

O/003/12

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION No. 2448261
STANDING IN THE NAME OF
VICTORIA MCCANN**

AND

**IN THE MATTER OF A REQUEST FOR A DECLARATION
OF INVALIDITY THERETO UNDER No. 83601
BY WNBFI INC.**

BACKGROUND

1) Victoria McCann (hereinafter the registered proprietor) has the following trade mark registered in the UK:

Mark	Number	Date Applied for / date registered	Class	Specification
Pronaturalmuscle	2448261	02.03.07 / 05.09.08	35	Retail services provided online connected with nutritional products.
			42	The hosting of an online website to promote nutritional advice and advice on personal training.

2) By an application dated 14 October 2009 WNBF Inc. (hereinafter the applicant) applied for a declaration of invalidity in respect of this registration. The grounds are, in summary:

a) The applicant is the proprietor of the following mark:

Mark	Number	Date applied for / date registered	Class	Specification
PRO NATURAL	2434748	06.10.06 / 12.10.07	41	Conducting bodybuilding championships among drug-free athletes and bodybuilding exhibitions.

b) The applicant states that it has used its mark with regard to organising body building competitions for men and women since 1990. The applicant contends that the mark in suit offends against Sections 5(2)(b), 5(3) and 5(4)(a) as the marks are similar and the services are either similar or in the alternative use of the mark by the registered proprietor would take advantage of and/or be detrimental to the distinctive character and repute of the applicant. The applicant claims that the registered proprietor is a bodybuilder who participated in the applicant's competitions but disputed being placed fourth in June 2006. Subsequently relations have soured and a court case is due to be heard regarding alleged comments made about the applicant by the registered proprietor. The applicant also contends that the application for registration was made in bad faith and offends against section 3(6) as the registered proprietor was aware of the applicant's use of the mark PRO NATURAL.

3) The registered proprietor filed a counterstatement, dated 22 April 2010, denying the above grounds. She stated:

"The domain name "pronaturalmuscle.co.uk" is descriptive and the respondent is making fair use of it, i.e. pro, natural are precisely descriptive of the "muscle". PRO NATURAL, as it stands, could mean many things. Not until you add "muscle" to it does it become something affiliated with bodybuilding/fitness/products etc. at least to a layman. The name PRO NATURAL is not precise at all. It is merely a generic name."

4) Only the applicant filed evidence, although the registered proprietor did file an undated response. Both ask for an award of costs. Neither side wished to be heard.

APPLICANT'S EVIDENCE

5) The applicant filed a witness statement, dated 22 July 2011, by Andrew John Murch, their Trade Mark Attorney. At exhibit AJM1 he files a copy of a World Intellectual Property Organisation's (WIPO) decision in relation to a domain name dispute between the parties involved in the instant case. WIPO found:

- WNBF had used the mark PRO NATURAL in connection with body building competitions since 1989 and has spent considerable sums promoting the mark and competitions.
- That Ms McCann had set up the British Natural Bodybuilding Federation (BNBF) which was affiliated to WNBF and had participated in competitions run by WNBF under the PRO NATURAL mark. However, following a dispute over her being placed fourth in a competition the BNBF withdrew its affiliation in June 2006 and derogatory comments about the WNBF had been posted on a website partially owned by Ms McCann.

REGISTERED PROPRIETOR'S RESPONSE

6) The registered proprietor herself filed a response which was not dated and was not in the form of a witness statement. This response basically denied that she was aware of the use of PRO NATURAL by the applicant, although accepting that the applicant had used the mark since 1989 and that it had been promoted. She states:

“[It is] denied that the registered proprietor was aware that PRONATURAL or indeed, PRONATURAL MUSCLE was anything except a generic, descriptive term.”

7) She accepts the WIPO finding although fundamentally disagreeing with it.

8) That concludes my review of the evidence filed in these proceedings insofar as I consider it necessary.

DECISION

9) Section 47 of the Trade Marks Act 1994 reads:

“47.-(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

(2) The registration of a trade mark may be declared invalid on the ground -

- (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

- (b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.”

10) I shall first consider the ground of invalidity under Section 5(2)(b) which reads:

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

- (a)....
- (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.”

11) An “earlier trade mark” is defined in section 6, the relevant part of which states:

“6.-(1) In this Act an "earlier trade mark" means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.”

12) The applicant is relying upon its trade mark listed in paragraph 2 which is clearly an earlier trade mark. It was registered on 12 October 2007 and as such is not subject to The Trade Marks (Proof of Use, etc) Regulations 2004.

