

Claim No: |

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

INTELLECTUAL PROPERTY LIST

INTELLECTUAL PROPERTY ENTERPRISE COURT

B E T W E E N

WHO DARES WINS (ALFRETON) LIMITED

Claimant

and

1. RACING PIGEON INTERNATIONAL LTD

2. MARK JAMES LYFORD

3. BMI ONE LOFT RACE LIMITED

4. LEE BARRY SULLIVAN

5. IAN SULLIVAN

Defendants

PARTICULARS OF CLAIM

1. This is a case about copyright and passing-off in the competitive field of pigeon racing. In summary, it is the Claimant's case that the First Defendant produced certain works pursuant to an agreement ("the Works"); the intellectual property in the Works was to be owned by the Claimant; the First and Second Defendants deny that the Claimant owns these rights, and they have authorised the Third to Fifth Defendants to use the Works (or colourable imitations of the Works) with the Third-Fifth Defendants knowing that the Works had been created for, and were identified with, the Claimant.

THE PARTIES

2. The Claimant is a company engaged in the organisation of pigeon races. It is a company incorporated under the laws of England and Wales (**Annex 1**). It offers a race called the WHO DARES WINS INTERNATIONAL ONE LOFT RACE, and has done so since 2014. Further details of this activity are set out below in the section on “Passing Off”.
3. The First Defendant is a company incorporated under the laws of England and Wales (**Annex 2**) with the Second Defendant as its sole shareholder and director (**Annex 3**). For the purposes of these proceedings, it is engaged in the marketing and promotion of pigeon races, and the creation of creative works in connection with such marketing and promotional activities. D1 and D2 shall be collectively referred to as RPI, since the acts of one are the acts of the other and there is no distinction in the context of this case between the two parties.
4. The Third Defendant is a competitor of the Claimant, and is a company incorporated under the laws of England and Wales (**Annex 4**). It has as its sole director and shareholder the Fourth Defendant (**Annex 5**). It organises the BRITISH MASTERS INTERNATIONAL ONE LOFT RACE.
5. The Fifth Defendant is the Fourth Defendant’s brother and is involved in the day-to-day running of the Third Defendant alongside the Fourth Defendant. He is listed as one of the contacts for the Third Defendant alongside the Fourth Defendant (**Annex 6**).

A BRIEF PRIMER ON THE WORLD OF PIGEON RACING

6. For the benefit of the Court, we provide a brief primer on pigeon racing to assist with understanding the claim.
7. Pigeon racing falls into two types of racing:

- a. Club racing, where the owners must have their own loft and the pigeons are released and return to their individual lofts with the “winning” pigeon being the pigeon with the highest average speed (since the birds all travel different distances home); and
 - b. One Loft Racing, where the pigeons are kept by the race organiser for a period of time and are then released together from another location. Since they are being released from the same spot and are returning to the same loft, the winner is the first bird back.
8. A “One Loft” competition generally consists of a number of shorter races (called “Hot Spot” races), with most also having a final, longer-distance race. One purpose of the Hot Spot races is to acclimatise and train the pigeons over the period that they are with the race organiser to race longer distances (notably, the final race in the series).
9. One of the reasons for the popularity in “One Loft” racing is that since the birds are all raised together and are subject to the same training, the winning bird is perceived to be the result of the best breeder or bloodline, rather than being the result of better handling (in part or whole). This can lead to the winning birds being worth significant amounts at auction following the races. It can also lead to winning breeders being able to command better prices for their birds.
10. One further difference between club racing and “One Loft” racing is that “One Loft” racing allows for involvement by members of the public who do not have a loft of their own: the pigeons can be obtained from the race organiser and entered into the race, and some race organisers will arrange for an auction of the birds after the race. It is therefore possible for a person with no skill in animal husbandry, no loft and no birds to acquire and race a bird via the race organiser and to have the bird sold after the race season such that they never physically take care of the pigeon themselves. They will have put money into the race in the hope of winning prizes and their birds subsequently getting a good price at the post-race auction.

11. Within the UK pigeon racing is regulated by the Royal Pigeon Racing Association (“RPRA”), who publish a rule book pertaining to the sport. Both the Claimant and the Third Defendant are members of the RPRA and races must be held in accordance with the Rules published by the RPRA from time to time. In addition, there are rules for each of the races. These are largely similar across all races, but may add in certain terms beyond the scope of the RPRA Rules in order to ensure fairness.
12. The terms “One Loft” and “One Loft Racing” are known throughout the pigeon racing public as generic terms.
13. As can be seen at **Annex 8**, there are significant cash incentives for the winners of One Loft Racing: there are prizes for the Hot Spot races and a larger prize for the final race. As a result, there is a market for entries into One Loft racing competitions, and some people may speculate on entries in the hope of realising a profit if their birds win races.

