

O/532/18

TRADE MARKS ACT 1994

TRADE MARK APPLICATIONS 3184296 AND 3184291

BY ANGELPRO LIMITED

AND

OPPOSITIONS 408270 & 408281

BY PROVENTURE CONSULTING LIMITED

AND

TRADE MARK APPLICATION 3205819

BY PROVENTURE CONSULTING LIMITED

AND

OPPOSITION 409150

BY ANGELPRO LIMITED

Background and pleadings

1. This case consists of three cross oppositions between ProVenture Consulting Limited (“ProVenture”) and Angelpro Limited (“Angelpro”). ProVenture is the proprietor of UK trade mark 2416831 **ProVenture** in class 35. The mark was registered in 2006 in relation to:

“Business management, business administration, provision of business information, office functions.”

2. ProVenture opposes trade mark applications 3184291 and 3184296 filed by Angelpro on 7th September 2016 (“the first relevant date”). Both applications are for a series of two marks. Application 3184291 is for the marks **VenturePro** and **Venture Pro**. The difference between the marks covered by the second application - 3184296 - is immaterial for present purposes. I will therefore focus on just this mark:



3. Angelpro’s applications were originally filed in relation to goods/services falling in classes 9, 35, 36 and 38. However, following ProVenture’s opposition, class 35 was deleted. The applications currently cover:

“Class 9: Financial management software; Computer software programs; Computer software programs for database management.

Class 36: Providing investors with financial information; Finance and credit information; Financial analysis; Investment portfolio management services; Provision of financial information for professionals in the field of portfolio management, for portfolio management.

Class 38: Provision of access to an online database system, all relating to company information.”

4. ProVenture claims that the marks covered by Angelpro’s applications are similar to its earlier UK trade mark 2416831, that the respective goods/services are similar,

and there is a likelihood of confusion on the part of the public. Consequently, the applications should be refused under s.5(2)(b) of the Trade Marks Act 1994 (“the Act”).

5. Additionally, ProVenture claims the earlier trade mark has acquired a reputation in the UK because of the use of the mark since 2006. According to ProVenture, use of Angelpro’s marks would be likely to cause confusion and thereby take unfair advantage of the reputation of the earlier mark. Further, if Angelpro’s marks were used in relation to goods/services of lower quality than its own, use of the marks could potentially be detrimental to the reputation of the earlier mark. Therefore, registration should be refused under s.5(3) of the Act.

6. Further, ProVenture claims to have acquired a valuable goodwill under the mark **ProVenture** in relation to:

“...business support services which, as well as in person, they offer over the internet relating to business management, business administration, provision of business information and office functions. These services include coaching and career advice, executive and interim recruitment, website design and software concerning organisational and relationship management.”

7. According to ProVenture, use of Angelpro’s marks would cause the public to believe that the parties are the same or are connected with one another. Accordingly, such use would amount to a misrepresentation to the public which would damage Angelpro’s goodwill through loss of sales and/or loss of control of its reputation. Therefore, registration should be refused under s.5(4)(a) of the Act.

8. On 10th January 2017 (“the second relevant date”), ProVenture filed application 3205819 to register **PROVENTURE** as a trade mark for a range of goods/services in classes 9, 16, 35, 41 & 42. Angelpro claims that there is a likelihood of confusion between this mark and the VenturePro marks as described in paragraphs 2 and 3 above. Consequently, it requests that the application be refused in relation to the following similar goods/services:

Class 9: Downloadable apps; downloadable smartphone applications (software); downloadable software; downloadable applications for use with mobile devices; downloadable mobile applications for the management of information; downloadable mobile applications for the management of data; downloadable mobile applications for the transmission of information, downloadable publications.

Class 41: Non-downloadable apps; non-downloadable software.

Class 42: Design and development of websites; planning, design, development and maintenance of websites for third parties; design and development of software; hosting services and software as a service and rental of software; providing temporary use of on-line non-downloadable software for database management; providing temporary use of on-line non-downloadable software for importing and managing data; providing temporary use of on-line non-downloadable software for the transmission of information; providing temporary use of on-line non-downloadable software for the management of information; providing temporary use of on-line non-downloadable software for the management of data; providing temporary use of on-line non-downloadable software for the transmission of data; information, consultancy and advice in relation to the aforesaid.

9. Further, Angelpro claims that ProVenture was aware of its interest in VenturePro when applying to register its PROVENTURE mark for identical goods/services. According to Angelpro, ProVenture's behaviour fell below the standard of commercial conduct observed by reasonable men and women in the sector concerned. Consequently, ProVenture's application should be refused in total under s.3(6) of the Act because it was made in bad faith.

10. Both sides filed counterstatements denying the grounds of opposition. I note that:

- (i) Angelpro put ProVenture to proof of use of earlier trade mark 2416831.
- (ii) Proventure claimed that it had been using its trade mark in relation to a wider range of goods/services than those covered by its earlier trade mark 2416831 and that application 3205819 was intended to protect its legitimate business interests under the mark;

- (iii) Proventure claimed that this included a software application which it had been developing since 2014 and beta-testing since July 2016.

11. The opposition proceedings were consolidated.

Case management

12. On 6th October 2017, ProVenture sought to add a further ground of opposition to Angelpro's applications based on s.3(6) of the Act. It alleged that Angelpro had:

- (i) Misled ProVenture about the size of its business;
- (ii) Misled ProVenture about the extent of its plans to market software under its marks;
- (iii) Indicated that it would agree to a co-existence agreement, but then failed to continue to negotiate to achieve such an agreement.

