

BL O-0441-24

TRADE MARKS ACT 1994

IN THE MATTER OF

UK TRADE MARK NO 3333426 IN THE NAME OF  
WAYNE BARRETT-MCGRATH  
IN RESPECT OF THE TRADE MARK:

# Slaughter and the Dogs

AND

INVALIDATION THERETO UNDER NO 503957

BY

HOWARD BATES

## Background and pleadings

1. These proceedings have been unusually lengthy, with a very large volume of correspondence on file. In their dealings with the tribunal, neither side has been represented by legally qualified representatives,<sup>1</sup> which has not helped the situation. The case has been fought in an emotionally charged manner and despite best efforts, has been be-set by procedural issues, resulting in case direction letters and case management conferences. I do not intend to deal with every issue that has arisen during these proceedings (to do so would be disproportionate), but will confine this document to issues and material that are relevant to the substantive decision to be made.

2. In essence, this is a dispute between band members concerning the right to use the name of a band, which has had a changing line-up of members during its lifetime.

3. On 22 August 2018, Wayne Barrett-McGrath (the proprietor, hereinafter, Mr Barrett-McGrath) applied to register the mark shown on the cover page of this decision as a trade mark under no. 3333426. It was subsequently registered on 16 November 2018 for the following goods:<sup>2</sup>

### **Class 9**

Musical cassettes; Musical recordings; Musical recordings in the form of discs;  
Musical sound recordings; Musical video recordings.

4. Howard Bates (the cancellation applicant, hereinafter 'Mr Bates') seeks invalidation of the registration under the provisions of section 47 of the Trade Marks Act 1994 (the Act). He does so on grounds under section 5(4)(a) of the Act.

5. Under the section 5(4)(a) ground Mr Bates relies upon the sign 'Slaughter and The Dogs', which he claims has been used throughout the UK since 1975 for the following goods and services:

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<sup>1</sup> Save that Mr Bates was represented by Counsel at the final hearing.

<sup>2</sup> International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).

“Musical recordings in the form of discs, CD, Vinyl, Cassette, Download Mp3, Streaming services; Musical sound recordings; Musical video recordings. DVD recordings. Live musical performances on stage T.V., radio and film. All forms of merchandise including Tee Shirts, Posters, Stickers, photographic images, and any other formats be they electronic or material.”

6. In support of his case, Mr Bates submits:

*“1. The name Slaughter and the Dogs has acquired its own goodwill as a musical band, and each band member, including myself as the original bassist and a founding member has prima facie acquired an undivided share in that goodwill. There has never been any consistent and/or formal arrangements between band members as to the division of shares or interests in the band name.*

*2. I have been involved in signing recording contracts with other band members, and merchandising contracts.*

*3. Wayne Barrett-McGrath has claimed an exclusive right to the band name on the 22<sup>nd</sup> August 2018, and he cannot do so. The registration should be in the joint names of all band members who have continued to use the name.”*

7. On 19 September 2021, Mr Barrett-McGrath filed a notice of defence that was submitted by Erin Custer-McGrath, self-described as, ‘Manager of Slaughter and the Dogs and personal representative of Wayne Barrett’. I reproduce the defence as written:

*“Mr. Wayne Baret-McGRATH strongly disagrees with the Cancellation Applicants’ statement. Mr. Bates was a contracted member as a bass player for a mere three (3) years, before he went off and started the group, ‘Studio Sweethearts’ with Mr. Michael ‘Mick’ Rossi. He is owed absolutely NOTHING, much less ownership to the name, with his request being almost laughable. Mr. Barrett-McGRATH then retained a bass player, Mr. John Pierre THOLLET, who played with Slaughter and the Dogs for over thirty (30) years. Mr. Bates has been involved with his wife, in the Bed and Breakfast industry in Dorset, U.K., for almost thirty (30) years, and he has not been involved in the music industry*

*during this time, with the two exceptions of a Maurice Murray conjured 'Original Line Up' show at the Ruby Lounge in London in 2015 (against Mr.Barrett-McGRATH's wishes,) and another Maurice Murray and Jennie Russell-Smith of Rebellion Festivals conjured 'Original Line Up' played again against Mr. Barrett-McGRATH's wishes, at the Rebellion Festival in 2016. Mr. Howard Bates is now scheduled to play some 'Slaughter', 'Bite Back' project that has been stalled for a year and a half. (Maurice Murray is trying to bill it as the 'original' Slaughter and the Dogs and we have consulted an Intellectual Property Attorney, Mr. James Buckley regarding this.) Mr. Bates hasn't been fighting illegal merchandise that has and is being manufactured, which is why the trademark was filed. Attached are the few contracted musical contributions made by Mr. Howard Bates during his (3) year tenure in the Trademark Owners band."*

8. Both parties filed evidence and skeleton arguments. A hearing was held by video conference on 20 June 2023 at which Mr Bates was represented by Karen Boyes of Counsel and Mr Barrett-McGrath was represented by Erin Custer-McGrath.

9. Both sides seek an award of costs, a matter that I will return to later in this decision.

10. I make this decision having taken full account of the many papers before me and of the submissions made by both parties at the hearing.

## **Preliminary issues**

### Legal representation

11. Despite numerous references to consultation with lawyers, Mr Barrett-McGrath has not been represented by a legal professional at any point during these proceedings. He has been content to be represented by Erin Custer-McGrath throughout this case and I confirmed with her at the second case management conference, that she is not legally qualified.

### Without prejudice information

12. Throughout the proceedings reference has been made to attempts to settle these proceedings and other related disputes in this and other jurisdictions. I have not taken any of those comments into account in reaching this decision.

### Allegations and speculation

13. Neither side requested cross-examination of the other, so I make this decision based on the evidence before me. The proprietor, Mr Barrett-McGrath and his representative have made numerous statements concerning collusion between band members, threats, illegal activity by Mr Bates and his associates and have used defamatory language throughout their dealings with this case. These are not matters that I intend to consider in making this decision; however, I will return to them when considering appropriate costs.

### The proprietor's evidence

14. Throughout the proceedings the proprietor has filed evidence attached to email and not under cover of a witness statement.<sup>3</sup> I have given case directions at case management conferences and in letters sent via tribunal caseworkers making it clear that the proprietor's evidence should have been filed within the evidence round set for the proprietor. I will not consider any of the additional material which is not filed in the correct manner and was received piecemeal throughout this case.

## **EVIDENCE**

15. Mr Bates filed evidence in chief in the form of a witness statement, dated 12 December 2021, and exhibits HB1-HB21. He filed evidence in reply in the form of a second witness statement, dated 6 September 2022, and exhibits HB2, HB9, HB10-14 and HB21-49.<sup>4</sup>

16. Mr Barrett-McGrath filed a witness statement, dated 14 March 2022, and exhibits WMB1-WMB26.<sup>5</sup> Unusually, Mr Barrett-McGrath's witness statement is contained in exhibit

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<sup>3</sup> See for example four emails dated between 5 and 9 August 2022 which have attachments that should have been filed as evidence.

<sup>4</sup> The unusual sequence of exhibit numbers is a result of the multiple evidence filings by Mr Barrett-McGrath.

<sup>5</sup> I note that the exhibits are labelled WMB whereas the proprietor's initials are WBM, nothing turns on this.

WMB5 of his evidence. I have accepted it in this form as it contains a signed statement of truth and makes reference to the other exhibits filed.

17. I have no intention of summarising the evidence in full. I will instead endeavour to provide a coherent narrative based on my conclusions drawn from the evidence provided.

