

O-114-11

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2521337
BY ASHLEY SIMS TO REGISTER THE TRADE MARK**

JELLYATRICS

IN CLASS 30

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 99895
BY RICHARD BEEVERS**

TRADE MARKS ACT 1994

**IN THE MATTER OF application No. 2521337
by Ashley Sims to register the trade mark
JELLYATRICS in Class 30**

and

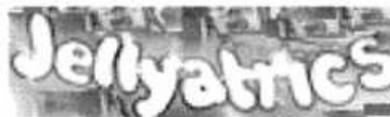
**IN THE MATTER OF Opposition thereto under No. 99895
by Richard Beevers**

BACKGROUND

1) On 16 July 2009, Ashley Sims of 15 Market Street, Castle Donnington, Derby, DE74 2JB applied under the Trade Marks Act 1994 for registration of the trade mark JELLYATRICS In respect of *confectionary* in Class 30.

2) The application was published in the Trade Marks Journal on 16 October 2009 and on 15 December 2009, Richard Beevers of Court House, Golf Lane, Duffield, Derbyshire, DE56 4GA filed notice of opposition to the application. The grounds of opposition are in summary:

- a) the application falls foul of Section 5(4) (a) of the Trade Marks Act 1994 (“the Act”) because Mr Beevers is entitled to object to the registration and use of the JELLYATRICS mark in respect of confectionery because of his goodwill identified by the following four marks:



JELLYATRICS

Jellyatrics

b) the application was applied for in bad faith because when Mr Sims applied for the mark he was aware that the goodwill identified by the mark belonged to others. He was aware that another party was using the identical mark on identical goods and had been using the mark for some time. Further, Mr Sims had had a relationship with that other party (or their predecessors in title) and the application was filed with the specific intention of pre-empting the proprietor and seeking significant consideration for the assignment of the mark either from the proprietor or from the highest bidder on the open market. The application therefore offends under Section 3(6) of the Act.

3) Mr Sims subsequently filed a counterstatement, in the form of a letter attached to the relevant form, dated 2 February 2010. He denies the opponent's claims. He also states that he is the inventor and creator of JELLYATRICES and that he originally registered the mark on 28 November 1998. He explains that he contracted the manufacturing and selling rights to Barnack UK Ltd ("Barnack") in 1999 and that in June 2000 he agreed to sell the rights to a company called "Stage 42". He states that the agreement was that Stage 42 would pay him £65,000 made up of a £10,000 up front deposit and a further £50,000 over the period needed for the royalties to accrue this balance. When the deposit was paid, Mr Sims "handed the certificate to them". He does not explain what this "certificate" is, but goes on to say that it was not a transfer of the title, but rather it showed good faith and was proof that the rights in the name existed. Full transfer was to take place upon payment of the £50,000. He states that he has only received approximately £5,000 of this. Rather than being received as an orthodox payment, Mr Sim's claims that a gentlemen named Rob Lowe paid his mobile phone bill for about twenty months, but that he has no evidence of this.

4) He later discovered that Stage 42 had "sold on" the rights to Richard Beevers, contrary to his agreement with Stage 42. He has informed Barnack that he is in dispute with Mr Beevers and as a result Barnack has accrued into a holding account, the royalties they were paying to Mr Beevers, until such time as the dispute is resolved.

5) Both sides filed evidence in these proceedings. Both sides ask for an award of costs. The matter came to be heard on 17 March 2011 when Mr Beevers was represented by Kieron Taylor for Swindell and Pearson and Mr Sims represented himself.

Opponent's Evidence

5) This takes the form of a witness statement, dated 20 July 2010, by Mr Beevers. Mr Beevers agrees with Mr Sims contentions that he invented the JELLYATRICES brand and that in his capacity as director of Upside Down Licensing Company Limited licensed use of the mark to Barnack UK Limited. Mr

Beevers produces, at Exhibit RWB002, the licence agreement dated 6 January 1999 between these two companies.