13. On examination it became clear that these allegations arose because of pre-litigation discussions between the parties aimed at avoiding litigation. Those discussions appeared to be covered by the 'without prejudice' rule protecting communications aimed at achieving settlement or avoiding a dispute. Further, even if true, they indicated no more than that Angelpro had negotiated in bad faith (as opposed to filing its trade mark application in bad faith). Further still, the discussions appeared to have occurred in October 2016, i.e. after the first relevant date.¹ Consequently, there did not appear to be any legal basis for ProVenture's proposed s.3(6) ground of opposition.

14. A case management conference ("CMC") took place on 22nd November 2017. Ms Carin Burchell of Branded! represented ProVenture. Mr Christian Bunke of Basck Limited represented Angelpro. Following the CMC, I rejected ProVenture's application to add a bad faith ground to its oppositions to Angelpro's applications. I directed that the following statements should be struck out of the case papers on the basis that they were (a) covered by privilege, and (b) irrelevant:

¹ The case law under s.3(6) indicates that the question of bad faith must be assessed as at the date of the application for registration.

- (i) Descriptions of negotiations between the parties in Angelpro's counterstatements;
- (ii) Responses to Angelpro's description of the negotiations (which revealed further details of these discussions) in a witness statement filed on behalf of ProVenture.

15. A substantive hearing took place on 15th August 2018. The parties were represented as before.

The evidence

16. ProVenture's evidence consists of:

- (i) Three witness statements by Mr Stephen Cooley (its Managing Director);
- (ii) Two witness statements by Carin Burchell and one by Rahema Hussein (ProVenture's Trade Mark Attorneys);
- (iii) A witness statement by Lee Somerville of Pocketworks (a development company that produced a downloadable software app' for ProVenture);
- (iv) Witness statements by Ben Still, Jackie Berry, Kerstan England, Tom Riordan, Theresa Grant and Merran McRae (customers of ProVenture who were told about and/or shown the software app' ProVenture was developing during 2016).

17. Angelpro's evidence consists of two witness statements by Andrew Calder, its Managing Director.

18. I have read all the evidence.

ProVenture's oppositions to Angelpro's applications 3184291/296

19. I will start by considering whether Proventure has shown genuine use of trade mark 2416831. The relevant parts of s.6A of the Act are as follows.

““Raising of relative grounds in opposition proceedings in case of non-use

6A. - (1) This section applies where -

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if -

- (a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

- (a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and
- (b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) -

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

20. The opposed marks were published on 14th October 2016. Therefore, the relevant period is 15th October 2011 to 14th October 2016.

21. Mr Cooley’s evidence is that ProVenture provides *“business consultancy in relation to recruiting, developing and attracting people to organisations, leadership development, performance and personal coaching, strategy development, organisational development, website development for assessment, recruitment and brand development, websites for career management, downloadable apps (software) for professional relationship management and development, strategies for business financing including expansion and acquisitions.”*

22. I note that *“website development for assessment, recruitment and brand development, websites for career management, downloadable apps (software) for professional relationship management and development”* do not fall within class 35 or within any of the terms for which ProVenture registered the earlier trade mark. Consequently, those goods/services are irrelevant to the proof of use enquiry.

23. At the hearing, Angelpro’s representatives accepted that Mr Cooley’s evidence showed use of the earlier mark in relation to human resources services, recruitment, coaching, career management and business advisory services. Therefore, there does not appear to be any dispute about Mr Cooley’s claim to have used the earlier mark in relation to *“business consultancy in relation to recruiting, developing and attracting people to organisations, leadership development, performance and personal coaching, strategy development, organisational development.”* Further, it was not disputed that these services fell within the broad descriptions of services for which the earlier mark is registered in class 35. I therefore find that ProVenture has shown genuine use of the earlier mark in relation to the services described above.

24. This leaves “strategies for business financing including expansion and acquisitions.” Mr Cooley’s evidence is that ProVenture offers “Corporate Advisory Services for SME owner managers in the realms of the acquisition of businesses. This may entail identifying suitable acquisition targets, valuing the business, structuring a deal and identifying appropriate sources of finance.” Mr Cooley provides a list of 30 business or individuals which he describes as completed projects.² The list is headed ‘Corporate Advisory’. Despite Mr Cooley’s indication that these are completed projects, 14 of the names listed are marked as “on-going”, some since 2006. Mr Cooley also states that “my company acts on the disposal side of corporate finance, preparing information memorandums, valuing businesses and marketing the business for sale and dealing with enquiries up to the successful completion of the sale of business.” There is no further elaboration of exactly what services ProVenture provided to whom under this heading. The turnover figures provided are not broken down to reveal the scale of ProVenture’s business in this area. I could not find anything in the 16 exhibits to Mr Cooley’s statement (including invoices, advertisements and press coverage of the business) which appeared to relate to the activities described above. When I asked her at the hearing, Ms Burchell could not point me to any such evidence.

25. In my view, Mr Colley’s evidence on this matter is too vague and unsubstantiated to justify protection of the mark in relation to any kind of financial valuation services. Angelpro does not dispute that the earlier mark has been used in relation to *business advisory services*. Consequently, I find the following list of services to be a fair specification for the purposes of this opposition.

