

O-520-16

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

**IN THE MATTERS OF TRADE MARK APPLICATIONS 3097280, 3097286,
3097285, 3097284, 3097283 & 3098940
BY BUTE TECHNOLOGY LIMITED TO REGISTER THE FOLLOWING TRADE
MARKS IN CLASS 12:**

**DriverEye, VehicleDefend, CVProtect, DriverSens,
DriverTek & Driverdefend**

AND

**OPPOSITIONS THERETO (NOs. 404548, 404549, 404550, 404551, 404934 &
404935) BY FUELDEFEND GLOBAL LIMITED**

Background and pleadings

1. This dispute concerns six oppositions filed by FuelDefend Global Ltd (“FDG”) against the registration of the following trade marks:

- i) 3097280 for the mark **DriverEye** which was filed on 3 March 2015 and published on 20 March 2015. It was filed by Commercial Vehicle Protection Solutions Limited (“CVPS”), but now stands in the name of Bute Technology Ltd (“Bute”). Registration is sought in respect of automotive vehicles in class 12.
- ii) 3097286 for the mark **VehicleDefend** with the same dates, ownership and specification as above. It should be noted that this mark has now been withdrawn by the applicant.
- iii) 3097285 for the mark **CVProtect** with the same dates, ownership and specification as mark i).
- iv) 3097284 for the mark **DriverSens** with the same dates, ownership and specification as mark i).
- v) 3097283 for the mark **DriverTek** with the same dates (save that the mark was published on 29 May 2015), ownership and specification as mark i).
- vi) 3098940 for the mark **Driverdefend** which was filed on 12 March 2015 and published on 29 May 2015. It has the same ownership as the above marks, but is sought to be registered for “[c]amera and sensor equipment to record and monitor commercial driver safety; all for use on heavy goods vehicles (HGV)” in class 9.

2. The grounds of opposition are the same in each case, all being based on section 3(6) of the Trade Marks Act 1994 (“the Act”). The basis of the claim is that a previous employee/director of FDG (Mr Terry Winter) set up CVPS whilst still in the employ of FDG. The marks were, it is claimed, conceived by FDG as the name of a new suite of products and that they are the property of FDG. It should be noted that CVPS no longer

own the marks. They were first assigned to a company called CV Protect Limited (“CVPL”), who subsequently assigned them to Bute.

3. The oppositions were all defended by (at the relevant time) CVPS. The notice of defence and counter-statement was completed by Mr Winter. I note the following:

- Mr Winter accepts that he was a director and shareholder of FDG. He adds that he is still an owner.
- That contrary to FDG’s “incorrect” assumption that he left the employment of FDG on 13 February 2015, his last day of paid work was actually 23 January 2015 when a P45 was issued to him by FDG.
- Mr Winter states that the marks were conceived in and around March 2015 by himself and his employees. They have been used, it is claimed, on various pieces of internal and external documentation.
- Mr Winter states that FDG did not conceive the marks. He states that FDG have a library of marks which they always seek to register at the time of conception. “They did not claim these marks nor asked for their lawyers to register nor seek to register these marks”. He adds that the “library of products” are often used by FDG before registering them and published to customers and suppliers on its website – at no point has the opponent used the marks as it would normally have done.
- FDG is asked to prove that use has been made on internal documentation, emails etc.
- Mr Winter claims that the oppositions have been made in bad faith.

4. The proceedings were consolidated. Both sides filed evidence. A hearing took place before me on 7 October 2016 at which Mr Jonathan Moss, of counsel, instructed by Lawrie IP Limited represented Bute and at which Mr Cameron McKenzie of HERSTAL represented FDG.

Section 3(6)

5. Section 3(6) of the Act states that:

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

6. The main requirements of the law were set out by Arnold J in *Red Bull GmbH v Sun Mark Ltd & Anr* [2012] EWHC 1929 and [2012] EWHC 2046 (Ch) (“*Sun Mark*”):

“Bad faith: general principles

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

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

132 Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2009] EWHC 3032 (Ch), [2009] RPC 9 at [167] and cf. *Case C-259/02 La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 at [31] and *Case C-192/03 Alcon Inc v OHIM* [2004] ECR I-8993 at [41].

