O/1064/23

CONSOLIDATED PROCEEDINGS

TRADE MARKS ACT 1994

IN THE MATTER OF UK REGISTRATION NOS. 3459677 & 3479005
IN THE NAME OF BEN LEWIS

INTRUDER WATCH

AND

THE APPLICATIONS FOR DECLARATIONS OF THE INVALIDITY THEREOF UNDER NOS 504080 & 504081
BY
KNIGHT SECURITY LIMITED

BACKGROUND AND PLEADINGS

1. On 20 January 2020, Mr Ben Lewis ("the proprietor") applied to register the mark shown below for *Closed circuit television systems* in Class 9. It was registered as UKTM No. 3459677 on 7 August 2020.

2. On 2 April 2020, the proprietor made a further application, to register **Intruder Watch**, also for *Closed circuit television systems* in Class 9. This mark was registered as UKTM No. 3479005 on 11 August 2020.

3. On 28 July 2021, Knight Security Limited ("the applicant") applied to have both trade marks declared invalid under section 3(6) of the Trade Marks Act 1994 ("the Act") which is relevant in invalidation proceedings under section 47(1) of the Act.

4. The applicant states that the proprietor, a former employee, was involved in a confidential project to develop and launch a security solution that used Artificial Intelligence ("AI") technology in a camera product. The brand name selected for this product was "Intruder Watch". The applicant claims that the proprietor was in possession of confidential information relating to this product, the brand and marketing position and that in breach of obligations of confidence and trust and post-contractual employment obligations owed to the applicant, the proprietor created a competing product using the brand name "Intruder Watch" and contacted the applicant's customers claiming to be an employee or a successor business of the applicant, or to provide a successor product to the applicant's "Intruder Watch", or that he was the originator of the product and that the applicant no longer had relevant expertise in this area. The applicant also claims that the proprietor sought to use the contested marks in order to block the applicant's use of the sign "Intruder Watch" and/or to prevent it from registering it as a trade mark.

5. The proprietor filed defences and counterstatements denying that the applications for the contested marks were made in bad faith. He admits that he was employed by the applicant and was involved in the confidential project referred to in paragraph 4 above, but denies that the applicant conducted business under an "Intruder Watch" brand prior to the application dates of the contested marks and also denies knowledge of any intention on the part of the applicant to make commercial use of an "Intruder Watch" sign. He states that he was aware that the applicant wished to market an AI-led security system under the name "Knight Watch" and that in July 2019, when the applicant alleges that he secured a contract for the applicant's "Intruder Watch" product, he was employed by another firm, which he left in February 2020. He also denies having breached any restrictive covenants or having "poached" clients.

6. The applications for invalidation were consolidated on 17 March 2022.

7. The consolidated applications came to be heard in person by me on 5 April 2023. The applicant was represented by Andrew Lomas of Counsel, instructed by Brandsmiths SL Limited, and the proprietor was represented by John Eldridge of Counsel, instructed by JMW Solicitors LLP.

EVIDENCE

8. The applicant filed evidence in chief on 31 May 2022 in the form of a witness statement from Timothy Knight, principal shareholder and Managing Director of the applicant. He sets out the history of the project referred to in paragraph 4 and the discussions around the name of the product, and gives an account of Mr Lewis's activities following his leaving the employment of the applicant.

9. The proprietor filed evidence on 1 August 2022. This consists of a witness statement from Mr Lewis of the same date responding to the allegations made against him. It refers to an earlier witness statement by Mr Lewis dated 16 December 2021 and made to explain the reasons for the late filing of a defence in these proceedings. Paragraphs 17-24 contain material relevant to the substantive issues. There are also two identically worded witness statements from Ben Foley and Shaun Williams, former employees of the applicant, who state that they were unaware that "Intruder Watch" was selected or

even discussed as the name of a service to be provided by the applicant. Both of these witness statements are dated 28 July 2022.

10. The applicant filed evidence in reply on 3 October 2022. This consists of two witness statements. The first comes from Mr Knight and focuses on Mr Lewis's role at the applicant and responds to statements made by the proprietor. The second witness statement is from Warren Ryland, who is the owner and founder of Marframe Limited, a strategic marketing consultancy employed by the applicant.

