

O/519/20

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION 3339895
IN THE NAME OF PAUL PATRICK CANO**

FOR THE TRADE MARK

ANGELWINGS

IN CLASSES 9 AND 41

AND

**THE APPLICATION FOR A DECLARATION OF INVALIDITY THERETO
UNDER NUMBER 502918 BY
GLENN CANO AND DAVINIA CANO**

Background and pleadings

1. Paul Patrick Cano (“the proprietor”) applied for the trade mark ANGELWINGS (number 3339895) on 20 September 2018 in classes 9 and 41. The application was published on 28 September 2018 and achieved registration on 24 May 2019. The trade mark is registered for the following services:

Class 9: Musical sound recordings; musical video recordings; pre-recorded CDs, DVDs, audio discs, video discs, featuring music, downloadable audio recordings, downloadable video recordings, and downloadable MP3 files featuring music; downloadable multimedia files featuring music; audio and video recordings featuring music, all of the aforesaid goods featuring musical content from a musical performance group.

Class 41: Music entertainment services; live entertainment services; production of shows; production of sound and video recordings; music production services; presentation of live performances; audio-visual performances; video performances; performing of music; performing of singing; radio and television entertainment; publishing; sound recording services; providing digital music (not downloadable) from the Internet; publication of lyrics of songs in book and sheet form.

2. On 22 November 2019, Glenn Cano and Davinia Cano (“the applicants”) applied for a declaration that the trade mark is invalid under section 47(1)/3(6) of the Trade Marks Act 1994 (“the Act”). The applicants state:

- They are both current members of the Gibraltar band ANGELWINGS and are the registered proprietors of European Trade Mark (EUTM) number 017987881 ANGELWINGS in classes 9, 25 and 41. This was applied for on 21 November 2018.
- The applicants were unaware of the proprietor’s trade mark application until after it was registered. The proprietor has opposed the applicants’ EUTM.

3. The main pleadings are reproduced below:

The Proprietor and the Applicants were co-members of a band called ANGELWINGS from April 2013 until June 2018, when the Proprietor left the band. The band had no formal agreement in place defining the business relationship between the members, nor did it have any agreement in place over name ownership. Thus, following *Byford v Oliver & Dawson*; sub nom. *SAXON TM [2003] F.S.R. 704(39)*, the changing membership of the ANGELWINGS band has formed successive partnerships at will, and the name and goodwill of the band is owned by these partnerships, and not by individual band members.

Accordingly, upon a member's departure, he holds a share in the realisation of that partnership's assets, but he does not own a part of whole of the partnership name and goodwill itself. The new partnership formed by the remaining band members also owns a share in the realisation of the earlier partnership's assets, and, through continued activity under the band name, accrues its own goodwill in the name.

The Proprietor applied to register the UK Trade Mark on 20 September 2018, three months after his departure from the band. Since the Proprietor's departure, the Applicants and other band members have continuously performed and promoted themselves as ANGELWINGS, thereby accruing goodwill in the name as the new band partnership.

In contrast, although the Proprietor has set up an ANGELWINGS Facebook page, to the Applicants' knowledge the Proprietor has not once performed publicly under the ANGELWINGS name since leaving the band, and thus has not accrued any goodwill in the name since leaving the band. Additionally, the Applicants have recently learned that the Proprietor's Gibraltar business trade licence for ANGELWINGS has been revoked, because he was unable to show that he has traded under the name in the preceding year.

The Proprietor has however made repeated attempts to stop the Applicants' band from using the name ANGELWINGS: he has threatened litigation if the Applicants' band continues to call itself ANGELWINGS, attempted to stop them from performing at a festival called Gibraltar Calling, threatened an ANGELWINGS fan who set up an ANGELWINGS fan page on Facebook, and filed an application to register the Trade Mark.

As a result, following *SAXON*, because the Proprietor has not accrued any goodwill in the name independently from his former membership of the band, and has repeatedly attempted to interfere with the rights of former partners and stop the current band members from using the name, his application to register the UK Trade Mark is demonstrably in bad faith.