133 Thirdly, a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. The standard of proof is on the balance of probabilities but cogent evidence is required due to the seriousness of the allegation. It is not

enough to prove facts which are also consistent with good faith: see *BRUTT Trade Marks* [2007] RPC 19 at [29], *von Rossum v Heinrich Mack Nachf. GmbH & Co KG* (Case R 336/207–2, OHIM Second Board of Appeal, 13 November 2007) at [22] and *Funke Kunststoffe GmbH v Astral Property Pty Ltd* (Case R 1621/2006-4, OHIM Fourth Board of Appeal, 21 December 2009) at [22].

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

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

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

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

Board of Appeal, 4 June 2009) at [53] and *Campbell v Hughes* [2011] RPC 21 at [36].

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

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

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

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

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

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

The relevant date

7. Whether the trade marks were applied for in bad faith must be assessed at a particular point in time. As stated in the *Sun Mark* case, the relevant date is the date on which the applications to register the marks were made. The relevant date is 3 March 2015 for all the applications, save for mark vi), for which the relevant date is 12 March 2015.

The evidence

FDG's primary evidence

8. The evidence is given by Mr Russell Fowler, FDG's Chairman and CEO. He states that his evidence comes from either his own personal knowledge or from some of the records of the company. He explains that he does not have all of the records of the company because they were seized by the police for use in criminal investigations¹ against two ex-directors (including Mr Winter) of FDG. He claims that those people also destroyed or deleted other records.

9. Mr Fowler states that Mr Winter (who he says was the sole director of CVPS) was the "SVP Operations and Financial Director" of FDG. Mr Winter resigned that position on 6 January 2015. Exhibit RF1/01 is provided in support of this, which consists of an email from Mr Winter to two individuals at FDG (Geoff Reyner and Richard Meechan) dated 6 January 2015. Mr Winter states in the email that:

"As you are both aware my mum's situation has worsened and has left me with little choice but to tender my resignation from FDG to look after her."

10. Mr Winter adds in the email that he has sent an email to Russell (presumably Mr Fowler) and Veronica [Geduld, according to a cc recipient email address] explaining

¹ A case-management conference took place during the course of proceedings in relation to these investigations, and whether the subject proceedings should be stayed to await the outcome of the investigation and the release of documentation. However, without knowing what documents had been seized, and whose property they were, I saw no benefit in delaying the subject proceedings further.

this, but he wanted Mr Reyner and Mr Meechan to be aware. It is not clear if this is the formal notice of resignation or whether the email sent to Mr Fowler and Ms Geduld is that. There is no information about any period of notice Mr Winter gave when tendering his resignation. Mr Fowler states that according to Mr Winter, his mother had two types of dementia and only had three months to live, however, this information is not in the exhibited email.

11. Mr Fowler states that what Mr Winter said [presumably that he resigned to look after his mother] was not true. He notes that Mr Winter changed the name of his [Mr Winter's] company TIW Consulting Limited to Commercial Vehicle Protection Systems Limited² the day after his resignation email and then two weeks later, on 28 January 2015, he incorporated CVPS. This was all before, it is claimed, Mr Winter's last day in the offices of FDG which, according to Mr Fowler, was 13 February 2015. He adds that Mr Winter's reference in the counter-statement to his last day in the office being 23 January 2015 is simply an attempt to mislead the tribunal. He states that Mr Winter had, until 13 February 2015, full access to all FDG's systems including banking and that he continued to place orders with suppliers and dealt with all aspects of FDG's operation.

12. Mr Fowler states that following Mr Winter's departure (and also that of an individual called Mr MacSween) FDG became concerned over a number of irregularities such as missing documents, deleted data and a host of other [unspecified] incidents.

13. Mr Fowler states that prior to working for FDG, Mr Winter performed a similar role in a company called TruckProtect Ltd which, following administration, was transferred to FDG. Prior to that he worked in an electronics company which made mobile phone accessories. He states that Mr MacSween worked for iGento and iFleet, which FDG acquired in 2014. He states that Mr Winter has approached suppliers and manufacturers of FDG by using contacts he could only have known by extracting information from FDG's database.

