

O-146-11

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2531847
BY PAUL SQUIRE TO REGISTER
A TRADE MARK IN CLASSES 25 & 35**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 100292 BY GABRIELLE JEMMOTT**

BACKGROUND

1. On 16 November 2009, Paul Squire applied to register the following trade mark:



Following examination, the application was accepted and published for opposition purposes on 18 December 2009 in Trade Marks Journal No. 6816 for the following goods and services:

Class 25: Clothing and hats.

Class 35: Retail services connected with the sale of clothing.

2. On 17 March 2010, Gabrielle Jemmott filed a notice of opposition. This consisted of a single ground based upon section 5(4)(a) of the Trade Marks Act 1994 (as amended) (the Act). Ms Jemmott states that **1AWAYS**:

“was first used in London UK on 06/07/2006 for the design of promotional t-shirts and design and production of sporting shoes (trainers).”

Ms Jemmott adds:

“The applicant’s mark is very similar to mine. I have established the trade mark 1AWAYS (and website 1AWAYS.com) that has acquired a reputation. I use this mark in the course of trade for goods identical to the classes applied for, therein lies a likelihood of confusion on the part of the public, which includes the likelihood of association with my trade mark.”

3. Ms Jemmott indicates that her opposition is directed against all of the goods and services in the application for registration.

4. On 1 April 2010, Mr Squire filed a counterstatement which consists, in essence, of a denial of the ground upon which Ms Jemmott’s opposition is based. The core of Mr Squire’s arguments can be seen from the following extracts taken from his counterstatement:

“In reference to Miss Jemmott’s statement “**the applicants mark is very similar to mine**”. The issue we have with that statement is, when you look at Miss

Jemmott's holding page there is no way of distinguishing which is her mark. Once we realised we were being opposed for the trade mark we looked at her holding page and at first thought her mark was 1AB. That seems to be her mark/logo, due to the fact that it appears to me that it has been designed, and is in the centre of her holding page. That in itself is nothing like our mark. Then above that is the word in capitals 1AWAYS. So the question is what is her mark? Is it 1AB done in the style that is prominent on her holding page, or is it 1AWAYS which really is just done in a font in capitals. We believe that a trade mark has to be a distinguishing mark that is immediately recognisable by the member of the public. While 1AB seems to fit that criteria, the words 1AWAYS basically written in capitals in our opinion isn't very distinctive. If we believe that 1AWAYS is her mark, and not the 1AB, we can see how the marks are similar, and could confuse consumers. But we do not believe this is the case. Our mark for Oneaways has, just like Miss Jemmott's 1AB, been designed for us by a designer.

In reference to Miss Jemmott's statement "**I have established the trade mark 1AWAYS (and website 1AWAYS.com) and has acquired a reputation.**" The issue we have with that statement is that according to Miss Jemmott she has been using the name 1AWAYS since 06/07/2006 and has had the website since 2007.

1. We find it fairly hard to believe she has acquired much of a reputation, simply because she has been trading for the best part of four years....Also when you type in GSJemmottCouture.com or 1AWAYS.com you end up at the same web address. Miss Jemmott has a link from her My Space page which brings you to GSJemmottCouture, which is also her 1AWAYS page. Miss Jemmott has only acquired 15 friends on her my space. This seems to contradict her statement about her acquiring a reputation.

2. Even now that I have her web address, I have to wonder why after 3 years is there still only a holding page up, and there seems to be no way of purchasing or viewing her clothes. There is no way of buying on line, or even a store address in which I could go to. The only point of contact is a PO Box address.

3. Another thing that seems to contradict her statement is, we checked her holding page, and fortunately there is a hit counter on there. So I have to wonder why if she's been using 1AWAYS for four years, and has had a web page for three years, is her hit count so low. The 1AWAYS page had only 770 hits on the 26th March 2010.

Then Miss Jemmott claims that "**the right was first used in London UK on the 06/07/2006 for the design of promotional t-shirts and design and production of sporting shoes (trainers).**" The first point I would like to make about that statement is, if Miss Jemmott is referring to the word Oneaways, then I would like to point out that the word Oneaways, is a commonly used word. It's a street term

that is used to describe a one off, limited or an exclusive item. We have been using the term oneaway/oneaways for at least twelve years.