11. At the hearing, Mr Lewis was cross-examined by Mr Lomas. The agreed scope of the cross-examination covered his contribution to the development of the brand "Intruder Watch" when employed by the applicant; his statements on how he came up with the name "Intruder Watch" for his own business; and his statement that he did not believe that the applicant had any *"concrete commercial plans"* to use the "Intruder Watch" brand before he had applied for the contested marks. I note that there were some inconsistencies between Mr Lewis's written evidence and what he said under cross-examination, and even within the statements made under cross-examination. I shall discuss these in more detail in due course.

12. I confirm that I have read all the evidence filed in these proceedings. In the decision that follows, I shall refer to relevant parts of this evidence where appropriate.

DECISION

13. Section 47(1) of the Act is as follows:

> "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)."

14. Section 3(6) of the Act is as follows:

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

The case law

15. As the legislation does not state what bad faith means, the decision taker must turn to the case law. Mr Lomas referred me to the summary provided by Arnold J (as he then was) in *Red Bull GmbH v Sun Mark Limited & Anor* [2012] EWHC 1929 (Ch), paragraphs 130-138, and a later summary by another Hearing Officer, Mr Mark Bryant, in *Sohana Trade Mark*, BL O-578-20, paragraphs 45-50.

16. Mr Eldridge had referred me to a judgment of HHJ Melissa Clarke in the Intellectual Property Enterprise Court: *Fox Group International Ltd v Teleta Pharma Limited* [2021] EWHC 1714 (IPEC). He submitted that this case disapproved a passage from *Red Bull* on which Mr Lomas sought to rely, namely paragraph 134:

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

17. Mr Lomas submitted that, to the extent that the *Fox Group* judgment was doing anything other than applying *Red Bull*, it was wrong. However, I agree with Mr Eldridge that the judge in *Fox Group* was seeking to apply later case law of the CJEU, namely *Koton Mağazacilik Tekstil Sanayi ve Ticaret AŞ,* Case C-104/18 P, and *Sky Plc v SkyKick UK Ltd*, Case C-371/18. This can be seen in paragraphs 43-48 of her judgment.

18. I also agree with Mr Eldridge that the most convenient summary of the case law is that made by the Court of Appeal in *Sky Limited & Ors v Skykick, UK Ltd & Ors*, [2021] EWCA Civ 1121. Floyd LJ considered the judgments in *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07, *Malaysia Dairy Industries Pte. Ltd v Ankenævnetfor Patenter Varemærker* Case C-320/12, *Koton Mağazacilik Tekstil Sanayi ve Ticaret AŞ,* Case C-104/18 P, *Hasbro, Inc. v European Union Intellectual Property Office (EUIPO),* Case T-663/19, *pelicantravel.com s.r.o. v Office for*

Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-136/11, and *Psytech International Ltd v OHIM,* Case T-507/08.[1] He said:

> "67. The following points of relevance to this case can be gleaned from these CJEU authorities:
>
> 1. The allegation that a trade mark has been applied for in bad faith is one of the absolute grounds for invalidity of an EU trade mark which can be relied on before the EUIPO or by means of a counterclaim in infringement proceedings: *Lindt* at [34].
>
> 2. Bad faith is an autonomous concept of EU trade mark law which must be given a uniform interpretation in the EU: *Malaysia Dairy Industries* at [29].
>
> 3. The concept of bad faith presupposes the existence of a dishonest state of mind or intention, but dishonesty is to be understood in the context of trade mark law, i.e. the course of trade and having regard to the objectives of the law namely the establishment and functioning of the internal market, contributing to the system of undistorted competition in the 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: *Lindt* at [45]; *Koton Mağazacilik* at [45].
>
> 4. The concept of bad faith, so understood, relates to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other sinister motive. It involves conduct which departs from accepted standards of ethical behaviour or honest commercial and business practices: *Hasbro* at [41].

[1] Section 6(3)(a) of the European (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to refer to the trade mark case law of EU courts, although the UK has left the EU.

5. The date for assessment of bad faith is the time of filing the application: *Lindt* at [35].

6. It is for the party alleging bad faith to prove it: good faith is presumed until the contrary is proved: *Pelikan* at [21] and [40].