² A change of name certificate is provided in Exhibit RDF/02

14. In relation to the counter-statement completed by Mr Winter, Mr Fowler states that Mr Winter is not an owner of FDG. In relation to Mr Winter's use of a FDG email address up to 13 February 2015, Mr Fowler provides Exhibit RFD/04. This consists of an email to a Mr Dave Trenton of Triumphtech dated 13 February 2015. The email is about trying to "reconnect some OST files to my Fuel Defend email account". The sender's email domain is not actually identified, but it is clear from the footer of the email that it is coming from FDG. I note the following as part of the footer:

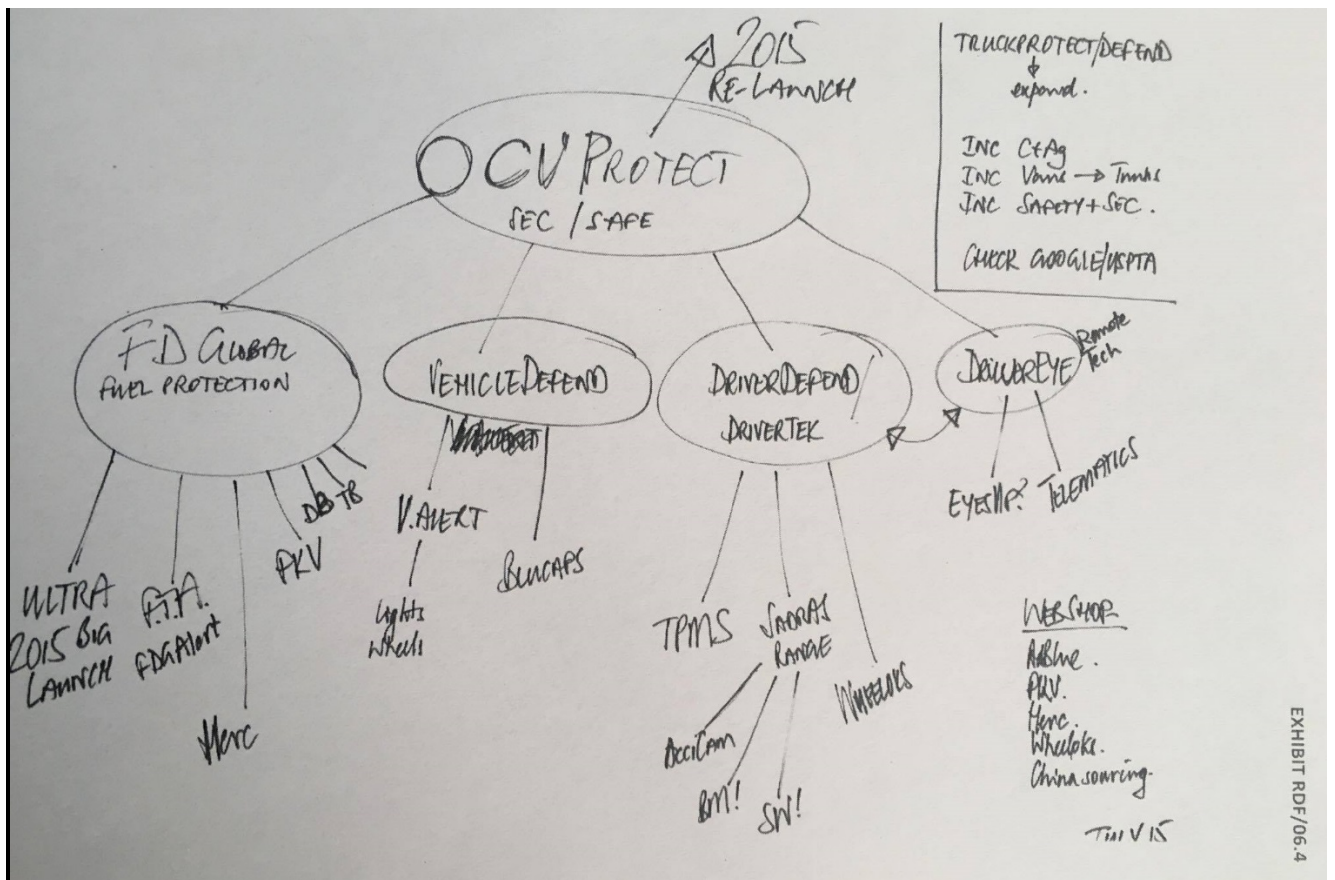
"Please can you update all correspondence address for any finance related activities to finance@fueldefend.com – For the attention of Rajeev Saini as I officially left [FDG] on 23 January 2015 but I am still performing some handover duties for the short term."

