

**O/027/22**

**TRADE MARKS ACT 1994**

**TRADE MARK APPLICATION No. 3435234**

**BY SEATED TECHNOLOGIES, INC.**

**AND**

**OPPOSITION No. 419740**

**BY SEATED, INC.**

## **Background and pleadings**

1. This an opposition by Seated, Inc. (“the opponent”) to an application filed on 9<sup>th</sup> October 2019 (“the relevant date”) by Seated Technologies, Inc. (“the applicant”) to register seated as a trade mark in classes 9, 35, 41, 42 & 43.

2. The goods/services for which registration of the mark is sought are shown below.

Class 9: Downloadable applications for mobile phones and tablets for making reservations and booking of seats and spaces at restaurants, bars, hotels, hospitality establishments and at entertainment, sporting, culinary and cultural events; downloadable applications for mobile phones and tablets for providing information in the field of reservations and booking of seats and spaces at restaurants, bars, hotels, hospitality establishments and at entertainment, sporting, culinary and cultural events; downloadable applications for mobile phones and tablets for providing information in the field of restaurants, bars, hotels, hospitality establishments and at entertainment, sporting, culinary and cultural events; downloadable applications for mobile phones and tablets for providing reviews and ratings of restaurants, bars, hotels, hospitality establishments and at entertainment, sporting, culinary and cultural events.

Class 35: Administration of a consumer loyalty program to promote the goods and services of others; administration of a consumer loyalty program to reward consumers for using and participating in the restaurants, bars, hotels, hospitality establishments and entertainment, sporting, culinary and cultural events of others; advertising the goods and services of others; providing online business directories featuring restaurants, bars, hotels, hospitality establishments and entertainment, sporting, culinary and cultural events.

Class 41: Entertainment ticket agency services; providing services for making reservations and booking of seats and spaces at entertainment, sporting, culinary and cultural events; providing information in the field of reservations and booking of seats and spaces at entertainment, sporting, culinary and cultural events.

Class 42: Providing online software for making reservations and booking of seats and spaces at restaurants, bars, hotels, hospitality establishments and at entertainment, sporting, culinary and cultural events; providing online information in the field of reservations and booking of seats and spaces at entertainment, sporting, culinary and cultural events; providing online reviews and ratings in the field of reservations and booking of seats and spaces at entertainment, sporting, culinary and cultural events.

Class 43: Providing services for making reservations and booking of seats and spaces at restaurants, bars, hotels, hospitality establishments; providing information in the field of reservations and booking of seats and spaces at restaurants, bars, hotels and hospitality establishments; providing online information in the field of restaurants, bars, hotels and hospitality establishments; providing online reviews and ratings of restaurants, bars, hotels and hospitality establishments.

3. The opponent claims to have an earlier unregistered right to **SEATED** in the UK as a result of the use of that mark since at least April 2017 in relation to:

Computer software and mobile device software for personal computers, laptops, tablets, mobile phones, and other devices for on line ticketing services and making ticket sales for entertainment events including musical events, musical concerts, live shows and tours; software for providing pricing and information about entertainment events including musical events, musical concerts, live shows and tours; computer software and mobile device software for managing, sharing, storing or otherwise providing electronic information over the internet or other communications network.

Printed tickets for musical events, musical concerts, live shows, tours, artists and performers.

Promotion services for venues and live entertainment events for others including musical events, musical concerts, live shows, tours, artists and performers; promotion services for venues and live entertainment events for others including musical events, musical concerts, live shows, tours, artists and performers through advertising and marketing in print, digital and mobile mediums; advertising and marketing services; advertising and marketing services, namely, promoting the goods and services of others; entertainment marketing services, including, marketing, promotion and advertising for musical events, musical concerts, live shows, tours, artists and performers.

Accepting, processing and reconciling credit card, debit card and other forms of payment transactions on line; financial transaction services, namely, providing secure commercial transactions and processing payments.

Arranging for ticket reservations for events, including musical events, musical concerts, live shows, tours, artists and performers; ticket reservation services for events, including musical events, musical concerts, live shows, tours, artists and performers; ticket reservation services for events, including musical events, musical concerts, live shows, tours, artists and performers, all provided via a website and mobile device, software and technology; ticket agency services for entertainment, including musical events, musical

concerts, live shows, tours, artists, performers and entertainment experiences; ticket agency services for entertainment, including musical events, musical concerts, live shows, tours, artists and performers, via telephone, online and mobile apps, websites and offline ticket outlets and entertainment experiences; ticket agency services for entertainment, including musical events, musical concerts, live shows, tours, artists and performers rendered online, through phone orders and through ticket outlets.

Providing information on entertainment services; tickets sales information services for entertainment, including musical events, musical concerts, live shows, tours, artists and performers; tickets sales information services for entertainment, including musical events, musical concerts, live shows, tours, artists and performers rendered online, through phone orders and through ticket outlets.

Providing temporary use of a web-based, non-downloadable software application for selling and buying tickets and making reservations for entertainment events, including musical events, musical concerts, live shows, tours, artists and performers; online non-downloadable system for searching and purchasing tickets for entertainment events, including musical events, musical concerts, live shows, tours, artists and performers.

4. The opponent claims to have acquired a valuable goodwill in the UK under **SEATED** prior to the relevant date. According to the opponent, use of the contested mark would constitute a misrepresentation to the public and result in damage to the goodwill of the opponent's business. Consequently, use of the contested mark would constitute passing off. Therefore, the applicant's application should be refused under section 5(4)(a) of the Trade Marks Act 1994 ("the Act").

5. The opponent further claims that the application was made in bad faith and should therefore be refused under section 3(6) of the Act.

6. The applicant filed a counterstatement denying the grounds of opposition and putting the opponent to proof of its claims that (a) it had established an actionable goodwill in the UK by the relevant date, and (b) the application was filed in bad faith.