The second point is that, nowhere on her holding page does it mention that she is involved in the design of t-shirts or of sporting shoes (trainers). In fact her page seems to show that she does the exact opposite to trainers and t-shirts. Miss Jemmott's holding page is entitled 1AWAYS Boutique. The word boutique indicates that she is designing and making formal wear.

In reference to the law of passing off, well I would assume that if we were trying to pass ourselves as Miss Jemmott's 1AWAY, it would be because she has acquired such a reputation, that we would be trying to profit by allowing members of the public to think that we are the same brand. This is not the case, as we had never heard of her, we haven't seen her clothing range, and we do not know where she sells her clothes from."

5. Both parties filed evidence. Neither party asked to be heard nor did they file written submissions in lieu of a hearing.

EVIDENCE

Ms Jemmott's evidence

6. This consists of a witness statement, dated 1 July 2010, from Gabrielle Jemmott. Ms Jemmott explains that she is the Creative Director of 1AWAYSboutique, a position she has held since 2006. Ms Jemmott confirms that the facts in her statement come from her personal knowledge or from "the records of my company", adding that she is "duly authorised to speak on my company's behalf in the prosecution of this application."

7. Ms Jemmott states that the trade mark 1AWAYS was first used in the United Kingdom in 2006 in relation to clothing and sporting footwear (in class 25) and advertising, business administration and retail services connected with the sale of leisure apparel and sporting footwear (in class 35). Attached to Ms Jemmott's statement are 31 exhibits; these are as follows:

GJ1 – consists of three photographs said to date from Spring/Summer 2006 for what Ms Jemmott describes as a "sporting footwear sample, designed in-house and manufactured by NIKE iD with the mark digitally embroidered". The numeral and word 1 AWAYS appears on the left hand side of the heel portion of the shoe.

GJ2 – consists of photographs (again said to date from Spring/Summer 2006) of, inter alia, four t-shirts (two black, two white) bearing the numeral and word 1 AWAYS which Ms Jemmott describes as "leisure apparel samples".

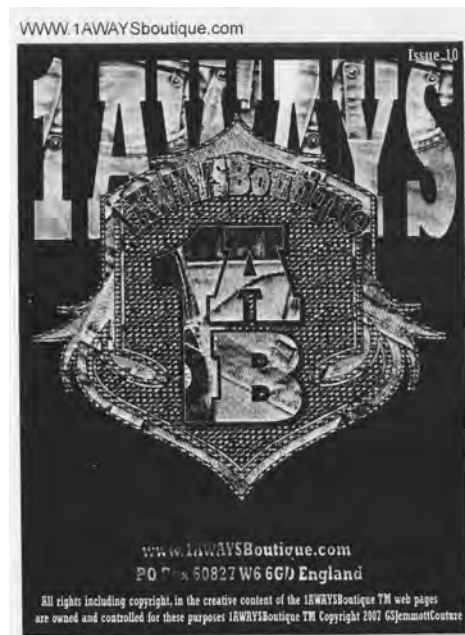
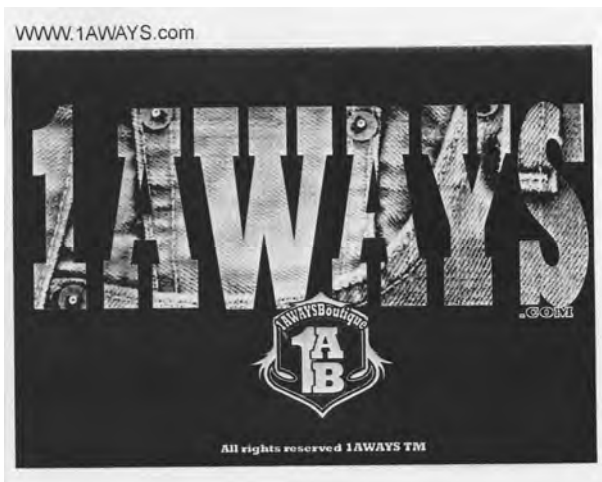
GJ3 and 4 – consists of an e-mail dated 16 June 2010 from nikestore.europe@nike.com to Ms Jemmott and a page from the records of the same organisation. The record page

identifies Ms Jemmott as the customer and refers to an order number and creation date of 9 June 2006. The value of the invoice is £101, of which £95 is in relation to “Air Max 90 Mens ID”.

