O/367/20

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION NUMBER 3,281,886 IN THE NAME OF EMERGENCY EVACUATION EQUIPMENT AND TRAINING (3ET) LIMITED

AND IN THE MATTER OF A REQUEST FOR A DECLARATION OF INVALIDITY BY PAINTCRAFT LIMITED

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF GEORGE SALTHOUSE (O/493/19) DATED 22 AUGUST 2019.

DECISION

Introduction

1. This is an appeal from the decision of Mr George Salthouse, for the Registrar, dated 22 August 2019 (O/493/19) where he invalidated the trade mark (No 3,281,886) of Emergency Evacuation Equipment and Training (3ET) Limited ("3ET") on the grounds section 3(6) and 5(4)(a) of the Trade Marks Act 1994 obtained. 3ET appeals the decision on the basis that Mr Salthouse conduct and the decision itself was such as to give rise to a reasonable perception of bias.

2. This appeal comes at the end of a bitter dispute between 3ET and Paintcraft, but the key facts can be summarised as follows.

3. Mr Gary Wilson is currently a director of 3ET. Previously he worked for the fire service and he started acting as a consultant for Speedings Ltd in 2007. Mr Wilson and Speedings developed an evacuation mat for obese people (bariatric) around 2010. Speedings manufactured and sold bariatric evacuation mats to Paintcraft (and associated companies) between 2011 and 2014. In 2014 Speedings stopped making these mats and Paintcraft started manufacturing in-house.

4. There is no dispute that Paintcraft (by which I mean Paintcraft and its associated companies) sold bariatric evacuation mats under the mark EvacMat from 2011.

5. 3ET's case before the Hearing Officer was that from 2011 Speedings had been selling these mats under the mark EvacMAT to both Paintcraft and the emergency services. In addition, Mr Wilson says that when Paintcraft took over production of the mats there was already a distribution agreement in place between Speedings and Paintcraft (the agreement covering both the use of the mark and the right to use the product designs).

6. This distribution agreement, 3ET says, had been negotiated with Alison Hayward, an employee of Paintcraft at the time. However, Mr Wilson accepts that nothing was ever reduced to writing. The terms of this agreement, he says, are that, in exchange for the right to use the mark and design, a royalty of £10 was to be paid to Alison Hayward (of Paintcraft) for every unit sold. He accepts that no money would pass to Speedings. It was also agreed, according to Mr Wilson, that Paintcraft was restricted to selling mats to the healthcare sector and that any goodwill generated in the mark EvacMAT would vest in Speedings.

7. Speedings assigned "the intellectual property rights arising from the Bariatric EvacMat" to 3ET on 3 October 2017. By this time Ms Hayward had left Paintcraft and had become a director of 3ET. She was also now in a relationship with Mr Wilson.

8. Paintcraft's case is that between 2011 and 2014 Speedings manufactured the mat and affixed Paintcraft's mark to the goods before supply. When Paintcraft took over manufacture in 2014 it continued to apply the same mark as before. It denies there was any distribution agreement, but does not deny it paid Ms Hayward £10 for every sale of a mat.

9. 3ET applied to register EvacMAT on 11 January 2018 and it completed the registration procedure on 27 April 2018. On the 11 May 2018, 3ET sent a letter to Paintcraft asserting its rights in the newly registered mark. After an exchange of further correspondence, on 14 June 2018 Paintcraft applied to invalidate the mark under section 3(6) and 5(4)(a) of the Trade Marks Act 1994.

10. 3ET was represented in the registry by Mr Keay of Counsel and by Mr Wilson on appeal. Paintcraft Limited was represented by Mr Ivison of Counsel both in the registry and on appeal.

Bias and apparent bias

11. The right to a fair trial exists under both the common law and under Article 6 of the European Convention of Human Rights. A trial can only be fair and be seen to be fair if the person hearing it is not biased or does not appear so. If a hearing was unfair then however elegantly argued the decision resulting from it, however well-written, it remains unfair. Further, what appears to be a fair hearing cannot be saved if the judgment itself is tainted by bias.

12. Recently, the Supreme Court considered an allegation of bias in *Serafin v Malkiewicz & Ors* [2020] UKSC 23. The issue of what bias meant was not before the court, but it accepted a definition from Leggatt LJ in *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468, paragraph 17:

> Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case

13. It is therefore possible for a tribunal to disagree with every point made by one party and agree with every point made by another provided this was due to the legal merits of the case. Furthermore, a tribunal can accept the version of events of one party entirely and

discount the version put forward by the other side absolutely provided this is done after fairly considering the factual merits of the case.