7. Both sides seek a contribution towards their costs.

## **The evidence**

8. The opponent's evidence consists of witness statements by Mr David McKay, who is the Chief Executive Officer and co-founder of Seated, Inc., a role he has held since its incorporation in January 2017. The main purpose of Mr McKay's evidence is to show that the opponent has established goodwill in the UK. He also provides information about a dispute between the parties in the USA.

9. The applicant's evidence consists of a witness statements by Mr Bo Peabody, the Co-Founder and current Executive Chairman of Seated Technologies, Inc. and Mr Alan Hudson, the General Partner of GMG Ventures LLP, which is an investor in the applicant company. The main purpose of their evidence is to throw light on the applicant's plans to use SEATED in the UK.

## **Representation**

10. The applicant is represented by Fieldfisher LLP. The opponent is represented by Albright IP Limited. A hearing was held remotely on 10<sup>th</sup> November 2021 at which Mr Jamie Muir Wood appeared as counsel for the opponent. The applicant was represented by Mr Leighton Cassidy of Fieldfisher.

## **The section 5(4)(a) ground**

11. Section 5(4)(a) states:

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

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

*(aa) [...]*

*(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.”*

Subsection (4A) of Section 5 states:

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

12. There is no evidence that the applicant used the contested mark in the UK before the date it filed the application for registration. Consequently, 9<sup>th</sup> October 2019 is the (only) relevant date for assessing whether use of the contested mark would have amounted to passing off.

### Goodwill

13. Counsel for the opponent submitted that whilst the goods and services relied upon by the opponent appear lengthy, they can be summarised as software for and services associated with ticketing for entertainment events. I understand services “associated with ticketing for entertainment events” to include promotional services for events for which third parties sell tickets.

14. In *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*<sup>1</sup> Lord Neuberger (with whom the rest of Supreme Court agreed) said (at paragraph 47 of the judgment):

*“I consider that we should reaffirm that the law is that a claimant in a passing off claim must establish that it has actual goodwill in this jurisdiction, and that such goodwill involves the presence of clients or customers in the jurisdiction for the products or services in question. And, where the claimant's business is abroad, people who are in the jurisdiction, but who are not customers of the claimant in the jurisdiction, will not do, even if they are customers of the claimant when they go abroad.”*

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<sup>1</sup> [2015] UKSC 31

And later said, at paragraph 52:

*“As to what amounts to a sufficient business to amount to goodwill, it seems clear that mere reputation is not enough, as the cases cited in paras 21-26 and 32-36 above establish. The claimant must show that it has a significant goodwill, in the form of customers, in the jurisdiction, but it is not necessary that the claimant actually has an establishment or office in this country. In order to establish goodwill, the claimant must have customers within the jurisdiction, as opposed to people in the jurisdiction who happen to be customers elsewhere. Thus, where the claimant's business is carried on abroad, it is not enough for a claimant to show that there are people in this jurisdiction who happen to be its customers when they are abroad. However, it could be enough if the claimant could show that there were people in this jurisdiction who, by booking with, or purchasing from, an entity in this country, obtained the right to receive the claimant's service abroad. And, in such a case, the entity need not be a part or branch of the claimant: it can be someone acting for or on behalf of the claimant.”*

13. The requirement to have customers in the UK means that it is not sufficient for the opponent to show that it has provided services to customers in the USA (or elsewhere in the world) for events held in the UK. On the other hand, showing that the opponent has customers in the UK for events held elsewhere may be relevant, if the opponent can show that those people became customers in this jurisdiction rather than whilst abroad.

14. The opponent's evidence in support of its claim to have established goodwill in the UK by the relevant date falls into the following categories:

- (1) Promotion of entertainment events via the seated.com website since 2017;
- (2) Sales of tickets in the UK via that website starting in December 2017 for events in the USA;
- (3) The acquisition of the website seated.co.uk in January 2018, which redirects traffic to the opponent's seated.com website;

- (4) Sales of tickets for UK-based events via the seated.com website starting in January 2019;
- (5) Sales of tickets by third party ticket providers Ticketmaster and See Tickets which resulted from onward links provided to users of the opponent's website.

15. Mr McKay's evidence is that the opponent established the seated.com website in 2017. By the relevant date, the opponent had acquired eight other domain names including the word 'seated', one of which is seated.co.uk. Mr McKay says that by 2020 the opponent's platform had 800k registered users in the USA. His evidence is that the opponent first sold a ticket for an event in the USA to a customer based in the UK in November 2017. Mr McKay provides pages from the website dashboard.stripe.com. These pages appear to confirm the sale of a ticket to someone using a computer with a UK IP number. This was in connection with a musical event held in Denver in December 2017.<sup>2</sup>

16. Mr McKay goes on to explain that:

*"In November 2017 artists began to promote their United Kingdom events via my Company's Seated platform, even when we were not the seller of these tickets. This means fans were getting notified by Seated about artists' events in the United Kingdom, whilst tickets are sold on different platforms, such as Ticketmaster and See Tickets. Artists often use Seated to publish their United Kingdom events to their website, to Facebook, and to capture fan sign-ups for those events. This is very valuable promotion for my Company's Trade Mark on artists' websites and social media platforms. Exhibit DM11 contains a list of major UK events promoted on Seated since 16 November 2017 until the filing date of the opposed UK Trade Mark Application and screenshots of artists using our "powered by seated" promotions in the United Kingdom dating back to 2018."*

17. According to Mr McKay, there were "at least 12,939 registered customers" in the UK by the relevant date. Exhibit DM11 consists of a list of over 500 entertainment

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<sup>2</sup> See exhibit DM12



events held in the UK between 16<sup>th</sup> November 2017 and the relevant date, which Mr McKay says were promoted via the seated.com platform.<sup>3</sup> I pause here to note that (a) there is no evidence showing how “*fans were getting notified by Seated about artists’ events in the United Kingdom*”, other than from looking at these listings on the opponent’s website, and (b) there are no examples in evidence of anyone being proactively notified about upcoming events.