4. The proprietor filed a defence and counterstatement, denying the claims, as follows:

- The application was filed as soon as possible after the proprietor intended to use the mark and with the intention of protecting his own rights to the name and continued use of the mark.
- The proprietor is the founder member of the band together with Martin Figueras and Darren Fa, both of whom left in 2015 and 2017, respectively, without asserting any rights or any interest in the name ANGELWINGS. At the instigation of the proprietor, the applicants joined the band in April 2013, rehearsing in a room owned by Glenn Cano. At the end of June 2018, the

applicants ousted the proprietor from the band and the partnership and then the band ceased to exist. On 12 July 2018, the proprietor sent a letter to the applicants to assert his rights; chiefly, that the name and logo were solely the proprietor's ideas, that this was recognised by all the original band members, and had been stated in the media. The proprietor stated that the name and logo were items he wished to keep and would be using for his new band. No reply was received.

- The proprietor denies that he voluntarily left the band. ANGELWINGS was the proprietor's idea conceived from a song called "Wish I had an Angel" which contained the lyrics "burning angelwings to dust". Although nothing was discussed or specifically agreed as to ownership, everyone agreed to use the name for the band and at all material times it had always been understood that the name ANGELWINGS belonged to the proprietor.
- The proprietor took the absence of a reply to his letter of 12 July 2018 as an implied agreement regarding ownership of the name ANGELWINGS in which "in recognition that the Proprietor put the band together and came up with the name, the Proprietor always retained the right to the exclusive use of the mark for the goods and services that have been registered. It had also been agreed that any royalties were to be divided in equal shares between the two Applicants and the Proprietor."
- It is therefore denied that there was no agreement in place defining the business relationship between the members, or the ownership of the name. The proprietor denies that his interest in the name is merely limited to the realisation in the name and the goodwill that it has accrued (if any).
- In the alternative, in the absence of any agreement regarding ownership of the name, ANGELWINGS would be owned by the partnership that was formed between the applicants and the proprietor and not by individual members of the band. In this scenario, neither the applicants nor the proprietor owned the name ANGELWINGS upon the dissolution of the partnership at the end of June 2018, when the proprietor was ousted from the band.

- As far as the proprietor is aware, the applicants have performed once in a pub in southern Spain, neighbouring Gibraltar (24 February 2019); once in Munster, in Germany, on 21 June 2019; but never in the UK. The proprietor denies that the applicants have acquired any goodwill in the name as the new band partnership or at all.
- As a result of being ousted from the band, the proprietor was deprived of the rehearsal facilities owned by Glenn Cano. As a consequence, the proprietor has been unable to perform in public since the band was split up by the applicants. However, shortly after he was ousted, the proprietor began recruiting new members and has now formed a new band with Mark Downs, Clare Butterfield, Anthony Gracia and interim member Christopher Calderon. The proprietor has been tirelessly searching for a rehearsal room, taking up the matter with the Chief Minister of Gibraltar. He expects shortly to have access to a rehearsal room that will enable him to perform in public under the name ANGELWINGS.
- The proprietor promotes himself as ANGELWINGS on Facebook and other social media platforms in his quest to perform in public, having written two songs which are ready to be recorded and released with an album to be called “Ascending”.
- The applicants’ have not accrued any goodwill in the name independently from their former membership, whether in the UK or at all, given the lack of use from the time the original band was split until the proprietor filed his application for registration.
- Having ousted the proprietor from the band, the applicants retained partnership equipment and have failed to account or even offer to account to the proprietor for his share of partnership assets. The applicants instructed a third party band not to send to the proprietor an ANGELWINGS video which was paid for in part by the proprietor; and deprived of orchestral backing tracks of which the proprietor was a co-composer.

- The applicants filed an EUTM on 21 November 2018 without informing the proprietor and in the knowledge that the proprietor had asserted his ownership of the name by letter dated 12 July 2018. When the applicants learned of the proprietor's invalidity proceedings against the EUTM based upon the present contested application, they obtained an extension of time to respond in the obvious hope that the proprietor's rights would be extinguished by a no deal Brexit.
- After the exit date of the UK from the EU was extended to 31 January 2020, the applicants only filed this application on 25 November 2019, seeking to cancel the proprietor's UK trade mark when they were aware of the proprietor's UK trade mark since at least 16 July 2019 and after they became aware of the proprietor's invalidity action against their EUTM. The strategic object of the applicant's application to invalidate the proprietor's UK trade mark is to obtain a suspension of the proprietor's invalidation action against the applicants' EUTM.
- The applicants ousted the proprietor from the band and now seek to take an undue advantage of the fact that the proprietor has, by reason of their conduct, been unable to rehearse or perform in public.
- The applicants are related (Glenn Cano is the uncle of Davinia Cano), but neither are related to the proprietor.