### **First iteration of the band**

18. The band Slaughter and The Dogs was formed in Manchester in 1975. This is not disputed.

19. Mr Barrett-McGrath stated in his defence and throughout these proceedings that the band is his band and Mr Bates was a contracted musician and not a founding member of the band. In his witness statement he submits:

*“2. In 1975, I, unable to play bass and sing simultaneously, was introduced to Howard Bates...through my drummer Brian Grantham. As with the rest of the band, [Mr Bates] auditioned and was put on a five (5) year contract as a contractual musician. Mr. Michael J Rossi was selected by me, to embark on this musical endeavor, never the ‘main driving force’, of the band...”*

20. Mr Barrett-McGrath says in his statement that, *“3...Being teenagers, knowing nothing about royalties, copyrights, songwriting credits, we were taken advantage of.”* This appears to be his explanation as to why all four members received an equal share of monies paid to the band. At paragraph 6 of the same statement, Mr Barrett-McGrath claims that he and Mr Rossi were ‘the driving force’ writing all of the songs and lyrics. He states that Mr Bates and Mr Grantham were contracted musicians.

21. Mr Bates states:<sup>6</sup>

*“4. At no time was I ever under, given the impression, or told by anyone that the bands creation, name, etc was the sole property and brainchild of Mr Barrett McGrath. I was never hired as a session/contracted musician or entered into*

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<sup>6</sup> See Howard Bates first witness statement, dated 12 December 2021.

*any such agreement. The only contracts and agreements I ever signed were relating to recording and publishing contracts all of which, as a founding member...of the band I was entitled to a 25% share.”*

22. In support of his position, Mr Bates provides a copy of the first recording contract with Decca Records,<sup>7</sup> dated 10 August 1977. The band members listed (in the order shown in the contract) are Howard Bates, Wayne Barrett-McGrath, Brian Grantham and Mick Rossi.

23. The contract confirms a royalty rate of 10% paid to the band (referred to as ‘the Artist’). It is clear from the contract that all four members of the band were equal, and that no member was entitled to a greater share of royalty monies than the others.

24. Mr Bates provides a royalty statement from Decca Records, dated 31 December 2014, which shows Mr Bates’ partner share as 25% of royalties due.<sup>8</sup>

25. He also provides a royalty statement from Warner Brothers (Warner Chappell Music Ltd), dated 12 December 1989, in which payment is made for his share of the royalties earned through ‘the Slaughter and the Dogs contracts with Blackhill Music’.<sup>9</sup> The calculation clearly shows Mr Bates receives a 25% share of the royalties.

26. Mick Rossi, previously referred to as Michael J, another member of the band, provided a witness statement<sup>10</sup> in which he confirms that Howard Bates was a founder member of Slaughter and the Dogs and that all royalties were split equally between the four musicians under the recording contract with Decca and the second recording contract with DJM (which I will come to shortly). Mr Rossi also states that Mr Bates was not contracted by Mr Barret-McGrath. He also states that Mr Bates designed the first album cover, came up with the title of the first album, ‘Do It Dog Style’ and devised the title of the second album ‘Slaughter Bite Back’, as well as writing songs with the band.

27. Mr Barret-McGrath has not provided any evidence to support his position that Mr Bates was a contracted musician and not a permanent member of the band. He has referred to

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<sup>7</sup> See exhibit HB2.

<sup>8</sup> See exhibit HB4.

<sup>9</sup> See exhibit HB3.

<sup>10</sup> See exhibit HB1 to Mr Bates’ first witness statement.

'the contract' that shows the hiring of Mr Bates but has not filed it in support of his case, instead submitting that it is 'available on request'. Mr Barret-McGrath has provided a photograph of a press kit for DJM records that relates to a band called 'Studio Sweethearts' (a band that included Mr Bates). It describes Mr Bates as 'a leading member of Slaughter and The Dogs'. A sticky note is attached to the picture which reads, 'NOT FOUNDING MEMBERS'.<sup>11</sup> I do not find the words 'leading member', used in record company promotional material to be inconsistent with Mr Bates' statement that he was in the original line-up of Slaughter and the Dogs.

28. In contrast, Mr Bates' evidence demonstrates that the four band members named in the contract with Decca records were the original or 'founding' members of Slaughter and the Dogs and entered the first recording contract in 1977.

29. In short, I find that Mr Bates was an original member of Slaughter and the Dogs at its inception, along with Mr Barrett-McGrath, Brian Grantham and Mick Rossi.

### First album

30. Slaughter and the Dogs' first album was called 'Do It Dog Style' and was released at the end of 1978. This is not disputed. The images below show the front cover of the album and the four original band members (Barrett-McGrath, Bates, Grantham, Rossi) on the back cover.



<sup>11</sup> See WMB18



31. Mr Bates is listed as the song writer on two album tracks, one with Mr Barrett-McGrath and one with Mr Rossi.<sup>12</sup>

32. Mr Bates submits that after the release of the first album, in late 1978, 'Mr Barrett-McGrath disappeared without warning, the first of two occasions'.

33. Mr Barrett-McGrath submits:

*"7...I did not disappear without warning." In fact, I have my diary that includes all the dates, cities and money we made for the shows we played in 1978 alone. Being it is considered a historical document due to its detailed account of the Punk Rock era, and as it is in pristine condition, I am not including it with the Submission of Evidence, but can supply copies of dates, performances, etc., graciously upon request from the Tribunal and for its records..."*

34. The diary has not been provided, irrespective, there is no suggestion by Mr Bates that Mr Barret-McGrath was not a member of the band at all in 1978.

35. In his own statement Mr Barret-McGrath's says that he was not happy with the management of the band and 'disbanded his band' in 1978.

### **Reforming the band**

36. After Mr Barret-McGrath was assured that management changes had been made, he reformed 'his band', Slaughter and the Dogs, according to his account. They then signed a recording contract with D.J.M.

37. Mr Bates states:

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<sup>12</sup> There is dispute concerning song writing credits for Victims of the Vampire (the track credited to Mr Bates and Mr Barrett-McGrath) but nothing turns on it and I do not intend to consider it in detail, it being outside the scope of this decision. Mr Bates has raised with the record company his lack of songwriting royalties for some of the band's songs and that would seem to be the appropriate course of action.

*“8. We re-established contact with Mr Barrett McGrath in 1979 and after lengthy discussions we all decided to reform the band, signing a recording contract with D.J.M. Records. The members of the band were myself, Mick Rossi, Philip Rowland<sup>13</sup> and Mr Barrett McGrath. We recorded several songs, released a single, and were contracted to record an album and undertake a full live U.K. tour to promote it.”*

38. It is clear from the evidence that the band ceased to exist, briefly, at the end of 1978 and reformed in 1979, with Philip Rowland having replaced Brian Grantham.

### **Mr Barrett-McGrath leaving the band**

39. The date is not clear, but sometime after the new recording contract was signed with DJM, Mr Barrett-McGrath left the band. He maintains that he left in the autumn of 1979 due to continuing issues with management of ‘his’ band. In his witness statement he states that he, once again, disbanded his band and went to France.

40. In Mr Bates’ reply evidence he provides a copy of an interview with Mr Barrett-McGrath from August 2018, which is titled *“Barrett-McGrath explains in his own words why he left Slaughter and the Dogs.”*<sup>14</sup> It includes the following:

*“The thing was, I just wasn't finding it to be fun anymore and I needed to do something different. We'd left Decca after the first album but had a new deal with DJM in Manchester. They tried to salvage what they could from the record deal, but really, I'd left them in the shit and it's something that I've regretted ever since. It was a very bad move.”*