BACKGROUND

14. D1 was engaged by C to assist it with the marketing and promotion of C’s One Loft races. C dealt exclusively with D2, and RPI provided a proposal for what was to be done and the remuneration for this work (**Annex 7**). Amongst the tasks of RPI were the creation of various intangible items, such as a website, flyer designs and a refreshed logo (collectively “the Works”)
15. Annex 7 reflects the full written terms between the parties: the parties did not deal with the ownership of intellectual property rights in the written agreement between them, nor did they discuss the intellectual property. For reasons which follow in the section entitled Terms to be Implied, C says that it was to be implied that C owned the intellectual property in the Works, that the Works were original and not subject to further permission from third parties, and that the use of the Works would not be subject to challenge from third parties in relation to at least copyright infringement.

16. RPI proposed and C agreed that the consideration for its work would be a 30 bird entry. This meant the entry of 30 birds into C's competition, and RPI would be able to promote and sell on these entries. The promise of a 30 bird entry was understood between the parties to mean either:

- a. That C would provide the birds from its own stock and would enter them; or
- b. That the entries could be the entrants' birds.

17. At the time of the agreement, C's entrance price was £500 for 3 birds, and as a result the value of the consideration was likely to be around £5000. D2's position was that he had a number of connections within the pigeon racing world, and so would be able to promote and sell these entries with no difficulties: the manner of remuneration was RPI's proposal. It was understood by RPI to be necessary for the entries to be sold on: to allow him or any of his family members to enter would place the perceived impartiality of the race in question.

18. C proposed to complete on its part of the agreement, but RPI wished to retain the birds itself (via D2). C informed D2 that the birds could not be entered into C's One Loft Contest as birds of D2, whether recorded as owned by D2 or owned indirectly by friends or family members, as to do so would breach the race regulations.

19. RPI took ownership of the 30 birds and as such had full payment of the consideration it negotiated for its work. It is not known by C who RPI sold the birds to.

20. RPI created the Works, and examples of these are shown at **Annex 8**.

TERMS TO BE IMPLIED

21. As at the time of the agreement, it is to be implied for reasons of business efficacy that:

- a. All intellectual property rights to the Works and their parts were to be owned by C;

- b. That all Works and all parts of them were the creative expression of RPI and were original works such that copyright subsisted in them;
- c. That no further permission was required from any third parties to use the Works;
- d. That the use of the Works would not infringe the intellectual property of any third parties;
- e. That the rights of C to the Works would be such as to allow it to prevent third parties from reproducing the Works or any part of them; and
- f. RPI would not reproduce the Works for any other client or produce Works which infringed the rights of C.

22. Each of para. 21(a)-(d) are standard terms commonly incorporated into agreements for the creation of works for third parties or the licensing of intellectual property rights. 21(e) is the corollary of 21(a)-(b): if the Works were entirely original and created by RPI and the rights to them were to be owned by C then C would have all relevant rights for the purposes of 21(e). 21(f) is a plainly obvious clause which imposes an obligation on RPI not to undermine the work done for C.

23. As to 21(a), due to the fact that the Works were the key intellectual property assets of C it is inevitable that the parties would have both understood that C would need to own all rights to them and to be able to prevent the use by third parties (including RPI).

24. Each of the implied terms set out at paragraph 21 is:

- a. reasonable and equitable;
- b. necessary to give business efficacy to the contract;
- c. so obvious that "it goes without saying";
- d. capable of clear expression;
- e. not contradicted by any express term of the contract

25. By reason of the above we say that it is to be implied that each of the terms set out in paragraph 21 above was part of the agreement between the parties.

26. As a result of the above, C is the owner of the intellectual property rights in the Works.

RPI'S CHALLENGES TO OWNERSHIP OF THE IP

27. The commercial relationship between the parties ended on 19 April 2020 at the request of RPI. At that time no complaint was made about the continued use of the Works by C, nor was any notification sent by RPI to C regarding the ownership of the intellectual property in the Works.

28. At a time unknown to C but prior to 30 November 2021 RPI began to work with D3. The exact terms and scope of such work is not known to C, but as set out below RPI provided D3 with an amended logo and flyer design which copies the Works and which is so similar to them as to mislead the public as to the source of D3's services or as to any commercial connection with C.

29. At around the time D3 adopted this amended logo and this amended flyer D1 sent cease and desist notices to C (**Annex 9**) demanding that C cease use of the Works. D1 asserts that it is the owner of all copyright in the Works, contrary to the implied terms set out above. By reason of the notices, D1 has threatened to bring proceedings for infringement of the rights to the Works.