7. Where the court or tribunal finds that the objective circumstances of a particular case raise a rebuttable presumption of lack of good faith, it is for the applicant to provide a plausible explanation of the objectives and commercial logic pursued by the application: *Hasbro* at [42].

8. Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all the factors relevant to the particular case: *Lindt* at [37].

9. For that purpose it is necessary to examine the applicant's intention at the time the mark was filed, which is a subjective factor which must be determined by reference to the objective circumstances of the particular case: *Lindt* at [41] – [42].

10. Even where there exist objective indicia pointing towards bad faith, however, it cannot be excluded that the applicant's objective was in pursuit of a legitimate objective, such as excluding copyists: *Lindt* at [49].

11. Bad faith can be established even in cases where no third party is specifically targeted, if the applicant's intention was to obtain the mark for purposes other than those falling within the functions of a trade mark: *Koton Mağazacilik* at [46].

12. It is relevant to consider the extent of the reputation enjoyed by the sign at the time when the application was filed: the extent of that reputation may justify the applicant's interest in seeking wider legal protection for its sign: *Lindt* at [51] to [52].

13. Bad faith cannot be established solely on the basis of the size of the list of goods and services in the application for registration: *Psytech* at [88], *Pelikan* at [54]".

19. Point (3) of this summary deals with the question of whether dishonesty is necessary for a finding of bad faith. It makes clear that it is, but that dishonesty must be considered within the context of trade mark law.

20. Further relevant points arising from the case law are the following:

a. An allegation of bad faith is a serious allegation which must be distinctly proved, but in deciding whether it has been proved, the usual civil evidence standard applies. However, Arnold J (as he then was) said that *"cogent evidence is required due to the seriousness of the allegation"*. This means that it is not enough to establish facts which are as consistent with good faith as bad faith: *Red Bull*, paragraph 133;

b. It is necessary to ascertain what the applicant knew at the relevant date: see *Red Bull*, paragraph 137; and

c. Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: see *Hotel Cipriani SRL & Ors v Cipriani (Grosvenor Street) Limited & Ors*, [2008] EWHC 3032 (Ch), paragraph 167.[2]

21. According to Mr Geoffrey Hobbs QC, sitting as the Appointed Person, in *Alexander Trade Mark*, BL O/036/18, the key questions for determination in a claim of bad faith are as follows:

a. What, in concrete terms, was the objective that the party alleged to have acted in bad faith has been accused of pursuing?

[2] Approved by the Court of Appeal in *Hotel Cipriani Srl & Ors v Cipriani (Grosvenor Street) Limited & Ors* [2010] EWCA Civ 110.

b. Was that an objective for the purposes of which the contested application could not properly be filed?

c. Has it been established that the contested application was filed in pursuit of that objective?[3]

The relevant date

22. In these proceedings, there are two application dates. The parties agreed that the relevant date should be the earlier of the two, i.e. 20 January 2020.

The applicant's case

23. Mr Eldridge submitted that the applicant's case depends on it having used the sign "Intruder Watch". He drew my attention to paragraph 21 of the statements of grounds:[4]

> "In light of the foregoing, the Proprietor avers and invites the tribunal to find that that [sic]:
>
> (i) The Proprietor can have had no reasonable belief that, in the circumstances, he was entitled to register the Registration; and
>
> (ii) The Proprietor knew that a third party (namely the Applicant) had used the mark in the UK, or had reason to believe that it may wish to do so in future; and
>
> (iii) The Proprietor sought to gain an unfair advantage by exploiting the reputation of a name well-known to the Applicant's clients.
>
> (iv) The Proprietor acted in breach of duties of confidence, trust and pursuant to his employment and post-employment contractual obligations

[3] Paragraph 8.
[4] These are identical for both applications.

as regards the interests of the Applicant, with whom there had recently been an obligation of trust and confidence and/or continued to be a contractual restriction and/or obligation of confidence, as well as ongoing contractual obligations.

(v) The objective that the Proprietor was (in complete disregard to the obligations owed by him to the Applicant) to unfairly and unlawfully compete with the Applicant in the same market, for the same products under the same brand and cause consumer confusion and/or prevent the Applicant from continuing to use the INTRUDER WATCH mark because of the risk of consumer confusion or because of the existence of and threats based on the rights granted by the Registration.