### **The band after Mr Barrett-McGrath’s departure**

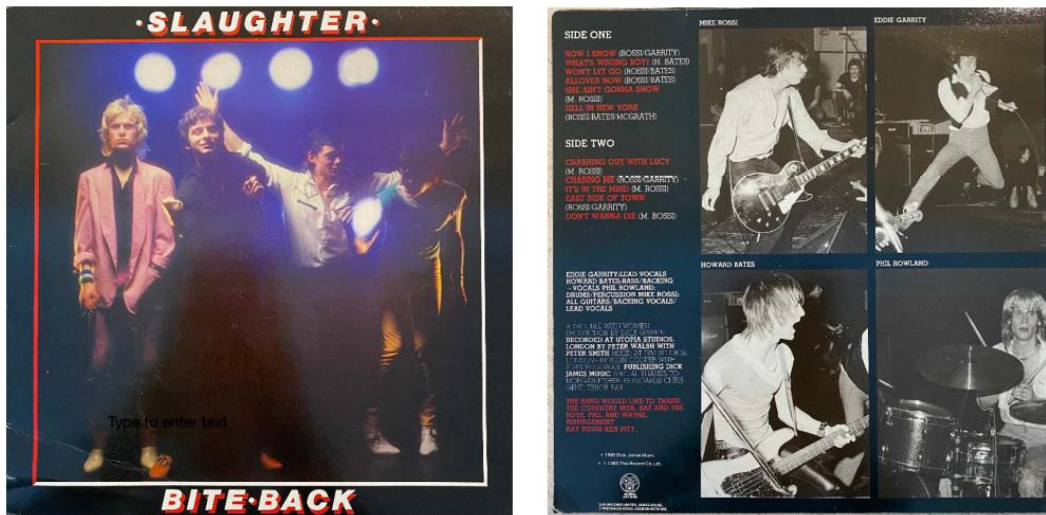
41. Mr Bates submits that Mr Barrett-McGrath’s departure left the remaining band members with contractual obligations to the record company (DJM) that they needed to fulfil. Accordingly, they recruited a singer, Eddie Garrity, and released an album under the name

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<sup>13</sup> Mr Rowland had performed with the band during live shows promoting the first album, see Mr Bates first witness statement at paragraph 7.

<sup>14</sup> [www.fearandloathingfanzine.com](http://www.fearandloathingfanzine.com), Barrett-McGrath in his own words.

'Slaughter'. It was titled, 'Bite Back' and is also referred to, throughout the evidence, as 'the second album'. It is shown below, with the four members of the band pictured on the back cover:<sup>15</sup>



42. The members of the band at this time were Bates, Rossi, Rowland and Garrity.

43. Mr Barrett-McGrath points out that he is named as a songwriter on 'Hell in New York', on that album,<sup>16</sup> and draws my attention to the fact that he is thanked on the back cover. This is not inconsistent with his departure from the band, which he has confirmed in his own words. It seems highly likely to me that a band producing an album is likely to use material created between their last album and the next – a period in which Mr Barrett-McGrath was, for a short time, a member of the band.

44. Mr Barrett-McGrath submits "...[Mr Bates] had NO creative involvement with (the Mark) Slaughter and the Dogs in 1980, as it did not exist."<sup>17</sup> This is likely due to the fact that the second album was released under 'Slaughter' rather than 'Slaughter and The Dogs'.

45. However, there is evidence that shows that the 1980 single, 'I'm the One', from the Bite Back Album by Slaughter was released by 'Slaughter and the Dogs', as shown below. Mr Bates is credited as a songwriter on all three tracks on that single.<sup>18</sup>

<sup>15</sup> See exhibit HB6.

<sup>16</sup> See exhibit WMB20.

<sup>17</sup> See paragraph 16 of Mr Barrett-McGrath's witness statement.

<sup>18</sup> See exhibit HB44.



46. Mr Bates also provides a poster for a live show in which they performed as Slaughter and the Dogs in Hull in 1979. He states the line-up was himself, Mick Rossi, Phil Rowland and Eddie Garrity.<sup>19</sup> The poster is shown below:



47. In the same year a live show was performed at the Russell Club (on 17 May 1980) under the name 'Slaughter and the Dogs' using poster artwork taken from the first album, as follows:

<sup>19</sup> See exhibit HB29.



48. The record company DJM promoted the band Slaughter and the Dogs in its January 1980 issue.<sup>20</sup> They promoted the third band line-up, which included Eddie Garrity and Phil Rowland.



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<sup>20</sup> See exhibit HB35.

49. I find Mr Barrett-McGrath's statement that the band Slaughter and the Dogs did not exist in 1980 inconsistent with the evidence of a single release, live performances and record company promotion of the band Slaughter and The Dogs in that year.

50. In addition, I find Mr Barrett-McGrath's statement that the band was his band and that he ended it in 1979 to be inconsistent with evidence of the band continuing in his absence. Clearly the remaining members were conscious of their obligations to the record company and recruited a new singer to enable them to fulfil those obligations.

51. I conclude, from the evidence, that the band Slaughter and The Dogs continued for a period after Mr Barrett-McGrath's departure. The band members during this period, 1979-1980, were Howard Bates, Eddie Garrity, Mick Rossi and Phil Rowland.

### **Slaughter and The Dogs after 1980**

52. Evidence of activity by the band Slaughter and the Dogs after the initial period, is scant to say the least.

#### Skeleton argument by the proprietor (Mr Barrett-MacGrath)

53. In the skeleton argument filed on behalf of Mr Barrett-McGrath prior to the hearing, it is claimed that the mark, Slaughter and the Dogs, without the cancellation applicant (Mr Bates) has a discography containing over sixteen full length albums and singles and compilations. This has not been shown in evidence.

#### The 1991 album

54. Mr Barrett-McGrath provides images of what he describes as 'the next' Slaughter and The Dogs album, which was released in 1991.<sup>21</sup> He states that Mr Bates was not involved with this album; he does not say who was in the band.

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<sup>21</sup> See WMB21.



55. Mr Bates does not dispute that he was not involved with the band during this period.

#### John Thollet – bass player

56. Mr Rossi refers to Mr Thollet playing bass on one studio album in 2001, called, 'Beware of' and recorded on Captain Oi Records.<sup>22</sup> It is not clear who was in the band at this time.

57. In Mr Barrett-McGrath's counterstatement reference is made to John Thollet, a bass player who is said to have played with the band for 'over thirty years'. In Mr Barrett-McGrath's evidence Mr Thollet is claimed to have played with the band for 23 years.<sup>23</sup> Mr Rossi's statement<sup>24</sup> claims that Mr Thollet was hired on a gig to gig/tour to tour basis and confirms, "...there were many years where Slaughter & the Dogs were inactive and not touring, recording or playing live shows. So, to say J.P. Thollet was with us for 23 years is misleading".

#### The band after 2002

58. A witness statement is provided from Maurice Murray,<sup>25</sup> a promoter. It includes the following:

<sup>22</sup> See HB1, Mick Rossi's witness statement dated 27 August 2022.

<sup>23</sup> See Mr Barrett-McGrath's witness statement, paragraph 14.C.

<sup>24</sup> Exhibit HB1 to Mr Bates' first witness statement.

<sup>25</sup> See exhibit HB31a – the witness statement of Maurice Murray, dated 4 July 2022.

*“I have worked with Mick Rossi and Wayne Barrett McGrath as both Promoter and as their social media admin from 2002-2016 for their band Slaughter and the Dogs. Also from 2014 - Present I have continued to work with Mick Rossi and Howard Bates in the same role as promoter and social media admin for Slaughter and the Dogs.”*

59. Mr Barrett-McGrath describes Mr Murray as someone who ‘makes up stories’.<sup>26</sup> No evidence has been provided in support of that claim nor was a request made to cross-examine Mr Murray. Mr Murray’s evidence speaks for itself and I intend to consider it in the usual way.

#### Royalty cheques from 2007

60. Mr Barrett-McGrath has provided evidence of royalty cheques for song writing credits dated for the period 1 July 2007 – 31 December 2007. They are said to relate to England, Italy and Australia, though it is not clear which payments relate to which country. They include credits for songs that are on the first Slaughter and The Dogs album, Do It Dog Style, the second album, Slaughter Bite Back and the Shocking Album. Further songs are listed that are not otherwise shown in evidence, but I cannot conclude whether these are songs performed by Slaughter and The Dogs, which albums they feature on, if they are singles, or what the line up of the band was at the time.

61. There clearly was some activity in the period between 1980 and 2015 when the Slaughter and the Dogs tours made up of original members began (I will come to these shows shortly).