30. Further, RPI publishes a website called "asktommo.com", example pages of which and the contact details of which are at **Annex 10**. "Tommo" is a reference to Gary Tomlinson, the sole director of C. As can be seen from the content of **Annex 10**, the website contains a substantial number of allegations regarding the behaviour of C. The relevant allegations for the purposes of this claim are that:

- a. C did not pay for the work undertaken by D1;
- b. That D1 owns all the rights to the Works;
- c. That C should – but will not – cease use of the Works; and

d. That C is harassing third parties with regard to the Works.

31. RPI therefore has demonstrated its intention to publicise the allegations listed above alongside its threats of action for infringement of the intellectual property in the Works.

32. C has written via its representatives to RPI to deal with the ownership of the intellectual property in the Works and the correspondence is at **Annex 11**. Despite the letters from C's representatives being marked "Private and Confidential", RPI immediately published them on the website "asktommo.com" together with their response. No remedy is sought in relation to this behaviour on the basis that the content of those letters now forms the basis for these particulars, but it is a measure of RPI's intention to use a dispute to harm C and C's director and to publish matters which cannot be correct.

33. In his letter of [] D2 suggests that in relation to the logo, it was licensed in from a third party. It is presently unclear what the scope of that licence is, what was licensed in and whether RPI had the right to sublicense the use of the elements (if a licence was granted) to C. It is also unclear whether the earlier allegation that D1 is the owner of the copyright to the logo is true in light of this later allegation that the logo was licensed in to D1. C's representative sought clarity in relation to that claim but RPI has not responded to that request.

THE ACTS OF D3-D5

34. From a point currently unknown, but believed to be around 25 November 2021, D3 has promoted itself by reference to an amended flyer (**Annex 12**). Immediately prior to that date it used a flyer in the form shown at **Annex 13**. The amended flyer at **Annex 12** was designed by RPI. D3 has also adopted an amended logo, with the former version shown at **Annex 14** and the amended version at **Annex 15**. C understands that this amendment was undertaken by RPI.

35. The One Loft races of C are amongst the largest in the country, and it is inevitable that D3-5 knew of the design of C's flyers and its logo. D3-5 will have been immediately aware that the amended designs at **Annex 12** and **Annex 14** produced by RPI were copied from or took the same subject matter as the Works.
36. D3-5 have each promoted the races of D3 by using the amended designs, and as at the date of this claim have not responded to the letter of claim from C's representatives.

COPYRIGHT INFRINGEMENT

37. It is, to the best of C's knowledge, the position that the Works were created (and each of them) by D2. It is understood that D2 is an employee of D1 or otherwise the intellectual property vests in D1 by reason of the relationship between D1 and D2.
38. Each of the Works was the result of the intellectual creation of their designer D2 and but for the implied assignment from D1 all of the rights would vest in D1; in the alternative, as D2 benefitted from and negotiated the agreement with C he also agreed to transfer such rights as were not transferred from D1.
39. Each of the Works is an artistic work, namely a graphic work.
40. Each of D3-5 has reproduced the flyer as set out above by reason of the adoption and reproduction of the amended flyer shown at **Annex 122**. D1 and D2 have acted pursuant to a common design with D3-5 to create, adopt and reproduce the amended flyer shown at **Annex 12**. As such the Defendants and each of them is jointly liable for the infringement of the copyright of C.

PARTICULARS OF INFRINGEMENT

41. The Amended Flyer takes a substantial of C's flyer insofar as it takes:

- a. The identical "pigeon and cups" logo of C
- b. A similar use of the same (or a very similar) shade of blue for the background
- c. The use of the colour red for the main headlines
- d. The same layout of the relevant prize money
- e. The use of a logo which incorporates an image of the British isles.

42. C relies upon the following as evidence of copying:

- a. The designer was the designer of C's flyer and thus had access to all of the electronic files and knew what images had been used;
- b. The similarities set out above;
- c. That D3-5 would have been aware of the activities of C as a competitor of it;
- d. That the first version of the amended flyer used by D3 had upon it the details of C; and
- e. That RPI in its pre-action correspondence made it clear that he believed he was entitled to permit D3-5 to use the amended flyer and to licence the Works as he had not been paid by C.

43. In all the premises the amended flyer of D3 infringes the copyright of C in its amended flyer, and the amended logo of D3 infringes the copyright of C in its amended logo.

PASSING OFF

44. Since 2014 C has organised the WHO DARES WINS INTERNATIONAL One Loft Pigeon Race. It is seen as one of the pre-eminent One Loft races in the United Kingdom (**Annex 16**) and C is the owner of all of the goodwill pertaining to the business in organising and running pigeon races.

