

O-551-17

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK REGISTRATION 2432117
IN THE NAME OF GORDON ALLAM MARK SIMMONDS
IN RESPECT OF THE TRADE MARK:**

X-Pression

IN CLASS 26

AND

**AN APPLICATION TO RECTIFY THE REGISTER (UNDER NO. 84771) BY
FEME LIMITED**

BACKGROUND, PLEADINGS AND RELEVANT EVIDENCE

1) Registration 2432117 is for the trade mark “X-Pression” in respect of various goods in Class 26. It currently stands in the name of Gordon Allan Mart Simmonds, who is the Trustee in Bankruptcy of Asghar Hussain, who has a claim of being a previous registered proprietor in the contested chain of title. A number of applications to record assignments have been received by the Registry prior to, or since the commencement of these proceedings with claims to ownership being made variously by Mr Simmonds, Mr Asif Raza Khan and Feme Limited (hereafter “Feme”). Mr Simmonds’ application to record himself as the owner was actioned by the Registry and hence he currently stands as the recorded proprietor. However, as a result of my directions not to action further outstanding applications to assign the registration until these proceedings have been settled, they have not been actioned. This is because their validity is inextricable linked to the issues before me in these proceedings. Following developments that I don’t need to detail here, two of these parties are claiming to be the correct current proprietor, namely Feme and Mr Khan. A request for the Registrar to rectify the register was made by Feme on 23 November 2016. It claims that the current recorded chain of title is incorrect for reasons that I discuss below. Mr Khan claim that he is the correct current proprietor. Consequently, this dispute is between Feme and Mr Khan.

2) Both sides have filed evidence in the form of the following:

On behalf of Feme

- A witness statement, dated 8 May 2017, by William Miles, an associate at Briffa, Feme’s representative in these proceedings;
- Two witness statements, dated 20 March and 21 June 2017 respectively, by Mushtaq Ghani, partner of Ismail & Ghani solicitors.

On behalf of Mr Khan

- Three witness statements, dated 30 January, 28 February and 7 July 2017 respectively, by Mr Hussain, a former owner of the contested registration;
- Two witness statements, dated 30 January and 28 May 2017 respectively, by Alan Venner of Oakleigh IP Services Ltd, Mr Khan's representative in these proceedings;

3) It is not disputed by either party that the following occurred:

9 September 2006: the registration was applied for in the name of Baacha Traders Ltd.

24 April 2008: assignment from Baacha Traders Ltd to Hairzone Ltd (hereafter "Hairzone").

19 June 2012: Hairzone dissolved (the notice of dissolution was attached to Feme's application for rectification (Form TM26R).

15 May 2013: an application was made to record a change of ownership from Hairzone to Mr Hussain. The assignment document was not provided but in Box 5 of the form the date of transfer of ownership was recorded as 15 May 2013.

4) This latter application to record a change of owner is contested by Feme on the basis that at the effective date of the assignment, Hairzone had been dissolved and its assets passed to the Duchy of Lancaster. It claims that, as a result, the assignment is not valid because Hairzone was not in possession of the registration at that time. On this basis, and in the belief that the registration was *bona vacantia*, on 4 November 2016 Feme purchased the registration from the Duchy of Lancaster (the assignment document is provided with its Form TM26R).

5) Subsequently, evidence is provided in support of Mr Khan's case in the form of an assignment document dated 16 July 2010 transferring ownership of the registration from Hairzone to Mr Hussain¹. Mr Hussain states that he paid £1000 for the registration and exhibits his bank statement from the time showing a payment for this amount to Hairzone².

6) Mr Miles finds it surprising that the only reference to the registration number appears on the front page of the assignment document³ and it includes a "UK0000" prefix. He has made enquiries to the UKIPO regarding when it began designating registration numbers in this way. He has not received a response to this query, but it is his belief that this prefix was not adopted by the UKIPO until the end of 2012⁴. To support this view he provides, from his own company records, case details of various trade marks printed from the register at various times between 2008 and 2017. The three examples dated 18 September 2012 or earlier refer to the trade mark number merely as 7 digits whereas three further examples, the earliest of which is dated 24 May 2013, all show the 7 digit trade mark number prefixed with "UK0000"⁵. Mr Miles states that the presentation of trade mark numbers changed sometime between 18 September 2012 and 24 May 2013 and the prefix "UK0000" would have been completely unknown in July 2010⁶.

7) If valid, the significance of this assignment is that it pre-dates when Hairzone was dissolved and would have the effect of providing a valid change of ownership to Mr Hussain. A further effect would be that Feme's purchase of the registration from the Duchy of Lancaster would not be valid because the registration would not have been part of Hairzone assets that became *bona vacantia* when the company was dissolved.