13) In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). In the case of *La Chemise Lacoste SA v Baker Street Clothing Ltd* [ALLIGATOR O/333/10] Mr Hobbs QC acting as the Appointed Person set out the test shown below which was endorsed by Arnold J. in *Och-Ziff Management Europe Ltd and Oz Management Lp v Och Capital LLP; Union Investment Management Ltd & Ochocki*, [2010] EWCH 2599 (Ch).

(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/ 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; nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(e) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 in that mark;

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

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

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

(i) 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;

(j) if the association between the marks causes the public to wrongly believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

14) In essence the test under section 5(2)(b) is whether there are similarities in marks and services which would combine to create a likelihood of confusion. In my consideration of whether there are similarities sufficient to show a likelihood of confusion I am guided by the judgments mentioned above. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements taking into account the degree of similarity in the services, the category of services in question and how they are marketed. Furthermore, I must compare the registered proprietor's mark and the mark relied upon by the applicant on the basis of their inherent characteristics assuming normal and fair use of the marks on the services in their specifications.

15) In the instant case the applicant has not provided evidence regarding use of its mark. It cannot therefore benefit from an enhanced reputation. The registered proprietor contends that PRO NATURAL and indeed PRONATURAL MUSCLE are generic descriptive terms. She also contends that to a layman PRO NATURAL could mean anything and that it is only when the term MUSCLE is added to PRO NATURAL that it becomes something affiliated with bodybuilding/fitness products. I agree with the latter comment and as such to my mind, the applicant's mark has a high degree of inherent distinctiveness.

16) As the case law in paragraph 13 above indicates I must determine the average consumer for the services of the parties. I must then determine the manner in which these services are likely to be selected by the said average consumer. Nutritional products and advice on such products and personal training are services likely to be sought by members of the general public as well as those who take their fitness more seriously such as bodybuilders. The average consumer for the registered proprietor's services would therefore include the average consumer for the applicant's services.

17) I shall now consider the services of the two parties. For ease of reference, I set out the relevant services of both parties below:

Registered proprietor's specification	Applicants' specification
Class 35: Retail services provided online connected with nutritional products.	Class 41: Conducting bodybuilding championships among drug-free athletes and bodybuilding exhibitions.
Class 42: The hosting of an online website to promote nutritional advice and advice on personal training.	

18) The accepted test for comparing goods is that set out by Jacob J. in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 28 TREAT, which was effectively endorsed by the Advocate General in *Canon*; ETMR 1. The factors to be taken into account are:

- a) The respective uses of the respective goods;
- b) The respective users of the respective goods;
- c) The physical nature of the goods;
- d) The respective trade channels through which the goods reach the market;
- e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be found on the same or different shelves;
- f) The extent to which the respective goods are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods in the same or different sectors.

19) I also take into account the comments of Jacob J. in *Avnet Incorporated v. Isoact Ltd* [1998] FSR 16 where he said:

“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.”

20) It The term “hosting” relates to the provision of computer services. However, even if I regard the registered proprietor’s services to be actually offering advice it is clear that whilst some users may be common to the services of both parties, the uses and trade channels are different and the services would not be in competition with each other. Nor are they complementary. The services must therefore be regarded as dissimilar. This would normally be the end of the issue however in case I am wrong regarding the services I will go on to consider the marks.

21) Turning to the marks it is equally clear that the registered proprietor’s mark incorporates the whole of the applicant’s mark, indeed the only difference is that it has the word “muscle” at the end. As the registered proprietor herself said the distinctive part of the mark is the first two words “Pro” and “natural”. The marks must be considered to be highly similar almost to the point of identity.

22) I take all of the above into account when considering the marks globally. I also take into account the interdependency principle – a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods, and vice versa. despite the similarity of the marks the differences in the services is such that there is no likelihood of consumers being confused into believing that the services provided by the registered proprietor are those of the applicant or provided by some undertaking linked to them. The invalidity under Section 5(2) (b) therefore fails.

23) I now turn to the ground of invalidity under section 5(4)(a) which reads:

“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

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.”

24) In deciding whether the mark in question offends against this section, I intend to adopt the guidance given by the Appointed Person, Mr Geoffrey Hobbs QC, in the *WILD CHILD* case [1998] RPC 455. In that decision Mr Hobbs stated that:

“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.

25) I also note the comments of Pumfrey J in *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* case, in which he 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."

26) I must also keep in mind the comments of Mr Justice Floyd in *Minimax GMBH & Co KG and Chubb Fire Limited* [2008] EWHC 1960 (Pat) in which he says of the above:

"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."