6) Mr Beevers produces an agreement, dated 1 August 2000, between Upside Down Licensing Company Limited (the “vendor” and “assignor”) and Mr Beevers and Mr Lowe (the “purchasers” and “assignees”). Mr Sims is identified as guarantor. I reproduce below, in some detail, relevant text from this agreement:

“2. Agreement for Sale

Subject to the terms and conditions of this agreement, the Vendor shall with full title guarantee sell to the Purchasers who shall purchase as at the Effective Date [identified elsewhere as being 1 August 2000] all the property, assets and rights owned by, or under the control of the Vendor and used in the conduct of the Business including but without limitation:

2.1 the Business as a going concern;

2.2 the Goodwill;

2.3 the Intellectual Property Rights;

2.4 ...

2.5 the sole and exclusive right to receive royalties, commissions and other payments in relation to the Business and the “Jellyiatrics” brand, name, theme and figures

3. Purchase Consideration

3.1 The consideration for the sale by the Vendor of the Assets shall be the sum of £10,000.00 together with further consideration payable in accordance with clause 3.3 below

3.2 The consideration of £10,000.00 shall be paid in cash upon completion

3.3 The Purchasers shall up to the third anniversary of the Effective Date (“the Third Anniversary”) pay by way of further consideration (“the Further Consideration”) a further sum up to a maximum of £55,000.00, be remitting the first £55,000.00 of the royalty payments received by the Purchasers after the Effective Date but before the Third Anniversary (“the Royalties”) from:

3.3.1 Barnack UK Limited pursuant to an agreement dated 6th January 1999 between Barnack UK Limited and the Vendor (“the Barnack Licence Agreement”); and

3.3.2 any third party pursuant to any further licensing of the Intellectual Property Rights.

The Purchasers shall only be liable to pay the Further Consideration to the extent that Royalties are received by them in relation to the licensing of the Intellectual Property Rights. All Royalties received after the Effective Date over and above the sum of £55,000.00 and all Royalties received after the Third Anniversary shall belong absolutely to the Purchasers. The obligation to pay any sum in respect of any Further Consideration shall cease forever on the Third Anniversary save in respect of Royalties received which relate to the period before the Third Anniversary up to a maximum of £55,000.00. In the event of the Trade Mark being assigned by the Purchasers to a third party, any consideration received by the Purchasers will first be applied in discharging the balance of the Further Consideration provided that if such consideration is less than the amount outstanding in respect of the Further Consideration, the Purchasers shall only be liable to the Vendor for the amount received by them from the third party”

7) In Schedule 1 of the agreement, the Guarantor (being Mr Sims) is recorded as “the owner of the whole of the issued share capital of the Vendor” and also the following text:

“4.1 Disclosure of Intellectual Property Rights

The Vendor is the sole legal and beneficial owner of the Intellectual Property Rights. Neither the Guarantor nor any third party has any right or interest in any of the Intellectual Property Rights

4.2 Validity of Intellectual Property Rights

Each of the Intellectual Property Rights is valid and enforceable and no act has been done or omission permitted whereby of them has ceased to [sic] might cease to be valid and enforceable” [is the last bit relevant? Remove?]

8) Schedule 3 to the agreement relates to the assignment of goodwill and states:

“1. In pursuance of the Agreement and in consideration of the sum of ... now paid by the Assignees (receipt of which the Assignor hereby acknowledges) the Assignor with full title guarantee hereby Assigns and Transfers all rights title and interest in the Goodwill (as defined in the Agreement) to the Assignees with the exclusive right for the Assignees and their assigns to hold themselves and their assignees out as carrying

on the Business (as defined in the Agreement) in succession to the Assignor”

9) Finally, Schedule 5 to the agreement provides the detail relating to the assignment of intellectual property rights and states:

“1. In pursuance of the Agreement and in consideration of the sum of ... now paid by the Assignees (receipt of which the Assignor hereby acknowledges) the Assignor with full title guarantee hereby Assigns and Transfers all rights title and interest in the Intellectual Property Rights (as defined in the Agreement) to the Assignees with the exclusive right for the Assignees and their assigns to hold themselves and their assignees out as carrying on the Business (as defined in the Agreement) in succession to the Assignor”

10) Mr Beevers states that he is given to understand that all the relevant monies were paid to Mr Sims. In addition to the original £10,000, he identifies that Mr Sims was paid £12,134.71 during the three years following the agreement. This breaks down to £4726.95 in the first year, £3438.36 in the second year and £3970.40 in the third year. He also states that at no time between the year 2003 (when the last of these payments was made) and when this current matter arose in 2009 did Mr Sims ever claim he was not paid his full and fair share.

11) In July 2008, Mr Beevers buys out Mr Lowe and he provides the sales agreement relating to this at Exhibit RWB004.

12) At Exhibit RWB005, Mr Beevers provides a copy of a letter sent to Mr Sims on 7 December 2009. It makes clear that it is an open letter that will be disclosed in evidence in the event that the disagreement between the parties resulted in the need for an opposition. In the letter, Mr Beevers makes an offer of £200 in exchange for Mr Sims' withdrawal of his application. Further it explains that Mr Beevers is the owner of the goodwill identified by the mark JELLYATRICES and that, as Mr Sims was aware of this, his application was also an act of bad faith. It also makes reference to the purpose of filing the application was to force Mr Beevers to buy the application for a significant consideration (an example of £25k is given).

13) Mr Beevers also states that “the various JEKKYATRICES marks has been long standing and there is an annual turnover under the marks of between £200,000 and £300,000.”

Applicant's Evidence

12) This takes the form of a witness statement by Mr Sims. He states again that he solely invented a range of jelly type sweets that he branded JELLYATRICES. In

November 1998 he filed an application to register the name as a trade mark. This was granted and allocated the number 2183143.

13) He also confirms that in January 1999 he entered an arrangement with Barrack, a confectionary manufacturer and that he received a royalty from them, calculated as a percentage of the retail price. He also states that the brand was, and still is, sold in various supermarket chains and retail outlets throughout the UK.

14) He states that in August 2000 he agreed, in good faith, subject to contract, to sell the ownership rights to the JELLYATRICKS brand and the licensing benefit of it to a company called Stage 42 that was then owned by Mr Lowe and Mr Beevers. He alleges that the price agreed was £65,000 comprising of a £10,000 deposit and the following three years royalties. He confirms that if these royalties did not amount to the outstanding £55,000, he would stand the shortfall and also that he would not be paid more than the £55,000.

15) Mr Sims claims that title to the brand was to remain with him until the full agreed payments had been received and that the agreement was not honoured because not all royalties were passed on to him during this three year period. He says that besides the £10,000 payment, all he received was “approximately £5,000” of “unorthodox payments”. He also claims that the value of the royalties at that time was £12,600 per annum and rising.

16) As Stage 42 did not meet the fundamental requirements of the agreement, he considers the contract null and void. As such, the intellectual property rights did not pass to Stage 42 but remained with him. He cites financial constraints and health problems as reasons for not pursuing the issue until now.

17) Mr Sims also refers to “[t]he current Barnack turnover [being] between two hundred and three hundred thousand pounds per annum, providing, ..., at least a 6 percent royalty”. He also states that Barnack are aware of this dispute and since August 2009 it has been accruing the royalties in a holding account until the decision in these proceedings is known.

Opponent’s Evidence in reply

18) This consists of four witness statements. The first of these, dated 22 October 2010, is by Mr Lowe. He confirms that all monies due under the agreement between the Upside Down Licensing Company Ltd and Mr Beevers and himself were paid to Mr Sims. These were administered by Wendy Lowe. As the period concerned was more than seven years ago, he no longer has precise records, however he has been able to construct a table of royalties all of which were duly made to Mr Sims. In summary, this amounts to £3,545.21 in the first year, £859.59 in the second and £992.60 in the third year. These payments total

£5,397.40. He has not received any communications from Mr Sims to the effect that the appropriate payments due under the agreement were not made.