Business consultancy in relation to recruiting, developing and attracting people to organisations, leadership development, performance and personal coaching, strategy development, organisational development; business advisory services.

² See exhibit SC5 to Cooley 1

The section 5(2)(b) ground of opposition

26. Section 5(2)(b) of the Act is as follows:

“5(2) A trade mark shall not be registered if because-

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

Comparison of goods/services

27. The respective goods/services are shown below:

Earlier trade mark 2416831	Opposed goods/services in Angelpro’s applications
Class 35: Business consultancy in relation to recruiting, developing and attracting people to organisations, leadership development, performance and personal coaching, strategy development, organisational development; business advisory services.	Class 9: Financial management software; Computer software programs; Computer software programs for database management. Class 36: Providing investors with financial information; Finance and credit information; Financial analysis; Investment portfolio management services; Provision of financial information for professionals in the field of portfolio management, for portfolio management. Class 38: Provision of access to an online database system, all relating to company information.”

28. At the hearing, Ms Burchell stated that Angelpro’s applications in class 36 were no longer of concern to ProVenture. Similarly, the applications to register the marks in relation to *financial management software* was no longer an issue. Consequently, I do not need to decide whether these goods/services, and the services in class 35 for which the earlier mark is entitled to protection, are similar.³

³ Although, for the avoidance of doubt, I would have found that they were not similar.

29. As regards, *computer software programs* and *computer software programs for database management*, Ms Burchell submitted that they are similar to ProVenture's business consultancy services because they cover *downloadable apps (software) for professional relationship management and development*, which are a natural extension of business consultancy services in the HR field.

30. The software in question appears to be an app' for recording details of professional relationships, such as contact details and business roles, as well as information about individuals or their businesses. It is not a service providing consultancy advice so it serves a different purpose. Software and business services are plainly different in nature and method of use. They are not in competition and there is no evidence that they are complementary in the sense described in the case law.⁴ On the contrary, software apps are not important or indispensable for the provision of business consultancy services or vice versa. Further, I do not accept that software apps are a natural extension of business consultancy services. On the contrary, the skills required to develop a software application are quite different to those required to provide business consultancy services, even if there is some use for the app' in the field of business to which the services are directed. And there is no evidence that it is common or customary for businesses providing business consultancy services to also trade in supporting software applications. I therefore find that the respective goods and services are dissimilar.

31. Turning to *provision of access to an online database system, all relating to company information* in class 38 of the Angelpro's applications, Ms Burchell submitted at the hearing that these services were similar to *provision of business information*, which are covered by the registration of earlier trade 2416831. However, although ProVenture undoubtedly provides information to businesses as part of its various business consultancy services, it has not shown use of the earlier mark in relation to the provision of information about businesses. Consequently, the specification at paragraph 27 above does not cover *provision of business information*. Class 38 covers telecommunications services. The 10th edition of the

⁴ That the one is important or indispensable for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking. *Boston Scientific Ltd v OHIM*, Case T-325/06

NICE classification guide contains an explanatory note about the services which fall in this class. It says:

“Class 38 includes mainly services allowing at least one person to communicate with another by a sensory means. Such services include those which: 1. allow one person to talk to another, 2. transmit messages from one person to another, and 3. place a person in oral or visual communication with another (radio and television).”

32. Therefore the services that fall within class 38 are mainly about providing the means of communication rather than the provision of the information accessed via those means. The provision of company information as such is proper to class 35. Where there is doubt, the class chosen by the applicant can be considered in assessing the scope of the services covered by the application.⁵ Further, in *Avnet Incorporated v Isoact Limited*,⁶ Jacob J. (as he then was) stated that:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

33. Consequently, even leaving aside the classes of services covered by the application, it is not appropriate to construe *provision of access to an online database system, all relating to company information* as meaning *provision of company information*.

34. For these reasons I find that the services at issue are not similar. This means that none of the goods or services covered by applications 3184291 and 3184296 are similar to the services in class 35 for which ProVenture's earlier trade mark is entitled to protection. As it is necessary to establish some degree of similarity between the respective goods/services to succeed under s.5(2)(b) of the Act, it follows that the s.5(2)(b) ground of opposition must be rejected.

⁵ *Altecnic Ltd's Trade Mark Application* [2002] RPC 34

⁶ [1998] F.S.R. 16

The section 5(3) ground of opposition

35. Section 5(3) states:

“(3) A trade mark which-
(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

36. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Adidas-Salomon*, Case C-487/07, *L’Oréal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

- a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.
- (b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.
- (c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.
- (d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark’s reputation and distinctiveness; *Intel*, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oréal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a

reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oréal v Bellure*).

Reputation

37. ProVenture's earlier trade mark can only have acquired a reputation for the purposes of s.5(3) in relation to the services for which it is registered and has been used.⁷ This means the services listed at paragraph 27 above.

38. Mr Cooley's evidence is that ProVenture started trading under that name in 2006. It appears to have started as an executive recruitment agency mainly serving local government and other public-sector organisations.⁸ In 2008, ProVenture started to provide personal coaching services. It has since provided such services to 75 individuals, mainly in public sector roles. In 2010 it started to provide career management courses, again mainly serving public sector bodies. Mr Cooley says that ProVenture provides around half a dozen such courses a year with attendances of between 6 and 20.

