

Attracting a global audience of 900 million viewers, the opening ceremony was one of the most memorable aspects of the 2012 London Olympics. One of the highlights was a performance by 965 drummers, known as the 'Pandemonium Drummers'.

After the Olympics, the Pandemonium Drummers Association (the 'Association') was formed, with the drummers that performed in the Olympics as 'members', one of whom was Andrew Johnston.

On 3 August 2013, Mr Johnston applied, on behalf of himself, to register PANDEMONIUM DRUMMERS as a UK trade mark in class 41. The Association opposed the application under sections 3(6) and 5(4)(a) Trade Marks Act 1994, claiming that it had earlier rights in PANDEMONIUM DRUMMERS, having performed under the sign since 27 July 2012. The main issue in the opposition was whether Mr Johnston had made the application in bad faith.

It was revealed in evidence that on 29 July 2013 Mr Johnston had been suspended from all responsibilities within the Pandemonium Drummers having applied, in breach of his fiduciary duties, to register 'The Pandemonium Drummers Limited' as a company without the Association's authority.

The hearing officer referred to the case of *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch), in which Mr Justice Arnold made the following general statements about the assessment of bad faith:

1. The relevant date for assessing whether an application was made in bad faith is the application date;
2. However, later evidence is relevant if it casts light backwards on the position as at the application date;
3. A person is presumed to have acted in good faith unless the contrary is proved;
4. Bad faith includes not only dishonesty, but also "some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined";
5. The legislation concerning bad faith is intended to prevent abuse of the trade mark system;
6. The tribunal must make an overall assessment, taking into account all the factors relevant in the case;

7. The tribunal must first ascertain what the defendant knew about the matters in question and then decide whether, in light of that, the defendant's conduct is dishonest (or falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people;

8. Consideration must be given to the applicant's intention.

The hearing officer also considered BL O/094/11 *Ian Adam* at paragraph 33, in which the Appointed Person said:

"The line which separates legitimate self-interest from bad faith can only be crossed if the applicant has sought to acquire rights of control over the use of the sign graphically represented in his application for registration in an improper manner or for an improper purpose."

Applying these principles, the hearing officer found that Mr Johnston had acted in bad faith. He had applied to register the mark following his suspension and knowing that he had no authority to represent the Association. He had applied for the trade mark in his own name when he knew that he was not entitled to do so. Furthermore, he had subsequently used the trade mark application to oppose a European trade mark application legitimately filed by the Association, which had caused disruption to the Association's activities. This action cast light backwards on Mr Johnston's intentions as at the application date.

This decision is a reminder to organisations to obtain intellectual property protection at the earliest opportunity and to make sure it is clear who has the authority (and responsibility) to do that on behalf of the organisation.

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