(vi) This was an objective for the purposes of which the Registration could not be properly filed.

(vii) The Registration was filed in pursuit of that objective.

(viii) The Proprietor's actions involve conduct which departs from accepted principles of ethical behaviour or honest and commercial business practices and constitute bad faith with regards to the application for the Registration."

24. Mr Eldridge's submissions focused on point (iii) of this paragraph.
However, the wording of points (v) and (vi) lead me to consider that the objective that the applicant claims the proprietor was pursuing in filing the applications for the marks is as set out in (v).

25. To answer Mr Hobbs' first two questions, I find that the proprietor is accused of knowing that the applicant was using the sign "Intruder Watch" or having reason to believe that it might wish to do so in the future. In applying for the contested marks, he acted in breach of duties of confidence owed to the applicant and intended to compete unfairly and unlawfully with the applicant and/or to prevent it from continuing to use "Intruder Watch" as a brand. In the light of the case law cited above, I consider that

this is an objective for the purposes of which the contested applications could not properly have been filed.

Was the applicant using the sign "Intruder Watch" at the relevant date?

26. The proprietor adduced evidence to support its claim that the applicant had not used the sign "Intruder Watch" in the form of a Google search which he states only returns his own company as trading under the brand and a screenshot from the Wayback Machine showing that the web page https://knightsecuritygroup.com/intruder-watch-ai-based-system/ was not live until August 2020.[5] The Google search is not probative, as the way search algorithms work means that each user retrieves a list of results designed to be targeted towards its own interests, based on previous searches. The search on the Wayback Machine is for a specific webpage, rather than references to "Intruder Watch" more generally.

27. The witness statements of Mr Foley and Mr Williams also go to this point. Both state that they left the employment of the applicant in 2019. Mr Williams says that he left in November, while Mr Foley does not specify the month of his departure. Mr Knight, in his reply evidence, states that Mr Foley left in April (i.e. before the name "Intruder Watch" was decided on) and that neither witness was based at head office.[6] Mr Lewis confirmed under cross-examination that he believed that these were the correct dates.[7] Mr Foley was not in a position to have been aware or unaware of the selection of "Intruder Watch" as a brand for any service to be provided by the applicant and I shall consider his evidence no further.

28. Turning to the evidence of Mr Williams, I note that Mr Knight states that:

> "Shaun Williams also left in November 2019 and would not have had any reason to know about our marketing plans. In both of their witness statements they state that they were only aware of the name KnightWatch. I would challenge this understanding on their part as KnightWatch only ever

[5] Exhibits BL05 and BL06.
[6] Second witness statement of Timothy Knight, paragraph 21.
[7] Transcript, page 6.

had a nominal run and largely remained on our marketing 'drawing board'. I do not know of any reason why either of them would have had awareness of this initial proposition and would be very surprised if they had any knowledge of the final selection of Intruder Watch as the brand for this product."[8]

29. However, in his first witness statement, Mr Knight says that *"The brand INTRUDER WATCH was used from July 2019 onwards by Knight Security."*[9] The applicant does not explain why, given the Mr Williams was employed until November of that year, he claims to have been unaware of any other brand than "Knight Watch".

30. The only documentary evidence that the applicant has adduced to show its use of the sign "Intruder Watch" comes in the form of a notification received from LinkedIn's Privacy and Intellectual Property Escalations department in 25 August 2020 stating that it had received a claim alleging that the applicant's company page contained material that infringed the Intruder Watch trade mark. The allegedly infringing material is shown below and appears to have been posted around April 2020:[10]

[8] Second witness statement of Timothy Knight, paragraph 21.
[9] First witness statement, paragraph 13.
[10] Exhibit TW-1, page 30.

31. In my view, the evidence does not show that the sign "Intruder Watch" was a name well-known to the applicant's clients at the relevant date. This does not in itself mean that the bad faith claim will fail, as I shall now go on to consider whether the applicant has shown that the proprietor knew, or had reason to know, that the applicant had plans to use the sign.