15. Mr Fowler states that the P45 referred to by Mr Winter was issued by and to himself, without Mr Fowler's knowledge.

16. Mr Fowler states that the marks were not conceived by Mr Winter in March 2015, but were in fact conceived by Mr Geoff Reyner [of FDG] on 13 May 2013. In support, he provides Exhibit RDF/05 which consists of an email from Mr Reyner to various people within FDG, including Mr Winter. It relates to proposals for some new products which are to be used by trucks to help reduce accidents with cyclists. One of the proposed product names is TruckPal, but with an alternative name being identified as CVProtect. Mr Fowler states that this shows the use of one of the names, CVProtect, being conceived some 20 months before Mr Winter claims that he conceived the marks and, thus, that his statement is false.

17. Mr Fowler then explains that the above plans were then developed via meetings between Mr Fowler, Mr Reyner, Mr Winter and Mr MacSween. Reference is made to Exhibits RDF/06. This is made up of a series of five documents (RDF/06.1-06.5) which I will describe as mind maps. Much of the information in the mind maps is not relevant. However, the mind map in RDF/06.4 does show many of the trade marks the subject of this dispute as part of what appears to be some form of planning process, including CV Protect, VehicleDefend, DriverEye, DriverTek and DriverDefend. DriverSens is not shown. Mr Fowler states that these documents show that FDG planned to launch a

new company called CVProtect ideally at the beginning of January 2015 or, as a fall back, July 2015. It is worthwhile at this juncture showing what the most relevant mind map (Exhibit RDF 6.4) looks like:



18. At the hearing, Mr Moss highlighted that in the bottom right hand corner of the above document it is written “July 15” which must have been the date on which this mind map was produced. I will return to his accompanying submission and the dating issue later.

19. Mr Fowler states that the documents shown in Exhibits RDF/06.1-RDF/06.2 (he does not mention RDF/06.3-6.5, although this could just be a mistake) would have been provided to Mr MacSween and also, in his capacity as the person who would undertake further Internet searches and make applications for trade marks and domain names, Mr Winter.

20. Reference is also made to Exhibit RDF/08, which consists of a printed note from Mr Reyner which, one would assume, has been solicited for the proceedings. He

states that “you [Mr Fowler] are correct in your thought that this was all discussed in 2014. Reference is made to a meeting on 3 July 2014. The following is stated:

“We had a three hour meeting on websites and marketing in which JMM³ was present and the issue of CVProtect was raised as a re-launch idea for FDG in 2015. This was when the attached diagram you sent was drawn up and brand names were discussed.”

21. Mr Fowler states that this was in preparation for the launch of “a newly branded CVProtect in 2015”. I note now a submission made at the hearing by Mr Moss that in the above note Mr Reyner refers to the “attached diagram” not “attached diagrams”, thus it is not clear that he saw more than one, nor is it clear which one he did see.

22. Mr Fowler states that Mr Winter has tried to gain a commercial advantage by contacting a longstanding supplier of FDG and in some instances warning them off FDG. Exhibit RFD/07 contains some form of text message exchange between Mr Winter and Grace Geo, one of FDG’s suppliers. In the exchange, from October 2015, Mr Winter states: “Do you know who Vehicle Safety and Security Group are? Be careful!”. The relevance of this is not clear as I have no information about the group referred to.

23. The point to much of Mr Fowler’s evidence is that Mr Winter and Mr MacSween were aware of the planned launch of CV PROTECT (and presumably the other names mentioned in the mind maps) and that they stole the idea and tried to launch before FDG had a chance to realise its plans. He states that Mr Winter did not conceive the marks in question and that they belong to FDG.

24. Mr Fowler states that CV Protect (which I assume is a reference to CVPS) has tried to mislead people. Exhibit RDF/09 contains a print from its website (at www.cvprotect.com) which indicates that it is a member of the Fleet Operators

³ It is not clear who JMM is, but later evidence shows that Mr MacSween’s first name is Jamie, so one would assume it is him.

Recognition Scheme (FORS). Exhibit RDF/10 is a print of FORS' membership list which does not include CVPS.

CVPS/CVPL/Bute's evidence

Witness statement of Mr Jamie MacSween

25. Mr MacSween is a director at Bute. He accepts that he was employed by FDG as Director of Electronics. He gives his dates of employment as being between 27 March 2014 and 5 January 2015. He was subsequently employed by CVPS between 1 February 2015 and 30 June 2015.