¹ Mr Hussain's first witness statement

² Mr Hussain's Exhibit AS1

³ Shown in the annex to this decision

⁴ Mr Miles' witness statement, para. 37

⁵ Exhibits WM12 and WM13

⁶ Mr Miles witness statement, para. 40

8) Therefore, the claimed assignment between Hairzone and Mr Hussain dated 16 July 2010 becomes pivotal in understanding the correct chain of ownership and ascertaining whether the register is in error. However, there is tension between the existence of the assignment and the date claimed on the form for an application to record the change of owner filed on 15 May 2013, where the effective date of the assignment was recorded as also being the 15 May 2013. Feme also point out that application to record the change of owner was signed, on behalf of Hairzone, by Ibrar Hussain but that on the day he signed it, Hairzone had been dissolved for nearly a year and, consequently, he had no authority to sign the document. In the course of proceedings, I directed that Mr Hussain submit a witness statement to explain this. In this statement he claims that the assignment did take place on 16 July 2010 and was made in the form of an agreement provided at Exhibit AS1⁷. He states that because he was so busy at the time, he forgot to record the assignment. Mr Hussain states that he was reminded by Ibrar Hussain in May 2013 that the trade mark "was still in Hairzone's name and that [he] had to transfer it to [his] name. Ibrar was planning to return to the medical profession and wanted this matter to be settled."⁸

9) He also states that he is:

"... just a businessman, not a lawyer or a specialist in trade marks or assignments. When I filled out Form TM16 to record the assignment of registration No. 2432117 on 15th May 2013, I put the same date in section 5 'Date of Transfer of Ownership' instead of the actual date of the agreement (16th July 2010) simply because out of ignorance I thought that was what the Form was asking for - the date on which I completed the Form.

It was out of the same ignorance that I arranged for Ibrar Hussain to sign Section 8 of the form, 'Authorisation to Change the Register'. At the time of signing the agreement in July 2010, Ibrar was a director of Hairzone and the company was

⁷ Mr Hussain's second witness statement, para. 2

⁸ Ibid, para. 3

trading. I simply assumed that was what was supposed to go in this section, the name of the person in the company who had originally agreed to the sale at the time the agreement was signed."⁹

10) Mr Miles points out that the form of application to record the change of owner filed on 15 May 2013 actually relates to the transfer of three registrations and not just the contested registration¹⁰. It is claimed that there is tension between this fact and the claim by Mr Hussain that the Application to Record Change of Ownership (Form TM16) was prepared following a reminder from Ibrar Hussain that he had not yet recorded the assignment of the contested registration.

11) A further and later assignment is also contentious:

12 December 2013: An application to record a change of ownership from Mr Hussain to the respondent in these proceedings, Mr Khan, was filed at the Registry together with a copy of the related assignment document. The assignment document itself is also dated 12 December 2013 and records that £1000 was paid by Mr Khan for the trade mark¹¹.

12) On 30 June 2015, Mr Hussain had a bankruptcy order against him. It is claimed on behalf of Feme that the December 2013 assignment has been prepared recently (2016) and back-dated in an effort to remove the registration from Mr Hussain's list of assets, but it has been pointed out that the assignment was prepared by a firm of solicitors. Feme asked Mr Ghani to review the assignment document of 12 December 2013 provided by Mr Hussain. Mr Ghani is a partner of Ismail & Ghani, the firm of solicitors that appeared to have prepared the document. He states that he does not recognise the document nor is he able to find any record of it in his files¹². He states further that this is not a surprise to him because Ismail & Ghani do not deal with intellectual property

⁹ Ibid, paras 4 and 5

¹⁰ Mr Miles' witness statement, para. 46

¹¹ a copy is provided at Exhibit WM10 of Mr Miles' witness statement

¹² Mr Ghani's first witness statement, para 3


matters and so do not have any experience in drafting trade mark assignment documents¹³.

13) In respect of the signatures and company stamp on the assignment document, Mr Ghani comments as follows:

"... The first two signatures appear to belong to Asghar Hussain and Asif Raza Khan. I do not know either of these individuals nor have they ever been clients of Ismail & Ghani¹⁴.