18. Mr McKay’s evidence is that traffic from the seated.co.uk website is re-directed to the seated.com website. He says that between 1<sup>st</sup> January 2018 and 8<sup>th</sup> October 2019 765,973 users from the UK visited the opponent’s event listings and 102,096 visited the seated.com website. The distinction between visiting the opponent’s event listings and visiting the opponent’s seated.com website is not explained. There is no evidence as to how many of these users arrived at the seated.com website after being re-directed from the UK website (as opposed to landing directly at the seated.com website). Exhibit DM7 is said to include a “*web analytics summary*” for seated.com covering the period in question. It is not clear where this information has come from. The page concerned does not even mention seated.com. There is an entry on the page indicating that it relates to “*All accounts & Seated Tour Widget.*” The analytics page shows there were over 10m users from the USA and 765,973 UK users. It also shows there was a ‘bounce rate’ of 62% amongst UK users and the average session length was 49 seconds. This suggests that the majority of UK visitors immediately left the website(s) again, and a large proportion did not stay on the website(s) very long.

19. There are five examples in exhibit DM11 showing advertisements for tickets for two UK musical events held in 2018, and three others held shortly after the relevant date. However, these pages are from the artists’ own sites, not from seated.com. This may be what Mr McKay is referring to when he says that artists “*use Seated to publish their United Kingdom events to their website etc*”. Mr McKay draws attention to the statement ‘powered by seated’, which appears on each of these pages next to, or below, the ticket purchase options. Nowhere in the evidence is the meaning of ‘powered by seated’ clearly explained.

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<sup>3</sup> Exhibit DM10 includes 8 examples of seated.com being mentioned on social media sites and third party websites as the source of tickets for events in the USA, and one page from the go.seated.com website through which tickets could be requested for an event in the USA.

20. Mr McKay states that “...in January 2019 my company began to sell tickets in the United Kingdom directly via our Seated platform. Tickets were sold for the first United Kingdom events on 16 January 2019 for events by the artist PUP.” The tickets concerned were for four dates on a tour of the UK and Europe by the Canadian band PUP. Mr McKay provides a copy of a page from (an unidentified) social media site promoting PUP’s UK/EUROPE tour.<sup>4</sup> The promotion contains no reference to tickets being available from the seated.com website. Examples of what appear to be internal sales records are also in evidence for tickets sold for individual events on the PUP tour, and for five subsequent events by different artists prior to the relevant date.<sup>5</sup> They collectively cover 19 sales totalling around £1150 worth of tickets. I note that in each case the words “no address” appear in the place designated for the customer’s address. There are no copies of communications in evidence, such as invoices or emails, to, or from, customers showing use of the SEATED mark in connection with these ticket sales. However, I note that the customers concerned are recorded as having paid for their tickets in GBP and from UK based accounts, suggesting that they were UK residents.

21. Mr McKay says that the sales shown in these records are only examples of sales of tickets via the seated platform between January 2019 and the relevant date. He provides financial figures showing the value in GBP of orders placed for events in the UK held between January 2019 and September 2019. Such orders could, of course, have been placed by customers in the USA who are not relevant for the purpose of the opponent’s claim to have established goodwill in the UK. I will therefore focus on the weight to be attached to Mr McKay’s further evidence that 1669 orders were placed by UK customers via the seated.com platform between January and October 2019, i.e. around the relevant date. He says these orders were worth around £72k. On my reading of his evidence, this figure could include orders placed by UK customers for tickets for events held in Europe or the USA, as well as for UK based events. However, as noted earlier, such sales may still be relevant if they were made under the sign SEATED and show more than that “..there are people in this jurisdiction who happen to be [the opponent’s] customers when they are abroad.”

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<sup>4</sup> See exhibit DM13

<sup>5</sup> See exhibit DM13

22. As noted above, the opponent also relies on the “*transactional value*” of ticket sales made to UK customers by Ticketmaster and See Tickets. This is as a result of what Mr McKay calls “*referrals*” from the seated platform. Between February 2019 and October 2019 these “*sales*” amounted to around £53k (Ticketmaster) and £32k (See Tickets). There is no evidence that the opponent received a commission on these referrals. I do not see how people who thought they were purchasing tickets from Ticketmaster or See Tickets can be regarded as customers of the opponent for ticket agency services. I accept that, if properly established, the provision of commercial information about UK entertainment events leading to ticket sales by another provider could provide a basis for claiming goodwill in the UK in relation to the business of *providing online information in the field of reservations and booking of seats and spaces at entertainment ....events*. I do not accept that merely listing entertainment events on a website would have created an attractive force that brought in custom for the opponent from UK customers. Therefore, these entertainment listings are only relevant if the provision of such information created an attractive force which drew in business for the opponent from customers in the UK.

23. The applicant submits that the opponent’s evidence does not show that it had established goodwill in the UK under SEATED at the relevant date because:

- (1) Mere evidence of the registration of domain names is not evidence of goodwill;
- (2) In the absence of evidence that UK customers were targeted, promoting events in the USA does not show goodwill in the UK;
- (3) The use of “*powered by seated*” on artists’ websites would not generate goodwill because it is the artists’ names which are the attractive force which brings in custom and no attention would be paid to whom the concert is ‘powered by’;
- (4) The single advertisement in evidence for UK concerts (by the band PUP) for which tickets are claimed to have been sold via the seated.com website shows no use of SEATED;

(5) The examples of interactions with customers via the opponent's social media sites shown in exhibit DM6 all appear to be with US based customers;

(6) The opponent has not provided market share figures, and the value of the ticket sales listed in exhibit DM13 (as examples of those sold to UK customers) appear to be trivial in the context of the likely size of the entertainment market in the UK;

(7) The total sales figures claimed for sales to UK customers prior to the relevant date are uncorroborated by any financial documents, and the limited evidence of UK sales in evidence does not support the level of sales claimed, or the opponent's claim to have had "at least" 12,939 customers in the UK at the relevant date.