14. In this case, Mr Wilson is alleging that the Hearing Officer's conduct gave the appearance of bias at the very least. The test to be applied to determine if there was apparent bias was set out by Lord Hope in *Porter v Magill* [2001] UKHL 67, paragraph 103:

> a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias

15. The approach to making this assessment was summarised by Hildyard J in *M&P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch), paragraph 26:

> First, all the circumstances having a bearing on the suggestion that the Judge appeared to be biased must be ascertained; and second, it must then be determined whether those circumstances would lead the fair-minded and informed observer to conclude that there was a real possibility that the Judge was biased (see *In re Medicaments* [[2001] 1 WLR 700], at p. 711 A-B; and *Porter v Magill*, at [102]-[103])

16. Most of the cases dealing with bias (including *Serafin*) have involved allegations that the judge became too involved in the eliciting of evidence from witnesses. In this case, the evidence presented to the Hearing Officer was entirely documentary. He indicated early during the hearing that he had read all the evidence and had already prepared a summary of it for his own use. He was therefore familiar with everything said in the documentation.

17. In *M&P Enterprises*, Hildyard J considered the approach a judge should take during closing submissions, after the evidence has been heard in full, at paragraph 223 to 225:

> 223. There is a clear distinction between, on the one hand, interventions in cross-examination and re-examination with respect to the evidence and on the other hand, intervention in counsel's closing submissions for the purpose of testing them: (and see per Jonathan Parker LJ at paragraph 145 in *Southwark LBC v Kofi-Adu* [2006] EWCA Civ 281).
>
> 224. The Judge's role as to the evidence is to seek to ensure that admissible evidence is put forward, elicited and tested by the parties in accordance with the rules: the Judge is, as it were, the recipient and should be careful not to become involved in that process further than is necessary to ensure compliance with the rules.
>
> 225. By contrast, closing submissions offer the appropriate opportunity not only for Counsel to put forward their case on the evidence as it has emerged, but for Counsel to be tested by the Judge to enable him or her fully to understand the case as presented and to identify any weaknesses in it as a preliminary to writing a judgment. In the latter context, intervention is both appropriate and common-place: and fairly critical and dogged questioning is neither unusual nor improper. The provisional view of the Judge may now be apparent, or even expressed: but that is not of itself objectionable, the trial, having in effect, entered the adjudication stage. Of course, even at such a stage a judge may exhibit or give the appearance of some pre-existing bias: but a provisional view before judgment is to be distinguished from that. Nor, without more (and the additional feature would have to be fairly striking), is the fact that a judge is markedly more interventionist in one side's case than the other any indication of bias.

18. In a case before the registry where there is only documentary evidence which the Hearing Officer has read and considered, the hearing itself is part of the "adjudication stage" using Hildyard J's phrase (which was also adopted in *Serafin,* paragraph 43). Thus, by the time of the hearing, the Hearing Officer may have quite properly formed a provisional view of that evidence and the merits of the case.

19. In *Re G (A Child)* [2015] EWCA Civ 834, paragraph 31, Black LJ discussed the difficulty a judge might have conducting a trial, and her observations can apply equally to a hearing before the registry:

> Managing a trial can be challenging, even for an experienced judge, and it is sometimes necessary to react without much time for refined consideration. Generous allowance always has to be made for this and also for the fact that, even with counsel's help, it is very difficult to tell from a transcript, or even from listening to a recording, precisely what was going on at all stages during the hearing. Furthermore, different judges have different styles and counsel and litigants can usually be expected to cope with the talkative, the uncommunicative, the robust, and even the irritated judge, provided the judge's behaviour does not stray outside acceptable limits

20. Black LJ continued at paragraph 38:

> [Nor is] the fairness of a hearing… dependent on a comparison between the way in which the judge has treated the two sides. If one party has been treated in such a way as to disable him or her from advancing his or her case properly, the hearing is not rendered fair by the fact that the other party has been treated equally unfairly.

21. 3ET alleges that the Hearing Officer's apparent bias was demonstrated in three ways. The first was his approach to questioning 3ET's Counsel (Mr Keay) during the hearing, the second the Hearing Officer's refusal to admit additional evidence, and the third his assessment of the evidence.