The third signature is that of the witness. I do not recognise this signature. I have shown the Assignment to my colleagues at Ismail & Ghani and can confirm that none of them recognise this signature"¹⁵

14) Next to the third signature is a stamp which appears to state: "Ismail & Ghani Solicitors" [and the company's address and contact details]. Mr Ghani states that whilst the contact details are correct, the stamp itself is not a true likeness of the company's stamp and that he does not believe it to be genuine¹⁶. At Exhibit MG2, Mr Ghani produces "a true likeness of Ismail & Ghani's stamp" this is shown below together with the stamp that appears of the assignment document:

| Ismail & Ghani stamp | Stamp on assignment document |
|----------------------|--|
| |  |

¹³ ibid

¹⁴ Ibid, para 4

¹⁵ Ibid, para 5

¹⁶ Ibid, para 6

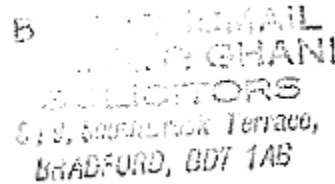
| | |
|--|--|
| ISMAIL & GHANI SOLICITORS 8/9 SOUTHBROOK TERRACE BRADFORD WEST YORKSHIRE BD7 1AB TEL: 01274 737546 | |
|--|--|

15) Mr Hussain responded by way of his third witness statement. He states that:

- (i) despite Mr Ghani’s denial, he personally acted in the matter of the assignment of the contested trade mark from himself to Mr Khan¹⁷;
- (ii) Mr Ghani was not instructed by Mr Khan but he was introduced to Mr Hussain and Mr Khan by a business associate, Mr Naveed Asghar and he assumes he was the formal client¹⁸;
- (i) Mr Ghani prepared the assignment and Mr Hussain, Mr Khan and Mr Naveed Asghar went to see him at his company’s office on 12 December 2013. Mr Ghani acted as the witness and he stamped the document¹⁹. The photocopy of the assignment document is produced²⁰;
- (ii) Mr Hussain paid £600 cash to Mr Ghani²¹;
- (iii) Subsequently, Mr Hussain unsuccessfully attempted to speak to Mr Ghani by telephone. He then accompanied an acquaintance to Mr Ghani’s office on 27 March 2017. He was not present, but his partner, Mr Ismail, when asked if he knew Mr Naveed Asghar, replied “Naveed Asghar is the friend of my partner Ghani”²²;
- (iv) Mr Hussain provides a copy of a letter issued by Ismail & Ghani to his acquaintance²³, dated 28 March 2017, bearing the company’s stamp. Mr Hussain notes that it is different to the stamp that Mr Ghani states, in his

¹⁷ Mr Hussain’s third witness statement, para. 2
¹⁸ Ibid, para. 3
¹⁹ Ibid, para. 4
²⁰ Exhibit AS2
²¹ Mr Hussain’s third witness statement, para. 5
²² Ibid, paras. 6 and 7
²³ Exhibit AS3

witness statement, is a true likeness of his company's stamp. This stamp is shown below:



16) In his second witness statement, Mr Ghani states:

- He does not know Mr Naveed Asghar, Mr Asghar Hussain or Mr Asif Reza Khan. He has never met them and they have never been his clients²⁴;
- Mr Naveed Asghar has never introduced any clients to him or his firm and none of these three gentlemen attended the offices of Ismail & Ghani on 12 December 2013²⁵;
- The assignment agreement (bearing a Ismail & Ghani stamp) was not drafted, prepared, witnessed or executed by himself or anyone at Ismail & Ghani and the assignment is totally unfamiliar to me and he does not practice in intellectual property matters²⁶;
- He is fully aware of the signatures of the other solicitors who worked for Ismail & Ghani in 2013 and that in December 2013, the firm was made up of two partners, himself and Mr Ismail. He does not recognise the signatures, or his own signature on the document²⁷;
- The stamp used on the assignment is not genuine. The firm has a main office stamp which is used for attesting documents and Mr Ismail has a personal stamp. He does not have a personal stamp but, instead, uses the main office stamp²⁸;

²⁴ Mr Ghani's 2nd witness statement, para 3

²⁵ Ibid, para 4

²⁶ Ibid, para 6

²⁷ Ibid, para 7

²⁸ Ibid, para 8

- In response to the evidence that Mr Ismail stated that Mr Asghar was Mr Ghani's friend, Mr Ghani explains that Asghar is a common name and that he does have a friend who lives in Pakistan with that name and who visited his office recently. He believes that Mr Ismail's comment would have been in respect of this friend rather than Mr Naveed Asghar²⁹.

17) More recently, there has been further claimed changes to the chain of title of the registration and I will turn to these only if the question of ownership is not resolved by my findings on the issues identified in the earlier paragraphs, above.