24. In connection with point (6) above, Mr Cassidy drew my attention to the decision of Mr Thomas Mitcheson QC as the Appointed Person in *Smart Planet Technologies, Inc. v Rajinda Sharma* (RECUP)<sup>6</sup> where, following a review of the authorities, he concluded that:

*".. a successful claimant in a passing off claim needs to demonstrate more than nominal goodwill. It needs to demonstrate significant or substantial goodwill and at the very least sufficient goodwill to be able to conclude that there would be substantial damage on the basis of the misrepresentation relied upon."*

25. In response to these criticisms, counsel for the opponent submitted that:

(1) Mr McKay's evidence has not been challenged and should therefore be accepted;

(2) The acquisition of the seated.co.uk in January 2018 shows an intent to target the UK market;

(3) Although criticisms can be levelled at various parts of the opponent's evidence, the evidence should be considered as a whole, and when considered

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<sup>6</sup> BL O/304/20

as such it establishes the existence of a more-than-nominal UK goodwill under SEATED at the relevant date.

26. In answer to the applicant's characterisation of the opponent's UK goodwill as trivial (at most), Mr Muir Wood relied on the well-known High Court case of *Stannard v Reay*<sup>7</sup> and the more recent judgment of the Court of Appeal in *Caspian Pizza Ltd v Shah*.<sup>8</sup> It was submitted that these cases show that:

(a) a short period of trading is potentially sufficient to generate protectable goodwill;

(b) the hurdle that needs to be overcome to demonstrate goodwill is not particularly high;

(c) substantial goodwill means there must be actual real customers in the United Kingdom and a real number of those rather than just a handful.

27. In the *RECUP* case the party asserting an earlier right relied on 10 invoices showing sales of around 40k paper cups to 2 customers prior to the relevant date. The evidence showed that the relevant UK market for the goods amounted to 2.5 billion paper cups per annum. The Appointed Person decided that the sales relied on were trivial when set in this context. The Appointed Person was fortified in his decision that insufficient goodwill had been generated under that mark by the fact that the mark obviously alluded to the type of recyclable cups at issue. *RECUP* was, at best, a weakly distinctive mark.

28. The plaintiff in *Stannard v Reay* had only operated a mobile fish and chip van on the Isle of Wight under the name Mr Chippy for a matter of weeks before the defendant started competing for business under the same name. The facts were unusual because of the intensely localised nature of the case. There was no doubt that the plaintiff had acquired a substantial number of UK customers in a particular locality before the defendant started trading. *Stannard v Reay* shows that trading does not have to be long in time before the courts will provide protection in a clear case of

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<sup>7</sup> [1967] FSR 14

<sup>8</sup> [2017] EWCA (Civ) 1874

passing off. *Caspian Pizza Ltd v Shah* was about a pizza takeaway in Worcester and a chain of similar businesses operating under the same name in the Birmingham area. Once again, there was no doubt that both parties had acquired a substantial number of UK customers by the relevant date. *Caspian Pizza Ltd v Shah* is best understood as addressing the issue of priority where both parties have established local goodwill.

29. There is no doubt that a small business with a more-than-trivial goodwill can protect signs which are distinctive of that business under the law of passing off. For example, in *Lumos Skincare Limited v Sweet Squared Limited and others*<sup>9</sup> the Court of Appeal in England and Wales held that the defendant had passed off its LUMOS nail care products as the claimant's goods. The relevant date was October 2010. The claimant had been selling LUMOS anti-ageing products since 2007. The goods retailed at prices between £40 and £100 per bottle. The Claimant's sales were small: of the order of £2,000 per quarter from early 2008 to September 2009, rising to £10,000 per quarter by September 2010. The vast majority of these sales were to the trade, including salons, clinics and a market. As at the relevant date, the Claimant had sold to 37 outlets and was still selling to 25 of them. There was evidence of repeat purchases. Although the number of customers was small, or, as the judge at first instance put it, "very limited", the claimant's goodwill was found to be sufficient to entitle it to restrain the defendant's use of LUMOS.

30. I accept that 1669 orders for £72k worth of tickets for entertainment events placed by UK customers between January 2019 and the relevant date should not be rejected solely on the grounds that it is, as a matter of principle, too trivial to generate a protectable goodwill in the UK in relation to ticket agency services.

31. However, where the extent of the UK goodwill claimed is small, as in this case, it is all the more important that the opponent's evidence is sufficiently solid to substantiate the full extent of the limited goodwill claimed. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)*<sup>10</sup>, Pumfrey J. stated:

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<sup>9</sup> [2013] EWCA Civ 590

<sup>10</sup> [2002] RPC 19 (HC)

*“27. There is one major problem in assessing a passing of 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 s.11 of the 1938 Act (see Smith Hayden & Co. Ltd's Application (OVAX) (1946) 63 R.P.C. 97 as qualified by BALI Trade Mark [1969] R.P.C. 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 to the relevant date.....”*

32. As Floyd J. (as he then was) explained in *Minimax GmbH & Co KG v Chubb Fire Limited*:<sup>11</sup>

*“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods.”*

It follows that, although relevant, the absence of specific evidence from the trade or the public in the UK attesting to the existence of the opponent's goodwill in this jurisdiction is not necessarily fatal to the opponent's case. This depends on the whether there is other evidence showing that a significant or substantial goodwill was established in the UK under SEATED by the relevant date.