The Hearing

22. Mr Wilson submits that the Hearing Officer's conduct during the hearing gave rise to apparent bias. It is clear from the transcript that the Hearing Officer questioned and interrupted Mr Keay repeatedly throughout his submissions whereas Mr Ivison received only a few comments and questions. An imbalance in questioning during the two parties' respective submissions does not in itself suggest any unfairness; indeed, fairness may sometimes require significantly more questions to be addressed to one party than the other. The question is whether it was appropriate to ask a disproportionate number of questions of Mr Keay. To answer this it is necessary to reiterate the matters in issue.

23. It was accepted by both parties that Paintcraft had sold mats using the mark before the relevant date. It was also acknowledged these sales would generate goodwill in the mark. It was disputed who owned this goodwill. It was 3ET's case that a distribution agreement existed which meant it owned the goodwill arising from Paintcraft's sales of the mat and further, or alternatively, that Speedings had traded using the mark EvacMAT before Paintcraft began using it.

24. Mr Keay acknowledged that while the legal burden ultimately fell on the applicant for a declaration of invalidity, once Paintcraft had established there was goodwill in the

mark it fell to 3ET to prove it belonged to them. Therefore, all the work fell to 3ET. As Hildyard J explained in *M&P Enterprises,* a judge asks questions during submissions to "test" a party's case and any preliminary view formed. If, after properly considering the evidence, the Hearing Officer had formed a preliminary view that 3ET had not made out its case then the Appellant should have expected more questions and interruptions as the Hearing Officer developed his understanding of its position. In short, the number of interventions by the Hearing Officer alone is not sufficient for the fair-minded and informed observer to consider that he was biased against 3ET. Indeed, that observer would probably take the contrary view that the Hearing Officer was giving 3ET every opportunity to make its case.

25. Turning from the quantity to the quality of those interventions. It is clear from the transcript that the Hearing Officer was exasperated with Mr Keay's submissions at times. There was a long exchange regarding the quality of 3ET's evidence. This covered issues such as the admissibility of Ms Hayward's witness statement (which had been exhibited to Mr Wilson rather than filed as a witness statement) and the extent to which Mr Wilson could give evidence on behalf of Speedings (as he was not an officer or director of the company).

26. I do not intend to investigate the merits of these issues. Tribunals and courts get the law wrong sometimes, which is why we have appeals, so even if the Hearing Officer was wrong about the law (and I am not saying he was) this would not suggest any degree of bias to the fair-minded and informed observer. The question is whether his interventions were fair and allowed 3ET to put its case.

27. There were moments where the Hearing Officer became emphatic in his comments, a particular exchange demonstrates the height of the Hearing Officer's frustration (page 28 of the Transcript):

> THE HEARING OFFICER: So you do not think that at that point when they allowed Paintcraft to — let us say that they allowed it, you do not think that that was acquiescence in Paintcraft using their mark at the very least?
>
> MR KEAY: It is not acquiescence. It is a licence. They are granting them permission—
>
> THE HEARING OFFICER: Where is the licence?
>
> MR KEAY: A licence does not have to—
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> THE HEARING OFFICER: Where is the grant—
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> MR KEAY: A licence does not have to be in writing. It is permission.
>
> THE HEARING OFFICER: Good Lord! It does if you want to try and claim you have a licence.
>
> MR KEAY: But that is just wrong. That is—
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> THE HEARING OFFICER: If you want to walk into a court Mr Keay, and say, "Do you know what, we licensed them to use that product", the first question is where is the licence. "Oh, we claim we have got one."

> MR KEAY: A licence in law amounts to permission to use a right which would otherwise be unlawful. That is all the licence is.
>
> THE HEARING OFFICER: Yes. Once I say that you did not, that it was just transferred and you say you did, again, without any corroboration, seriously as a lawyer you would advise a client, "I tell you what, let's license them to use our product and we will not produce one scrap of paper, we will not make a single note at the time of what has gone on, who we spoke to, what happened, we will just do it"?
>
> MR KEAY: I am not saying that for a moment. The evidence is what it is. I am not saying that this is what would—
>
> THE HEARING OFFICER: I will grant you you are fighting with one hand tied behind your back because of the evidence. I will grant you that, and I am not trying to get funny with you at all. I appreciate you are trying your damndest to deal with a complete absence of corroboration. Come on, Mr. Keay, let us be reasonable, why would I accept that there was one?