18) The respondent has filed written submissions that I will keep in mind. A hearing took place before me on 5 October 2017, however, the respondent failed to attend and did not inform the Registry of this prior to the hearing. Feme were represented by Ms Jacqueline Reid. Mr Ghani attended, what proved to be unnecessarily, for cross examination. Mr Hussain was due to attend for cross-examination, but as with Mr Khan, he failed to attend.

DECISION

19) Section 64 of the Act reads:

“64. - (1) Any person having a sufficient interest may apply for the rectification of an error or omission in the register:

Provided that an application for rectification may not be made in respect of a matter affecting the validity of the registration of a trade mark.

(2) [...]

²⁹ Ibid, para. 10

(3) Except where the registrar or the court directs otherwise, the effect of rectification of the register is that the error or omission in question shall be deemed never to have been made.

(4) [...].

(5) [...].”

20) Feme makes a claim to ownership of the registration that results from the purchase of the registration from the Duchy of Lancaster. Consequently, it has the necessary “sufficient interest”.

Validity of the assignment from Hairzone to Mr Hussain, dated 16 July 2010

21) I must decide whether the claimed assignment of the registration from Hairzone to Mr Hussain on 16 July 2010 is valid. If I find it is not valid, then the contested registration will have passed to the Duchy of Lancaster as part of Hairzone’s assets in 2012. If this was so, then Feme’s purchase of the registration from the Duchy of Lancaster on 26 November 2016 will be valid. However, if I find that the 2010 assignment is valid, then Mr Hussain would have been the owner of the registration at the date of the claimed assignment from himself to Mr Khan on 12 December 2013. This assignment is also contested by Feme and as a second matter, I may have to also consider the validity of that assignment.

22) At the hearing, Ms Reid identified a series of issues that, she submitted, illustrates that the 2010 assignment is false and was produced contemporaneously for the purposes of defeating Feme's case in these proceedings. The issues identified are:

- The first sight of these documents was when Mr Hussain provided it as an exhibit to his witness statement of 30 January 2017. This is despite Mr Khan/Mr Hussain having numerous opportunities to produce it or mention it earlier;

- When Mr Hussain submitted the Form TM16 to register an assignment on the trade mark register in May 2013, in box 5 of that form he recorded the effective date of the assignment as 15 May 2013 and not 16 July 2010. Ms Reid further submitted that his subsequent explanation for this must be disbelieved;
- The only place in the document that the specific trade mark is mentioned is on the front sheet. Here, the presentation of registration number is as UK00002432117. It is submitted that this particular presentation of registration numbers (with “UK” and four zeros appearing before the number) was only adopted by the Registry in late 2012. The implication taken from this is that the purported 2010 assignment was prepared, not in 2010, but later than 2012. No explanation has been provided by Mr Khan;
- Ibrar Hussain had no authority to sign the Form TM16 (that was filed on 15 July 2013) because, at that time, Hairzone had already been dissolved and he was not, at that time, a director of the company;
- The assignment document was not filed with the Form TM16, but only appeared as part of Mr Khan’s evidence on 20 January 2017.

23) Mr Hussain’s evidence is that he purchased the registration from Hairzone on 16 July 2010 for the sum of £1000 and he exhibits a copy of a bank statement showing payment to Hairzone.

24) I start by considering the presentation of the registration number on the 2010 assignment document. Mr Khan and Mr Hussain have remained silent on this point. Feme’s evidence supports its submission that this particular form of representation of registration number was not introduced by the Registry until, at the earliest, late 2012. This raises the question that, if this is so, why is it used on the front of an assignment document purported to be from 2010? It seems inconceivable to me that this particular form of representation was alighted upon coincidentally. The use of four zeros is so arbitrary as to make coincidence extremely unlikely. This important issue is likely to have been tested under cross-examination, but Mr Hussain did not attend the hearing. Therefore, Feme’s criticism remains unchallenged and I see no other reason why this

form of presentation was used unless the document was not prepared at the time claimed. This leads me to conclude that it was produced for the purposes of these proceedings in an attempt to “plug a hole” in the ownership history and to engineer a history that would lead to Mr Khan being the current owner.

25) When considering the other evidential factors keeping the above finding in mind, despite being plausible when considered in isolation, the following all appear fabrications in an attempt to maintain the illusion that there was a genuine chain of ownership leading to Mr Khan:

- Mr Hussain’s claim that the £1000 payment to Hairzone was in respect of the purchase of the registration;
- his claim to have erroneously put the wrong date on the Form TM16;
- that he was too busy to record the assignment in 2010.

26) In addition, that fact that the 2010 agreement was not provided with the Form TM16 submitted to record the assignment on the register in 2013 is also consistent with the finding that it was produced more contemporaneously to create a chain of ownership to Mr Khan.