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<sup>11</sup> [2008] EWHC 1960 (Pat)

33. In my view, evidence tendered to show sufficient use of an unregistered trade mark to create an earlier right to the mark in the UK should be subject to the same degree of critical scrutiny as evidence filed to resist the revocation of a registered UK trade mark on grounds of non-use. In this connection, I note the oft-quoted guidance of Mr Daniel Alexander Q.C. as the Appointed Person in *Awareness Limited v Plymouth City Council*<sup>12</sup> where he stated that:

*“22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”*

34. I find the opponent’s evidence of (a) the use of SEATED in the UK market, (b) the volume of orders for tickets from SEATED placed by UK customers, and (c) the number of UK customers receiving information services from SEATED, to be insufficiently solid to support the opponent’s claim to have established a significant/substantial UK goodwill under SEATED by the relevant date. I have already identified some of the gaps in the opponent’s evidence. The most obvious ones are:

(1) Despite basing its claim largely on services provided to UK customers via the Seated online platform, there is not a single example in evidence showing what the seated.co.uk or seated.com websites looked like at any point in time;

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<sup>12</sup> Case BL O/236/13



(2) There are no examples in evidence showing communications between the opponent and the many UK customers to whom it claims to have provided entertainment tickets and/or related information;

(3) It is not clear how the opponent provides tickets to UK customers and there are no examples of any such tickets in evidence;

(4) The opponent has not provided the name, address or geographical location of a single UK customer;

(5) There is sparse evidence showing only one sale of a ticket to a customer using a computer with a UK IP address during 2017, and no evidence showing any sales of tickets to UK based customers during 2018;

(6) Apart from the existence of the opponent's seated.co.uk domain name, and the evidence that it has a facility to re-direct users to seated.com, there is no evidence of any advertising of goods/services under SEATED which was specifically directed at the UK market;

(7) The basis for the opponent's claim to have had "*at least*" 12,939 customers in the UK by the relevant date is not explained or substantiated by the evidence and seems difficult to square with the opponent's claim to have received only 1669 orders from UK customers between January and October 2019.

35. I see much force in Pumfrey J.'s suggestion that evidence of goodwill should include "*evidence as to the manner in which the goods are traded or the services supplied.*" The absence of the sort of evidence described in (1) to (4) above (or equivalent evidence) makes it very difficult to assess "*the manner in which ... the services [were] supplied.*" Importantly, this includes the role played by the mark SEATED in that process, and the extent to which the services concerned appeared to UK consumers to be targeted partly at them.

36. I acknowledge there is evidence of use of 'powered by seated' in proximity to the ticket ordering facilities on a small number of third party websites in 2018/2019. However, it is not clear exactly what 'powered by seated' meant in this context. For example, there is no evidence that those clicking on the 'buy tickets' button would have

been taken to the seated.com website, or to pages on any other site where SEATED would have been visible. This makes it difficult to judge whether people buying tickets from these third party websites would have regarded themselves as customers of SEATED, rather than just customers of the artist whose website they were visiting. Further, it is not possible to tell from the evidence whether, or what extent, the offers to sell tickets from these third party websites were targeted at UK customers.<sup>13</sup> I do not, therefore, accept that this evidence assists the opponent's claim to have established a significant or substantial UK goodwill by the relevant date.

37. I find that I cannot attach much weight to Mr McKay's evidence that between 1<sup>st</sup> January 2018 and 8<sup>th</sup> October 2019, 765,973 users from the UK visited the opponent's event listings and 102,096 visited the seated.com website. This is because: (1) the source of this information has not been clearly identified; and (2) it is not possible to establish from the information provided what proportion of these visitors were actively seeking the opponent's website (as opposed to arriving on it by accident) or for what purpose.

38. The omissions and difficulties covered in paragraphs 34 -37 above, coupled with the virtual absence of evidence of sales of tickets to UK customers under the SEATED mark prior to January 2019, means that the opponent's case rests heavily on Mr McKay's narrative evidence that the opponent received 1669 direct orders for tickets from UK customers in the period January 2019 to October 2019. As Mr Muir Wood pointed out, Mr McKay was not cross examined on this evidence. In *Robot Energy Limited v Monster Energy Company*<sup>14</sup> Ms Emma Himsforth, as the Appointed Person, reviewed the case-law covering the weight to be attached to a witness's evidence in the absence of cross examination, as set out in *Pan World Brands v. Tripp (EXTREME)*,<sup>15</sup> *Williams and Williams v. Canaries Seaschool SLU (CLUB SAIL)*<sup>16</sup> and *Advanced Perimeter Systems Ltd v. Keycorp Ltd (Multisys Trade Mark)*.<sup>17</sup> Having done so, the Appointed Person summarised the position as follows:

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<sup>13</sup> None of the websites have .co.uk addresses and none of the pages show the currency in which tickets were being sold.

<sup>14</sup> BL O/308/20

<sup>15</sup> [2008] RPC 2

<sup>16</sup> [2010] RPC 32

<sup>17</sup> [2012] RPC 14.

*“73. As was made clear in the decision in CLUB SAIL grounds of opposition cannot be rejected automatically on the basis that the witness who sought to refute them was not cross-examined. It is necessary to form a view as a matter of judgment whether the evidence is sufficient to establish the relevant fact which requires, as the Hearing Officer correctly said, the decision taker to consider the evidence as a whole. That the Hearing Officer took this view is entirely consistent with the guidance set out in CLUB SAIL (and EXTREME and MULTISYS). This includes weighing up in particular (1) the power of one side to produce the evidence and the other to contradict it; and (2) the plausibility of the positions that have been adopted in the context of the evidence as a whole which entails where the parties have elected to proceed without cross-examination accepting that the evidence of one witness might be found to have been disproved or displaced by the evidence of another.”*

39. Therefore, the absence of cross examination does not mean that Mr McKay’s evidence that there were 1669 direct orders by UK customers from seated.com prior to the relevant date must be accepted at face value. Rather, the absence of supporting documents/information of the kinds described at paragraph 34 above indicates to me that his assertion of 1669 direct orders by UK customers should be treated with a certain degree of caution. This is all the more so in circumstances where the documents/information concerned appear to be of the kind that should be readily available to the opponent.

40. However, I do not have to go so far as to disbelieve Mr McKay’s evidence about the 1669 orders to find that it is insufficient to establish the opponent’s claimed UK goodwill. This is because even if the opponent received 1669 orders from UK customers (or, at least, customers who paid from UK-based bank accounts) this does not show that the people who placed these orders were customers of the opponent in the UK (as opposed to becoming customers whilst visiting the USA). This means that Mr McKay’s evidence could mean little more than that “*..there are people in this jurisdiction who happen to be [the opponent’s] customers when they are abroad.*” As explained above, this is not sufficient to establish goodwill in the UK.