62. I can conclude that Mr Thollet played bass with the band, at some point. Mr Barret-McGrath and Mr Rossi were also involved in at least one album each and were clearly in the band to the extent that they hired Mr Murray as their promoter. I have no reason to doubt Mr Murray’s statement that he worked with Mr Barret-McGrath and Mr Rossi from 2002-2016 and Mr Bates and Mr Rossi from 2014. However, despite acting as a promoter for various iterations of Slaughter and The Dogs in this period, Mr Murray has not provided any details or evidence of gigs, tours or music output by Slaughter and the Dogs during

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<sup>26</sup> See Mr Barrett-McGrath’s witness statement, paragraph 14.E.



that period and nor have any of the band members. The evidence simply is not sufficient to draw any firm conclusions regarding the output or line-up of band members during this period.

### **Original line-up performances**

63. In 2015 and 2016, the four original band members, Barrett-McGrath, Rossi, Bates and Grantham, performed together at a Slaughter and The Dogs gig in Manchester and as a featured band at the Rebellion festival in Blackpool. Mr Bates describes Rebellion as the UK's premier punk festival. Mr Murray refers to these events in his statement (reproduced as written):<sup>27</sup>

*"2. On the 9/10/2015 I successfully Promoted the full original 1976 Slaughter and the Dogs line up consisting of Barrett/ Rossi/Bates/Grantham for a Sold Out gig in Manchester called BACK TO THE START. I had this gig filmed and it was released on DVD and sold by myself via the social network platforms that I had set up with all profits then shared back between all 4 members of the band.*

*3. Due to the success of this gig the band were then offered a co headline spot at Rebellion Festival in Blackpool for August 2016..."*

64. This is confirmed in the statements of Mr Bates and Mr Rossi. Mr Barrett-McGrath submits:

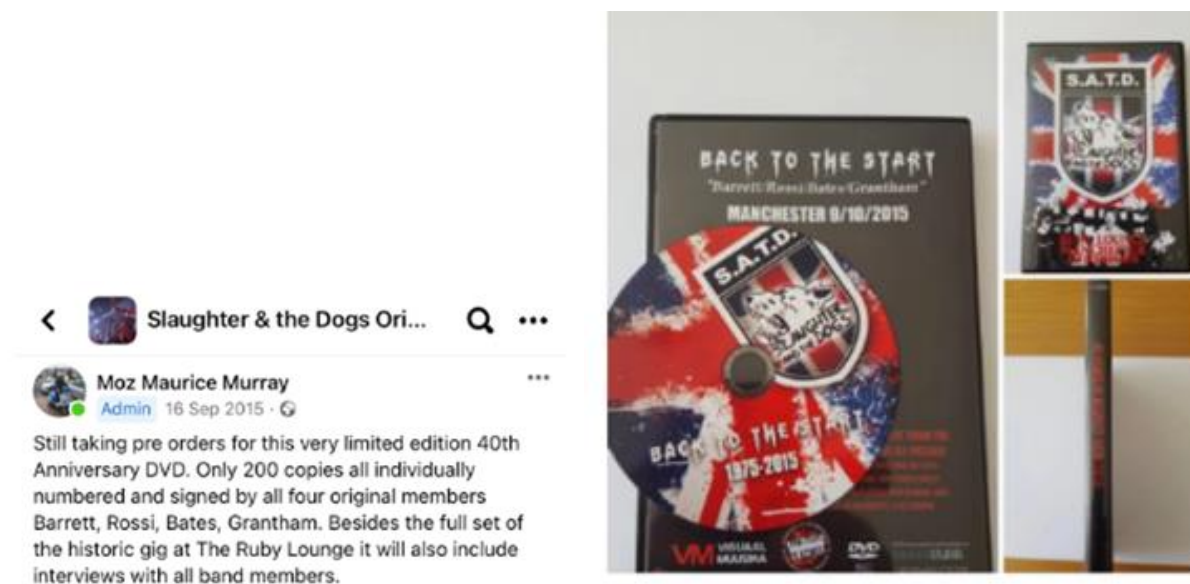
*14. Mr. Maurice Murray did conjure up the "Original Line-Up" show at the Ruby Lounge in 2015, against my wishes, and I chose to do it based on the monetary factor and the fact I was told I would not have to deal with the [Mr Bates] or Mr. Brian Grantham again.*

65. In response, Mr Bates states that this submission, "...lacks credibility as Mr Barrett McGrath took part in both events enthusiastically with no mention of any concerns he may have had at the time to anyone involved."

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<sup>27</sup> As above at 25.

66. The DVD that was released following the gig is shown below and was promoted on social media by 'Moz' Maurice Murray. His social media post from that time supports his and Mr Bates' view that all of the band members took an active role in promoting the show, taking part in interviews and signing DVDs:



67. The poster for the 2016 event is shown below:



68. Mr Barrett-McGrath provides evidence from two promoters who state they have been involved in his current iteration of Slaughter and the Dogs since 15 December 2021. They both confirm that Mr Bates is not a member of that band.<sup>28</sup> Mr Bates does not claim to be a member of Mr Barrett-McGrath's current Slaughter and The Dogs line-up; rather, he claims to have been an original member from 1975 until 1980 and to have performed sporadically (since 2015) with the original Slaughter and The Dogs line-up and the 1980 line-up (which had continued, briefly, after Mr Barrett-McGrath's departure).

69. Whatever each band member's reasons were for taking part in the two shows in 2015 and 2016, it is clear from the evidence that those events took place and included the original four members of the band, namely, Howard Bates, Wayne Barrett-McGrath, Mick Rossi and Brian Grantham.

### Performances after the reunion shows

70. In his witness statement, Mr Bates confirms that he also performs with the 1980 line up of the band, with Mick Rossi, Phil Rowland and Eddie Garrity. In promotional material the shows are titled 'Slaughter Bite Back', a reference to the second album:



71. I note that promotional text accompanying the second poster describes the band as, *"The full original line up of SATD that recorded and toured the legendary BITE BACK album. Playing most of the original Bite Back album plus several SATD classics."*<sup>29</sup>

<sup>28</sup> See exhibits WMB24 and WMB25.

<sup>29</sup> See exhibit HB14.

72. Mr Barrett-McGrath also continues to play with Slaughter and The Dogs in a different band to the one that includes Mr Bates. His representative has made reference to Mr Barrett-McGrath being on tour and performing with the band throughout these proceedings, which is supported by evidence.

### Social media evidence

73. Mr Bates provides evidence from third parties, which he says shows his long-standing association with the band. He states:

*“I am a founding member and as such have an inextricable link with the mark and its history and continue to be recognised as such as a major creative contributor to the sound of the mark that is ‘SLAUGHTER AND THE DOGS’.”*

74. He provides what he describes as, ‘a small selection of the accolades and recognition I have received from fans and followers of the band from its creation right up to the present day’.