5. The parties have the same surname. I will refer to Glenn Cano and Davinia Cano as the applicants, unless it is necessary to refer to them individually (in which case, I will use their full names) and to Paul Patrick Cano as the proprietor.

6. The parties have been represented throughout these proceedings; the applicants by Haseltine Lake Kempner LLP, and the proprietor by Lysaght. The applicants and the proprietor filed evidence and written submissions in lieu of a hearing, there being no request to be heard. I make this decision after careful consideration of all the material that has been submitted.

The evidence

7. The applicants' evidence comes from Glenn Cano, who has filed two witness statements, and Davinia Cano.¹ They describe themselves, respectively, as the keyboardist and the vocalist. The proprietor filed a witness statement dated 13 May 2020. He describes himself as the founder member and guitarist.

8. I have read all the evidence. As is common with music band disputes, the evidence contains substantial narrative from the parties' individual points of view. It is clear that, on occasion, emotions ran high. While no doubt cathartic for the writers, quite a lot of what they say does not have a bearing upon the legal ground for the application for invalidation. I will draw from the evidence when it has a bearing on my assessment of the ground as pleaded. I note from the applicants' written submissions in lieu of a hearing that they refer to the application being filed in bad faith because it interfered with the goodwill in the Angelwings name held by other band members, was filed with no intention to use and was filed with the intention of interfering with the applicants' activities under the Angelwings name. It is essential that pleadings are clear from the outset. Whilst I accept that the pleadings do explicitly claim bad faith in relation to an interference in the goodwill held by the band members and an interference with the applicants' activities, the pleadings are at best oblique with reference to lack of intention to use. However, as will become clear, this does not make a difference to the outcome of this decision.

Decision

9. Section 47 of the act states:

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

¹ Glenn Cano's witness statements are dated 3 March 2020 and 28 July 2020. Davinia Cano's witness statement is dated 28 July 2020.

10. Section 3(6) of the Act states:

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

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

“Bad faith: general principles

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

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

132 Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2009] 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 Plastics 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).”

12. In *Sky v Skykick*, Case C-371/18, the Court of Justice of the European Union recently provided further clarification about the purpose and scope of article 3(2)(d) of

the Trade Marks Directive (which is given effect in the UK by s.3(6) of the Act). The Court stated:

“74. The Court has held that in addition to the fact that, in accordance with its usual meaning in everyday language, the concept of ‘bad faith’ presupposes the presence of a dishonest state of mind or intention, regard must be had, for the purposes of interpreting that concept, to the specific context of trade mark law, which is that of the course of trade. In that regard, the EU rules on trade marks are aimed, in particular, at contributing to the system of undistorted competition in the European Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin (judgment of 12 September 2019, Koton Magazacilik Tekstil Sanayi ve Ticaret v EUIPO, C-104/18 P, EU:C:2019:724, paragraph 45 and the case-law cited).

75. Consequently, the absolute ground for invalidity referred to in Article 51(1)(b) of Regulation No 40/94 and Article 3(2)(d) of First Directive 89/104 applies where it is apparent from relevant and consistent indicia that the proprietor of a trade mark has filed the application for registration of that mark not with the aim of engaging fairly in competition but with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties.”

13. Therefore, making a trade mark application with the intention of undermining, in a manner inconsistent with honest practices, the interests of a third party, amounts to an act of bad faith.

14. The relevant date is 20 September 2018, the filing date for the trade mark application. I must decide what the proprietor knew at that date and then decide whether filing the application fell short of acceptable commercial behaviour and was, therefore, an application made in bad faith.