The proprietor's knowledge at the relevant date

32. It is not disputed that the proprietor was employed by the applicant, a provider of security solutions to clients in London and the South East of England, between 13 May 2016 and 12 July 2019 in the role of Engineering & Technical Manager. Mr Lewis states that:

> "As such, my primary role was providing technical based expertise and site-based services to the company's clients. I was not at any point employed to make or be involved in decisions or part of any board meetings on matters such as the company's branding."[11]

33. Mr Lewis's employment contract stated that, in addition to his normal duties, he might be required to undertake *"additional or other duties as necessary to meet the needs of the business"*.[12] Mr Knight adduces evidence to show that at various points in his employment Mr Lewis was working on copy for the applicant's website, a client briefing on cyber-attacks and proposals for a promotional video.[13] On 8 October 2018, Mr Lewis sent an email to Mr Knight attaching the latest version of a flyer he had drafted relating to an AI-led security solution.[14] Under cross-examination, Mr Lewis confirmed that he had been involved in providing technical input to marketing material and that he knew that at this particular point the product was to be called "Knight Watch".[15]

[11] Second witness statement of Mr Lewis, paragraph 8.
[12] Exhibit BL09, Clause 2.
[13] Exhibit TW-2, pages 9-10, 11, 13-19, 26.
[14] *Ibid*, pages 30-33.
[15] Transcript, page 11.

34. This was the name that was still being used when, according to Mr Ryland, who acted as an advisor to the applicant on marketing and branding, he (Mr Ryland) was shown a draft customer presentation for this product. He states that he believes the presentation to have been put together by the proprietor, and recalls that this was in or around February 2019.[16] He says that he suggested to the business that the name be changed as "Knight Watch" might be misunderstood to denote a product that only worked when it was dark.[17]

35. Under cross-examination, Mr Lewis stated that he did not recall Mr Ryland objecting to the name "Knight Watch" *"in any way, shape or form"*, but he did not dispute that there had been discussions on an alternative name.[18] Mr Knight states that *"Mr Lewis was involved and consulted throughout the branding and development process and his views and opinions as to a suitable product name were sought throughout."* He also describes him as *"a key member of the team"*.[19] In his written evidence, Mr Lewis says that:

> "… I was not central, and in large parts, not heavily involved in conversations about branding whether in relation to 'Knight Watch' or 'Intruder Watch' although I may have been copied into emails when brand suggestions had already been decided upon. It is completely denied, as is alleged in the TK Witness Statement at paragraph 5, that I was closely involved in the *'branding of the INTRUDER WATCH Product'*. I may have been sent final versions of branding by the management team, to comment upon from the perspective of a technical employee, but this was always once the decision making had been completed."[20]

36. However, the documentary evidence suggests that Mr Lewis was not quite so unengaged in discussions leading up to the final decision on a new name. On 25 April 2019, Mr Ryland emailed Mr Lewis asking him to telephone him with his comments on a draft factsheet for the new product, which contained a list of alternative names.

[16] Witness statement of Mr Ryland, paragraphs 6-7.
[17] *Ibid*, paragraph 8.
[18] Transcript, page 12.
[19] First witness statement of Mr Knight, paragraph 10.
[20] Second witness statement of Mr Lewis, paragraph 8.

"Intruder Watch" was not one of these. It appears that a telephone conversation took place as, on 29 April 2019 (which was a Monday), Mr Ryland followed up his earlier email:

> "Hi Ben,
> As per our chat last week, do you have any comments on this [i.e. the factsheet]? For example, is 'IntelliWatch CCTV Video Analytics System' still your preferred option?
> Many thanks
> Warren"[21]

37. Mr Lomas asked Mr Lewis about these emails:

> "Q. So you were forwarded this email that was talking about moving on from KNIGHT WATCH and finding another brand; yes?
> A: Yes.
> Q: Warren called you up to discuss it and then he emails on 29 April and he says is IntelliWatch still your preferred option. You can see that, right?
> A: Yes.
> Q: Do you remember IntelliWatch being your preferred option?
> A: I remember IntelliWatch being on a list of options at a certain point in time. I couldn't honestly tell you when that time was but it was on a list of options.
> Q: At this point in time KNIGHT WATCH is effectively dead, right, there are different brands being considered because it is not the one they want to take forward any more?
> A: Yes, basically."[22]

38. There is a further email from Mr Ryland dated 16 May 2019 at 11:44, which said that another employee has suggested IntelliCam as an option. Mr Ryland said that he liked this name and noted that it was not covered by any trade marks. He asked

[21] Exhibit TW-1, pages 14-21.
[22] Transcript, page 13.

