

TRANSCRIPT OF PROCEEDINGS

Ref. IP-2019-000160

Neutral Citation No: [2020] EWHC 3863 (IPEC)

**IN THE HIGH COURT OF JUSTICE
INTELLECTUAL PROPERTY AND ENTERPRISE COURT**

Holborn
London

Before MR RECORDER D CAMPBELL QC

IN THE MATTER OF

FIONA ANNE GEORGE (Claimant)

-v-

CLAIRE BOND (Defendant)

MR C PEARSON appeared on behalf of the claimant

THE DEFENDANT appeared in person

JUDGMENT

28 APRIL 2020

APPROVED WITHOUT REFERENCE TO CASE PAPERS ON 26 MAY 2021

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RECORDER CAMPBELL QC:

1. This is an action for infringement of UK registered trademarks, numbers 2296073 ('073') and 25484497 ('497') in the name of the claimant ("Ms George").
2. This is the claimant's application for summary judgment. The claimant has been represented by Mr Pearson of counsel, and the defendant has represented herself.
3. The '073 mark is a device mark consisting of the words 'Oven Angels' plus an angel logo, all in a golden font. It was registered as of 21st March 2002 in class 37 for the following services, namely: '*Cleaning services; cleaning of ovens, hobs, ranges and kitchens.*' The '497 mark is for the words 'Oven Angels' and is registered as of 25th May 2010 in class 37 for the same services.
4. The claimant has adduced a considerable amount of evidence to the effect that she has made substantial use of her marks in relation to cleaning services, but particularly the cleaning of ovens, hobs, ranges and kitchens, for many years. I refer to the turnover figures set out at paragraph 6.2 of the points of claim, plus the documentary exhibits annexed to the remainder of paragraph 6. Despite the use of the plural in the trading name, the claimant is a sole trader. All of her services have been provided in South East England, but particularly Kent and Sussex.
5. One of the ways in which the claimant has promoted her business is via a website at www.ovenangels.co.uk, which she has used since 2000.
6. The defendant ("Ms Bond") also offers oven cleaning services. There is some minor dispute - which is not in my view material - as to whether the defendant was established in 2015 or in 2017. Ms Bond told me, and I accept, that she traded in West Sussex from November or December 2017 under the name Oven Rescue. In December 2018 she relocated with her family to Henley on Thames and started trading as The Oven Angels.
7. More particularly, she used the words The Oven Angels (which was referred to as the defendant's first word mark), and also two device marks. The first of these device marks consisted of the words The Oven Angels, plus the logo of an angel. The colour used in the logo could also be described as golden, although slightly more yellow than the claimant's logo. The defendant also used another device mark, which was a variation of the first with a green background, but again incorporating the words The Oven Angels and the angel logo.
8. The defendant also registered the domain name www.theovenangels.co.uk for use in connection with her business and used the email address claire@theovenangels.co.uk.
9. On or about July 22nd 2019, and in response to a complaint about her trading name from the claimant, the defendant changed it to The Oven Archangel. As well as this change to the words (creating what I will call the defendant's second word mark), the defendant also changed her device mark by replacing the words "The Oven Angels" in that mark with "The Oven Archangel". The logo remained unchanged, as did the green background. At the same time the defendant registered a new domain name, www.ovenarchangel.co.uk.
10. Despite the change of name, the defendant's services remained unchanged. They remained oven cleaning services. Furthermore, the defendant's marketing, including her

Facebook page, continued to refer to the old name via historical posts. The defendant told me, and it was not disputed, that the defendant was unable to delete these references to the old name. Like the claimant, despite the use of the plural, the defendant was also a sole trader.

11. Save for the argument about whether the defendant was established in 2015 or 2017, none of the facts and matters which I have set out were seriously disputed.

12. I will now come to the document filed by the defendant on 18th of November 2019, and entitled ‘Statement of Fact.’ The claimant has treated this document as if it were a defence and I shall do likewise. I shall summarise the points made in that defence.

- a. The first is that the defendant trades, as I have said, in Henley on Thames within a five to ten mile radius of her home.
- b. Secondly, Ms Bond sets out details of communications with the claimant’s legal representatives, including her change of name to The Oven Archangel and her cost of having to do so.
- c. Thirdly, Ms Bond says as follows: ‘I appreciate that I unwittingly infringed trade mark law.’
- d. Fourthly, Ms Bond disputes the claimed damages of £21,000. She says there is no evidence to support this figure, that there is no franchise offer in place, that the claimant’s business has never been franchised, and if it were it would be unviable.
- e. Fifthly, Ms Bond draws attention to what she describes as other organisations with the word angel in their names and in the same line of business. For instance, there are Chores Angels, Oven Angel, Oven Angelic, and Angelic Ovens, among others. However no figures are given for the turnover of any of these businesses.
- f. Sixthly, Ms Bond explains that she is unaware of any confusion relating to use of the original name, i.e. The Oven Angels, and that she believes it is unlikely there will be any confusion caused by the current name, i.e. The Oven Archangel. She mentioned this lack of risk of confusion at the hearing, and the claimant did not suggest Ms Bond should not be believed. She also stressed that she did not believe there was any detrimental effect to the claimant.