41. I am prepared to infer that people with UK bank accounts who purchased tickets from the opponent for entertainment events held in the UK are likely to have been UK

customers. However, the only clear evidence of such sales relates to five orders for four concerts on the PUP tour in early 2019. These sales amounted to only around £300 worth of tickets. In my view, that is a trivial level of business in the UK in the context of UK ticket agency services for the musical entertainment market and insufficient to show that the opponent had a significant/substantial goodwill in the UK at the relevant date.

42. The opponent's case under section 5(4)(a) therefore fails because it has not established the existence of the necessary goodwill in this jurisdiction.

### **The section 3(6) ground**

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

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

44. The opponent's pleaded case is as follows:

*“The Applicant and the Opponent are involved in a dispute regarding the identical Trade Mark in the USA, and other countries. The Opponent's US Attorney issued a 'cease and desist' letter to the Applicant's US Attorney on 26 September 2019 with a requested response date of 4 October 2019. On 4 October 2019, the Applicant's US Attorney, contacted the Opponent's US Attorney, to state that they were, allegedly, investigating the claims and would respond to the claims made in the 'cease and desist' letter. A courtesy extension was agreed by the Opponent, on the basis requested by the Applicant's US Attorney, namely, to investigate and respond to the claims made in the 'cease and desist' letter. Then, in the period between 7 October 2019 and 10 October 2019 (inclusive), the Applicant filed a number of foreign Trade Mark Applications for the word Mark 'SEATED', including the opposed UK Trade Mark Application.*

*In the Opponent's submission, the opposed UK Trade Mark Application was filed in bad faith and without legitimate commercial rationale. The Applicant knew about the Opponent's use of the identical Trade Mark, and accordingly, at the filing date of the opposed UK Trade Mark Application, their intention was*

*dishonest, and fell short of the standards of acceptable commercial behaviour. The Applicant's objective, was, inter alia, to undermine the Opponent's interests in their Trade Mark, to block use of their established Trade Mark in the UK, to force the Opponent into a negotiation in the US Trade Mark dispute, and to gain leverage.*

*Further, or in the alternative, in the Opponent's submission, at the filing date of the opposed UK Trade Mark Application, the Applicant did not have a bona fide intention to use the Trade Mark applied for in the UK in relation to any of the goods and services applied for. In fact, at that date, and to date, use of the Applicant's Trade Mark was, and is, confined to only a small number of cities in the USA. Further, or in the alternative, from the information given in the Applicant's response in the US Trade Mark dispute, regarding their goods and services of current or future interest, the Opponent submits that, the list of goods and services applied for in the opposed UK Trade Mark Application is excessively broad, including goods and services beyond those that the Applicant has a bona fide intention to use the opposed Trade Mark in relation to. The Applicant has included goods and services that they have informed the Opponent they do not have an intention to use the opposed Trade Mark in relation to, for example, goods and services relating to the sale of tickets to live entertainment events. In bad faith, and to block use and registration of the Opponent's Trade Mark in the UK, the Applicant has included goods and services in the opposed UK Trade Mark Application that precisely cover the Opponent's goods and services, but in respect of which, the Applicant does not intend to use the Trade Mark applied for.”*

45. Whether it is bad faith to apply for a trade mark without an intention to use it in relation to the specified goods and services was considered by the CJEU in *Sky v Skykick*, CJEU,<sup>18</sup> (“*Sky CJEU*”) and by the Court of Appeal in England and Wales in *Sky Limited & Ors v Skykick, UK Ltd & Ors*,<sup>19</sup> (“*Sky CA*”). The law appears to be as follows:

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<sup>18</sup> Case C-371/18

<sup>19</sup> [2021] EWCA Civ 1121

- a) Applying to register a trade mark without an intention to use it is not bad faith *per se*. Therefore, it is not necessary for the trade mark applicant to be using, or have plans to use, the mark in relation to all the goods/services covered by the specification: *Sky CJEU*.
- b) The bad faith of the trade mark applicant cannot, therefore, be presumed on the basis of the mere finding that, at the time of filing his or her application, that applicant had no economic activity corresponding to the goods and services referred to in that application: *Sky CJEU*.
- c) However, where the trade mark application is filed without an intention to use it in relation to the specified goods and services, and there is no rationale for the application under trade mark law, it may constitute bad faith. Such bad faith may be established where there are objective, relevant and consistent indications showing that the applicant had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark: *Sky CJEU*.
- d) A trade mark may be applied for in good faith in relation to some of the goods/services covered by the application, and in bad faith as regards others: *Sky CJEU*.

46. In assessing the opponent's case I will keep in mind the relevant points from the Court of Appeal's summary of the relevant case law in *Sky CA*, as follows:

*"68. The following points of relevance to this case can be gleaned from these CJEU authorities:*

*1. -*

*2. -*

*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 Mağazacılık 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].*

*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. -*

*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].”*

47. At the hearing, the opponent relied on: (1) the existence of a dispute between them in the USA over the right to use the trade mark SEATED in relation to booking for restaurants (the applicant) and entertainment events (the opponent); (2) the timing of the UK application, shortly after the opponent sent the applicant a cease and desist letter in the USA; (3) the absence of any business conducted by the applicant in the UK; (4) a statement made by the applicant’s representatives in communications between the parties to the effect that it had no intention to use SEATED in relation to the booking of tickets for entertainment events; and (5) the absence of any “positive case” put forward by the applicant.

48. I pause here to note that, as is clear from the case law cited above, the onus is on the opponent to prove bad faith. Therefore, the applicant is not required to provide a positive case of good faith unless and until the opponent has presented evidence from which “*a rebuttable presumption of lack of good faith*” can be drawn. I will therefore start by examining whether the opponent has provided such evidence.

49. The opponent relies on evidence which it says shows confusion between the parties’ mark in the USA. However, it is well established that trade mark rights are territorially limited. Therefore, the question of which of the parties is entitled to priority in the USA, and whether their concurrent use of SEATED has resulted in confusion in that territory (as the opponent says), or not (as the applicant says), is irrelevant to the issue of whether the applicant applied to register the contested mark in bad faith in the UK.