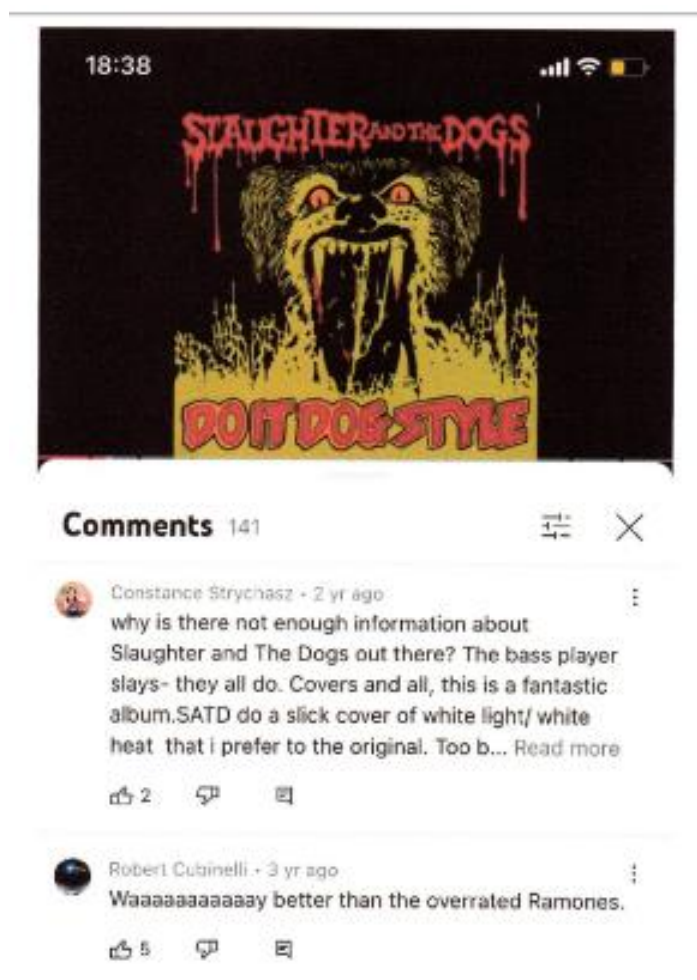
75. Mr Bates provides the following *facebook* post:<sup>30</sup>



<sup>30</sup> See exhibit HB37.

76. The post is a screen image of a YouTube Video titled, 'Vinyl Community: My top 5 under appreciated UK Punk Records from the 70s.' The video is not dated and nor is the messenger thread from which it was shared, but since YouTube began in 2005, the video must date from at least 30 years after the band was formed in 1975. In any case, they clearly reference Mr Bates' time in the band during the period before the contested trade mark was filed.

77. Mr Bates also provides a *facebook* post that has an image of the first album with 141 comments. It includes the following:<sup>31</sup>



78. And the following, which is dated 17 October 2021:<sup>32</sup>

<sup>31</sup> See exhibit HB39.

<sup>32</sup> See exhibit HB40.

17:45

There's a few bass players that really inspire me when I play bass... you are in my top 5. To be exact you are #1. I reference your style alot bassed on everything you've done with SATD/BITE BACK. It's a major influence when I play with The Streetz. Bass was my first instrument, I took it very serious as a teen for years, the natural groove to swing it never left my hands. It's fun to be back on it. The Bite Back record is ALL ABOUT BASS AND DRUMS imo... 10/10.



Aa



79. And:<sup>33</sup>

Awesome! I'll be sending everyone I know that way!

And thank you so much for the add. It's not everyday people get to talk with the ones who inspired them. My fundamentals are so heavily rooted in your lines on "Do It Dog Style".



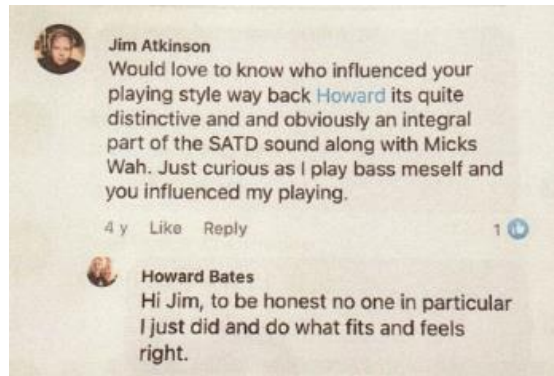
21 MAY 2016, 23:35



80. And:<sup>34</sup>

<sup>33</sup> See exhibit HB41.

<sup>34</sup> See exhibit HB42.



81. Social media evidence has also been filed by Mr Barrett-McGrath’s representative by way of her statement dated 14 March 2023. It is not in evidential form and does not include a statement of truth, so I will treat it as submissions. It includes the following:

*“To help prove the mark is synonymous with [Mr Barrett-McGrath], I offer the following Exhibit WMB23 the Social Media Numbers of both the Mark and [Mr Bates] and his band associates. You can clearly see; the mark is synonymous with [Mr Barrett-McGrath] literally thousands of times over, versus [Mr Bates] and/or his associates.”*

82. The page referred to appears as follows:

**SOCIAL MEDIA STATISTICS PROVING THE PROPRIETOR  
SYNONOMOUS WITH THE MARK**

**SLAUGHTER AND THE DOGS OFFICIAL FACEBOOK PAGE**  
<https://www.facebook.com/slaughterandthedogsuk/>  
8,829 people like this  
9,108 people follow this  
TOTAL 17,937

**SLAUGHTER BITE BACK Original 1980 Line up!**  
<https://www.facebook.com/groups/636966330155667/>  
Public group  
717 members  
TOTAL 717

**Mick Rossi from Slaughter And The Dogs**  
<https://www.facebook.com/groups/slaughterandthedogs/>  
Private group  
2.2K members  
TOTAL 2,200

**Slaughter II**  
<https://www.facebook.com/groups/1883028848627358/>  
Private group  
397 members  
TOTAL 397

**TOTAL FOR PROPRIETOR SYNONOMOUS WITH MARK 17,937 AND GROWING**

**TOTAL FOR CANCELLATION APPLICANT AND ASSOCIATES 1117**

83. The problem with this evidence is that I cannot see the content of the pages, so it is simply a list of three *facebook* groups and a *facebook* page that is unlikely to be an exhaustive list of all iterations of Slaughter and The Dogs-related *facebook* pages. For example, Mr Bates' own page, which is shown in his evidence and referred to above is not on the list. In addition, only two of the four *facebook* accounts make reference to the contested mark, Slaughter and The Dogs. It is also not clear how many of the people following the pages are in the UK, or how many of them were following any of the pages at the relevant date. There is no mention of the proprietor, Mr Barrett-McGrath on the page, nor do I have any idea what the content of these pages is. There are other social media platforms that may feature content from any of the other members of the band. In short, this exhibit falls a long way short of showing that the mark is synonymous with Mr Barrett-McGrath. At best it shows there are *facebook* pages related to the band, which may or may not be endorsed by members of the band, old and new.

#### **Final remarks regarding evidence**

84. It is necessary for me to explain why large parts of Mr Barrett-McGrath's evidence are not relevant to the decision it fell to me to make. I do this due to the absence of professional representation, the voluminous nature of the evidence filed in support of these points and the vigorousness with which these points have been pursued.

#### The earlier cancellation case before this tribunal under no. 503042

85. That case concerned a bad faith claim brought under section 3(6) of the Act against the same trade mark as that which is subject to cancellation proceedings in this case. The previous cancellation case was brought by another member of the band under a ground which, in his own words, was incorrect, due to his lack of legal knowledge. It subsequently failed.

86. Mr Bates has relied on this case due to the findings of another hearing officer regarding goodwill in Slaughter and The Dogs and findings made with regard to the original members. I have reached my own conclusions on these points based on the evidence before me, though I note that the findings, where they overlap, are on all fours with each other.



87. Mr Barrett-McGrath has relied on the same case that he says proves that Mr Murray 'makes up stories' and has 'defamed himself and his wife'. The hearing officer in that case made no such findings. Defamation is not dealt with by this tribunal and no findings were made by the hearing officer with regard to the voracity of Mr Murray's evidence.

88. In her skeleton argument filed on behalf of the proprietor, Ms Custer-McGrath says of Mr Bates:

*"He is falsifying evidence in lieu of the truth to deceive the tribunal, trying to change the history of the name of the mark that was already proven to be created by the proprietor in cancellation case 503042."*

89. The hearing officer in the earlier cancellation did not find the name 'Slaughter and The Dogs' was created by the proprietor, Mr Barrett-McGrath. At paragraph 34 of that decision the hearing officer said:

*"The proprietor believes that he owns the band name because he claims to have come up with the idea. This is disputed by the applicant. However, I do not consider this point to be relevant for the purposes of the present proceedings as creation of a name per se provides no legal right to use it or to exclude others from using it."<sup>35</sup>*

90. I need say no more about the earlier case. Its relevance to this case is limited as the evidence is different, the applicant was different, and the grounds are different. To the extent that the previous hearing officer considered goodwill in that case, their findings and mine agree.