26. Mr MacSween states that CVProtect was initially selected as an abbreviation of the company name (Commercial Vehicle Protection Solutions Limited). The decision was taken, Mr MacSween states, after consulting a design agency called Dare to Think. Some email exchanges relating to this are provided in Exhibit JMO1. I detail below some of the relevant exchanges:

- i) 19/2/15 – Mr MacSween to Mr Green (of Dare to Think). Mr MacSween advises Mr Green of what he says are sub brands for the new business (CVProtect, VehicleDefend, DriverTek, DriverEye & DriverSens). He asks how the logo is coming along.
- ii) 19/2/15 – Mr Green responds stating that the logo has not been started because he had not heard back from him as to the company name. An extract from an earlier email is given in which Mr Green asks “..I need to know the actual company name you wish to appear on the logo. You mentioned you needed to confirm the actual company name first...”.
- iii) 19/2/15 – Mr MacSween responds stating that the company to be used is CVPS.
- iv) 19/2/15 – Mr Green responds seeking clarification as to whether the logo needs to include the letters CVPS and whether it also needs to include the

full company name. Some questions about sub brand logos are asked, but they are not to be produced at this stage.

- v) 19/2/15 – Mr MacSween responds stating that just the letters CVPS are to be included. With regard to sub-brands, the plan is to use them below the logo with some stylisation to link the sub-brand and main brand together.
- vi) 19/2/15 – Mr Green asks whether CVPS has to be stuck to, explaining that acronyms are difficult to remember unless they spell something. He adds “Just thinking whether “cvprotect” could be better, and more memorable”.
- vii) 20/2/15 – Mr MacSween responds saying that “...I see what you mean on CVProtect” and “Let’s go with this”.
- viii) 20/2/15 – Mr Green responds stating that he will “get cracking on with this..”.

27. Mr MacSween states that the six subject trade marks were conceived independently as a result of discussions between himself, Mr Winter and a Mr Richard Meechan. During the discussions, consideration was given to a number of brands. It is not clear when these discussions took place, but it must have been prior to 19 February 2015 as the marks are mentioned in the above email chain.

28. Mr MacSween states that he has never had sight of the documents provided by Mr Fowler (the mind maps). He adds that no discussions took place during the course of his employment with FDG concerning the adoption of the terms either as a new company name or brand. He states that, to his knowledge, there were no plans to launch a new company named CVProtect (or the other marks) during the course of his employment.

29. It is stated that FDG is disgruntled by the fact that some of its previous employees have set up a competing business. Mr MacSween states that the lodging of these oppositions is one of a number of mechanisms FDG have adopted to make the establishment of their new business more difficult. Another example is given of FDG, allegedly, setting up a webpage which is said to tarnish the reputation of CVPS/CVPL.

He says that the webpage was taken down in September 2015 but a copy is provided at Exhibit JMO2. It is hosted at the domain cvprotect.com. It is not the most obvious form of tarnishing behaviour. Without knowing the background context the website simply looks a bit odd. It contains the name cvprotect (above which there is a logo which could be interpreted as a middle finger gesture) and the five sub-brands. It uses slightly childish language and a cartoon of a thief. Another example is the allegation that Mr Fowler set up a company called The Original Commercial Vehicle Protection Solutions Limited less than a month after CVPS was incorporated. When CVPS was dissolved, Mr Fowler applied to strike off the company he set up. Information about the companies is shown in Exhibit JMO3, which includes information showing that Mr Fowler was an officer of the company Mr MacSween refers to.

Witness statement of Mr Winter

30. Mr Winter does not mention Bute, but he confirms that he was a director of CVPS and CVPL, the former being incorporated on 28 January 2015. He accepts that he was a director of FDG (SVP Operations and Financial Director). He states that he was at FDG between 1 February 2011 and 23 January 2015. He explains that this latter date was his last formal day of employment, but that he remained at FDG's offices until 13 February 2015 in order to complete his hand over. He provides at Exhibit TWO1 company information about FDG which shows his date of resignation as director as 23 January 2015.

31. Mr Winter gives exactly the same evidence (it is worded in an identical or near identical fashion) as Mr MacSween in terms of i) never having had sight of the mind maps, ii) that the marks were conceived independently by himself, Mr MacSween and Mr Meechan, iii) that no discussions took place during the course of his employment with FDG about the possible adoption of the marks, iv) that there were no plans to launch a new company called CVProtect (or the other marks) and, v) that CVPS/CVPL have at all times acted in good faith. The only thing he adds that is any way different to the evidence of Mr MacSween is that in respect of point iv), that given his position at FDG as financial director, such an initiative [of a new company] would have required extensive financial planning and at no point was he required to undertake the formal

and/or financial requirements for setting up a new company called CVProtect (or any of the other marks).