28. This sort of exchange continued for another page of the transcript, but the extract sets the flavour fully enough. Putting it neutrally, it is clear the Hearing Officer was doubtful that the evidence provided by 3ET was sufficient to establish the existence of a licence (or distribution agreement). The transcript demonstrates his view very clearly, and at times, his frustration is evident. However, did such frustration lead to 3ET getting an unfair hearing; in particular, did it stop it putting its case? As the Supreme Court said in *Serafin* at paragraph 46:

> Training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case.

29. The questions put to Mr Keay may have been a little fractious at times, but at no point does the transcript suggest Mr Keay felt inhibited in making his submissions. Indeed, as the Appellant's submissions relating to the section 5(4)(a) were ending, the Hearing Officer prompted Mr Keay to highlight any evidence of turnover he missed which would have helped 3ET (Transcript, p 31) indicating his mind was still open. Overall, I can see nothing on the transcript which would suggest to the fair-minded and informed observer that the Hearing Officer was biased against 3ET.

The admission of new evidence

30. At the start of the hearing before the Hearing Officer, 3ET applied to admit new evidence. The evidence was a series of invoices covering the sale of eight mats by Speedings between 2011 to 2015.

31. Mr Wilson says that that one side having two "lots" of evidence and the other side only one was contrary to natural justice and so unfair. This is a simplification of what happened. The question was not whether the Hearing Officer had the power to admit more evidence from Mr Wilson, he clearly did (see Trade Marks Rules 2008, r 20(4)); rather, the issue the Hearing Officer had to decide was whether it was fair to Paintcraft to do so very late (ie a couple of working days before the hearing).

32. The Hearing Officer rightly identified the factors relevant to whether to admit late evidence as those from *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel)* [2016] EWHC 3103 (Ch). He went on to give his reasons for refusing the application in paragraph 14 of his Decision:

> …However, these documents have been provided by Mr Wilson, who is not an officer of the company and without an explanation of how or where he obtained the documents. There is an obvious question mark over their validity in the absence of any such explanation. Further, given the dates on the documents there is no reason why these could not have been supplied either with the original witness statement of the Director of Speedings or at any point in the intervening months since PL's evidence pointed out the lack of corroboration of the claim that Speedings Ltd were the senior users. The invoices themselves do not show what, if any label, was upon the goods. As Mr Ivison points out, it could have been sold with the label produced for PL and bearing their details and MHRA number…

33. These were all good reasons for rejecting the late admission of the evidence. In any event, the small number of sales and the absence of evidence that the sales were under the mark EvacMAT means even if the invoices were admitted they probably would not have taken matters further. I can see nothing in the way the Hearing Officer dealt with this application which would suggest to the fair-minded and informed observer that he was biased.

The judgment

34. Mr Wilson alleges the bias in the judgment was evidenced by improper "inference", he explained it thus (Appeal transcript, p 3):

> The point of the appeal is that, without the inference used by Mr. Salthouse to bolster and add to the Paintcraft evidence, the accusation of bad faith and passing off could not have been reasonably and fairly upheld.

35. At the outset it is entirely proper, and normal, for a fact finder to make inferences from evidence. It is the very nature of circumstantial evidence as the definition in *Jowitt's Dictionary of English Law* (5th Ed) makes clear:

> **Circumstantial Evidence**
> An indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact…

36. While police dramas might lament there being only circumstantial evidence to prove a case, many criminal convictions (with the much higher standard of proof) are founded on nothing more. It is the very duty of a tribunal to make inferences from the evidence that exists to make any factual determinations.

37. Mr Wilson goes on to suggest that the Hearing Officer's summary of evidence, particularly of 3ET's evidence, was all "negative interpretations" and "misrepresentations". There is no basis in this criticism whatsoever. The Hearing Officer summarised the evidence of both sides setting out the strengths and weaknesses as he saw them. I will not go through all of Mr Wilson's criticisms in detail as many turn on the use of words by the Hearing Officer which Mr Wilson sees as derogatory or otherwise improper, such as "he appears" and "he claims". These are common phrases used by tribunals and courts at all levels to distinguish what a witness says from a finding of fact by the court. It cannot suggest bias.

38. Mr Wilson also complains that the Hearing Officer disregarded Exhibit 3ET-6 (a Company Profile for Speedings). The Hearing Officer acknowledges that the document was prepared for the Hearing, but quite rightly points out it is unsigned. Mr Wilson's Witness Statement simply introduces the exhibit with the following statement:

> The full history of how the product "Bariatric EvacMat" was developed and supplied to the healthcare sector, is described in detail in Exhibits 3ET-6, 7, 8, 9 &4.