39. ProVenture's annual turnover in 2016 was around £440k. According to Mr Cooley, the market for executive search has changed since the company started trading in 2006. These days word-of-mouth referrals and recommendations mean that less national advertising is required. Nevertheless, ProVenture still spends around £20k per annum on advertising. No examples of such advertising were provided, but judging from the invoices in evidence most of this 'advertising' is ProVenture's placing of job advertisements in various publications.⁹ These include national newspapers such as the Sunday Times, The Guardian, The Sunday Telegraph and Health Services Journal, as well as websites, such as Career for Leaders and The IT Job Board.

40. I find that ProVenture's evidence shows that it is a small company operating mainly in the public sector and mainly in relation to executive recruitment and

⁷ See paragraph 27 of the decision of the General Court in *Tulliallan Burlington Ltd v EUIPO*, Case T-123/16

⁸ See exhibits SC1, SC6, SC7 and SC10 to Cooley 1

⁹ See exhibit SC6 to Cooley 1

development. Considered against the whole UK market for the services listed at paragraph 27 above, I do not consider that the evidence establishes that ProVenture had any more than a tiny share of that market. Further, the company appears to operate with only a very modest degree of advertising/promotional activity. Consequently, it cannot be assumed that the company would be known to a much wider section of the public than just those who constitute its existing customers. Therefore, I do not accept that at the first relevant date ProVenture would have been known to a “significant part” of the public concerned with the services set out at paragraph 27 above.

41. This means that the s.5(3) claim falls at the first hurdle. However, in case I am wrong about this, I will go on and consider whether the other aspects of the s.5(3) ground are made out.

Link

42. As I noted above, my assessment of whether the public will make the required mental ‘link’ between the marks must take account of all relevant factors. The factors identified in *Intel* are:

The degree of similarity between the conflicting marks

43. Ms Burchell submitted that the respective trade marks are highly similar. She pointed out, they each consist of (or include) the words VENTURE and PRO, albeit in a different order. Mr Bunke for Angelpro disputed that the respective marks are highly similar, although he conceded that they were similar to a degree.

44. According to the Oxford Dictionary, ‘venture’ is a noun meaning “A *risky or daring journey or undertaking.*” This is a well-known word. I find that the word would carry this meaning in all the marks at issue. ‘Pro’ is, among other possible meanings, a shortened form of the word ‘professional’. Especially given the business focus of the goods/services, I find that most users would recognise the word as having this meaning in the marks. The combination of ‘Venture’ and ‘Pro’ has no immediately obvious meaning (irrespective of the order of the words). However, there is still a

recognisable degree of conceptual similarity between the words making up the marks, notwithstanding the fact that the marks as wholes have no immediately obvious meaning.

45. The closest of Angelpro's earlier marks to ProVenture from a visual perspective is VenturePro in application 3184291. As a rule of thumb, it is often said that the beginnings of word marks make more impact than the endings. The beginnings of these marks are plainly different. However, the overall visual impression created by the marks is nevertheless quite similar. Therefore, notwithstanding the different order of the words, I find that those marks are visually similar to a medium to high degree. Angelpro's other marks, in which 'Pro' appears as a separate word and/or a V device appears before the words Venture Pro are less visually similar to the earlier mark.

46. Turning to the degree of aural similarity, I find that the different order of the words in the marks has more impact on the sound of the marks than on the way they look. Nevertheless, there is some similarity in sound because the same words are being verbalised. In my view, the marks are aurally similar to a medium degree.

The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

47. I have already held that the respective goods/services are dissimilar. However, I accept ProVenture's case that they could be provided to the same business users. Such users are likely to pay at least a normal degree of attention when selecting the goods/services.

The strength of the earlier mark's reputation

48. If the earlier mark has a qualifying reputation, it is only a weak one. The earlier mark is far from being a household name.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use

49. The earlier mark has an average degree of inherent distinctive character. It may have become slightly more distinctive through use, but not such as to have materially enhanced its distinctive character.

Whether there is a likelihood of confusion

50. Ms Burchell submitted that there is a likelihood of confusion through imperfect recollection. I consider that this would be a real concern if the respective goods/services were the same or highly similar, but they are not. I therefore prefer Angelpro's submission that the differences between the respective goods/services are sufficient to exclude the likelihood of confusion, including the likelihood of association in the sense of indirect confusion.

Conclusion

51. Standing back and looking matters in the round I find that, even if ProVenture had a qualifying reputation at the first relevant date, the relevant public would not have made the required mental link between the parties' marks. Consequently, the risk of detriment to the earlier mark, or of Angelpro's marks taking unfair advantage of any reputation attached to ProVenture, does not arise. The s.5(3) ground of opposition is therefore rejected.

The section 5(4)(a) ground of opposition

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

"A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b) [.....]

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

53. In *Discount Outlet v Feel Good UK*,¹⁰ Her Honour Judge Melissa Clarke, sitting as a Deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56 In relation to deception, the court must assess whether “*a substantial number*” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

54. Mr Calder claims that Angelpro spent £0.5m developing software for sale under its trade marks. However, there is no evidence of any actual sales under the marks prior to the first relevant date. Consequently, that is the date at which ProVenture’s s.5(4)(a) claim must be assessed.