27) The applicant has failed to file any evidence of use of its mark in the UK. As such it cannot get over the first hurdle in relation to goodwill and so the ground of invalidity under Section 5(4)(a) fails.

28) I now turn to the ground of invalidity under Section 5(3) which in its original form reads:

"5-(3) A trade mark which -

(a) is identical with or similar to an earlier trade mark, and

(b) is to be registered for goods or services which are not similar to those for which the earlier mark is protected,

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 Community trade mark, in the European Community) 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."

29) By virtue of regulation 7 of the Trade Mark (Proof of Use, etc) Regulations 2004, Section 5(3)(b) has now been repealed. The equivalent provision in Section 10 of the Act dealing with infringement has also been amended. As the explanatory note indicates:

"These amendments implement the decision of the European Court of Justice in *Davidoff & Cie SA and Zino Davidoff SA v Gofkid Ltd* of 9th January 2003 (C-292/00) which was confirmed by its decision in *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd* of 23rd October 2003 (C-408/01). Those decisions determined that Article 5(2) of the Directive, which on the face of it, grants a right to the proprietor of a trade mark to prevent third parties from using an identical or similar trade mark in relation to goods or services which are *not similar* where the earlier trade mark has a reputation and use of that sign takes unfair advantage or is detrimental to the distinctive character of that earlier trade mark, also applies to goods or services which are similar or identical to those for which the earlier trade mark is registered."

30) The scope of the Section has been considered in a number of cases notably *General Motors Corp v Yplon SA (Chevy)* [1999] ETMR 122 and [2000] RPC 572; *Premier Brands UK Limited v Typhoon Europe Limited (Typhoon)* [2000] RPC 767; *Daimler Chrysler v Alavi (Merc)* [2001] RPC 42; C.A. *Sheimer (M) Sdn Bhd's TM Application (Visa)* [2000] RPC 484; *Valucci Designs Ltd v IPC Magazines (Loaded)* O/455/00; *Mastercard International Inc and Hitachi Credit (UK) Plc* [2004] EWHC 1623 (Ch) and *Electrocoin Automatics Limited and Coinworld Limited and others* [2005] FSR 7.

31) Guidance in relation to reputation under Section 5(3) has been set out in *General Motors Corporation v Yplon SA* in paragraphs 23 to 27. Paragraphs 26 & 27 indicate the standard that must be reached:-

“26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.”

32) This test sets out the threshold and the onus is upon the applicant to prove that its trade mark enjoys a reputation or public recognition. In the present case the applicant has not provided any evidence of reputation at all, the ground of invalidity under Section 5(3) therefore fails.

33) Lastly, I turn to consider the ground of invalidity under Section 3(6) which reads:

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

34) Section 3(6) has its origins in Article 3(2)(d) of the Directive, the Act which implements Council Directive No. 89/104/EEC of 21 December 1988 which states:

“Any Member State may provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where and to the extent that....

(c) the application for registration of the trade mark was made in bad faith by the applicant.”

35) The Directive gives no more clue as to the meaning of “bad faith” than the Act. Subsequent case law has avoided explicit definition but has not shirked from indicating its characteristics. In *AJIT WEEKLY Trade Mark* [2006] RPC 25, Professor Ruth Annand sitting as the Appointed Person held as follows:

“[35] ... Bad faith is to be judged according to the combined test of dishonesty for accessory liability to breach of trust set out by the majority of the House of Lords in *Twinsectra Ltd v Yardley* [2002] 2 AC 164, with *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 providing the appropriate standard, namely acceptable commercial behaviour observed by reasonable and experienced persons in the particular commercial area being examined.....

[41] ... the upshot of the Privy Council decision in *Barlow Clowes* is: (a) to confirm the House of Lords’ test for dishonesty applied in *Twinsectra*, i.e. the combined test [footnote omitted]; and (b) to resolve any ambiguity in the majority of their Lordships’ statement of that test by making it clear that an enquiry into a defendant’s views as regards normal standard of honesty is not part of the test. The subjective element of the test means that the tribunal must ascertain what the defendant knew about the

transaction or other matters in question. It must then be decided whether in the light of that knowledge, the defendant's conduct is dishonest judged by ordinary standard of honest people, the defendant's own standards of honesty being irrelevant to the objective element....

[44] In view of the above and in particular the further clarification of the combined test given by the Privy Council in *Barlow Clowes*, I reject Mr Malynicz's contention that the Hearing Officer erred in failing to consider the registered proprietor's opinions on whether its conduct in applying for the mark fell below ordinary standard of acceptable commercial behaviour."