### Illegal merchandise

91. In his first witness statement Mr Barrett-McGrath states that the 2015 T-shirt, "WAS NOT approved and is now considered illegal merchandise online". Mr Bates replies in the following terms:

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<sup>35</sup> The hearing officer relied upon Harrods Limited v Harrodian School Limited, referred to at footnote 40 of this decision.

*“...ALL merchandise relating to this event was official and fully approved by ALL four founding members of the mark, Slaughter and The Dogs, and [Mr Barrett-McGrath] received his full 25% share from the proceeds of ALL sales.”*

92. In support of his statement, Mr Bates provides the following photograph of the band line up for the show on 9 October 2015.<sup>36</sup>



93. Mr Barret-McGrath is on the left, Mr Murray is on the right, wearing the official T-shirt.

94. Mr Bates states that he designed a T-shirt for the 2016 Rebellion Festival that was approved by all band members. The T-shirt for the event is shown below, in a promotional post from Moz Murray:



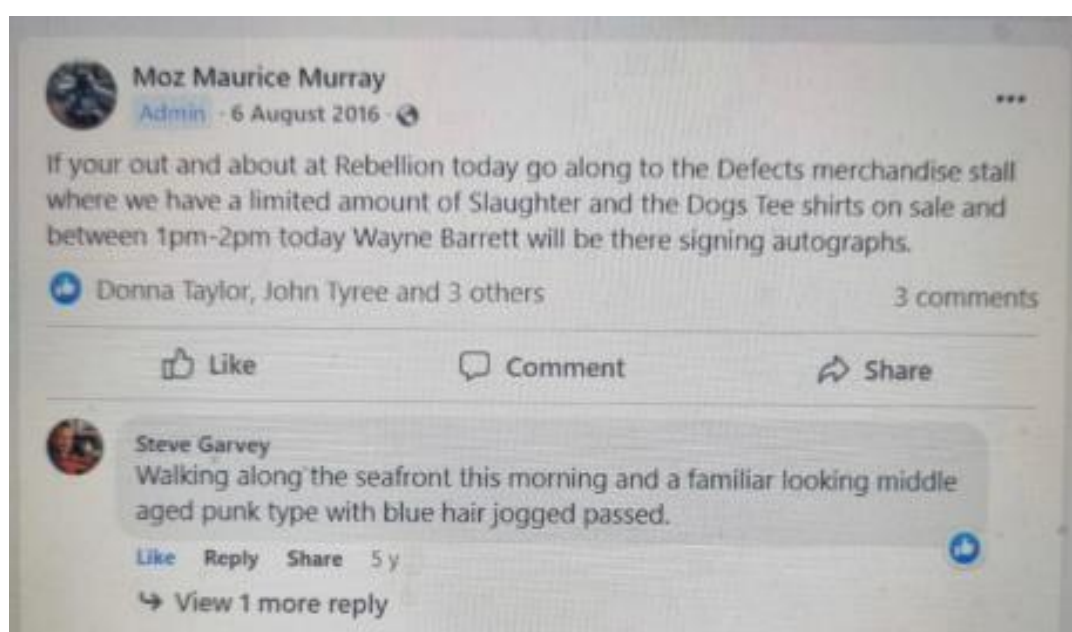
95. Mr Barrett-McGrath submits that the T-shirt for the 2016 Rebellion festival was not approved and is a boot leg product.

<sup>36</sup> See exhibit HB48.

96. In response to this claim, Mr Murry states:<sup>37</sup>

*“7. I was asked by Wayne Barrett if I would post on social media that he would be appearing at the trade stall for The Defects at Rebellion to pose for photographs and sign autographs alongside this stall that had the official Tees for sale for the band.”*

97. He provides the following social media screen shot:



98. Large parts of Mr Barrett-McGrath’s evidence relate to what he considers to be ‘illegal merchandise’. Both he and his representative make reference to this being the reason he filed for the contested trade mark.<sup>38</sup>

99. I have three comments to make in this regard. The first is that there is no evidence to support the view that the two T-Shirts for the original line up Slaughter and The Dogs gigs were produced without the consent of Mr Barrett-McGrath. In fact, the evidence provided by Mr Bates and Mr Murray points the other way. Mr Barrett-McGrath was photographed with the band’s promoter wearing the 2015 T-shirt. Mr Barrett-McGrath also attended the 2016 stand at which the band’s official merchandise was being sold, in order to sign

<sup>37</sup> As at 21.

<sup>38</sup> See exhibit WMB6 – submissions made by Erin Custer-McGrath.

autographs. If Mr Barrett-McGrath had such strong views regarding these T-shirts, I would have expected some evidence to have been put forward to show that he had expressed concern at the relevant times.

100. Secondly, and I deal with this point only because Mr Barrett-McGrath and his representative believe this to be material to their case, 'counterfeit' T-shirts sold by third party sellers are outside the scope of this decision.<sup>39</sup>

101. Thirdly, as Mr Bates rightly submits in his reply evidence, the proprietor of this contested Slaughter and The Dogs trade mark, Mr Barrett-McGrath, has registered the mark only in class 9 (recorded music) and consequently has no protection for goods in class 25 (which would include T-shirts). In short, the mark is not registered for T-shirts.

#### Statements and submissions that relate to Mr Bates' career

102. Numerous submissions have been made by and on behalf of Mr Barrett-McGrath that concern other companies that Mr Bates has been involved in. These appear to have been made to 'prove' Mr Bates has not been involved in the music industry since the first iteration of Slaughter and The Dogs. This is irrelevant. There is no reason why Mr Bates could not have been involved in a company and created music during the same period and, in any case, Mr Bates has not claimed involvement in Slaughter and The Dogs during the period to which that evidence relates.

103. I have reached this decision based on the relevant evidence before me.

#### **DECISION**

104. The law of passing off is relevant to invalidation proceedings because the provisions of section 47(2)(b) of the Act state that a trade mark may be invalidated if it was registered in breach of section 5(4)(a). The relevant sections of the Act read as follows:

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<sup>39</sup> Exhibits WMB12, WMB13, WMB14 and WMB16 are cease and desist letters sent to third party sellers by Erin Custer McGrath, the proprietor's representative.

“5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met...

(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

And:

“47. - (2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground -

(a) ...

or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.”

105. It is settled case law that in order to succeed under this ground three elements must be present - goodwill, misrepresentation and damage. In *Discount Outlet v Feel Good UK*,<sup>40</sup> Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of

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<sup>40</sup> [2017] EWHC 1400 IPEC.

deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether "*a substantial number*" of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21)."

### **Relevant date**

106. In terms of the relevant date for assessment of this ground, in *Advanced Perimeter Systems Limited v Multisys Computers Limited*,<sup>41</sup> Mr Daniel Alexander QC, sitting as the Appointed Person, quoted with approval the summary made by Mr Allan James, acting for the Registrar, in *SWORDERS Trade Mark*:<sup>42</sup>

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’”

107. The filing date of the contested trade mark is 22 August 2018. For this ground of invalidation to succeed, the use of the contested trade mark must have been capable of being restrained at that date due to pre-existing goodwill. Given the nature of this dispute, it is clear that both sides claim to have an interest in the sign Slaughter and The Dogs, since the day the band was formed in 1975.<sup>43</sup> Furthermore, the date of the behaviour complained about is likely to be earlier than the filing date, i.e. when Mr Barrett-McGrath started up his own version of the band in the absence of the ‘last-men standing’ in 1980.

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<sup>41</sup> BL O-410-11

<sup>42</sup> BL O-212-06

<sup>43</sup> The exact date has not been provided.