55. I accept that ProVenture had acquired a protectable goodwill under that name in relation to the services set out in paragraph 27 above. I have already considered,

¹⁰ [2017] EWHC 1400 IPEC

and rejected, ProVenture's claim that there would be a likelihood of confusion if ProVenture is used in relation to the services in class 35 set out in paragraph 27 above and Angelpro's marks are used in relation to the goods and services in classes 9, 36 and 38 covered by Angelpro's applications 3184291 and 3184296. I would reach the same conclusion about misrepresentation for the purposes of the s.5(4)(a) ground of opposition. This is because I do not accept that a substantial number of ProVenture's customers or potential customers would be likely to be deceived.

56. However, ProVenture's earlier right under s.5(4)(a) is claimed to be wider in scope in three respects compared to the services in class 35 specified in paragraph 27 above. Firstly, it is claimed that ProVenture provided career support services to the general public. As these services are provided to the general public, they may not fall within the business consultancy services considered above. Secondly, it is claimed that ProVenture provided its customers with software in the form of a downloadable app'. Thirdly, it is claimed that ProVenture provided websites for its clients for recruitment and leadership development purposes.

57. Mr Cooley's evidence is that ProVenture has provided career support services to the general public since 2010 via websites, particularly careeradviceforme.co.uk and supeople.com. The first named website is available to members who pay a subscription. Mr Cooley says that his company uses software to track visits and visitors to these websites including the i.p. locations of the visitors. Despite this, he does not say how many visits these sites have received, or how many people have taken out subscriptions for the careeradviceforme website. These are striking omissions. Further, although Mr Cooley claims that these career support services were provided under the PROVENTURE mark, the examples of the relevant websites in his evidence do not show any use of PROVENTURE.¹¹ I do not therefore accept that ProVenture has provided career support services to the general public on any significant scale under the mark PROVENTURE.

¹¹ See exhibit SC4 to Cooley 1

58. According to Mr Cooley, ProVenture developed a downloadable software application for use on mobile devices and online use. It is mainly for business networking purposes. It enables users to record specific meeting notes, set reminders and record personal information. Mr Cooley says that the app' has been in development since 2014. It was originally developed under the name Pollinate, but was re-named Cyrcla in December 2016. Mr Cooley's evidence is that the app' has been discussed and developed under the PROVENTURE mark with senior executives in target organisations and existing clients since November 2015. Prototypes were discussed with 22 senior executives and circulated to a wider group of 50 people. It is not clear from Mr Cooley's evidence exactly when these things happened. However, Mr Cooley is clear that senior executives and others were involved in beta-testing the app' from July 2016. He provides a list of 55 people who he says were involved on beta-testing the app'.¹² Some of these were personal friends of Mr Cooley. The app' was made available to the general public in January 2017 via the Apple Store. I note that this is after the first relevant date. It is therefore necessary for me to assess what goodwill had been created under the name ProVenture (if any) by the first relevant date (in September 2016).

59. Mr Sommerville is the Head of Production at Pocketworks, the company that developed the app' for Proventure. His evidence is that he first discussed the idea for the app' with Mr Cooley on 11th August 2015. The first prototype was developed on 24th November 2015 and the first version of the app' which represented a minimal viable product ("MVP") was produced on 21st April 2016. This was followed by a pilot product on 6th June 2016. Mr Sommerville says that *"during the prototype, MVP and testing phase, the app was downloaded 27 times by... beta testers"*. I note that this is fewer than the 55 people named on Mr Cooley's list of beta-testers. The difference may be accounted for by the fact that Mr Cooley's list includes testers on version 3 of the app', which was by then called Cyrcla. As that name was not adopted until December 2016 according to Mr Cooley (i.e. after the first relevant date), it appears that only those who beta-tested the earlier versions of the app' are relevant for present purposes. There are 24 of these on Mr Cooley's list, which roughly accords with the 27 downloads of the app' mentioned by Mr Sommerville.

¹² See exhibit SAC12 to Cooley 2

60. ProVenture's evidence includes witness statements from:

- (i) Ben Still, Managing Director of West Yorkshire Combined Authority, an existing customer of ProVenture. Mr Still says that Mr Cooley showed him a prototype of the app' in June 2016 and that later, in "*September 2016*", he was sent a link to the app' for testing purposes.
- (i) Jackie Berry, the Chief Executive of Hull University Union, an existing customer of ProVenture. Ms Berry says that Mr Cooley first discussed the app' with her in "*early 2016*" and later, in "*September 2016*", she was sent a link to the app' for testing purposes.
- (ii) Kersten England, Chief Executive of Bradford Council, an existing customer of ProVenture. Ms England gives similar evidence to Ms Berry.
- (i) Tom Riordan, Chief Executive of Leeds City Council, an existing customer of ProVenture. Mr Riordan says that Mr Cooley first discussed the app' with him in "*the middle of 2015*" and later, in August 2016, Mr Cooley installed the app' on his mobile phone for testing purposes.
- (ii) Merran Mcrae, the Chief Executive of Wakefield Council, an existing customer of ProVenture. Ms Mcrae says that Mr Cooley first discussed the app' with her on 10 August 2016 when they met for lunch. Later, in "*September 2016*", she was sent a link to the app' for testing purposes.

61. Ms Burchell submitted that when ProVenture's goodwill was considered as a whole, the extension of the business into software apps was sufficient to give it an earlier right in relation to software.