50. The mere fact that the applicant has no economic activity in the UK corresponding to the goods and services referred to in the application does not create “*a rebuttable presumption of lack of good faith*” either. Further, as noted above, applying to register a trade mark without an intention to use it is not bad faith *per se*.



51. The opponent's *prima facie* case therefore depends on the allegation that the application is merely a tactic to block the opponent's SEATED mark access to the UK market and gain leverage in the dispute in the USA. The relevant facts relied on to support this allegation are: (1) the timing of the UK trade mark application, shortly after the applicant was served with a cease and desist letter in the USA; (2) statements made on behalf of the applicant that it has no intention to use the mark in relation to some of the services listed in the application.

52. The evidence shows that on 26<sup>th</sup> September 2019 the opponent's US attorneys sent the applicant a cease and desist letter.<sup>20</sup> The basis for this letter was stated to be that:

*"It has come to our attention that [the applicant's] mobile application software is offering reservation and ticketing services for food and entertainment events under 'SEATED'.*

53. On 4<sup>th</sup> October 2019, the applicant's US attorneys acknowledged receipt of the letter and indicated that they would respond as soon as possible.<sup>21</sup> The opponent's attorneys wrote again on 14<sup>th</sup> October 2019 complaining about the applicant's lack of response to its letter, and that the applicant had, instead, filed a number of international applications (including the application subject to this opposition) to register SEATED in relation to the kind of services provided by the opponent in the USA.<sup>22</sup> The applicant's attorneys replied on 25<sup>th</sup> October 2019 disputing the opponent's claim that it had infringed its rights, but conditionally offering to enter negotiations to find a solution.<sup>23</sup>

54. The mere fact that the UK trade mark application (and several others) was filed following the applicant's receipt of the opponent's cease and desist letter does not establish that it was merely a tactic in the US dispute: the applicant may have been intending to extend its US business abroad at some point. It is entirely feasible that

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<sup>20</sup> See exhibit DM20

<sup>21</sup> See exhibit DM21

<sup>22</sup> See exhibit DM23

<sup>23</sup> See exhibit DM23. Neither party claims that the content of this letter is covered by the 'without prejudice' rule.

the threat of legal action in the USA simply spurred the applicant into filing international trade mark applications to get priority over the opponent in its potential target markets so as to safeguard its future plans. That is entirely legitimate behaviour in first-to-file jurisdictions (such as the UK), at least where the other side is not known to have any existing rights in the foreign territory. In this connection, I note the opponent's pleaded case includes the claim that "*The Applicant knew about the Opponent's use of the identical Trade Mark.*" The pleading does not specifically assert that the applicant knew about the opponent's trade under SEATED in the UK. The basis for a bad faith allegation must be clearly pleaded. In my view, the way the opponent has pleaded its case means that it cannot ask me to take account of the applicant's knowledge of the opponent's use of SEATED in the UK prior to the relevant date. In any event, there is no evidence showing that the applicant had any such knowledge. This is hardly surprising given that, even when specifically put to proof of the existence of its UK goodwill under SEATED, the opponent has been unable to do so for the purposes of its section 5(4)(a) case.

55. Mr McKay's evidence is that he had several conversations with Mr Bo Peabody, who appears to be the moving force behind the applicant company. Mr McKay says that:

*"Repeatedly, Bo Peabody has advised me that Seated Technologies Inc. does not intend to use the Trade Mark SEATED in connection with goods and services relating to the sale of tickets to live entertainment events. This was also confirmed by Seated Technologies Inc.'s US Attorney in correspondence sent to our US Attorney."*

56. In this connection, the applicant relies on the following statements from the letter of 25<sup>th</sup> October 2019 from the applicant's US attorneys in answer to the opponent's cease and desist letter:

*"[The opponent] allege that [the applicant] uses its SEATED mark with "ticketing services for food and entertainment events." [The applicant], however, does not currently offer ticketing services for any "entertainment events." Please explain the basis for this assertion."*

Later in the same letter, the applicant's attorneys wrote:

*"Further, the parties offer different services: [the applicant] focuses on connecting its users with highly rated restaurants and rewarding them each time they dine out, while [the opponent] sells tickets to musical events. Those are two very different activities. Moreover, [the opponent] does not offer its services through a mobile phone app; rather its services are exclusively available through its website.*

*Finally, as you note in your October 14 follow-up letter, [the applicant] has indeed proceeded with an international filing plan. We look forward to seeing your purported evidence of use in commerce in all those countries."*

57. In my view, these statements do not amount to an admission that the applicant had no intention of providing *entertainment ticket agency* and similar goods/services in the UK. This is because these statements: (1) were made in the context of a trade mark dispute in the USA and, therefore, reflect the position in that territory; and (2) refer to the parties' current businesses, not their future plans.

58. I also note the following evidence from Mr McKay on behalf of the opponent:

*"I personally decided to download [the applicant's] "SEATED" app for the first time and I was shocked to learn that they were actively selling tickets to live entertainment events and food & beverage festivals directly within their app. They also were promoting the popular ticketing website, StubHub, throughout many areas of their app. Additionally, Seated Technologies Inc. incorrectly advertised that this app was developed by my company, "Seated, Inc." on the Google Play store and on many areas of their own website. I believed that all of this was a clear infringement of my Company's [USA] SEATED Trade Mark for "Ticket agency services for entertainment, art, sports and special events rendered online."*

59. Thus the opponent's impression of what the applicant was doing in the USA included selling tickets for entertainment events.<sup>24</sup> In these circumstances, it is untenable for the opponent to maintain that the applicant could not have had any intention to provide such services in the UK. There is no bad faith in filing a trade mark application with the aim of blocking third parties from using the same or similar marks on the UK market and/or to gain leverage in a foreign trade mark dispute, if the applicant had a legitimate reason for filing the application, i.e. to protect its own future trade in the UK under the mark.<sup>25</sup> In my view, the opponent's evidence does not establish a *prima facie* case that the applicant's sole aim in filing the application was to block the opponent's access to the UK market in order to gain leverage in the dispute in the USA. This is sufficient to justify the rejection of the section 3(6) ground. However, in case I am wrong about this, and for the sake of completeness, I will go on to examine the evidence tendered on behalf of the applicant by Messrs Peabody and Hudson.