27) Taking all of this into account, I find that the claimed assignment between Hairzone and Mr Hussain in 2010 is faulty and cannot be relied upon for establishing the foundation for future transfers of ownership of the registration. As a consequence of this, any subsequent assignments that flow from this claimed assignment must also be faulty, including the claimed assignment from Mr Hussain to Mr Khan dated 12 December 2013.

28) Further, Mr Hussain’s attempt to record this 2010 assignment on the register in 2013 is criticised for another reason. The Form TM16 related to the transfer of three registrations and not just the contested registration. Mr Miles has pointed out that there is tension between this fact and the claim by Mr Hussain that the form was prepared

following a reminder from Ibrar Hussain that he had not yet recorded the assignment of the contested registration (only). This tension has not been explained in evidence, and Mr Hussain failed to attend the hearing for his scheduled cross-examination. This is a further factor consistent with Mr Hussain attempting to contemporaneously create a chain of ownership leading to Mr Khan.

29) It follows from my findings that Hairzone was still the owner of the registration in June 2012 when it was dissolved. It flows from this that, at that time, Hairzone's assets past *bona vacantia* to the Duchy of Lancaster. This position remained unchanged until, on 4 November 2016, Feme purchased the registration from the Duchy of Lancaster. An application to record this on the register was made by Feme on 26 November 2016.

30) As a consequence of my findings, the conclusion is that the correct current owner of the registration is Feme. However, in case I am found to be wrong regarding the validity of the claimed assignment of 16 July 2010, I will briefly consider the claim that the assignment from Mr Hussain to Mr Khan is also faulty for reasons independent of the reasons that the assignment of 16 July 2010 is faulty.

Validity of the assignment from Mr Hussain to Mr Khan, dated 12 December 2013

31) It is claimed on behalf of Mr Khan that this assignment was prepared by Mr Ghani, a solicitor with the firm Ismail & Ghani. Mr Ghani denies that this is so and has stated that:

- he has never met Mr Khan or Mr Hussain;
- his alleged signature on the assignment is totally different to his normal signature as shown on his witness statements;
- the company stamp that appears on with the signatures on the document is different to either of the two stamps used by his company.

32) Mr Ghani's evidence has been challenged in Mr Hussain's third witness statement and also claiming that he paid £600 cash to Mr Ghani. Mr Hussain's statements are uncorroborated and in light of my earlier findings regarding the production of an assignment document for the purposes of these proceedings, this brings into doubt the veracity of Mr Hussain's evidence more generally. Taking this into account together with the fact that Mr Ghani attended the hearing to be cross-examined on this very issue, it is appropriate that I find that the assignment of the registration, dated 12 December 2013, was fabricated for the purposes of these proceedings.

33) This finding provides an additional reason why I find that this first assignment is faulty.

Section 25

34) At the hearing, Ms Reid sought to rely on a claim based upon section 25(3) of the Act on the basis that because at the time Feme purchased the registration from the Duchy of Lancaster (on 26 November 2016), the claimed assignment of 16 July 2010 was not evident in any way and, as a result, cannot be used to prevent Feme's purchase of the registration from the Duchy of Lancaster.

35) In light of my earlier findings, it is not necessary to the outcome of the proceedings that I decide this point.

Conclusion

36) The alleged assignment of the registration from Hairzone to Mr Hussain, dated 16 July 2010 is faulty. As a consequence of this, all subsequent assignments of the registration are also faulty with the exception of Feme's purchase of the registration from the Duchy of Lancaster.

37) The current proprietor of the registration is Feme.

Costs

38) Ms Reid submitted that it was appropriate for Feme to receive enhanced costs because the proceedings were required only because there was a dishonest attempt to claim ownership of the registration, that it was necessary to file an increased amount of evidence and because, as a result of Mr Khan failing to attend the hearing without giving notice, Mr Ghani's trip from Yorkshire was unnecessary. I concur with these submissions and I invite Feme to provide a schedule of costs associated with the proceedings for my consideration. These should be provided within 14 days of the date of this decision. Mr Khan is permitted a further 14 days to provide any submissions on costs that he wishes to make. I will then issue a supplementary decision setting out the costs award.

Dated this 01st day of November 2017

Mark Bryant

For the Registrar

The Comptroller-General

Annex

Date 16th July 2019

DECISION ASSIGNMENT OF TRADE MARK

X-PRESSION

REGISTRATION NUMBER : UK00002432117

between

ARCOLAN HOLDINGS

and

MARKZONE LIMITED