15. There is little that appears to be common ground. Much of the content of the parties' evidence concerns arguments about how the name was conceived; who was putting in the most effort in the band; whether the proprietor was dismissed or agreed to leave; who said what on social media platforms; and at what point the proprietor planned to apply to register the trade mark or to appoint lawyers. As will become clear, none of that is relevant to the legal claim that the registration should be declared invalid.

16. The facts which do appear to be common ground are:

- The proprietor, along with two other members², was a founder member of the band in April 2013 and the applicants joined very shortly afterwards (in the same month);
- The proprietor left and re-joined the band at various times prior to the last time he left, in June 2018;
- Organising the band's paperwork and appearances was largely undertaken by the proprietor, but there was no formal management;
- The band produced an album and played at gigs and festivals in Gibraltar prior to the relevant date.

17. This dispute is not about who has the right to the ANGELWINGS name, although the proprietor's evidence indicates that he considers that to be the central issue. It is about whether the proprietor's application to register ANGELWINGS as a trade mark in the UK, on 20 September 2020, for the services set out at the beginning of this decision, was made in bad faith. The applicants' pleadings make frequent reference to goodwill. There is no passing off claim (under section 47/5(4)(a) of the Act); however, the issue of goodwill is not without relevance (the two grounds are often pleaded together and the issues may intertwine).³ That said, the main claim is made at the end of the pleadings; namely, that the proprietor has attempted to stop the current band members from using the name by registering the trade mark, which was an act of bad faith.

² Darren Fa and Martin Figueras

³ See, for example, *Fianna Fail v. Patrick Melly*, BL O/043/08, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, at paragraph 49.

18. Trade mark registrations are territorial. Gibraltar is a British Overseas Territory. For trade mark protection in Gibraltar, it is necessary to make an application in Gibraltar based upon a UK trade mark registration.⁴ It is, therefore, relevant to the ground that the contested registration was applied for in the UK because it would be necessary to have secured that registration in order to apply for a trade mark in Gibraltar.

19. None of the band members had contracts. The proprietor appears to be the only band member who left and re-joined and the only member who has asserted any rights in relation to the name. Various other band members left, and other individuals joined. Such an arrangement was considered by the late Laddie J in *Saxon Trade Mark* [2003] FSR 39, to which both parties have referred. The judge explained that, without a contract or agreement, the members of a band who perform for consideration are likely to constitute a partnership-at-will. This means that the assets of the band, including its goodwill and therefore rights to its name, are partnership assets to which each member is normally entitled to an undivided share. In relation to the legal position when members leave the band, Laddie J said:

“25. Absent special facts such as existed in *Burchell*, the rights and obligations which arise when a group of musicians, performing in a band as a partnership, split up can be explained as follows. It is convenient to start by considering the position when two, entirely unrelated bands perform under the same name. The first performs from, say, 1990 to 1995 and the second performs from 2000 onwards. Each will generate its own goodwill in the name under which it performs. If, at the time that the second band starts to perform, the reputation and goodwill of the first band still exists and has not evaporated with the passage of time (see *Ad-Lib Club v Granville* [1972] RPC 673) or been abandoned (see *Star Industrial Co v Yap Kwee Kor* [1976] FSR 256) it is likely to be able to sue in passing off to prevent the second group from performing under the same name (see *Sutherland v V2 Music* [2002] EWHC 14 (Ch),

⁴ Trade Mark Act 1948-31, section 3. Alternatively, at the relevant date in these proceedings, a European Trade Mark registration could have been used as a base to register a trade mark in Gibraltar.