Mr Lewis and Mr Knight for their views.[23] Mr Lewis responded at 11:45 saying that he had no objections.[24] The documentary evidence therefore contradicts the account given by Mr Lewis in his witness statements. He was asked about his involvement by Mr Lomas:

> "Q. You can understand given he is working off a presentation you have made of KNIGHT WATCH, you can understand why he would want your input on this brand?
> A: Yes, but I was excluded from all future meetings.
> Q: He goes on to say at paragraph 11 you had two face-to-face meetings. Do you remember those at all?
> A: No.
> Q: You do not have any reason to believe that Warren is making this up?
> A: No I have got no reason to doubt him. I just do not honestly remember them."[25]

39. The applicant's witnesses state that the decision to change the name to "Intruder Watch" was taken at a Board meeting on 4 June 2019. This is recorded in an email of 7 June 2019 from Mr Ryland to Mr Knight and three other individuals, none of whom was Mr Lewis. The decision was finally approved by Mr Knight by an email of 10 June 2019 to Mr Ryland and one of the recipients of the 7 June email.[26] Mr Knight states that after this Mr Ryland's firm Marframe worked with the applicant to develop the brand positioning and marketing literature and that *"Mr Lewis, due to his prominent role in this team was fully involved in and aware of this senior management sign off"*.[27] There is no documentary evidence to corroborate this statement until two emails from 8 and 9 July 2019. However, Mr Knight does state that he and Mr Lewis had verbal discussions once "Intruder Watch" had been adopted as the brand name.[28]

[23] Exhibit WR-1, page 2.
[24] *Ibid*, page 1.
[25] Transcript, page 12.
[26] Exhibit TW-1, pages 22-23.
[27] First witness statement of Mr Knight, paragraph 12.
[28] Second witness statement of Mr Knight, paragraph 13.

40. The first of the July emails was from Mr Ryland to Mr Lewis and appears not to have been copied to anyone else. The subject is “RE: Alternative Knightwatch names” and has an attachment with the document name “Knight_Watch_A4_2pp_v5.pdf”. It was sent on Monday 8 July 2019 at 18:31:

> “Hi Ben
> For the new product, do I recall you having a few photos of the camera actually distinguishing a person from a cat? Did it have lines around it, or something? You can see that the images in the attached flyer do not tell a story at-a-glance.
> Many thanks
> Warren”[29]

41. The words “Intruder Watch” do not appear anywhere in the body of the email itself, its subject or the name of the attached document. Mr Ryland states that the document that was attached to the email contained those words used as the name of the product. He also says in his witness statement that this email can be found in his bundle of exhibits at pages 1-5.[30] Pages 4 and 5 contain a flyer entitled “Intruder Watch CCTV Surveillance Analytics System”, with an “Intruder Watch” logo at the foot of the page. Mr Ryland’s evidence is that this was the flyer attached to the email. As I shall show later in my decision, Mr Lewis expressed doubts that this was in fact the attachment.

42. Mr Ryland then states that *“Mr Lewis responded to that email within an hour pointing me in the direction of someone who may be able to help”*.[31] Mr Ryland has not adduced Mr Lewis’s response in evidence. Under cross-examination, Mr Lewis said that he had never seen the email.[32] However, even if he had, the response that Mr Ryland says was sent would not, in my view, necessarily have required the opening of the attachment.

[29] Exhibit WR-1, page 1.
[30] Paragraph 15.
[31] Witness statement of Warren Ryland, paragraph 15.
[32] Transcript, page 14.

43. The next day, Mr Ryland sent the following email at 13:18 to Mr Knight, Mr Lewis and another employee of the applicant, with the subject "Proposition: Intruder Watch":

> "Gentlemen
>
> Please find attached the final version of Intruder Watch for your comments or approval. I look forward to hearing from you.
>
> Many thanks
> Warren."[33]

44. In Mr Knight's evidence, this email is followed by a two-page flyer. I have carefully compared this flyer with the purported attachment to Mr Ryland's email of the day before. They are identical. Neither Mr Knight nor Mr Ryland states that Mr Lewis responded to this email.