39. Accordingly, it is not clear what use the Hearing Officer could make of a document which makes a lot of factual assertions without any provenance or any proper introduction in the witness statement. Neither this nor any of the other points raised by Mr Wilson relating to the Hearing Officer's summary of evidence could suggest to the fair-minded and informed observer that the Hearing Officer was biased.

40. I will turn to the two key issues before the Hearing Officer which were central to 3ET's case and on which Mr Wilson says the eventual findings against 3ET appear unfair. The first issue was whether Speedings was the senior user and the second whether there was a distribution agreement.

Senior user

41. The Hearing Officer acknowledged that Mr Hammal and Mr Wilson had asserted that Speedings sold a product called a Bariatric EvacMAT to the emergency services from 2011 onwards (Decision, paragraph 22). He goes on to point out that Paintcraft disputed this fact and provided evidence demonstrating that the mark was not used on Speedings' website between 2011-2019 (Decision, paragraph 23).

42. Mr Wilson's objection, put simply, is that respectable company directors have given evidence the mark was used and that should be enough, and not accepting this evidence appears biased. At first blush, this might appear to be saying that fact finding should return to a form of compurgation. However, the situation is more complicated.

43. Mr Keay submitted below that Mr Hammal and Mr Wilson had said the product was sold and as this was not challenged by Paintcraft it should be accepted as proven. The Hearing Officer referred to the decision of Richard Arnold QC, as he then was, in *Extreme* (O/161/07), paragraph 36 of which is particularly relevant:

> Where, however, evidence is given in a witness statement filed on behalf of a party to registry proceedings which is not obviously incredible and the opposing party has neither given the witness advance notice that his evidence is to be challenged nor challenged his evidence in cross-examination nor adduced evidence to contradict the witness's evidence despite having had the opportunity to do so, then I consider that the rule in Brown v Dunn applies and it is not open to the opposing party to invite the tribunal to disbelieve the witness's evidence.

44. As the Hearing Officer noted, Paintcraft did comment on the assertion (denying it) and went further by providing evidence, which it said supported the fact Speedings had not used the mark on its website (see Decision, paragraph 23), which in turn 3ET did *not* challenge (and so the Hearing Officer had to accept there was no web based use).

45. Mr Wilson criticises the Hearing Officer for suggesting that Mr Wilson was "hardly an independent witness" when weighing his evidence (see Decision, paragraph 24). This

is an entirely fair statement. Mr Wilson is a director of 3ET and therefore has a direct interest in 3ET's mark not being invalidated. The Hearing Officer acted entirely properly and fairly when he went on to consider the weight that should be given to the evidence of an interested party. As the evidence of Speedings' use was challenged, the Hearing Officer had to go on to weigh the evidence to make factual findings (see Decision, paragraph 24). He set out his reasoning for making the decision he did and there is nothing he said which a fair-minded and informed observer would see as biased or otherwise unfair.

46. In any event, establishing a person as a senior user of a mark requires more than just sales under that mark. The sales need to be sufficient to generate protectable goodwill: there is a threshold requirement. Some form of extrinsic evidence is necessary to establish this threshold has been crossed, such as invoices or sales figures. Saying a mark has been used on a product in a particular sector with little more cannot enable such an assessment to be made (as it does not answer the question as to whether there has been enough use). It was accepted by 3ET before the Hearing Officer that no documentary evidence of sales had been filed. This being the case the Hearing Officer's findings were entirely logical and followed the (lack of) evidence. They in no way suggest bias or unfairness in his approach.

Distribution agreement

47. 3ET's case is that there was a distribution agreement which started in 2011 and continued in effect thereafter. There are two relevant periods that need to be considered. The first period is between the end of 2011 and 2014 during which time Speedings made and sold mats to Paintcraft, and the second period starts when Paintcraft began manufacturing mats in-house in 2014.

48. The distribution agreement according to 3ET was agreed by Mr Wilson, on behalf of Speedings, and by Ms Hayward, on behalf of Paintcraft. On appeal, Mr Wilson says the terms were that in exchange for the rights to make and sell the mats under the EvacMAT mark a £10 royalty for each unit sold was agreed to be paid by Paintcraft to Ms Hayward (an employee of Paintcraft). Mr Wilson accepts that there was no payment from Paintcraft to Speedings.