GJ5 – consists of photographs of two t-shirts said to date from Spring/Summer 2007 which Ms Jemmott describes as a “presentation page of printed sporting apparel samples with printed mark, page hosted by eBay.com www.stores.ebay.co.uk/1AWAYSboutique, page also used as advertising via seasonal e-mail shots.” The numeral and word 1 ALWAYS can be seen on both t-shirts and I note the page bears, inter alia, the numeral and words 1AWAYSBoutique.

GJ6, 7 and 8 – consists of e-mails dated 22, 26 and 27 October 2007 from eBay.com to Ms Jemmott which she describes as “seller’s fee correspondence”. I note that the e-mails dated 22 and 26 October respectively contain the following text: “Hello 1aways,” and “eBay sent this message to Gabrielle Jemmott (1aways).”

GJ9 – consists of what Ms Jemmott describes as “presentation pages for www.1AWAYS.com which links to www.1AWAYSboutique.com”. She explains that “this website operate as an e-Retailers and online presence for leisure wear brand 1AWAYS™ and exclusive wear label GSJemmottCouture®.” The pages look like this:



GJ10, 11 and 12 – consists of invoices dated 28 June 2008 (for £20.89) and 31 March 2009 (for £15.96 and £6.78) from Fasthosts Internet Ltd of Gloucester to Ms Jemmott which mention the 1awaysboutique.com, 1awaysboutique.co.uk, 1aways.com and 1aways.co.uk domain names. Mr Jemmott explains that these are “monthly billing invoices for aforementioned e-Retailers”.

GJ13 and 14 – consist of photographs of a range of t-shirts and a vest said to date from Spring/Summer 2008, 2009 and 2010 all of which appear to bear, inter alia, the numeral and word 1 ALWAYS and/or 1 ALWAYS Boutique. Ms Jemmott describes these as “presentation pages of printed sporting apparel samples with printed mark, pages hosted by www.1AWAYSboutique.com pages also used as advertising via seasonal email shots and post cards.”

GJ15-31 – are described by Ms Jemmott as “sales receipts from 2007-2010 for goods and services, purchased for the production and customisation of leisure apparel and sporting footwear i.e. T-shirt transfer papers/vinyl, leisure wear and manual heat press.” Some of the receipts provided are dated, some are not; some are difficult to read, some are impossible to read; the majority are dated prior to the material date in these proceedings (see below); as far as I can tell none mention the numeral and word 1 ALWAYS (or any variation of that combination). The invoices come from a range of suppliers, namely: Ryman the stationer, Primark, A-One Fabrics, Fabric World (UK) Ltd, H&M, Servicepoint, Crafty computer paper, and The Magictouch (GB) Ltd and total some £1600.

8. Ms Jemmott explains that sales of goods and services (including “promotional giveaways”) and amounts spent on promoting the goods and services in the period 2006 to 2008 were as follows:

Year	Sales (£)	Promotion (£)
2006	240	130
2007	81	170
2008	560	120

9. Ms Jemmott explains that the promotion (including promotional giveaways) has taken place on www.ebay.co.uk, www.1AWAYSboutique.com and www.1AWAYS.com. Ms Jemmott adds that the mark has been used on the goods and services claimed in London, Essex, Hertfordshire and Greater Manchester.

10. Ms Jemmott concludes her statement in the following terms:

“I truly believe that as a result of the use made of it by my company, the mark 1AWAYS is well known to the general public and to customers in the United Kingdom, and is uniquely associated with 1AWAYSboutiques™ and 1AWAYS.com and that it distinguishes leisure apparel and sporting foot wear sold by www.1AWAYSboutique.com from other designer clothing brands”

Mr Squire’s evidence

11. This consists of a document comprised of four pages of a mixture of written submissions and fact; attached to the written submissions are four exhibits. The filing of

evidence in trade mark proceedings is governed by section 69 of the Act and rule 64 of the Trade Marks Rules 2008 the relevant parts of which read as follows:

Section 69

“69. Provision may be made by rules-

(a) as to the giving of evidence in proceedings before the registrar under this Act by affidavit or statutory declaration;

(b)...