45. In his second witness statement, Mr Lewis states that:

> "… I can honestly say that I did not see this email at the time of its receipt. This is because my role at the Cancellation Applicant required me to be on site at the Cancellation Applicant's client's venue frequently, dealing with technical enquiries and trouble-shooting." (my emphasis)[34]

46. He also states that he was spending all his time attending sites in Surrey in the days before his departure and that most of the sites were in areas with no mobile phone or data reception.[35] Mr Lewis stated under cross-examination that towards the end of his time with the applicant he was at clients' sites *"nearly every single day for 12 hours a day"* (my emphasis).[36] He also said that he had not received the email:

[33] Exhibit TW-1, page 24.
[34] Paragraph 15.
[35] Paragraph 16.
[36] Transcript, page 16.

"Q: If we can go to paragraphs 15 and 16 of your statement, I will let you read this. You are familiar with them. You say, 'I did not see this at the time of its receipt.' That is a very careful wording because it does not say, 'I have never seen it', does it; it just says, 'I didn't see it when it was sent'?
A: I didn't receive it.
Q: That is not what your evidence says, does it, it just says, 'I can honestly say that I did not see this email at the time it was received; I did not say I haven't seen it.'
A: Okay, I have not seen it so I am assuming I have not received it because if I had received it I would have seen it."[37]

47. Later, he said that *"I don't remember seeing it."*[38] He also claimed that he was being left out of discussions during his final week of employment with the applicant.[39] However, this is not consistent with the documentary evidence. The 9 July email was sent to him, inviting approval of and comments on the final version of the flyer, notwithstanding the fact that he was due to leave the applicant's employment a few days later.

48. Further inconsistencies appear in the following exchange from the cross-examination concerning the 8 July email:

"Q: So page 4, for example, you have no reason to doubt that is the attachment that is attached to the 8 July email, do you?
A: If I am honest, I do doubt it because the attachment was clearly listed on that email as Knight Watch and now you are showing me a completely different brand.
Q. But the email on page 1 the subject says 'Alternative Knight Watch names'?
A: Yes, but –
Q: As a shorthand you might call the PDF.
A: Again we agreed on IntelliWatch.

[37] Transcript, page 15.
[38] *Ibid*, page 16.
[39] Transcript, page 16.

Q: Okay, we will move on. You say at paragraph 20, you say you did not see their email on the 9th, right?

A: Correct.

Q: But let's take this in steps. By July 2019 you knew that Knight Watch had been abandoned; right? We discussed this earlier. You knew there were different names and Knight Watch was no longer going to be the one they were going to market?

A: It 100% was not confirmed, it was going to be Knight Watch until such time as they chose another one which as far as I was honestly believing was IntelliWatch.

Q: Let's put it this way, there were alternative names that were being suggested one of which was IntelliWatch. Let's put it no higher than that for now. Right, if we go behind tab 13B, at paragraph 20 on page 7, I will just give you a chance to read that (*Pause for reading)*. A word you use throughout your evidence is 'concrete', so you are saying here that there was a more concrete plan to use KNIGHT WATCH than any other brand?

A: Correct, because there is a long list of names, so it is hard to determine that that is not going to be a decision until they have managed to look up the trade marks and copyrights for these other names.

Q: Sure, but you accept that there was a plan to move away from KNIGHT WATCH?

A: Correct, there was potentially a plan to move away from it, yes."[40]

49. In comparison with the extract reproduced in paragraph 37 above, this passage shows some inconsistencies. IntelliWatch has gone from being *"on a list of options at a certain point in time"* to being, at least in Mr Lewis's eyes, the front runner. Similarly, in the first extract, Mr Lewis agrees with the proposition that "Knight Watch" is *"effectively dead"* as a brand. Halfway through the second extract, he says that it was not 100% confirmed that "Knight Watch" would not be the brand used for the product and adds later that a decision would be made when it had been checked whether there were any conflicting intellectual property rights. By the end of the extract, Mr Lewis states that there was *"potentially"* a plan to adopt another name.

[40] Transcript, pages 14-15.