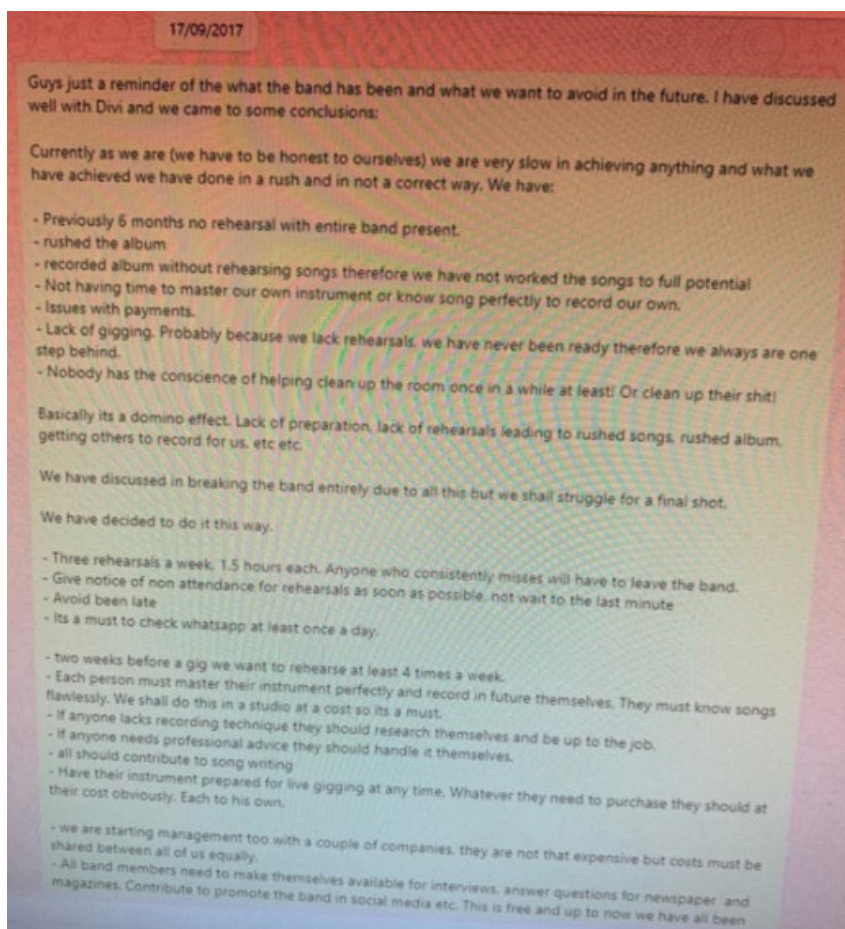
[2002] EMLR 28). On the other hand, if the goodwill has disappeared or been abandoned or if the first band acquiesces in the second band's activities, the latter band will be able to continue to perform without interference. Furthermore, whatever the relationship between the first and second bands, the latter will acquire separate rights in the goodwill it generates which can be used against third parties (see *Dent v Turpin* and *Parker & Son (Reading) Ltd v Parker* [1965] RPC 323). If the first band is a partnership, the goodwill and rights in the name are owned by the partnership, not the individual members, and if the second band were to be sued, such proceedings would have to be brought by or on behalf of the partnership.

26. The position is no different if the two bands contain common members. If, as here, they are partnerships at will which are dissolved when one or more partners leave, they are two separate legal entities. This is not affected by the fact that some, even a majority, of the partners in the first band become members of the second. A properly advised band could avoid the problem that this might cause by entering into a partnership agreement which expressly provides for the partnership to continue on the departure of one or more members and which expressly confirms the rights of the continuing and expressly limits the rights of departing partners to make use of the partnership name and goodwill. This is now commonplace in the partnership deed for solicitors' practices.”