(c)...”

Rule 64

“64.—(1) Subject to rule 62(2) and as follows, evidence filed in any proceedings under the Act or these Rules may be given—

(a) by witness statement, affidavit, statutory declaration; or

(b) in any other form which would be admissible as evidence in proceedings before the court.

(2) A witness statement may only be given in evidence if it includes a statement of truth.

(3) The general rule is that evidence at hearings is to be by witness statement unless the registrar or any enactment requires otherwise.

(4) For the purposes of these Rules, a statement of truth—

(a) means a statement that the person making the statement believes that the facts stated in a particular document are true; and

(b) shall be dated and signed by—

(i) in the case of a witness statement, the maker of the statement,

(ii) in any other case, the party or legal representative of such party.

(5) In these Rules, a witness statement is a written statement signed by a person that contains the evidence which that person would be allowed to give orally.

(6)...”

12. The comments contained in Tribunal Practice Notice 5/2004 are also relevant and read:

“Before the registrar, in inter partes proceedings, there continues to be a practice of combining factual statements and submissions or arguments in the 'evidence' filed by the parties to the dispute. In ACADEMY (O/169/00) Mr Simon Thorley, acting as the Appointed Person said:

“It is as important in proceedings before the Registry as in any other proceedings that a proper line is drawn between that which is truly evidence, which should be the subject of a properly prepared affidavit, statutory declaration or witness statement as the case may be, and submissions or arguments in relation to the matter in dispute which need not. To allow the two to be present in the same document is bound to lead to confusion and misunderstanding.”

13. As Mr Thorley pointed out, those parts of the written submissions which contained evidence of fact (and the exhibits to which this evidence relates) should have been the subject of, for example, a properly filed witness statement; they were not. While it is not necessary for me to summarise the submissions here, I will keep them in mind when reaching a decision. I will however refer to those parts of the submissions which I consider should have more properly filed as evidence.

14. In response to exhibit GJ1 Mr Squire provides as exhibit 1 a page downloaded from www.store.nike.com on 14 October 2010 of which he says:

“The Nike ID website is a site where anybody can go online and customise a pair of trainers. You then pay for them at retail price and Nike sends you the trainers.”

The page provided appears to support Mr Squire’s view of the matter.

15. Mr Squire also provides details of the costs he has incurred to date in relation to his application including providing as exhibit 4 a number of invoices including two invoices from Barques Design Limited of Ludgate Hill, Birmingham to 1Aways of Great Barr, Birmingham dated 5 November 2009 and 31 January 2010 respectively and which refer to, inter alia, “logo design” and “website design”.

16. That concludes my summary of the evidence and submissions filed to the extent that I consider it necessary.

DECISION

17. Ms Jemmott’s opposition is based upon section 5(4)(a) of the Act which reads as follows:

“5.-(4) A trade mark shall not be registered if, or to the extent that, its use in the

United Kingdom is liable to be prevented -

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

(b)

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

18. In reaching a conclusion, I note the comments of the Appointed Person, Mr Geoffrey Hobbs QC, in *Wild Child Trade Mark* [1998] RPC 455. In that decision Mr Hobbs said:

“The question raised by the grounds of opposition is whether normal and fair use of the designation WILD CHILD for the purposes of distinguishing the goods of interest to the applicant from those of other undertakings (see section 1(1) of the Act) was liable to be prevented at the date of the application for registration (see Article 4(4)(b) of the Directive and section 40 of the Act) by enforcement of rights which the opponent could then have asserted against the applicant in accordance with the law of passing off.

A helpful summary of the elements of an action for passing off can be found in Halsbury’s Laws of England (4th Edition) Vol. 48 (1995 reissue) at paragraph 165. The guidance given with reference to the speeches in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc.* [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731 is (with footnotes omitted) as follows:

‘The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

- (1) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
- (2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and
- (3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House’s previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House

constitute an exhaustive, literal definition of passing off, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.'

Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:

'To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

(a) the nature and extent of the reputation relied upon;

(b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;

(c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;

(d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.'"