36) In asserting that the mark was registered in bad faith, the onus rests with the applicant for invalidity to make a prima facie case. A claim that a mark was registered in bad faith implies some deliberate action by the registered proprietor which a reasonable person would consider to be unacceptable behaviour or, as put by Lindsay in the *Gromax* trade mark case [1999] RPC 10:

"includes some dealings which fall short of the standards of acceptable commercial behaviour".

37) The issue must be determined on the balance of probabilities. On the basis of these authorities it is clear that a finding of bad faith may be made in circumstances which do not involve actual dishonesty. Furthermore, it is not necessary for me to reach a view on the registered proprietor's state of mind regarding the application for registration if I am satisfied that her actions in applying for the mark in the light of all the surrounding circumstances would have been considered contrary to normally accepted standards of honest conduct.

38) In reaching my decision I shall also rely upon the CJEU decision in *Chocoladefabriken Lindt & Sprungli AG v Franz Hauswirth GmbH* (C-529/07) where they ruled that all the relevant factors must be taken into account such as:

"The fact that the applicant knows or must know that a third party is using, in at least one Member State, an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought;

the applicant's intention to prevent that third party from continuing to use such a sign; and

the degree of legal protection enjoyed by the third party's sign and by the sign for which registration is sought."

39) I am also aware of the comments of Mr Arnold Q.C. (as he was then) acting as the Appointed Person in *BRUTT Trade Marks* [2007] RPC 19 where he said:

"Cross-examination

23. It is the function of cross-examination to assist the tribunal to resolve conflicts of evidence. I agree with the hearing officer in thinking that cross-examination would have assisted him in the present case. It does not follow, however, that

cross-examination is essential in a case where bad faith is alleged or that the tribunal cannot assess evidence or make findings of fact in its absence. Fairness requires that adverse findings should not ordinarily be made against a witness, such as a finding that he has acted in bad faith, without the witness having the charge put to him and being given an opportunity to answer it: see *Allied Pastoral Holdings v Federal Commissioner of Taxation* (1983) 44 ALR 607 at 623. It should be borne in mind, however, that in proceedings such as these evidence is served sequentially and that giving a witness a proper opportunity to deal with a point will not necessarily require cross-examination.

More importantly, perhaps, if the opportunity for cross-examination is passed up, the consequence is that the tribunal must assess the evidence on that basis rather than refraining from considering the evidence and reaching a conclusion. It is instructive to remember that OHIM and the courts in most civil law jurisdictions consider themselves perfectly well-equipped to make findings that parties have acted in bad faith without the benefit of cross examination.”

40) In the instant case the registered proprietor has simply denied that she had any knowledge of the applicant's use of the mark PRO NATURAL. This is simply untenable. The registered proprietor competed in competitions run by the applicant under the mark PRO NATURAL and was also the head of the BBNF which was affiliated to the applicant organisation until mid July 2006. It would appear that the registered proprietor ceased competing in PRO NATURAL competitions only following a dispute when she was placed fourth in a competition she believed that she should have won. Following this she persuaded the BBNF to affiliate with a rival organisation to the applicant. It would also appear that following this rift that she, along with others, sought to register a domain name which featured at its beginning the applicant's "pronatural" mark, and allegedly posted detrimental comments on a website regarding the applicant, questioning the honesty and integrity (amongst other things) of its chief officer. This is the subject of a High Court action which has yet to be resolved. It is also alleged, and not denied, that she styled herself as holding the Pro natural Universe title.

41) The registered proprietor was clearly aware of the applicant's use of the mark PRO NATURAL. Ms McCann is a bodybuilder based in the UK yet took part in competitions organised under the PRO NATURAL mark by the applicant. This would suggest that amongst the UK bodybuilding fraternity the mark would have resonance and would be recognised as belonging to WBNF. In particular because of the issue of drug use in body building, an organisation such as the applicant which subjects competitors to drug tests and also lie detector tests is going to have a raised profile. In offering nutritional products and also web hosting or even offering advice on nutrition and personal training the registered proprietor was clearly seeking to ride upon the applicant's "clean drug free" coat tails. I have no doubt that the registered proprietor submitted the application in bad faith. The invalidity action under Section 3(6) is therefore successful.

COSTS

42) The applicant has been successful in its invalidity action and is therefore entitled to a contribution towards its costs. However, I take into account that the applicant was only successful in one of the four grounds originally pleaded, and that the evidence filed was to say the least sparse. I therefore order Ms McCann to pay WBNF Inc. the sum of £500.

This sum 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 10th day of January 2012

**G W Salthouse
For the Registrar
the Comptroller-General**