62. Mr Bunke submitted that the development of a software app' was irrelevant because (a) there were no sales prior to the first relevant date, or at all, and (b) the Cyrcla product was promoted under that name, not PROVENTURE.

63. Looked at most favourably to ProVenture, the involvement of customers in the development and testing of its software app' might be regarded as advertising a new software product. It is not clear whether, without any actual sales to UK customers,

an advertising campaign featuring a mark can create a protectable goodwill. See *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*.¹³ It appears that advertising a mark is not sufficient to create an actionable goodwill where there is no imminent prospect of a trade commencing under it: see *Bernadin (Alain) et Cie v Pavilion Properties Ltd*.¹⁴ Pre-launch publicity appears to have been accepted as sufficient to create an actionable goodwill in the cases of *Allen v Brown Watson*¹⁵ and *BBC v Talbot*¹⁶, but, as explained in paragraph 3-071 of Wadlow's 'The Law of Passing Off 5th Ed', the plaintiffs in these cases had long established businesses in the UK. The real issue was whether their new marks had become distinctive of those businesses to their UK customers through advertising alone. Similarly, the real issue in this case is not whether ProVenture had a protectable goodwill at the first relevant date, but whether it extended to downloadable software. As Floyd J. stated in *Minimax GmbH & Co KG v Chubb Fire Limited*¹⁷:

"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 must also do so as of the relevant date, which is, at least in the first instance, the date of application."

64. In examining the scope of ProVenture's goodwill it is important not to equate mere use of a name with establishing goodwill under it. As Jacob J. (as he then was) stated in *Hart v Relentless Records*¹⁸:

"62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the

¹³ [2015] UKSC 31 at paragraph 66 of the judgment

¹⁴ [1967] RPC 581

¹⁵ [1965] RPC 191

¹⁶ [1981] FSR 228

¹⁷ [2008] EWHC 1960 (Pat)

¹⁸ [2002] EWHC 1984 (Ch)

very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in BALI Trade Mark [1969] R.P.C. 472. The whole point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case.”

65. In this case the evidence shows that, prior to the first relevant date, ProVenture showed a small number of its existing customers the prototype software app' it had arranged to be developed. Those customers plainly knew that ProVenture was the party having the app' developed, although the app' was at that time to be called Pollinate. There is no evidence of any sales of the app' before or after the first relevant date. At the hearing, Ms Burchell told me that this was because ProVenture did not intend to charge for the app'. There must therefore be some doubt as to whether the app' is any more than a tool to attract customers to use ProVenture's existing commercial services. In this connection, I note that there is no evidence showing the number of downloads of the app' since it went live on the Apple Store in January 2017, which may have shown that this was a serious development of ProVenture's business into software apps. Further, Mr Calder's evidence is that, at as at August 2017, the app' was being promoted from a website called Cyrcla, with no mention of PROVENTURE. In these circumstances, I find that ProVenture has failed to establish that its goodwill extended to software apps at the first relevant date.

66. Further, even if I am wrong about that, the software app' in question is a very specific software application. Given the tiny scale of any possible goodwill in this aspect of ProVenture's business and the differences between the marks, I do not consider that the use of Angelpro's marks at the first relevant date would have deceived a substantial number of ProVenture's customers or potential customers, unless it was used for the same sort of app'. Therefore, ProVenture's opposition under s.5(4)(a) against Angelpro's applications in class 9 would not have succeeded, except in relation to *computer software programs* at large (which covers such software apps).

67. Finally, I turn to the claim that ProVenture provided websites for its clients for recruitment and leadership development purposes. Mr Cooley's evidence on this matter is that his company has been doing this since 2006. He provides 30 examples prior to the first relevant date.¹⁹ Some landing pages from these sites are in evidence.²⁰ These are said to show some use of ProVenture on the client's sites (thereby potentially broadening the reputation of ProVenture beyond its immediate clients). However, there is no persuasive evidence of this, at least prior to the first relevant date.²¹ Nevertheless, I accept that ProVenture provided website services for its clients, at least for recruitment purposes, between 2006 and 2016.

68. In this connection, I note that 9 of the invoices to customers in evidence identify services such as "*microsite*", "*revamping microsite*", "*website*."²² The latest invoice dated 2014 is the most informative about the services provided. It itemises services provided by ProVenture to AWYA in Wakefield, which included "*Web design, build, host and copy writing*" at a cost of £1950. The amounts shown on the other invoices for similar services vary between £600 and £4000. Therefore, this appears to have been a genuinely commercial aspect of ProVenture's business at the first relevant date. Consequently, I accept that, at the first relevant date, in addition to the services listed at paragraph 27 above, ProVenture's earlier right extended to *website design services, for use in the field of recruitment and leadership development*.

69. How does this affect my findings on Angelpro's applications? I find that it makes no difference. This is because *website design services, for use in the field of recruitment and leadership development* are sufficiently different to any of the goods/services covered by Angelpro's applications that, when taken together with the differences between the marks and the type of customer involved (i.e. these are not impulse purchases), the use of Angelpro's marks would not have been likely to deceive a substantial number of ProVenture's customers or potential customers into

¹⁹ See exhibit SC3 to Cooley 1

²⁰ Also in exhibit SC3 to Cooley 1

²¹ The screenshots provided appear to have been first created in 2017, or it is not clear when they were created.

²² See exhibit SC6 to Cooley 1

believing that the users of the respective marks are the same or connected. Consequently, such use would not constitute a misrepresentation to the public.