## Goodwill

108. The concept of goodwill was considered by the House of Lords in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

109. I am very clear in my finding that goodwill was created by the band, Slaughter and the Dogs, in respect of the activities of a band, namely live and recorded performances. I note that there does not appear to be any real dispute that goodwill existed, the crux of the dispute is the ownership of the goodwill. I also find that at least a residual goodwill still existed when Mr Murry organised the 2015 concert, which, according to the DVD cover and T-shirt produced for that show, marked the 40-year anniversary of the band. The second line on the DVD cover, after the title of the show, is the names of the four original band members, Barrett-McGrath, Bates, Rossi and Grantham, and it is clear to me that this was a ‘selling point’ for that show.

110. In fact, there would have been little point in organising the 2015 Slaughter and The Dogs show if there was no attractive force in the name Slaughter and The Dogs with which to bring in custom.

111. Where the ownership of the goodwill falls is a far more difficult question.

112. The first line-up of Slaughter and the Dogs was a significant one, with the first album *Do It Dog Style* still considered a significant UK punk album today. When Mr Barrett-McGrath left the band in 1979 the band continued with a new line-up, which was made up of Howard Bates and Mick Rossi from the first line up, with Eddie Garrity and Phil Rowland in place of Wayne Barrett-McGrath and Brian Grantham.<sup>44</sup> The first phase of the band ceased at some point in 1980. There had been three line-ups by this point:

1. Barrett-McGrath, Bates, Rossi and Grantham – first recording contract with Decca and first album, Do It Dog Style (1978)
2. Barrett-McGrath, Bates, Rossi and Rowland – enter second recording contract with DJM (1979)
3. Bates, Rossi, Rowland and Garrity – make and release second album after departure of Barrett-McGrath (late 1979-1980)

113. Whilst the second album appears to have been produced under the name ‘Slaughter’ rather than ‘Slaughter and The Dogs’, the single from that album and live performances from the time were made under the name Slaughter and The Dogs. It is clear from the evidence that there was a degree of co-branding at this point. I also note that the second album ‘Bite Back’ includes songs by the proprietor (Mr Barrett-McGrath) and offers thanks to Mr Barret-McGrath on the sleeve. From a fan perspective, the band was Slaughter and the Dogs and still made reference to the proprietor at that point.

115. I find in this case that the nature of the relationship between members of the band is akin to that described by Mr Hobbs in *The Animals*:<sup>45</sup>

*“7. So far as anyone can tell from the evidence on file in the present proceedings, the group was an unincorporated association of individuals with no contractual or other arrangements governing the relationship between and among its members. The evidence omits to explain how the business they carried on together was set up and managed...”*

*8. The evidence on file does not suggest that there has ever been a realisation or division of assets on dissolution of the group. There is also nothing in the evidence to suggest that the members of the group used the name THE ANIMALS with the licence or consent of anyone else. On the assumption that they used it as of right and in the absence of any basis in the evidence on file for either side to claim otherwise it seems to me that the goodwill and reputation*

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<sup>45</sup> BL O/369/13.



*built up and acquired by the group operating as THE ANIMALS should for the purposes of this dispute between these parties in these proceedings be taken to have belonged to ‘the last men standing’ in 1983: cf CLUB SAIL Trade Marks [2010] RPC 32 at paragraphs [26] to [28]. Burdon, Price, Valentine, Steel and Chandler will on that basis have been collectively entitled to control the use of the name THE ANIMALS in relation to live and recorded performances going forward from there.”*

115. In *Saxon Trade Mark*<sup>46</sup>, Laddie J explained that, without a contract or agreement, the members of a band or group who perform for consideration are likely to constitute a partnership-at-will. This means that the assets of the band/group, 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:

“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.”

116. In other words, each of the band line-ups of Slaughter and The Dogs will have acquired their own goodwill independently of each other.

117. In accordance with the decision in *The Animals*, there is no evidence that the band used the name Slaughter and The Dogs with consent from anyone or that the assets were divided when members left the band. Consequently, the goodwill generated by ‘the band’

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<sup>46</sup> [2003] FSR 39.

Slaughter and The Dogs should be taken to have been owned by the last men standing in 1980, namely Bates, Rossi, Garrity and Rowland.

118. Clearly, there have been other iterations of the band Slaughter and The Dogs from some time in the 1990s until the first reunion concert in 2015. As I have said, evidence in this regard is scant, but none of the evidence on file suggests that any of the 'last men standing' in 1980 abandoned their rights. The most I can infer from the evidence I do have is that none of the members took exception to the others participating in what Mr Hobbs describes in *The Animals* case as 'heritage groups' – in other words, groups performing under the name Slaughter and The Dogs that contained some of the original members.

119. By 2015, when 'Moz Maurice Murray' put the original line-up show together, there was clearly sufficient residual goodwill in the band Slaughter and The Dogs, to make the show worthwhile. Furthermore, that show was successful enough to enable the original line-up of Slaughter and The Dogs to take a significant role at the Rebellion punk festival the following year.

120. The bands activities in 2015 and 2016 would have re-energised the goodwill, changing it from residual to that of an ongoing band. It would not, in my view, have resulted in a new and separate goodwill being created, as members of the public going to see Slaughter and The Dogs would be going to see the 'remembered' band.

121. With regard to Mr Bates' claim to ownership in the goodwill in the band Slaughter and The Dogs, his position is clear. Whichever iteration of the band is considered to represent the 'last men standing', Mr Bates was part of it. He was part of the group that was 'disbanded' by Barret-McGrath, he was also part of the group that continued playing until 1980 and he was part of the reformed 'original' line up group in 2015. This means that whoever else might have been a member of the relevant partnership at the time, Mr Bates plainly had an undivided share of the goodwill as it stood at the relevant date upon which he can rely to bring this claim.

## Misrepresentation and damage

122. The relevant test for misrepresentation can be found in *Neutrogena Corporation and Another v Golden Limited and Another*, in which Morritt L.J. stated that:<sup>47</sup>

“There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is:

‘is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants’ [product] in the belief that it is the respondents’ [product]?’

The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148. The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 R.P.C. 147 at page 175; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101.”

123. The requirements for damage in passing off cases are described in *Harrods Limited V Harrodian School Limited*,<sup>48</sup> by Millett L.J., as follows:

“In the classic case of passing off, where the defendant represents his goods or business as the goods or business of the plaintiff, there is an obvious risk of damage to the plaintiff's business by substitution. Customers and potential customers will be lost to the plaintiff if they transfer their custom to the defendant in the belief that they are dealing with the plaintiff. But this is not the only kind of damage which may be caused to the plaintiff's goodwill by the deception of the public. Where the parties are not in competition with each other, the plaintiff's reputation and goodwill may be damaged without any corresponding gain to the defendant. In the *Lego* case, for example, a customer who was dissatisfied with the defendant's plastic irrigation equipment might be dissuaded from buying one

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<sup>47</sup> [1996] RPC 473

<sup>48</sup> [1996] RPC 697

of the plaintiff's plastic toy construction kits for his children if he believed that it was made by the defendant. The danger in such a case is that the plaintiff loses control over his own reputation.”

124. With regard to proof of damage, I bear in mind the decision in *WS Foster & Son Limited v Brooks Brothers UK Limited*,<sup>49</sup> in which Mr Recorder Iain Purvis QC stated:

“Damage

55 Although proof of damage is an essential requirement of passing off cases, it will generally be presumed where a misrepresentation leading to a likelihood of deception has been established, since such deception will be likely to lead to loss of sales and/or more general damage to the exclusivity of the Claimant's unregistered mark. Mr Aikens accepted that if there was a misrepresentation in the present case, then he had no separate case on damage. I hold that damage is inevitable, at least in the sense recognised in *Sir Robert McAlpine v Alfred McAlpine* [2004] RPC 36 at 49 (the ‘blurring, diminishing or erosion’ of the distinctiveness of the mark).”

125. On 22 August 2018, Wayne Barrett-McGrath applied to register ‘Slaughter and The Dogs’ as a trade mark for use in relation to, ‘*Musical cassettes; Musical recordings; Musical recordings in the form of discs; Musical sound recordings; Musical video recordings*’ in class 9. In doing so, he sought to acquire the right (by virtue of registration) to prevent others from using the name Slaughter and The Dogs for those goods.