13. I noted that in this document Ms Bond did not explain the reasons for choosing the name The Oven Angels in the first place. I asked her that question and she said she came up with the name herself. The document does not explain the reasons for the decision to use a logo of this particular design and colour either. I asked Ms Bond that question too and she said she designed that logo herself as well. Nor does Ms Bond explain her reasons for choosing The Oven Archangel as the new name of her oven cleaning business rather than a name having nothing to do with angels.

14. In any event, Ms Bond’s defence prompted the claimant to serve a reply, dated the 19th February 2020. That contains largely matters of arguments and I will not deal with it in detail. I should however mention that at paragraph 6 the claimant expressly drew attention to and relied upon the defendant’s admission of infringement to which I have already referred.

15. I now come to the present application for summary judgment. The claimant issued an application notice dated 19th February 2020, and supported it by a witness statement of a Mr Hiddleston of the same date. Mr Hiddleston is the claimant’s trademark litigator. Like the

reply, his paragraph 9 drew attention to Miss Bond's admission of infringement and concludes that this was intended to refer to her first word mark and her first device mark. I agree that was how it was most likely intended, and I should say Ms Bond repeated that admission before me today. However, Ms Bond makes no admission for the revised name of Oven Archangel.

16. I now turn to the law. It is not necessary or proportionate to go into much detail about the test for summary judgment. Mr Pearson's skeleton argument, which as it happens I had not seen prior to the start of this hearing but which was served on the defendant, summarised the principles which were set out at *Easyair v Opal Telecom [2009] EWHC 339 (Ch)* at [15]. I summarised these principles for Ms Bond's benefit during the hearing and it appeared to me she understood these principles. In short I must not hold a mini trial, but I have to consider whether the defence has a realistic rather than fanciful prospect of success.

17. The only cause of action here is trademark infringement. For instance, section 10(2) of the Trade Marks Act 1994 is relied on in relation to both marks, and in relation to each alleged instance of infringement. This was also the only cause of action relied on in the letter before claim. The Particulars of Claim also relies on what I regard as a secondary argument under section 10(1) of the Act in relation to the defendant's first word mark.

18. The law I have to apply in relation to trademark infringement was set out by the Court of Appeal in *Comic Enterprises v Twentieth Century Fox Film Corp [2016] EWCA Civ 41* at paragraphs [26] to [34]. Again I summarised some of the relevant principles to Miss Bond during the hearing. For instance, the legal test is whether there is a likelihood of confusion rather than actual confusion. That is a global assessment, in other words taking everything into account, including the visual, aural and conceptual similarity between the marks, and the similarity of the respective services.

19. I will now consider whether, applying the law on trade mark infringement as set out in *Comic*, the claimant is entitled to summary judgment.

20. I begin by comparing the respective marks. I shall start with the defendant's first word mark and its first device mark. The only difference between the claimant's word mark, i.e. The Oven Angels, and the defendant's first word mark is the word 'The'. Otherwise they are visually, aurally and conceptually identical. I agree with the claimant that this difference may go unnoticed by consumers, hence that use infringes the claimant's word mark under Section 10(1) of the Act. However that is only a relatively small part of the case. I need to consider the other marks as well.

21. So far as the other marks are concerned, I agree with the claimant that each of the defendant's first device marks infringes both of the claimant's marks, i.e. the claimant's word mark and the claimant's device mark. This is because there is a high degree of visual, aural and conceptual similarity for all permutations of the relevant comparison. It is lowest for the comparison of the parties' respective device marks, but the degree of similarity even there is still high in all three respects.

22. So far as the devices are concerned, the words are the most dominant part, but the respective golden angel logo used by both parties is also similar both in appearance and in colour. When I bear in mind that the respective services are identical, I have no doubt there

is a likelihood of confusion on the part of the average consumer. I do not require any evidence from actual consumers, and I do not see any realistic prospect of a different result at trial. Ms Bond would probably make the same arguments at trial as she has done today.

23. As a matter of law it is irrelevant that the claimant's trade has been restricted to a geographical area which does not overlap with that of the defendant's trade, since both of the claimant's trade mark registrations are national, with national effect. This might well be the reason why there is no direct evidence of actual confusion, but that is not the legal test anyway. The law only requires a *likelihood* of confusion.