70. ProVenture's opposition under s.5(4)(a) fails accordingly. This means that the oppositions to Angelpro's applications are rejected.

Angelpro's opposition to ProVenture's application 3205819

The 'bad faith' ground of opposition

71. 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.”

72. Angelpro's pleaded case is that:

- ProVenture's application was filed after it had threatened to oppose Angelpro's applications;
- The goods/services covered by ProVenture's application are identical to those covered by Angelpro's applications;
- ProVenture had realised that its existing registration in class 35 was fairly narrow;
- ProVenture had not reviewed the coverage of its trade mark despite having renewed the earlier registration.

73. Point 2 above is factually wrong. ProVenture's application covers goods/services in 5 classes only one of which (class 9) overlaps with Angelpro's applications. Further, although the goods in class 9 undoubtedly overlap, ProVenture's description of its class 9 goods do not mimic the list of goods in Angelpro's application.

74. The reasons advanced in support of Angelpro's bad faith ground do not, either individually or collectively, come anywhere near justifying the allegation of bad faith.

All they amount to is that ProVenture realised that its existing registration was too narrow and sought to rectify that by filing a new application of broader scope. It did so in addition to opposing Angelpro's applications. The wider scope of ProVenture's application was clearly because it better reflected its business interests and future plans. There is no bad faith in that. And ProVenture was plainly entitled to file a new application as well as opposing Angelpro's applications. At the hearing, Mr Bunke submitted that ProVenture had no intention of using its mark as a trade mark for computer software. In this connection, he pointed to the evidence that ProVenture had launched its software app' under the mark CYRCLA. However, the no-intention-to-use point was not pleaded in the notice of opposition. Further, it is entirely speculative. There is no reason why goods cannot be sold under two or more marks. They often are, e.g. house mark plus product mark. There is no substance in these points, whether pleaded or otherwise. Therefore, I reject the bad faith ground of opposition.

The section 5(2)(b) ground of opposition

75. Angelpro bases its s.5(2) ground of opposition on earlier trade marks 3184291 and 3184296. As these have survived ProVenture's oppositions, Angelpro is entitled to rely on these marks to oppose the registration of PROVENTURE.

Comparison of goods/services

76. In its notice of opposition Angelpro stated that it was relying on all the goods/services covered by the earlier trade marks. However, when I asked him about it at the hearing, Mr Bunke clarified that Angelpro relied only on the goods in class 9. Therefore, the respective goods/services are set out below.

Opposed goods/services	Goods covered by earlier marks
Class 9: Downloadable apps; downloadable smartphone applications (software); downloadable software; downloadable applications for use with mobile devices; downloadable mobile applications for the management of information; downloadable mobile	Class 9: Financial management software; Computer software programs; Computer software programs for database management.

<p>applications for the management of data; downloadable mobile applications for the transmission of information, downloadable publications.</p> <p>Class 41: Non-downloadable apps; non-downloadable software.</p> <p>Class 42: Design and development of websites; planning, design, development and maintenance of websites for third parties; design and development of software; hosting services and software as a service and rental of software; providing temporary use of on-line non-downloadable software for database management; providing temporary use of on-line non-downloadable software for importing and managing data; providing temporary use of on-line non-downloadable software for the transmission of information; providing temporary use of on-line non-downloadable software for the management of information; providing temporary use of on-line non-downloadable software for the management of data; providing temporary use of on-line non-downloadable software for the transmission of data; information, consultancy and advice in relation to the aforesaid.</p>	
--	--

77. In *Gérard Meric v OHIM*,²³ the General Court stated that:

“29. the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM-Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the

²³ Case T- 133/05

goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

78. Angelpro's earlier trade marks cover *computer software*. Consequently, applying the *Meric* principle, they cover all the opposed goods in class 9, except for *downloadable publications*. Downloadable publications involve the use of software, but considered from user's perspective, a downloadable publication is not software. It is a publication the value of which comes from the information contained in the publication rather than the software used to organise and present the information. However, I accept that the distinction between the software and the information presented through it is not always a stark one. I therefore accept that there are some similarities between these goods in terms of their nature, purpose and method of use. Consequently, I find that they are similar to a medium degree.

79. Software in class 9 is different in terms of method of use to non-downloadable software and software apps in classes 41 and 42, as well as to software provided as a service and/or for temporary use. However, the purpose of the software could be the same. Further, software as goods can compete with the provision of software through services, e.g. a user can purchase software or licence it from the cloud through a service provider. I therefore find that the respective goods/services are highly similar.

80. This leaves *design and development of websites; planning, design, development and maintenance of websites for third parties; hosting services* in class 42. Again, development of websites involves the use of software, but it is a distinct service compared to the sale of software as such. The nature (goods v services) and method of use is different, and there is no evidence that the goods/services are complementary. There is no evidence which assists me, but I accept that there may be a degree of similarity of purpose as well as some level of competition between software as goods, particularly software for developing one's own website, and website development services. In my view, the respective goods/services are similar to a medium degree.

Global comparison

81. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Average consumer

82. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. In assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*. I accept that the respective goods/services could be marketed to the same users, which includes business users. All such users are likely to pay at least a normal degree of attention when selecting the goods/services.