50. I have pointed out the inconsistencies in Mr Lewis's evidence on his knowledge. However, there are gaps in the applicant's documentary evidence. Notably, there are no emails between the confirmation of the decision to proceed with the name "Intruder Watch" on 10 June 2019 and the emails of 8 and 9 July 2019. Mr Knight states that:

> "While I have sought to provide email evidence to support the key involvement of Mr Lewis in the re-branding process, emails are only one form of evidence, and they typically are a means of communication between members of my team and external parties. Mr Lewis and I spoke on a regular basis, on many matters, including the Intruder Watch product which was a key part of the product line for the business for which Mr Lewis was ultimately responsible."[41]

51. Mr Knight states that the brand "Intruder Watch" was used from July 2019 onwards and that Mr Lewis secured the first customer for the product during the first month of its availability.[42] Mr Lewis denies having secured a contract for the applicant under the brand.[43] I note that the applicant has not provided any evidence to rebut this challenge. Mr Lewis left the employment of the applicant on 12 July 2019 to work for a large technology company, Hanwha Techwin Europe Limited, which in turn he left in February 2020.

52. In approaching an assessment of the evidence, I remind myself of the comments of Mr Geoffrey Hobbs QC, sitting as the Appointed Person, in *John Williams and Barbara Williams v Canaries Seaschool SLU*, BL O-074-10:

> "21. I think it is necessary to begin by emphasising that a decision taker should not resort to the burden of proof for the purposes of determining the rights of the parties in civil proceedings unless he or she cannot reasonably make a finding in relation to the disputed issue or issues on the basis of the available evidence, notwithstanding that he or she has striven to do so: *Stephens v Cannon* [2005] EWCA Civ. 222 (14 March 2005)."

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[41] Second witness statement of Timothy Knight, paragraph 7.
[42] First witness statement of Timothy Knight, paragraph 13.
[43] First witness statement of Ben Lewis, paragraph 21.

53. It is important to keep in mind the seriousness of an allegation of bad faith and that such allegations must be distinctly proved. On the basis of the evidence before me, I am persuaded that Mr Lewis was involved in discussions about an alternative name for the applicant's product before the decision on "Intruder Watch" was taken at the 7 June 2019 Board meeting. He was exposed to an array of different names, but I cannot see that at this stage the "Intruder Watch" name had been put to him. Moving on to the later emails, I note that the email from Mr Ryland of 8 July 2019 does not contain this sign within the body or subject of the email and the response Mr Ryland says that he received does not necessarily imply that any attachment was opened. This leaves the email from 9 July 2019, which did have "Intruder Watch" in its subject. This email was sent in the final week of Mr Lewis's employment, where he says that he was spending a large proportion of his time at clients' sites. The email did not require any action to be taken on his part. There is no further documentary evidence. Although I have highlighted the inconsistencies in Mr Lewis's own evidence, it remains my view that there are significant gaps in the account of the applicant. For example, in the passage from his second witness statement quoted in paragraph 50 above, Mr Knight states that he had regular conversations with Mr Lewis about the Intruder Watch product but he does not say when these took place, whether the name "Intruder Watch" was discussed or whether the two men talked about the product that later was to be known as "Intruder Watch", and the word *"regular"* is somewhat imprecise. An event may be infrequent, but still be regular.

54. I find that the applicant has not presented cogent evidence to support an allegation that the proprietor knew that the applicant was using the sign "Intruder Watch" or had reason to believe that it might wish to do so in future. On the basis of this finding, the remaining allegations, including breach of duties of confidence, fall away. The claims that the applications were made in bad faith are not made out and the applications for declarations of invalidity fail.

OUTCOME

55. UK Trade Mark Nos. 3459677 and 3479005 remain registered.

COSTS

56. The proprietor has been successful and is entitled to a contribution towards the costs of these proceedings in line with the scale set out in Tribunal Practice Notice No. 2/2016. In the circumstances, I award the proprietor the sum of £2200 which has been calculated as shown below. I have taken account of the fact that the statements of grounds and counterstatements were identical in both proceedings.

Preparing a statement and considering the other side's statement: £400
Preparing evidence: £800
Preparing for and attending a hearing: £1000
TOTAL: £2200

57. I therefore order Knight Security Limited to pay Ben Lewis the sum of £2200. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 9th day of November 2023

Clare Boucher,
For the Registrar,
Comptroller-General