126. This case is brought by Howard Bates, who, I have found to be an original member of the band. The fact that Mr Bates has pursued this action in the absence of other members of the band who have an interest in the goodwill, is not a bar to him raising it.<sup>50</sup>

127. This is a simple matter. The registered mark is the name of the band Slaughter and The Dogs. It is registered for goods that directly relate to the activities of a band, namely their recorded output. It is inevitable that the relevant public would believe that the goods

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<sup>49</sup> [2013] EWPC 18

<sup>50</sup> See *CLUB SAIL* trade marks [2010] RPC 32, paragraph 29.

are those of the band. Damage is easily foreseeable. It was open to the cancellation applicant, Howard Bates, to bring a case under the passing off ground to which the last four members of the band were collectively entitled. Mr Barrett-McGrath and his representative are keen to point out throughout the evidence and submissions that Slaughter and The Dogs is synonymous with Wayne Barrett-McGrath. That may well be the case (though the evidence does not support such a claim) but as I have found, it is also synonymous with other band members, who are entitled to the benefit of the goodwill generated by the band. The fact that the proprietor of the contested mark, Wayne Barrett-McGrath, is also one of the original members does not entitle him to lay claim individually to the whole of the benefit of the goodwill by registering the trade mark for himself.<sup>51</sup>

128. I therefore find that use of the proprietor's mark at the relevant date was liable to be restrained under the law of passing off in respect of all of the goods for which it is registered.

## **Conclusion**

129. The applicant has succeeded in invalidating the proprietor's Slaughter and The Dogs trade mark under sections 47 and 5(4)(a) of the Act.

## **COSTS**

130. Turning to the matter of costs, Mr Bates has been successful and is entitled to a contribution towards his costs. Mr Bates represented himself until the substantive hearing, at which he was represented by Karen Boyes of Counsel. In her costs submissions, dated 15 June 2023, Miss Boyes submits the following:

*"11. Counsel (Mrs Karen Boyes called 1991) has assisted and represented Mr Bates on specific instructions by way of Direct Access Pro Bono. Under the provisions of s194A of the 2007 Legal Services Act when Counsel is instructed Pro Bono and the assisted person is successful, costs can be awarded for Pro Bono Counsel with those fees going to the Access to Justice Foundation. We accordingly request such an order."*

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<sup>51</sup> It is clear from Saxon Trade Mark, at footnote 41, above, that founding members do not have a greater claim to goodwill than later members, though in this case, both Mr Bates and Mr Barrett-McGrath are founding members in any case.

140. A cost schedule has been provided for the work carried out by Ms Boyes and Mr Bates has completed a costs proforma to take account of the time he has spent on this case.

141. With regard to costs for preparation for the hearing, I intend to include this in Mr Bates' award. It is clear that considerable time would have been spent with Ms Boyes, who is a barrister but not an IP specialist, in order to equip her with the necessary information to present Mr Bates' case. This is particularly so, given the excessive, often irrelevant and sometimes highly critical correspondence from Wayne Barrett-McGrath via his representative.

142. In making such a statement I bear in mind that the proprietor was not professionally represented, and I fully expect that in such circumstances clarification may be required when dealing with unfamiliar processes and additional time may be necessary to complete a party's case. However, notwithstanding his unrepresented status, the proprietor's conduct in this case has been unacceptable.

143. I provide a few examples of the many comments received from the proprietor either criticising the cancellation applicant (Mr Bates) to the tribunal or addressed to him directly by filing correspondence with the tribunal:

*"25/12/2022 - Consult your "Barrister" to write to the Tribunal on your behalf, as ours will be doing after this last message, as I cannot be bothered to read or respond to your uneducated blabbering."*

*"13/01/2023 - The Cancellation Applicant lying to the EUIPO is relevant to his character, as it helps prove amongst many other pieces of evidence, his character of vengeance, dishonesty and malevolence."*

*"08/02/2023 - So, again, it just proves his character is a vengeful, falsifying individual with nothing better to do than make up stories and waste the Tribunals and my time."*

*“15/02/2023 - Another lie. And a sad reality for the Cancellation Applicant, who is not needed/wanted for these other projects, and cannot move on with his life, as they and the Proprietor have, once again proving he has no reason to even APPLY for the Cancellation of the Trademark 3333426, let alone dispute it.”*

144. On 14 July 2022, the proprietor requested to file an additional witness statement. The request was refused on 11 August 2022 by Mr Feldon (the hearing officer responsible for the case prior to my dealing with it). Later in the proceedings, I requested the proprietor remove without prejudice correspondence from their evidence. Very clear directions were given that additional material could not be filed.<sup>52</sup> Despite those directions, additional evidence, including the witness statement already refused by Mr Feldon, was included with the proprietor’s re-filed evidence.

145. On 7 September 2022, Ms Custer-McGrath made three requests for a closed hearing due to claimed defamation and threats from Mr Bates and his associates, fear for her personal safety if the hearing was open and further stated that proof of threats and defamation could be provided by her solicitor. No proof was forthcoming, and Mr Feldon duly refused the request.

146. There have been three case management conferences, though these were primarily between the tribunal and the proprietor and I note Mr Bates has not claimed for time spent in respect of them.

147. Mr Bates has been extremely patient throughout these proceedings both in respect of the way he has been addressed by the proprietor and in his responses to the many delays in getting this case to a hearing. I bear this in mind when making this cost award. His proforma is as follows:

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<sup>52</sup> See my case management letter, dated 23 January 2023.

<b>Tribunal Cost Pro Forma</b>	
<b>Form types</b>	<b>Time spent in hours/minutes</b>
Notice of Opposition	
Notice of Cancellation	5
Notice of Defence	
Considering forms filed by the other party	4
<b>TOTAL</b>	<b>9</b>
<b>Official fees for the above forms</b>	<b>£200</b>
<b>TOTAL</b>	<b>£200</b>
<b>Preparing evidence/written submissions and considering and commenting on the other side's evidence/written submissions</b>	
<b>Description of activity</b>	<b>Time spent in hours/minutes</b>
Preparation of evidence , exhibits and witness statements for 1st and 2nd submissions	35
Considering, commenting , checking for inaccuracies and errors of proprietors continual submissions and resubmissions of altered evidence and witness statements.	60
Creation of spreadsheet to present to tribunal detailed information of unauthorised changes of exhibit numbers in proprietors evidence.	4
<b>TOTAL</b>	<b>99</b>
<b>Preparing for a hearing</b>	
<b>Description of activity</b>	<b>Time spent in hours/minutes</b>
Preparation for hearing with counsel, review of skeleton arguments , case history all related case documentation. Analysis preparation of pro forma and all costs incurred to date.	40
<b>TOTAL</b>	<b>40</b>
<b>Other Expenses</b>	
<b>Description of activity</b>	<b>Time spent in hours/minutes</b>
Time spent to read and check for accuracy and relevance the vast amount of emails received from the proprietors representative and time spent seeking advice and guidance	22
<b>TOTAL on same with the Tribunal over a two year period.</b>	<b>170 hours @ £19.00 per hour = £3230.00 + £200 TOTAL =£3430.00</b>

148. In light of my comments above, I find Mr Bates' cost request to be a reasonable one and I am content to award the full amount claimed, £3230.00. In addition, Mr Bates is entitled to £200 in official fees for filing the cancellation application and I make a further award of £1000 for Ms Boyes professional representation of Mr Bates at the hearing.

149. I order Wayne Barrett-McGrath to pay Howard Bates the sum of £4430. These costs should be paid within 21 days of the date of this decision or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings (subject to any order of the appellate tribunal).



**Dated this 15<sup>th</sup> day of May 2023**

**Al Skilton  
For the Registrar,  
The Comptroller-General**