Witness statement of Richard Meechan

32. Mr Meechan is another previous employee of FDG who later joined CVPS/CVPL. He worked for FDG between 1 December 2013 and 23 January 2015 as Technical Director. His gives exactly the same evidence as Mr MacSween and Mr Winter (it is worded in identical or near identical manner) in terms of points i) to v) detailed in the preceding paragraph. He adds nothing further.

FDG's reply evidence

33. This comes, again, from Mr Fowler. He begins by stating that Mr Winter has, apparently, admitted in separate proceedings (at some point in 2014) that he approached other FDG shareholders to discuss buying Mr Fowler (and his family members) out of the business. He quotes something Mr Winter stated, but the source of the information is not provided. Mr Fowler adds that Mr Winter provided internally confidential information outside FDG (presumably at this time) which went beyond his legally defined director responsibilities.

34. Mr Fowler states that it was at this point (in 2014) that Messrs Winter, MacSween and Meechan decided to harvest as much data from FDG as they could with a view to setting up a directly competing business. He says that the company directory was downloaded and, as evidenced before, Mr Winter contacted FDG customers and suppliers as soon as he left; this is a reference, I assume, to the contact with Grace Geo.

35. Mr Fowler states that Mr Winter was responsible for dealing with Companies House. He set up a company called TIW Self 1 Ltd which later had its name changed to FDG. He also changed the name of TIW Consulting Ltd to CVPS whilst still working for FDG. Mr Fowler did not see anything unusual in this at the time because, apparently, it was explained that this was to be handed over to Mr Meechan who was setting up a private vehicle tracking based company for the insurance sector.

36. Reference is made to the criminal investigations which, apparently, show FDG as a victim of fraud. Of course, the investigations show nothing because no party has been found guilty of any criminal activity as of the time of writing this decision.

37. Mr Winter states that he still disputes the date of resignation of Mr Winter. He states that it is unreasonable to think that someone resigning on 6 January 2015 would give notice of less than three weeks. He states that Mr Winter was in the offices of FDG until 13 February 2015 and was acting fully as a director, placing large orders with suppliers in China for example. He adds that Mr Winter was offered a six month sabbatical due to the illness of his mother.

38. In relation to Mr MacSween's email exchanges with Mr Green, he highlights that the name was already used well before 20 February 2015 as evidenced by the registering of the domain name cvprotect.co.uk on 6 January 2015 by CVPS (Exhibit RDF/14 contains a relevant Whois print).

39. Mr Fowler finds it "staggering" to believe the claim that Messrs MacSween, Winter and Meechan managed to conceive the ideas for all the names in such a short space of time with no supporting materials to back up the claims. He considers that they simply used the notes and ideas from FDG.

40. Mr Fowler states that between 5 January 2015 and 13 February 2015 all three were still fully active officers of FDG so anything they supposedly created in that time belongs to FDG.

41. Reference is made to the email produced by Mr Rayner in 2013 (recipients included Mr Fowler and Mr Winter) which contained the first mention of CVProtect. Mr Fowler states that this was forwarded to Mr MacSween at jamiemacsween@gmail.com shortly before his company was acquired by FDG. The email is shown in Exhibit RDF/05 and reads:

"Jamie, some great thoughts from Geoff [Rayner] for a new company name. Preferences this end for the red section – name and positioning. So, we could

have SideWarn, or SideMinder or MetroWarn product from TruckPal. Do have a read below and let us know your thoughts – or any other wacky names”

42. The email to Mr MacSween was sent by Mr Fowler on 15 May 2013, two days after the email was sent to Mr Fowler by Mr Rayner. There is nothing in the heading of the mail to indicate a forwarded document, such as the words FWD.

43. Mr Fowler states that FDG condenses its names into one word. He identifies various other names it has used as: NeckIt, SpillStop, FuelKeepValve, SenderStop, CapIt, SideWarn, SideSafe, BackMinder and WheelStop. He says that it can be no coincidence that the opposed marks have the same structure.

44. Mr Fowler refers to the chronology of resignations (from FDG) and of companies being set up by the protagonists behind CVPS. I need not summarise this further but will return to the chronology if it is necessary to do so. He also refers to email exchanges in July 2014 between the three protagonists headed “alternative email address to use? Pulling together info..” where at least two of the three responded to each other by giving personal email addresses. Mr Fowler says that this is when they must have started to harvest FDG’s data including the CVProtect file which was due for launch in 2015. He says that they clearly had something to hide as there was no need to change from using their company email addresses.

