Hay was still being taught. The courses clearly identified the work of Ms Hay. Consequently, at the international priority date there was a residual goodwill in the business of Hay. (Goodwill resides in the business, not the sign which is used in relation to the business. Consequently, a party can have goodwill but owing to the nature of the sign and/ or its use by others may not be able to succeed in a passing-off action.) Hay was the senior user and so Ms Bowles could not prevent the use of HEAL YOUR LIFE for the services of the international registration under the law of passing-off. The issue of the distinctiveness of HEAL YOUR LIFE for the services at the date of the request for protection is a separate matter. To find that Ms Bowles could not prevent the use of HEAL YOUR LIFE at the international priority date, is not to state that Hay could prevent the use of the sign by Ms Bowles of the sign under the law of passing off; that is not a matter for a consideration in these proceedings.

122) The ground of opposition under section 5(4)(a) of the Act is dismissed.

Overall result

123) The international registration is to be refused protection in the United Kingdom under sections 3(1)(b), (c) and (d) of the Act.

Costs

124) In *West t/a Eastenders v Fuller Smith Turner PLC* [2003] EWCA Civ 429^{xv} Pumfrey J, sitting in the Court of Appeal, decided that, in awarding costs, the success in relation to separate grounds and the evidence adduced in relation to those grounds should be taken into account. Ms Bowles has failed in relation to the grounds of opposition under section 3(1)(a), 5(4)(a) and 3(6). Parts of the evidence were relevant to the last two grounds. Taking into account the successes and failures in relation to the grounds, each party shall bear its own costs.

Dated this 10th day of November 2011

**David Landau
For the Registrar
the Comptroller-General**

ⁱ *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] RPC 429 and *Inter Lotto (UK) Ltd v Camelot Group PLC* [2004] RPC 8 and 9.

ⁱⁱ *Hotpicks Trade Mark* [2004] RPC 42 and *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* Case C-529/07 paragraph 35.

ⁱⁱⁱ *Nonogram Trade Mark* BL O/367/00.

^{iv} See *Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI) v Frosch Touristik GmbH* Case C-332/09 P :

“41 Or, en premier lieu, s’agissant de l’ordonnance Alcon/OHMI, précitée, il convient de constater que, contrairement à ce que fait valoir l’OHMI, c’est à bon droit que le Tribunal a estimé qu’il ressort de cette ordonnance que la seule date pertinente aux fins de l’examen d’une demande de déclaration de nullité fondée sur l’article 51, paragraphe 1, sous a), du règlement n° 40/94 est la date du dépôt de la demande d’enregistrement.”

^v “41. Moreover, the Court of First Instance could without inconsistency in its reasoning or error of law take account of material which, although subsequent to the date of filing the application, enabled the drawing of conclusions on the situation as it was on that date (see, by analogy, the order in Case C-259/02 *La Mer Technology* [2004] E.C.R. I-0000 , [31]).”

^{vi} “62 Even though those documents were gathered four years after the application for registration of the mark WEISSE SEITEN had been lodged, they confirm the linguistic development which took place and the conclusions which result from the documents concerning the period prior to the lodging of the application.”

^{vii} *Wm Wrigley Jr Company v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Case C-191/01 P:

“32 In order for OHIM to refuse to register a trade mark under Article 7(1)(c) of Regulation No 40/94, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that such signs and indications could be used for such purposes. A sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned.”

^{viii} Other language versions of the Directive make this clear eg:

“las marcas que se compongan exclusivamente de signos o indicaciones que se hayan convertido en **habituales** en el lenguaje común o en las costumbres leales y constantes del comercio;”

and:

« les marques qui sont composées exclusivement de signes ou d'indications devenus **usuels** dans le langage courant ou dans les habitudes loyales et constantes du commerce; »

and

„Marken, die ausschließlich aus Zeichen oder Angaben zur Bezeichnung der Ware oder Dienstleistung bestehen, die **im allgemeinen Sprachgebrauch** oder in den redlichen und ständigen Verkehrsgepflogenheiten üblich geworden sind;“

^{ix} *Gromax Plastics Limited v Don and Low Nonwovens Ltd* [1999] RPC 367.

^x *Harrison v Teton Valley Trading Co* [2005] FSR 10. Full judgment to be found at the url:

<http://www.bailii.org/ew/cases/EWCA/Civ/2004/1028.html>

^{xi} (1) *Barlow Clowes International Ltd. (in liquidation)* (2) *Nigel James Hamilton and (3) Michael Anthony Jordon v (1) Eurotrust International Limited (2) Peter Stephen William Henwood and (3) Andrew George Sebastian* [2005] UKPC 37 to be found at the url:

<http://www.bailii.org/uk/cases/UKPC/2005/37.html>

and *Ajit Weekly Trade Mark* BL O/004/06.

^{xii} See *Royal Enfield Trade Marks* BL O/363/01.

^{xiii} *Re H (minors)* [1996] AC 563.

^{xiv} To be found at the url:

<http://www.bailii.org/ew/cases/EWHC/Ch/2010/443.html>

^{xv} The full judgment can be found at the url:

<http://www.bailii.org/ew/cases/EWCA/Civ/2003/429.html>