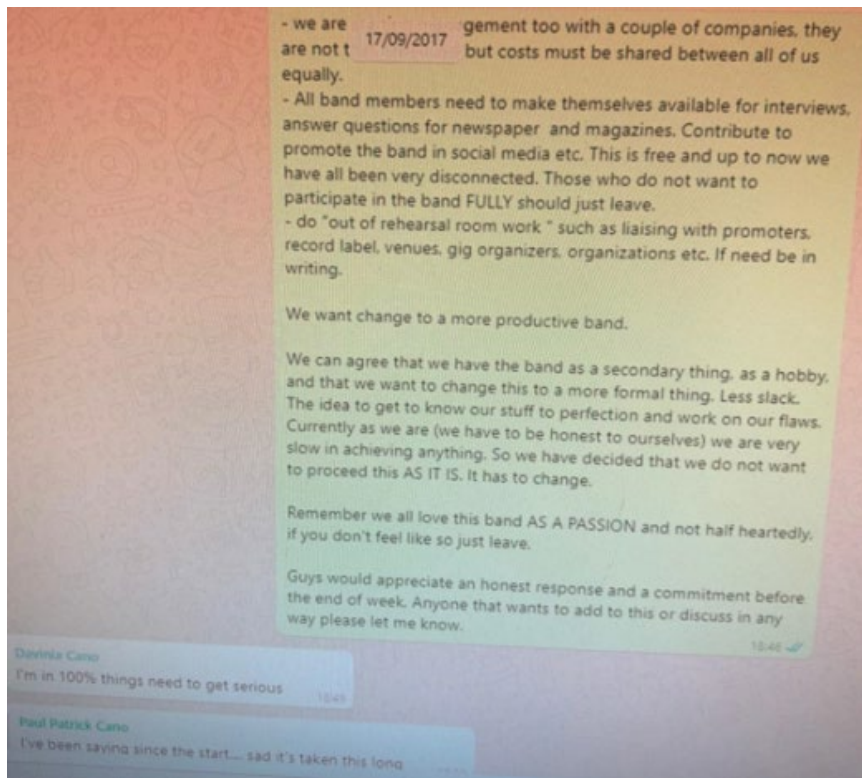
20. There was no partnership or any other agreement which expressly provided for the partnership/band to continue after the departure of one or more members, or one which expressly confirmed the rights of the continuing members and expressly limited the rights of those who had left to make use of the band's name and goodwill. The counterstatement states that the proprietor took the absence of any reply to his letter of 12 July 2018 as an implied agreement to its contents. Glenn Cano's second witness statement refutes this by stating that he was on holiday when the letter was received (a fact known to the proprietor as is evident from WhatsApp messages dated 23 July 2020 at page 59 of Exhibit GC3). Glenn Cano replied to the proprietor on 24 July 2018 and approached lawyers on 26 July 2018. The counterstatement also says “It had also been agreed that any royalties were to be divided in equal shares between the

two applicants and the proprietor.” No evidence supporting this statement has been filed by the proprietor. Glenn Cano has provided a copy of an “Album License Contract” between the band and the record label, dated 1 October 2010, in which the band is described as the licensor: specifically, the proprietor, Davinia Cano, Glenn Cano, Mark Brooks and Darren Fa are listed as ‘licensors’. If this is the agreement referred to in the counterstatement, it is erroneous to state that the royalties were to be divided in equal shares between the proprietor and the applicants as this ignores the fact that Mark Brooks and Darren Fa were also included in the royalty split.

21. The closest arrangement to an agreement between the members (and not one made in the express terms outlined by Laddie J in *Saxon*) was the WhatsApp message sent by Glenn Cano to the band members on 17 September 2017 after the Gibraltar Calling gig, to which the proprietor agreed (by replying he had been saying such things from the start):⁵



⁵ Page 14 of Exhibit DC1.



22. The tone and content of the proprietor's defence and evidence indicates that he considered that he had the sole right to the mark because he was a founder member of the band and because he thought of the name ANGELWINGS. However, since the name was an asset of the band, it follows that who was involved in the process of creating the name is irrelevant. Although some of the members no doubt feel a personal attachment to its genesis, the creation of a name *per se* provides no legal rights to use it, or to exclude others from using it.⁶ Therefore, it does not matter whether the proprietor, Davinia Cano or any other band member, or a combination, thought of the name. In relation to being a founder member, the *Saxon* case demonstrates that, since the goodwill generated by a band of regular performers is owned by the band collectively, rather than by its individual members (in the absence of any express agreement or contract otherwise), founding members do not have any greater rights to any goodwill created under the name than later members.

23. As of June 2018, when the proprietor left the band for the last time, the band was operating as a partnership-at-will which included the proprietor, Glenn Cano and Davinia Cano. The band at this time also included Nick Hassan, with whom the

⁶ *Harrods Limited v Harrodian School Limited* [1996] RPC 697.

proprietor disagreed, which appears to have been the catalyst for his departure. The proprietor said in a WhatsApp audio message to Glenn Cano, on 13 June 2018⁷:

“... a person that has only been eight months in the band [Nick Hassan] cannot, can't throw the band out of the window, e, if you want, if you all want to continue with him, and that I will leave, I will do it for the band...I also need to disconnect, but the band should continue...”.