24. If I might summarise, the legal test assumes that the average consumer, which is the benchmark for this purpose, knows of the claimant's mark and then comes across the defendant's mark in the context of the defendant's business. In such a situation consumers might well not have the two marks side by side, but in my view there is a likelihood that the average consumer for oven cleaning services, who is aware of the claimant's marks and then comes across the defendant's marks, would assume there is an economic link between the claimant and the defendant.

25. The fact there are other organisations using similar names does not help the defendant. There is no counterclaim for invalidity of the claimant's registrations, but even if there had been then the mere presence on the market of such third parties does not establish, for instance, that the claimant's mark has become the common name in the trade for oven cleaning services within the meaning of Section 46 (1) (c) of the Act, far less that this has happened in consequence of acts or inactivity by the proprietor.

26. I do not need to consider the claimant's suggestion – floated out during the hearing – that the claimant might have some form of licencing deals with such third parties. The claimant's legal advisers could have asked the claimant if this really was the position, and put in evidence to this effect. I disregard that argument.

27. I have not needed to consider the defendant's admission of infringement in relation to the first word and the first device marks, which was in any event confirmed before me today, as I say. But having regard to my own views, that admission was rightly made.

28. I now turn to the defendant's new name, The Oven Archangel. I agree of course that the words The Oven Archangel are less similar in visual and aural terms to the claimant's word mark. This is because of the addition of the prefix "Arch-". I would not go as far as the claimant as saying that the arch prefix gets lost, as the claimant put it, but in my view the marks remain visually and aurally similar. The degree of conceptual similarity is in my judgment higher than that, since an archangel is and in my judgment will be seen by the average consumer to be a higher degree of angel. It is not a meaningless prefix, it reinforces the meaning of the word angel. It is again important to bear in mind that respective services are identical. So whilst I agree that the case for infringement under Section 10(2) is not as strong for the second word mark and the second device mark, I am still clear in my mind that there is a likelihood of confusion between the claimant's marks and the defendant's marks, plural, on the part of the average consumer. Hence I conclude that the defendant's second word mark and second device mark infringe the claimant's word mark and also the claimant's device mark.

29. I appreciate the defendant has incurred costs in this redesign which are not trivial for the claimant, but I do consider that she should have gone further than that in her choice of new name to avoid the risk of infringement. That is particular so when the context of the defendant's use seems to encourage customers to link Ms Bond's new mark to Ms Bond's old mark. It is the same business at the same address being marketed via the same trade channels. Although Ms Bond says, and I accept, that she cannot delete the old Facebook posts, I agree that they still form part of the context of her use and it is difficult for me to see why this would not also add to the likelihood of confusion.

30. Finally, I should deal with Ms Bond's point about damages of £21,000 being in her view excessive. The short answer to this is that this is not a defence to liability and hence it is irrelevant at this stage of the proceedings. The longer answer is that I am simply not in a position to assess damages at this stage in any event for the following reasons.

31. It seems to me that if the claimant elects for an enquiry as to damages, these will most likely be assessed on the basis of a royalty rather than lost sales, because given the difference in geographical area, it seems unlikely to me that the defendant's infringement caused the claimant to lose any sales. That royalty will be assessed on the basis of the agreement that would be reached between a willing licensor and willing licensee. Mr Pearson for the claimant referred to this as the user principle.

32. I can see the force in Ms Bond's argument that damages should not be determined on the basis of how much a franchise would have cost, which is apparently the claimant's position. For a start, the claimant does not offer a franchise on its website, and the claimant's own average income seems to be £18,000 a year over some considerable period. If the claimant has never actually operated a franchise at all, there is no track record of franchising to set any kind of benchmark.

33. In addition it is not as if Ms Bond needed to use the name Oven Angels in order to trade at all, since other trading names are available. For instance, she originally provided oven cleaning services under the name of Oven Rescue, to give just one example.

34. On the user principle, the question is how much the willing licensor and willing licensee would be willing to pay to use the Oven Angels mark for oven cleaning services, as opposed to using other marks for the same business, but I cannot form any concluded views on any of these matters on the basis of the material I currently have, even if it were relevant for me to do so. These are all matters for another day, not for today.

35. Thus for the reasons which I have already explained in some detail, I will grant the claimant's application for summary judgment in relation to each of the defendant's first word mark, her first device mark in both variants and her second word mark and second device mark. I will now hear the claimant on the form of order which I should make. The claimant has submitted a form of order with the application notice and we will now go through it paragraph by paragraph. That is my judgment.

This transcript has been approved by the Judge