49. Philip Faulkner, a director of Paintcraft, in his Witness Statement of 18 March 2019 (paragraph 30) categorically denies any "distribution arrangement, licence, agreement or any other firm of any similar contract" has ever been in existence.

50. Mr Wilson accepts that such a distribution agreement is extraordinary. However, as before, he says three respectable directors say it exists and that should be sufficient and that the Hearing Officer finding otherwise appears to be bias.

51. While Mr Wilson and Mr Hammal both refer to distribution rights, it is only Ms Hayward who mentions the time or terms when these rights were said to have been agreed. However, I am not sure the statement from Ms Hayward (Exhibited at 3-ET4) actually supports Mr Wilson's account, in which she says:

> …At the end of 2011, I presented the Bariatric EvacMat to the Directors of Hospital Aids/Spectrum Healthcare for the first time, I can recall that it was very well received.
>
> Following on from this first presentation of the Bariatric EvacMat to the Directors of Hospital Aids/Spectrum Healthcare, I informed Gary Wilson of its success, he suggested getting Mr Rob. Hammal (MD of Speedings Ltd), to agree to distribution rights for Hospital Aids/Spectrum Healthcare in the healthcare sector I worked in. Gary got the Speedings approval for me to take back to the Directors of Hospital Aids/Spectrum Healthcare, I arranged a meeting with the principle Director, Mr Brian Thompson, at this meeting on informed him that I had secured distribution rights for us in the healthcare sector, he agreed to pay me a commission of £10.00 for every Bariatric EvacMat sold by the company…

52. In relation to the £10.00 payment (which Ms Hayward calls a commission, not a royalty), Ms Hayward says this was proposed by Mr Thompson after the distribution rights had been secured. On Ms Hayward's account, therefore, that £10.00 payment was agreed after the event and so could not be a term of the agreement.

The first period

53. A particular problem for 3ET is any agreement reached in 2011 would have related to the circumstances which were expected to exist at that time; that is, Speedings making a product for Paintcraft to sell. This involved, 3ET says, the mark EvacMAT being applied to the mats by Speedings with Paintcraft merely selling Speedings' product under Speedings' mark. Mr Wilson says therefore the goodwill from those sales would go to Speedings because customers would see it as the origin of the product and not Paintcraft.

54. This is problematic for at least two reasons. First, in the normal course of things it would be unusual for a distribution agreement to have royalty payments (even if this were agreed separately) where a completed product is sold to distributors. The sale price would include the value of any brand and any intellectual property right. Secondly, Speedings was affixing labels on the mats which included the mark EvacMAT, the mark Hospital Aids, and the MHRA number of Paintcraft. There was no Speedings mark on the labels at all. This makes the Hearing Officer's conclusion at paragraph 25 logical:

> …Any products sold by PL [Paintcraft] during the time that they were supplied by Speedings Ltd, could only have accrued goodwill to PL as there was no indication anywhere on the product, as far as the evidence shows, that Speedings Ltd were in any way connected with the product…

Second period

55. In the second period the manufacture and labelling was by Paintcraft itself. The above statement holds equally true as there was nothing on the packaging suggesting Speedings was connected to the product. In both instances, the agreement would only be effective if the goodwill was assigned in gross in the mark EvacMAT. Any distribution agreement agreed in 2011, without any amendments, would have to be flexible enough to cover a quite different situation when in 2014 Speedings stopped selling the product to Paintcraft and could no longer recover anything from the sale of mats themselves.

56. 3ET faces difficulties not only from the fact the distribution agreement would need to have complex terms to cover events both before and after 2014 but also because "distribution rights" is not a term of art with a clear legal meaning. Thus, even if the Hearing Officer had accepted that there was such an agreement, it fell to 3ET to provide evidence as to the terms of that agreement and, in particular, evidence that a term of the agreement required all goodwill generated from the sale of the mats to transfer from Paintcraft to 3ET. There was no evidence at all to this effect. This cannot be overcome by the fact Mr Wilson asserts emphatically what those terms were in his submissions on appeal.

57. For completeness sake, there is uncertainty whether a distribution agreement whereby goodwill created by Paintcraft from selling the EvacMAT vests in Speedings would be effective. This is because the common law rule is that goodwill cannot be assigned in gross (that is without the underlying business) without causing deception: *Pinto v Badman* (1981) 8 RPC 181, CA; and see generally Wadlow, *The Law of Passing Off* (5th Ed 2016), par 3-195 to 3-198.