19) The second witness statement, dated 22 October 2010, is by Trevor Sharpe, a director of Barnack. He points out that the agreement to distribute JELLYATRICS confectionery was between Barnack and the Upside Down Licensing Company Ltd and not Mr Sims personally. He also says that it is his understanding that the Upside Down Licensing Company Ltd is no longer in existence. Since the agreement came into effect in August 2000, he has met many times with Mr Beevers, to discuss and develop the brand.

20) He states that he is aware of, and has had sight of the agreement between the Upside Down Licensing Company Ltd and Mr Beevers and Mr Lowe. He points out that, contrary to Mr Sims' claim, the agreement is with Mr Beevers and Mr Lowe and not their company "Stage 42 Ltd".

21) Mr Sharpe explains that the sales value of JELLYATRICS confectionery is significantly less than that proposed by Mr Sims. He gives the example that in the year 1 April 2009 to 31 March 2010, total annual sales were £56,216.00.

22) He also explains that the license agreement was renegotiated, between the relevant parties, in 2004 when Mr Sims' "earnout" was complete. This was to facilitate a reduction in the retail selling price of JELLYATRICS confectionery. The new agreement also provided for royalties to be paid at 2.5%. This resulted in a total royalty payment for the year 1 April 2009 to 31 March 2010 of £1,405.40. He states that Mr Sims' estimate that total royalties since 1 August 2001 of £150,000 is "grossly inaccurate".

23) Mr Sharpe confirms that the total royalties payable for the three year period 1 August 2001 to 31 July 2003 would have been in the region of £5000, but that due to the time elapsed, he is no longer able to provide copies of his accounts to illustrate this.

24) Finally, Mr Sharpe states that, contrary to Mr Sims' assertion, royalty payments are still being made in the normal way to Mr Beevers and are not being held in a holding account pending the conclusion of these proceedings.

25) The third witness statement, dated 10 November 2010, is by Wendy Lowe. Ms Lowe confirms that, between 1 August 2000 and 31 July 2003, she administered a range of payments to Upside Down Licensing Company Ltd in accordance with its agreement with Mr Beevers and Mr Lowe. This involved invoicing Barnack for royalties for the sale of JELLYATRICS confectionery and then paying Mr Sims precisely the same amount, in line with the agreement between the parties.

26) As far as Ms Lowe recalls, all the necessary payments were made and she did not receive any communication from Mr Sims suggesting that any payments had not been made.

27) There is also a further witness statement, dated 30 October 2010, by Mr Beevers. He points out that it appears that Mr Sims believes he is entitled to royalty payments that relate to Barnack's total turnover and not just those of JELLYATRICKS confectionery. He refers to Mr Sims's witness statement where Mr Beevers alleges that Mr Sims believed the total turnover of Barnack was between £200k - £300k. With a royalty payment of 6%, this would provide royalties in the region of £33k to £50k a year.

28) He also makes a number of submissions that I will not detail here but I will keep them in mind.

DECISION

Section 5(4)(a)

29) Section 5(4) (a) reads as follows:

“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, or

(b)

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark”.

30) The requirements for this ground of opposition have been restated many times and can be found in the decision of Mr Geoffrey Hobbs QC, sitting as the Appointed Person, in *WILD CHILD Trade Mark* [1998] R.P.C. 455. Adapted to opposition proceedings, the three elements that must be present can be summarised as follows:

(1) that the opponents' goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the applicant (whether or not intentional) leading or likely to lead the public to believe that goods or

services offered by the applicant are goods or services of the opponents;
and

(3) that the opponents have suffered or are likely to suffer damage as a result of the erroneous belief engendered by the applicant's misrepresentation.