Degree of distinctiveness of earlier mark

83. I will focus on Angelpro's best case, which is the VenturePro mark in application 3184291. The earlier mark has an average degree of distinctive character. There is

no evidence that the level of distinctiveness has been enhanced through extensive use prior to the second relevant date.

Similarity of marks

84. I again focus on earlier mark VenturePro. The comparison is with PROVENTURE (which could include use of ProVenture). I adopt my findings at paragraphs 44-46 above. The marks are visually similar to a medium to high degree and aurally similar to a medium degree. There is also a recognisable degree of conceptual similarity between the words making up the respective marks, notwithstanding the fact that the marks as wholes have no immediately obvious meaning.

Likelihood of confusion

85. Angelpro's best case is that there is a likelihood of confusion through imperfect recollection. I consider that this is a real concern where the respective goods/services are the same or highly similar. I therefore find that there is a likelihood of confusion if PROVENTURE is used in relation to software (whether as goods or services) in classes 9, 41 and 42.

86. This leaves *downloadable publications* in class 9 and *design and development of websites; planning, design, development and maintenance of websites for third parties; hosting services* in class 42. These services are similar to a medium degree to Angelpro's *computer software*. However, my findings about the:

- differences between the respective goods/services;
- differences between the marks;
- users of the above services paying at least a normal degree of attention when selecting them;
- earlier mark being distinctive only to an average degree;

- when considered together are sufficient to exclude the likelihood of confusion, including the likelihood of association in the sense of indirect confusion.

87. Angelpro's opposition under s.5(2)(b) to the registration of PROVENTURE in classes 9, 41 and 42 therefore mostly succeeds, but fails in relation to the goods/services set out in paragraph 86 above.

Overall outcome

88. ProVenture's oppositions 408270 & 408281 to Angelpro's applications 3184296 and 3184291 are rejected. The marks covered by those applications may proceed to registration.

89. Angelpro's partial opposition 409150 to ProVenture's application 3205819 succeeds, except in relation to the goods/services set out in paragraph 86 above. This means that application 3205819 may proceed to registration in classes 16 and 35 and for the following goods/services in classes 9, 41 & 42:

Class 9: Downloadable publications; videos, DVDs and other electronic means of carrying sound and images.

Class 41: Provision of training courses; leadership development; executive coaching; non-downloadable publications; arranging, conducting and organisation of events; arranging, conducting and organisation of conferences; arranging, conducting and organisation of workshops; arranging, conducting and organisation of symposia; information, consultancy and advice in relation to the aforesaid.

Class 42: Design and development of websites; planning, design, development and maintenance of websites for third parties; website hosting services; information, consultancy and advice in relation to the aforesaid.

Costs

90. ProVenture seeks costs above the usual scale because Angelpro refused to enter substantive discussions or mediate when invited to do so. It also seeks costs for the CMC on 22nd November 2017 which resulted in 'without prejudice' communications being redacted from the evidence and pleadings.

91. Angelpro also asks for an award of costs. When I asked him at the hearing why Angelpro has rejected my request for it to consider mediation (ProVenture being agreeable), Mr Bunke explained that feelings had been running high at the time. This was partly because of ProVenture's application to add a 'bad faith' ground to its oppositions. Additionally, relations between the parties had deteriorated to the point where no settlement appeared possible.

92. As Angelpro has been more successful than ProVenture, and costs normally follow the event, I would not normally consider ordering Angelpro to pay costs to ProVenture. However, the registrar has a wide discretion to award costs. This means that unreasonable behaviour can be reflected in any costs awarded. Therefore, I would not rule out, as a matter of principle, the possibility of ordering a 'winner' who has behaved unreasonably to pay some of the costs of a party that has behaved reasonably, but ultimately lost.

93. Refusing to mediate when invited to do so by a Hearing Officer amounts to unreasonable behaviour, unless there is proper justification for that refusal. I do not find Angelpro's explanation for its refusal to mediate entirely convincing. Feelings often run high in litigation. That is a reason to actively consider alternative dispute resolution, not to avoid it. Admittedly, ProVenture's attempt to introduce a bad faith ground of opposition based partly on things said in settlement discussions must have undermined confidence that further dialogue of any kind could achieve a satisfactory result. That is unfortunate because both sides offered fall-back positions at the hearing, confirming my initial assessment that a mediated settlement looked a real possibility. Additionally, the parties are both small businesses with limited resources for litigation. Avoiding further such costs should therefore have been important to them.

94. I also take account of the fact that Angelpro also accused ProVenture of filing its application in bad faith. An allegation of bad faith is a serious one. Such allegations should not be made lightly and/or based on insubstantial reasons. Angelpro's bad faith allegation against ProVenture was no more justified than ProVenture's prospective bad faith allegation against Angelpro.

95. As to the costs of the CMC on 22nd November 2017, the CMC was required as much to deal with ProVenture's application to add a bad faith ground to its oppositions (which was rejected) as by Angelpro's references to without prejudice material. Further, ProVenture's initial response to this was to waive privilege and seek to file more details of the negotiations in its evidence. The removal or rejection of privileged material (from both sides) was therefore more a consequence of ProVenture's application than the object of it. Consequently, it is not fair to say that ProVenture was 'successful' at the CMC.

96. Considering matters in the round, I find that both sides have acted unreasonably in certain respects. I do not therefore intend to favour either side with an award of costs.

Dated this 24th day of August 2018

**Allan James
For the Registrar**