The material date

19. First I must determine the date at which Ms Jemmott's claim is to be assessed; this is known as the material date. In this regard, I note the judgment of the General Court in *Last Minute Network Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Joined Cases T-114/07 and T-115/07. In that judgment the GC said:

“50 First, there was goodwill or reputation attached to the services offered by LMN in the mind of the relevant public by association with their get-up. In an action for passing off, that reputation must be established at the date on which the defendant began to offer his goods or services (*Cadbury Schweppes v Pub Squash* (1981) R.P.C. 429).

51 However, according to Article 8(4) of Regulation No 40/94 the relevant date is not that date, but the date on which the application for a Community trade mark was filed, since it requires that an applicant seeking a declaration of invalidity has acquired rights over its non registered national mark before the date of filing, in this case 11 March 2000.”

20. The date of filing of Mr Squire's application is, therefore, the material date. However, if Mr Squire has used his trade mark prior to this, then this use must also be taken into account. It could, for example, establish that he is the senior user, or that there had been common law acquiescence, or that the status quo should not be disturbed; any of which could mean that Mr Squire's use would not be liable to be prevented by the law of passing-off – the comments in *Croom's Trade Mark Application* [2005] RPC 2 and *Daimlerchrysler AG v Javid Alavi (T/A Merc)* [2001] RPC 42 refer.

21. Although Mr Squire has commented on the preparatory steps he has taken (and provided some “evidence” in support), there is nothing to suggest that a trade in goods or services under the trade mark in suit had begun prior to the filing of the application for registration. In fact the evidence and submissions appear to point the other way. For example, the invoice from Barques Design Limited for the design of the logo is dated 5 November 2009 and refers to “fees for the above as quoted in our letter dated 30 October 2009”. In addition, in his submissions Mr Squire says, inter alia:

“While our website is still only a holding page, we have only had it up since November 2009. You can also e-mail us via our website. We plan to sell on line within the next 6-9 months.”

22. The material date for the assessment is therefore the date of his application for registration i.e. 16 November 2009. In the absence of any use by Mr Squire, I must make my assessment on what is known as a *quia timet* basis i.e. I must assess what would happen if Mr Squire's trade mark were to be used.

Goodwill

23. In order to succeed in an action for passing off, Ms Jemmott has to establish that at the material date there was goodwill in a business in which the numeral and word 1AWAYS had been used. The concept of goodwill was explained in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 223 as:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first.”

24. The goodwill must be of more than a trivial nature. In *Hart v Relentless Records* [2002] EWHC 1984 Jacob J stated:

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 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. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used “but had not acquired any significant reputation” (the trial judge's finding). Again that shows one is looking for more than a minimal reputation.

25. However, one does not need to be a large player to be protected under the law of passing-off. In *Stacey v. 2020 Communications Plc* [1991] F.S.R. 49 Mr. Justice Millett said:

“There is also evidence that Mr. Stacey has an established reputation, although it may be on a small scale, in the name, and that that reputation preceded that of the defendant. There is, therefore, a serious question to be tried, and I have to dispose of this motion on the basis of the balance of convenience.”

26. I also note that in *Stannard v Reay* [1967] FSR 140 it was held that:

“...even though the plaintiffs had only been trading for about three weeks, there was evidence of substantial takings by the business which fell when the defendants commenced trading. It was not impossible for goodwill in a new kind of business to be built up in a short period of time...”

(I note that the decisions in both *Stacey* and *Stannard* were made in the context of injunctive relief before full trial).

27. Finally, the following comment of Slade LJ in *Chelsea Man Menswear Limited v Chelsea Girl Limited and Another* [1987] RPC 189 is also relevant:

“However, the authorities show quite clearly that a plaintiff who has established a cause of action in passing off can obtain relief by way of injunction extending beyond the boundaries of the particular areas in which he has proved the existence of his reputation and goodwill.”