45. Mr Fowler refers again to the mind maps which he says were (all of them) produced in 2014 (hence the use of 2015 re-launch at the top of RDF/6.4). The re-launch was required as FuelDefend was no longer an accurate name for a company offering a wide range of safety and security products. He says that due to delays in Mr MacSween producing samples, and the possibility of having to revamp products, the re-launch was planned for January 2015 but with a fall-back of July 2015 if delays occurred.

46. Although Mr Fowler provided more exhibits than I have mentioned, I do not consider it necessary to summarise them any further than I have.

Analysis and findings

47. Given the number of marks involved and, also, the relationship between the protagonists behind this dispute, I should say upfront that it is inconceivable the both parties could have coined these marks independently of each other. From what I can see, there are two main potential scenarios:

- i) The marks were all coined by FDG in 2013 and/or 2014 and that upon leaving FDG Mr Winter (and/or his colleagues Mr MacSween/Mr Meechan) had knowledge of those marks and decided to apply for them as part of their new business venture, or,
- ii) They were coined by Messrs MacSween, Winter and Meechan in the early part of 2015 when setting up their new business venture. In relation to this scenario, Mr Moss accepted that the protagonists had sight of the email from 2013 in which CV PROTECT (but not the other marks) was mentioned, but, in essence, this was an innocuous reference as an alternative name for something and, therefore, the worst that can be said was that they sub-consciously copied this forgotten name.

48. In terms of the evidence filed, the information provided by Mr MacSween in relation to his exchanges with the design agency is not helpful. This is because Mr MacSween put the names to the design agency on 19 February 2015 so this does not assist in determining whether CVPS had prior knowledge of FDG's plans to use them. One thing these exchanges do, however, show, is that the claim in the counter-statement that the marks were created in or around mid-March 2015 is not accurate because they were coined at least a month prior to that. Indeed, the evidence provided by Mr Fowler relating to the domain name registration of cvprotect.com shows that name being coined even earlier again, as early as 6 January 2015. Of course, FDG's position is that the names were not coined by CVPS at all and that they were just copied from FDG.

49. The timing of the domain name registration is also interesting. It was the day following Mr Winter's resignation. Further, even on their own evidence, Messrs Winter

and Meechan were still in the employ of FDG at that time, Mr MacSween states that his employment ended the previous day. The evidence of all three is that the marks were coined in discussions between them and that CV Protect was coined as an acronym for the company name CVPS, however, I do find it somewhat surprising, although I accept not wholly implausible, that they moved so quickly to what must have been some form of brainstorming session to come up with the sub-brands, one of which was coined at least by 6 January. The plausibility of their account would have been easier to assess if they had said a bit more about their claimed discussions but they have said little beyond the claimed bare facts. Neither is there any form of documentation such as notes of meetings, emails to each other recording their decisions and discussions.

50. Before leaving the timing point, I must reject something put forward by Mr Fowler. He seems to suggest that if the names were coined whilst Mr Winter and his colleagues still worked for FDG, or were de facto working for it, then in some way FDG is entitled to the fruit of anything they came up with in terms of property ownership. Such a claim is not operative here because unlike certain unregistered rights such as design right or copyright, which constitute forms of intellectual property upon creation⁴, there is no equivalent for unregistered trade mark rights, unless, of course, trade has been conducted enabling a claim to be made under the common law tort of passing-off.

51. One of the most crucial parts of the evidence is the mind map showing most of the subject marks. Mr Winter states that this was produced by FDG as part of taking its business plans forward. As I stated earlier, Mr Moss highlighted that in the bottom right hand corner of the document, the words “July 15” appear. He submitted that anyone seeing that date would take it that this was the date on which the document was produced. Even though references to the 2015 re-launch are mentioned in the document, he submitted that this is not inconsistent with the date of the document being July 2015 because the re-launch could have been planned for later in the year. Mr McKenzie submitted that the document was from the time Mr Fowler indicated. As in many cases of this type, other aspects of the evidence, and other factors, push and

⁴ Which could be owned by an employer if created by an employee in the normal course of employment.

pull on the factual answer to this question. Against FDG's position is that Messrs Winter, MacSween and Meechan have all given direct evidence that they did not see the document nor knew of any plans to use the names, and that they conceived the names. Ms Moss highlighted that the witnesses had not been put on the stand to have their evidence tested by way of cross-examination. Whilst this is noted, it is clear that the evidence has been disputed and challenged from the outset, so the absence of cross-examination does not prevent me from disbelieving their evidence. There is also a wrinkle in Mr Fowler's evidence because, when referring to the documents which would have been sent to Messrs Winter, MacSween and Meechan, he refers to Exhibits RDF/06.1-06.2 instead of 06.01-06.05, although this, of course, could just be an error.