60. Mr Peabody's evidence is that:

*"6. After launching Seated Technologies in 2017, the intention was to expand the company and the SEATED brand beyond the US, including in, but not limited to, countries such as Canada and the United Kingdom.*

*7. Seated Technologies' first international market outside of North America (the US and Canada) was going to be London, UK. To help support our expansion plans into London, we have been working with Guardian Media Group Ventures ("GMG Ventures"), a London based Investment Company. GMG Ventures is an investor in Seated Technologies, and we specifically selected them as an investor because of our plans to expand into the UK.*

*8. I first began to communicate with Alan Hudson, who is the Co-founder and General Partner of GMG Ventures, in Q4 2018 about launching Seated Technologies in the UK. An example of our ongoing conversations can be found in Exhibit BP1, which consists of a screenshot of text messages starting from 9 October 2019 between Alan Hudson and I, relating to the launch of*

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<sup>24</sup> These appear to have been wine tasting and culinary entertainment events: see exhibit DM19

<sup>25</sup> See *Skykick CA* [2021] EWCA Civ 1121, at paragraph 52.

*Seated Technologies in London and the requisite funding. Alan's first text to me dated 9 October 2019 says, "Bo, when is London launching?". Alan and I had already had discussions about launching in London prior to that text conversation.*

*9. Trade Mark Application No. 3435234 SEATED ("the UK Application") was filed in the UK on 9 October 2019. I instructed the application to be filed through my US lawyers, Latham & Watkins LLP, who subsequently instructed UK counsel, Fieldfisher LLP, to file the UK Application. The UK Application was filed on the basis that there was a bona fide intention to use the SEATED mark in the UK given our intention to launch the brand in London."*

61. This is supported by Mr Hudson's evidence, who says:

*"7. GMG Ventures specialises in investment into early stage companies at the intersection of technology and media.*

*8. The Fund's current portfolio consists of numerous companies, including Seated Technologies, Inc. ("Seated Technologies").*

*9. I first began to speak to Bo Peabody, the Executive Chairman of Seated Technologies in December 2018, about launching Seated Technologies in the UK.*

*10. I can confirm that I exchanged text messages with Bo Peabody regarding the launch of SEATED in London in which I sent Bo a text message on 9 October 2019. The text began with me asking the question "Bo, when is London launching?" I sent the text on the basis there was genuine intention that the SEATED brand was going to be launched in London."*

62. At the hearing, counsel for the opponent pointed out that, apart from the copy of the text message dated 9<sup>th</sup> October 2019, there is no documentary evidence supporting Mr Peabody's written evidence that the applicant had plans to start trading under SEATED in the UK. Mr Muir Wood further noted that the text in question was received in the USA at 18.00 local time, which he pointed out was "conveniently" after the end of the business day in the UK and by a "strange coincidence" the very day the opposed trade mark application was filed.

63. The applicant was given an opportunity to file evidence or submissions in reply to the evidence of Mr Peabody, but it chose not to do so. Therefore, no criticism was made about the veracity of his written evidence during the written stage of the opposition procedure. In these circumstances, I consider that Mr Muir Wood was right to concede that, without having asked to cross examine Mr Peabody, it was not open to the opponent to ask me to simply disbelieve his clear evidence about a planned launch in London. The fact that Mr Peabody's evidence is supported by Mr Hudson's evidence, is another reason to accept his evidence that they had been in discussions since late 2018 about launching the applicant's business in the UK. Consequently, I accept their evidence about this.

64. In my view, this evidence is sufficient to rebut any presumption that might be drawn from the surrounding circumstances that the applicant's sole purpose in filing the application was to block the opponent's mark from access to the UK market to gain leverage in the US trade mark dispute.

65. Admittedly, the evidence of Messrs Peabody and Hudson says nothing specific about the goods/services for which the applicant intended to use SEATED on the UK market. Part of the opponent's case is that any such intention could not have extended to reservation and ticketing services for live entertainment events. This is because of statements made on behalf of the applicant (after the UK trade mark application was filed) in the USA dispute to the effect that the applicant's business did not include such services. As I noted earlier, there is no documentary evidence of the applicant having stated that it had no intention of using SEATED in the future in relation to reservation and ticketing services for live entertainment events, or having made any statement about its intentions for the use of SEATED on the UK market. I note that the services at issue were specifically mentioned in the opponent's cease and desist letter of 26<sup>th</sup> September 2019 as being amongst services the opponent considered the applicant was providing in the USA via its mobile application software. In these circumstances, the applicant was entitled to act on the basis that it was at least arguable whether its existing US business extended to those goods/services. Thus, it was entirely reasonable to cover those goods/services in the protection sought for its SEATED trade mark in foreign territories. Consequently, the applicant had "*a legitimate*

*objective, such as excluding copyists”* to include such goods/services in its UK application.

66. For the reasons given above, I reject the opponent’s bad faith allegation and, therefore, the section 3(6) ground of opposition.

### **Overall result**

67. The opposition fails. The contested mark will therefore be registered.

### **Costs**

68. The applicant has been successful and is entitled to a contribution towards its costs. I calculate the appropriate contribution as follows:

£250 for considering the notice of opposition and filing a counterstatement;  
£1250 for considering the opponent’s evidence and filing evidence in reply;  
£850 for preparing a skeleton argument and taking part in the hearing.

69. I therefore order Seated, Inc. to pay Seated Technologies, Inc. the sum of £2350. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is appeal, within twenty-one days of the final determination of this case (subject to any order of the appellate tribunal).

**Dated this 13<sup>th</sup> Day of January 2022**

**Allan James**  
**For the Registrar**