31) To the above I add the comments of Pumfrey J (as he then was) in the *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* case [2002] RPC 19, in which he said:

"27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the Registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under Section 11 of the 1938 Act (See *Smith Hayden (OVAX)* (1946) 63 RPC 97 as qualified by *BALI* [1969] RPC 472). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed at the relevant date. Once raised the applicant must rebut the prima facie case. Obviously he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of possibilities that passing off will occur."

The Relevant Date

32) The relevant date for determining the opponent's claim will be the filing date of the application in suit (*Last Minute Network Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Joined Cases T-114/07 and T-115), that is to say 16 July 2009. The earlier right must have been acquired prior to that date (Article 4.4(b) of First Council Directive 89/104 on which the UK Act is based).

Goodwill

33) I must first assess if Mr Beevers has acquired any goodwill and if so, what is the extent of this goodwill at the relevant date. Mr Beevers has provided a copy of the sale agreement ("the first agreement") between Mr Sims' company and Mr

Beevers and Mr Lowe. There can be no doubt that the terms of the agreement provide for the transfer of the goodwill associated with Mr Sims' business together with the (then) registered mark JELLYATRICES. Mr Beevers also provides a copy of a further agreement that shows that he bought out Mr Lowes business interests and rights related to the JELLYATRICES brand.

34) Mr Sims' allegation that he did not receive the full amount of royalties owed to him under the first agreement does not need to be addressed here. Regardless of whether the full amount of royalties were paid or not, Mr Beevers and Mr Lowe took on the business identified by the mark JELLYATRICES. Mr Sharpe noted, in his witness statement, that he has dealt with Mr Beevers on many occasions over the years in order to develop the JELLYATRICES brand together. He also provides an annual sales figure of over £56k for the year 2009 – 2010 that, whilst mainly after the relevant date provides an indication of the level of business identified by the mark JELLYATRICES. Finally, it is clear from Mr Sims' witness statement that he believes there is an ongoing goodwill identified by the mark.

35) Taking all these points together, I am satisfied that there is goodwill identified by the JELLYATRICES mark as manufactured by Barnack under licence from Mr Beevers. The mere fact that Mr Sims believes the first agreement should be declared null and void does not change this. The fact of the matter is that it has not been done so, and crucially, because of Mr Beevers business that has been operating since the effective date of the first agreement in August 2000, the public associate the goodwill with his business.

Misrepresentation

36) Have established that Mr Beevers is the proprietor of the goodwill identified by the mark JELLYATRICES, I must go on to consider if there is misrepresentation and damage. As Mr Sims' application is in respect of the same mark and is in respect of the same goods as are the subject of Mr Beevers' business, it is self evident that misrepresentation and damage will occur. In this respect, I am mindful of the comments of Morritt L J in the Court of Appeal decision in *Neutrogena Corporation and Anr. V Golden Limited and Anr.* [1996] RPC 473 when he confirmed that the correct test on the issue of deception or confusion was whether, on the balance of probabilities, a substantial number of the opponent's customers or potential customers would be misled into purchasing the applicant's products in the belief that it was the opponent's. Further, Lord Fraser in *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1980] RPC 31 HL, stated that the opponent must show that "he has suffered, or is really likely to suffer, substantial damage to his property in the goodwill". Clearly, use by Mr Sims, of the JELLYATRICES mark in respect of confectionery would mislead the consumer into believing his goods are those of Mr Beevers. It follows that Mr Beevers would suffer damage.

37) I, therefore, conclude that the ground based upon Section 5(4)(a) of the Act is successful.

Section 3(6)

38) Whilst my finding in respect of the grounds of opposition based upon Section 5(4)(a) of the Act effectively settle the case, due to the serious nature of the allegations of bad faith, I will also consider the ground based upon Section 3(6) of the Act. Section 3(6) reads as follows:

“3(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

39) In terms of the date at which the matter falls to be considered, it is well established that the relevant date for consideration of a bad faith claim is the application filing date (*Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07 paragraph 35).