52. Against the applicant's position is that Mr Fowler has given direct evidence that the document was produced in 2014 (see his reply evidence) and there is hearsay evidence from Mr Reyner who refers to the FDG meetings in July 2014 when the CV Protect re-launch was discussed and other (albeit unspecified) brand names were discussed. He also refers to the diagram (what I have described as mind maps) sent to him, although he refers to diagram in the singular. Furthermore, given that by July 2015 FDG had already fallen into dispute with the applicant concerning the marks, it seems highly improbable that it would then produce a document showing the names on its plans unless, of course, it was fabricated for the proceedings (with FDG copying the names applied for by the applicant) in an attempt to support the opposition. However, if that was the case, it would make no sense for such a fabricated document to use a date in July 2015. Irrespective of whether Mr Fowler has undertaken some actions which are antagonistic to the applicant, I do not consider that the production of this document is another example of that.

53. I am mindful not to overplay certain issues that have arisen in the proceedings. First, it is clear that Mr Fowler is upset by the conduct of his previous employees and directors in leaving FDG to set up a rival company. However, there is nothing wrong with this per se. Second, the criminal investigations that are taking place have no determinative relevance as no party has been found guilty of any crime. There is also the evidence about the reasons why Mr Winter resigned. Again, whether he resigned due to his mother's ill health or not is neither here nor there. The fact that FDG has a

history of using condensed names is also not pertinent because there can be no monopoly on the basic structure of a mark. What has some, although, I accept not significant weight, is the email between Messrs Winter, MacSween and Meechan where personal email addresses were exchanged for the purpose of “pulling together info”. This does suggest that the three individuals were aiming to collate some form of information from FDG.

54. I am also mindful that Mr Fowler appears to have produced as much information as he could, providing commentary and supporting exhibits where possible. There also appears to be good reason why more records were not available (due to the seizure by the police). On the other hand, the evidence of the applicant is less detailed consisting of brief explanation, supporting documents that do little to support their own independent creation of the names and there is no reason why CVPS’s records (if there were any) were not available. It is also not helpful that the three witnesses have given virtually identical testimony. Whilst I accept Mr Moss’ point that witness statements are often produced by attorneys for signature, in a case such as this, where the facts are heavily disputed, it would have been far better, and more persuasive, if the witnesses had used their own words and provided detailed accounts of their recollections.

55. Taking all the factors into account, I accept FDG’s evidence that it did conceive of all of the marks (save for DriverSens which is not detailed anywhere) in either 2013 and 2014 and that they formed plans for a possible new business venture under the CV PROTECT name. I also accept that the protagonists behind CVPS knew of these plans and, consequently, that they did not come up with them independently.

56. In terms of whether filing the applications in the face of such knowledge amounts to bad faith, I consider, at the very least, that reasonably experienced people in the relevant field would view such conduct as something that falls below the standards of normal acceptable behaviour. To leave a company to set up a rival business is one thing, but to take knowledge gained from that business and to steal a march on their existing ideas and business plans is another thing altogether. Even though the plans do not, on the basis of the evidence before the tribunal, appear to be particularly well

developed, the nature of the act is still an act of bad faith. I consider that this amounts to bad faith for the purpose of section 3(6) of the Act.

Conclusion

57. The oppositions are successful except in relation to DriverSens (because it is not in the plans) and VehicleDefend (which has already been withdrawn). The four remaining marks are to be refused.

Costs

58. FDG having been successful, it is entitled to a contribution towards costs. Costs from the published scale were requested. My assessment is set out below:

Official fee - £200 x 5 (including the withdrawn application, but excluding the failed opposition) £1000

Preparing statements of case and considering the counter-statements - £600

Filing and considering evidence - £1000

Attending the hearing - £400

Total - £3000

59. I order Bute Technology Ltd to pay FuelDefend Global Ltd the sum of £3000 within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 7th day of November 2016

Oliver Morris

For the Registrar,

The Comptroller-General