According to the law as stated in *Saxon*, it does not matter how long Nick Hassan had been in the band; he was also a member of the partnership-at-will.

24. In this WhatsApp message, the proprietor says that he will leave for the good of the band and that the band should continue. In his own evidence, the proprietor states that he never attempted to stop the band from performing; he states that what he did was to attempt to stop the band from using and performing under ANGELWINGS. The proprietor states that he never gave up the right to the name and that he asserted his right by letter on 12 July 2018:⁸

⁷ Exhibit GC2, page 13.

⁸ Exhibit GC2 Page 14 and Exhibit PC3.

12th July, 2018.

Davinia Cano,
C/o Cano Monumental Masons,
8, Wellington Court,
48, Devil's Tower Road.

As you are aware, the name "Angelwings" and "Band Logo" that was given to the Group was solely my idea and this has been recognized by all the original members of the band as well as stated in the Media.

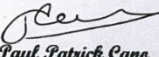
The name "Angelwings" and the "Band Logo" is therefore items I wish to keep and will be using for my new Band.

I am entitled to this; all the more so because everyone that is currently in the band was not in the group when it was founded, indeed, it is no longer the band "Angelwings" in any shape or form.

This being the case, the group as is now left, needs to re-invent itself with a new name since I hereby give you notice that I no longer consent and/or authorize you to use the name "Angelwings" for the purpose of any recordings, marketing, publicity, concerts or other musical events.

Should you not adhere to this request, I am afraid that I will have to refer the matters to my Legal Advisors.

Please confirm receipt of this letter and that you will be complying with the request made.


Paul Patrick Cano
(Founder of Angelwings).

25. Further, the proprietor states that there were never any terms set out regarding his departure. *Saxon* demonstrates that the name, as an asset of the band, belonged to the members collectively, not individually. There were never any express terms or agreements, so the absence of express terms when the proprietor left does not equate to a retention of the name by him. Making an assertion that you own something does not equate to legal ownership.

26. In stating that the band should continue without him, the proprietor consented to the previous partnership-at-will carrying on without him. This was not the first time he had said that the band should carry on without him. The proprietor left the band a total of seven times. When the proprietor left in April 2016, he also envisaged that the band should carry on without him, as is evident from a message to Glenn Cano on 10 April 2016⁹:

"All the relevant emails relating to the band are now with Glenn and Darren, I have informed some people who need to contact me for issues relating to Angelwings to contact anyone of you...if the content of the emails seems

⁹ Exhibit GC2, pages 3 and 4.

irrelevant don't discard them because they are contacts for radio stations or record labels that might come in handy in the future...See ya!!"

27. The proprietor states that he left the band on several occasions because of the lack of commitment from other members, compared to his own efforts and time. It also appears to have been a tactic on his part because he states:

"Accordingly, at times I did communicate a decision to leave as I thought that this might make the others think twice about things and make them realise that it was worthwhile to keep going from a more dedicated point of view."

28. In a WhatsApp message to Glenn Cano on 3 July 2016, the proprietor states that the name and logo were his because of his effort and time.¹⁰ However, as can be seen from the law, this is irrelevant. The proprietor's effort levels do not create an entitlement to a major band asset: the name.

29. Furthermore, the proprietor's statement that he never stopped the band from performing but did attempt to stop it using and performing under the ANGELWINGS name means that the proprietor was appropriating a valuable band asset. How else would the band attract an audience (i.e. custom), but by the name by which it had always been known? Apart from releasing a debut album, the band had performed live in public in Gibraltar, including at festivals where the crowds are typically larger than an indoor audience: once in 2014; four times in 2015 (including supporting Saxon at a rock festival, and supporting Kings of Leon and Duran Duran at another festival); once in 2016; once in 2017, at a festival; and once in 2018, prior to the proprietor's departure.¹¹ At best, the proprietor's statement that he accepted the decision that he was no longer a part of the band but that he believed that the band understood that the name belonged to him is naive.

30. It is academic whether the proprietor was 'ousted', 'dismissed' or agreed to leave. This is because the band consisted of a partnership-at-will, with no contract or

¹⁰ Exhibit GC2, page 7.