28. In order to make an assessment of whether or not Ms Jemmott has goodwill in a business conducted under the numeral and word 1AWAYS, I must be provided with sufficient information to reach an informed conclusion. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 Pumfrey J said:

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

Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

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

29. In *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat), Floyd J commented directly upon *South Cone* in the following terms:

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

30. Although in her witness statement Ms Jemmott refers to herself as the Creative Director of 1AWAYSboutique and then goes on to refer to "the records of my company", there is no evidence to suggest that this "company" has a legal personality of its own. In the circumstances, I have concluded that if Ms Jemmott's activities have resulted in a business conducted under the numeral and word 1AWAYS acquiring a protectable goodwill, then it is Ms Jemmott who is entitled to the benefit of that goodwill.

31. In his written submissions Mr Squire said:

"I truly believe that even though we acknowledge that Gabrielle Jemmott has had the website 1AWAYS from 2006. It seems to us that she really hasn't done anything with her company or brand that enables her to claim that not only has she acquired a reputation throughout the United Kingdom, and that we would profit from consumers thinking we are her..."

32. In her notice of opposition Ms Jemmott states that she first made use of the numeral and word 1AWAYS on 6 July 2006 and that this sign has been used in London, Essex, Hertfordshire and Greater Manchester; I note that Mr Squire accepts that Ms Jemmott had a website bearing this sign in 2006. A review of Ms Jemmott's evidence shows the sign being used (sometimes alone sometimes with other signs) in a number of different ways. It appears in the domain names www.1AWAYS.com and www.1AWAYSboutique.com and on what Ms Jemmott describes as the "presentation pages" for those websites (exhibit GJ9). It also appears on a pair of sample training shoes (exhibit GJ1) which, given the contents of exhibit GJ4, I take to be from June 2006 and on a number of sample t-shirts and a sample vest (exhibits GJ2, 5, 13 and 14) which are said to date from 2006, 2007, 2008, 2009 and 2010. Exhibits GJ6 and 8 dated 22 and 26 October 2007 are e-mails from eBay to Ms Jemmott which contain references to 1aways as do exhibits GJ10, 11 and 12 which are the invoices from Fasthosts Internet Ltd dated 28 June 2008 and 31 March 2009 which I note also refer to 1awaysboutique.co.uk and 1aways.co.uk. Finally, I have exhibits GJ15-31 which are a range of sales receipts (the vast majority of which are dated prior to the material date) and which Ms Jemmott explains represents amounts spent by her on goods and services "for the production and customisation of leisure apparel and sporting footwear."

33. Considering the totality of Ms Jemmott's evidence, I think it is reasonable for me to conclude that her interest in the sign 1AWAYS probably began sometime before the summer of 2006, but it was in the summer of 2006 and in the following years she took steps to commercialise this interest (including the adoption of various websites and the purchase of a range of items and services to assist in the creation of a number of sample products i.e. a pair of training shoes, a number of t-shirts and a vest). The

results of Ms Jemmott's efforts (including some £1600 spent by her purchasing goods and services) are that by the end of 2008 she had achieved sales of £881 and spent £420 promoting her business.

34. While the decision in *Stacey v. 2020 Communications Plc* makes it clear that it is not necessary for Ms Jemmott to be a "big player" to succeed under the law of passing off, equally the decision in *Hart v Relentless Records* makes it clear that any goodwill relied upon by her must be of more than a trivial nature. When the results of Ms Jemmott's activities since 2006 to commercialise the business using the 1AWAYS sign are considered in the context of the immense size of the clothing market in the United Kingdom (of which I take judicial notice), and in the absence of any evidence from the trade or the public, they are, in my view, most unlikely to have resulted in her business acquiring a protectable goodwill in the numeral and word 1AWAYS. Without a protectable goodwill there can be no misrepresentation or damage and as a consequence Ms Jemmott's opposition fails.

Costs

35. Mr Squire has been successful and is entitled to a contribution towards his costs. Awards of costs are governed by Annex A of Tribunal Practice Notice 4 of 2007. Using that TPN as a guide and bearing in mind the registrar's practice to award costs at half the rate that would have been awarded where a party had legal representation, I award costs to Mr Squire on the following basis:

Preparing a statement and considering Ms Jemmott's statement:	£100
Considering and commenting on Ms Jemmott's evidence:	£300
Total:	£400

36. I order Gabrielle Jemmott to pay to Paul Squire the sum of **£400**. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 28 day of April 2011

C J BOWEN
For the Registrar
The Comptroller-General