40) In *Gromax Plastics Ltd v. Don & Low Nonwovens Ltd* [1999] RPC 367, Lindsay J. considered the meaning of “bad faith” in Section 3(6) of the Act and stated (at page 379):

“I shall not attempt to define bad faith in this context. Plainly it includes dishonesty and, as I would hold, includes 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. Parliament has wisely not attempted to explain in detail what is or is not bad faith in this context; how far a dealing must so fall-short in order to amount to bad faith is a matter best left to be adjudged not by some paraphrase by the courts (which leads to the danger of the courts then construing not the Act but the paraphrase) but by reference to the words of the Act and upon a regard to all material surrounding circumstances.”

41) In *Harrison v. Teton Valley Trading Co* [2005] FSR 10, the Court of Appeal confirmed that bad faith is to be judged according to the combined test set out by the House of Lords in *Twinsectra v Yardley* [2002] 2 AC 164. Paragraphs 25 and 26 of the Court of Appeal decision are of particular assistance and read as follows:

“25. Lord Hutton went on to conclude that the true test for dishonesty was the combined test. He said:

“36. Therefore I consider that your Lordships should state that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he

sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.”

26. For my part, I would accept the reasoning of Lord Hutton as applying to considerations of bad faith. The words “bad faith” suggest a mental state. Clearly when considering the question of whether an application to register is made in bad faith all the circumstances will be relevant. However the court must decide whether the knowledge of the applicant was such that his decision to apply for registration would be regarded as in bad faith by persons adopting proper standards.”

42) The Privy Council considered earlier authorities in *Barlow Clowes International Ltd (in liquidation) & Others v Eurotrust International Limited & Others*, [2005] UKPC 37. In particular, their Lordships considered a submission from Counsel that an inquiry into the defendant’s views about standards of honesty is required. The majority of their Lordships were also in agreement with Lord Hutton’s comments in *Twinsectra*. They then went on to state:

“15. Their Lordships accept that there is an element of ambiguity in these remarks which may have encouraged a belief, expressed in some academic writing, that *Twinsectra* had departed from the law as previously understood and invited inquiry not merely into the defendant’s mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty. But they do not consider that this is what Lord Hutton meant. The reference to “what he knows would offend normally accepted standards of honest conduct” meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were.

16. Similarly in the speech of Lord Hoffmann, the statement (in paragraph 20) that a dishonest state of mind meant “consciousness that one is transgressing ordinary standards of honest behaviour” was in their Lordships’ view, intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also require him to have thought about what those standards were.”

43) On the basis of these authorities it is clear that a finding of bad faith may be made in circumstances which do not involve actual dishonesty. Furthermore, it is not necessary for me to reach a view on the applicant’s state of mind regarding the transaction if I am satisfied that their action in applying for the mark in the light of all the surrounding circumstances would have been considered contrary

to normally accepted standards of honest conduct. Thus, in considering the actions of Mr Beevers, the test is a combination of the subjective and objective. Furthermore, it is clear that bad faith in addition to dishonesty, may include business dealings which fall short of the standards of acceptable commercial behaviour i.e. unacceptable or reckless behaviour in a particular business context and on a particular set of facts.

34) It is contended, on behalf of Mr Beevers, that as Mr Sims has sold his rights identified by the JELLYATRICKS mark and that Mr Beevers (and Mr Beevers and Mr Lowe before that) has and is using the mark in the course of trade. It is claimed that Mr Sims filed the application as a deliberate act of bad faith to force further payments of royalties.

35) Mr Sims' defence is that he has not received the full amount of royalties owed to him and as stipulated in the first agreement. He explained that he "disappeared" for two years but he still retained his same e-mail address and he never received any contact from Mr Lowe. He never received any notification that the payments were ceasing. Therefore, in his view that the agreement is null and void and the goodwill and intellectual property rights did not pass to Mr Beevers and Mr Lowe. Mr Sims' also drew my attention to the fact that the proprietor details of the mark assigned as part of the first agreement were never changed to reflect ownership by Mr Beevers and Mr Lowe.