¹¹ Second witness statement of Glenn Cano, paragraphs 15 to 19 and Exhibit GC3, pages 16 to 23.

agreement between the members, or partners, and with none of the partners being in a position to 'dismiss', or expel, another partner.¹² The whole thrust of the proprietor's defence and evidence is that he believed he was entitled to make the application for the contested registration because a) he had conceived the name ANGELWINGS; and b) he had invested more emotional energy and shown more commitment than other band members.

31. The law shows that this belief was mistaken. However, the test is not whether he considered what he did to be right, which is a subjective question. The test is an objective one; namely, whether the proprietor's intentions in making the application would have been considered less than honest when judged against the normal standard of acceptable commercial behaviour observed by those in the music trade.

32. The proprietor knew and accepted that the band would continue without him; his issue was that it should continue without using the name ANGELWINGS. The band's music sales in the UK appear to have been vanishingly small. Glenn Cano's evidence shows that there were 131 downloads between July and August 2017 in the UK and elsewhere, with other figures provided which are after the relevant date.¹³ He states that the UK accounted for 25% of album sales, but there are no details as to the position at the relevant date. However, the band clearly had played gigs in Gibraltar, and had released an album. Going back to the claim by the applicants in their pleadings, the UK registration would have impeded the band's ability to continue playing on its home territory under the name which it had always used and by which it was known. The counterstatement states that the proprietor has registered the mark in Gibraltar and the UK: he would have needed the UK registration to register the mark in Gibraltar.¹⁴ Impeding the band's ability to continue using ANGELWINGS is not mere hypothesis: the evidence shows that, subsequent to the relevant date, the proprietor

¹² See section 25 of the Partnerships Act 1890: "No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners."

¹³ Page 34 of Exhibit GC3.

¹⁴ The applicants' written submissions in lieu of a hearing reveal the number of the proprietor's trade mark registration in Gibraltar as 11250, applied for on 4 July 2019, based upon the contested UK registration, as evidenced by the registration certificate attached to the submissions.

contacted other parties who were dealing with the band after the relevant date to warn them off, asserting his rights as owner of the trade mark registration.¹⁵

33. The proprietor had no more right to the name than any of the other band members. None of them had an individual right to it. The effect of partnership law does not appear to be widely understood by band members (and ex-band members), since this type of dispute is relatively common before the UK Intellectual Property Office and in the UK courts. However, knowledge or no knowledge about the law, it was both unrealistic and unfair to expect the band to change its name when it had already been performing for four years in Gibraltar. The proprietor knew that the band had previously performed (as he had been in the band at the time); he refers to it as “a signed band with expectations of touring and delivering a second album”¹⁶; he knew that the band had continued to perform in spite of his seven departures (and six re-joinings); and he knew that the band would expect and need to continue under the name that it had always used. He also knew that owning the trade mark registration would put him in a legal position to prevent that occurring. The proprietor’s own feelings about whether that was permissible are irrelevant. On 20 September 2018, the proprietor’s intentions in making the application would have been considered less than honest when judged against the normal standard of acceptable commercial behaviour observed by those in the music trade. The UK registration gave the proprietor the base for a trade mark registration in Gibraltar. He made the application with the intention of undermining, in a manner inconsistent with honest practices, the interests of a third party; namely, the band he had left. The application was made in bad faith. **The section 3(6) ground succeeds.**

Outcome

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

¹⁵ First witness statement of Glenn Cano, paragraphs 20 to 23; and second witness statement of Glenn Cano, paragraph 52.

¹⁶ Proprietor’s witness statement, paragraph 16.

Costs

35. As the applicants have been successful, they are entitled to a contribution towards their costs, based upon the published scale in Tribunal Practice Notice 2/2016. The costs breakdown is as follows:

Official fee	£200
Preparing a statement and considering the proprietor's counterstatement	£500
Preparing evidence and considering and commenting on the proprietor's evidence	£1500
Written submissions in lieu of a hearing	£400
Total	£2600

36. I order Paul Patrick Cano to pay to Glenn Cano and Davinia Cano the sum of £2600. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 20th day of October 2020

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