58. Considering these underlying difficulties with 3ET's evidence there was no possible way the Hearing Officer could have found that a distribution agreement existed which vested the goodwill Paintcraft generated in 3ET. While the Hearing Office did not pick up these additional points, his summary of his findings and reasoning seem balanced and no fair-minded and informed observer would consider them otherwise.

Bad faith

59. 3ET suggests that Paintcraft had not particularised the allegation of bad faith as required so it was unfair to allow it to proceed. However, the allegation was properly particularised in the right box on Form TM 26(I) in the following way:

> The Registrant worked with the Applicant for Cancellation and became aware the Applicant for Cancellation's trade mark EvacMat.
>
> The Registrant stopped working with the Applicant for Cancellation and shortly thereafter applied for a registration of the mark EvacMAT in full knowledge that this mark was owned by the Applicant for Cancellation.

60. Mr Wilson also suggests that there was apparent bias in the Hearing Officer's substantive findings on bad faith. Other than a general point about the Hearing Officer making unfair inferences, Mr Wilson alleges the Hearing Officer inserted a paragraph in his decision to fit the outcome of the case he was seeking. In other words, he implies that the Hearing Officer was inventing facts. The relevant part of the Decision is at paragraph 45:

> It seems clear that Mr Wilson believes that having been instrumental in designing and developing the product and having had, at least a hand, in naming the product, that he had some kind of rights to the name and design. Having worked for both Speedings Ltd and PL as a consultant he was paid by those companies for his services and any rights associated to the goods or the mark belonged to those companies and not to him personally. Mr Wilson's behaviour and letters have been far from exemplary but some of the comments in the evidence of PL have also fallen short of calm professionalism. Clearly, 3ET was aware of the use of the mark Bariatric EvacMat on stretchers / mats to evacuate obese individuals by PL over a number of years. Given the details on the label that he personally arranged to have printed by Quazar

> International Ltd it should have been obvious to him that no goodwill could accrue to Speedings Ltd as they were not named on the label and so no purchaser would have been aware even of the existence of Speedings Ltd. His initial letters to PL clearly indicate that Mr Wilson / 3ET were fully aware that PL had a goodwill in their mark yet he still decided to seek a registration, and having achieved this sought to prevent PL from continuing to use its mark. To my mind, this is the very essence of bad faith.

61. Mr Wilson submits that the finding by the Hearing Officer, that as a consultant, the rights in the design and name belong to Speedings not Mr Wilson, was improper (as was the suggestion that Paintcraft were paying him for his work). 3ET says there was no evidence of a consultancy agreement and so the Hearing Officer was making unfair inferences. In the absence of any agreement to the contrary (and there was no evidence of such an agreement), ownership of the rights in get-up or marks would be determined under the usual rule. The Hearing Officer was simply applying the normal rule to the mark and get-up (I am assuming that "any rights associated to the goods" is a reference to get-up and not design rights as these were not the subject of the proceedings).

62. Furthermore, in the usual course of things, a consultant would be paid for their work and (even if this were not the case) it was a reasonable thing for a person to assume. Further, whether there was payment or not was irrelevant to anything being determined. Accordingly, Mr Wilson's suggestion that the Hearing Officer was "inventing evidence" is entirely without basis. Nothing 3ET has put forward would suggest to a fair-minded and informed observer there was any bias or unfairness on the part of the Hearing Officer in reaching the conclusions he did on the issue of bad faith.

Conclusion

63. Overall, the reason 3ET lost was because it did not file the right sort of evidence; whether this was because no such evidence existed or otherwise is immaterial. This failing meant the Hearing Officer was critical of 3ET both during the hearing and in his decision. Nevertheless, his criticisms reflect either genuine weaknesses in 3ET's case, or at the very least, weaknesses which a fair-minded and informed observer would believe the Hearing Officer perceived. Accordingly, even with his moments of frustration, there was no evidence of actual or perceived bias on the part of the Hearing Officer.

64. I accordingly dismiss the appeal in its entirety. I order 3ET to pay Paintcraft the sim of £1,500 as a contribution to its costs arising from the appeal.

PHILLIP JOHNSON
APPOINTED PERSON
27 JULY 2020

Representation:

For the Appellant: Mr Gary Wilson (director of 3ET)

For the Respondent: Mr David Ivison (instructed by Dollymores)