36) These allegations appear to go to an issue of breach of contract and this tribunal does not have the power to decide on such matters. Further, whether or not the correct level of payments were made to Mr Sims are only relevant in assessing whether his making of the contested application was an act of bad faith in that it provides some indication as to what motivated Mr Sims to do so. As such, I do not intend to consider further the merits of the various arguments regarding the royalty payments.

37) What is clear from the evidence is that there is a clear chain of title that illustrates that Mr Beevers is, and was at the relevant date being the filing date of the contested application, the proprietor of the business and goodwill identified by the mark JELLYATRICKS. It is also equally clear to me that Mr Sims has had no claim over this business or goodwill since the effective date of the first agreement when he sold all aspects of the business including the, then registered, mark and the goodwill. Because he believed that he did not receive all the royalties due to him at that time is not a legitimate reason to now attempt to re-appropriate that goodwill and the mark associated with it. The correct approach would have been to challenge Mr Beevers through a breach of contract action. He has chosen not to do this.

38) Further, it is relevant that the issue of correct payment of royalties dates back to 2000 – 2003 and that Mr Sims has not acted upon, or even made known, his grievance until now. This has resulted in Mr Beevers (with Mr Lowe until 2008,

thereafter on his own) continuing to develop the business and the associated goodwill since that time. To now undermine this business and goodwill by purposely filing a directly conflicting trade mark application is clearly an act that can be described as contrary to accepted standards of honest conduct. It is equally clear to me that such an action cannot be used as a substitute for a breach of contract action.

39) It is clear to me that Mr Sims has been motivated by a belief that he has been the subject of an injustice relating to the amount of royalties he received but, nevertheless, this cannot be a defence of his actions. In saying this, I am particularly mindful of the comments, referred to above, of Lord Hutton when he said that a finding of dishonesty cannot be escaped because the person sets his own standards of honesty.

40) To summarise, Mr Beevers is the current proprietor of the business and its associated goodwill and he is fully entitled to oppose the contested application. Mr Sims has not owned the goodwill in the business or the mark JELLYATRICS since August 2000. His trade mark application amounts to an unfair attempt to re-appropriate the mark and goodwill and to do so is contrary to accepted standards of honest conduct.

41) Therefore, the ground of opposition based upon Section 3(6) is successful and I find that Mr Sims' application to register the mark JELLYATRICS was made in bad faith.

COSTS

42) The opposition having been successful, Mr Beevers is entitled to a contribution towards his costs. At the hearing, Mr Taylor submitted that Mr Beevers should be entitled to costs off the scale. His reason for making such a claim is the serious nature of bad faith and the fact that Mr Beevers made an offer, to Mr Sims, to pay consideration of £200 for the withdrawal of the application. Therefore, reasonable efforts were made to avoid the need for the opposition. I note these arguments, but nothing identified by Mr Taylor can be described as unusual in such proceedings, and whilst I acknowledge the seriousness of bad faith, it would be wrong to make an award of costs in every case where bad faith has been demonstrated. I am also mindful that, in my view, Mr Sims was acting out of a feeling of injustice and was not intending to obtain monies in a purely opportunistic way. As such, I find that it is appropriate to make an award of costs that is consistent with the published scale.

43) I take account of the fact that both sides filed evidence and that a hearing has taken place. I award costs on the following basis:

Preparing statement and considering the statement of case in reply
£500

Preparing evidence and considering other side's evidence	£600
Preparing for, and attendance at hearing	£500
TOTAL	£1600

44) I order Ashley Sims to pay Richard Beevers the sum of £1600. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 28 day of March 2011

**Mark Bryant
For the Registrar,
the Comptroller-General**