45. The design of the promotional material for C's races is distinctive: it is to the credit of RPI that the amended flyer which it produced for C has become synonymous with it, and has been used extensively by C including:
- a. Online in promoting the races (**Annex 17**)
 - b. As a pull-up banner at events (**Annex 18**)
 - c. In the background in videos by C's director Gary Tomlinson (**Annex 19**)
46. As a result, the relevant public has come to identify the design of the amended flyer with C and no other. The use by a competitor of a flyer and/or logo which is similar to the amended flyer or amended logo of C is liable to mislead a significant number of the relevant public into believing that the competitor is C or is in some way economically connected with C.
47. Since the adoption of the amended flyer shown at **Annex 12** by D3, C has received a number of messages asking whether D3 is now owned by C (**Annex 20**). C relies upon such messages as evidence of consumers being misled, and further consumers are liable to be misled.
48. By reason of consumers entering D3's competitions thinking them to be owned, controlled or connected with C (contrary to fact), D3 is liable to be unjustly enriched and C is liable to lose entries which would otherwise have taken part in C's competitions. Further, C risks having its goodwill dissipated or damaged by the acts complained of.
49. C has already noted that following the change of marketing material of D3-5 its rate of entries has dropped. The losses stemming from a drop in entries is not limited to the profits from the entries: C (in common with many One Lift organisers) also makes a profit from administering the post-race auction, and so a smaller number of birds means a lower income from that aspect of the business.

BREACH OF IMPLIED TERM BY RPI

50. As set out at paragraph 18 (c) and (d), above, it was an implied term of the agreement between the parties that C did not require further permission to be able to use the amended logo or the amended flyer, and that the use of each of them would not infringe the intellectual property of any third party.
51. Within the inter-partes correspondence between the parties RPI disclosed that the bird and cup element of the amended flyer was licensed from a third party.
52. If correct this would be a breach of the implied terms put forward at paragraphs 18(a), (b) and (e).
53. RPI also disclosed that it had licensed the bird and cup element of the amended flyer to be used by D3, which is a breach of the implied term at paragraph 18(f).
54. In an attempt to remedy to position of C being unable to use the bird and cup element because the licensor retracted permission, C sought the details of the licensor of that element and the details of any other design element which was licensed in: RPI has refused to disclose this information.
55. In order to remedy these breaches it is incumbent upon RPI to:
- a. Withdraw the licence to D3 to use the amended flyer or any part of it;
 - b. Obtain the full intellectual property rights to the bird and cup logo (and any other licensed element) from the licensor and transfer them to C; or
 - c. As an alternative to b), provide the details of the licensor(s) to C and undertake to indemnify C for the cost of obtaining the full intellectual property rights to the bird and cup logo; or

56. In the alternative, the Court may conclude that the obligations of RPI may be fulfilled by obtaining an exclusive licence from the licensor or indemnifying C for the cost of obtaining such a licence.

JOINT LIABILITY OF D2, D4 AND D5

57. In relation to each of the acts of infringement of copyright and passing-off, D4 is liable alongside D3 as the controlling mind of D3 and D5 is liable alongside D3 in relation to the acts undertaken for it as he promoted and undertook those acts in a personal capacity.

58. In relation to each of the acts of D3-5, they were done as part of a common design with RPI. In that regard the acts of D1 and D2 are inseparable, since D2 is the sole director and shareholder of D1. All activity of D1 is done by way of the acts of D2 and D2 only acts in this case through D1.

FLAGRANCY AND KNOWING INFRINGEMENT

59. Each of the acts of copyright infringement was conducted flagrantly in full knowledge of C's use of, and title to, the Works and knowing that the acts complained of reproduced the Works.

60. The acts of passing-off were conducted in full knowledge of the goodwill of C and that the acts complained of would mislead a significant proportion of the public into believing that D3 is C or is otherwise connected, endorsed or licensed by C contrary to fact.

INJUNCTION

61. Unless restrained by this Court, D3-5 threatens to continue the acts complained of, and RPI to further licence the use of the Works and to inform the public that C is not the owner of the intellectual property rights in the Works and should stop using them.

PRACTICE DIRECTION COMPLIANCE

62. On 14 December 2021 (in relation to RPI) and 20 December 2021 (in relation to D3-5) the Claimant's representatives sent letters by email to each of the Defendants. The Defendants have failed to comply with those demands.
63. On that basis the Claimant has complied with paragraph 7.1(1) and Annex A (paragraph 2) of the Practice Direction (Pre-Action Conduct).

AND THE CLAIMANT CLAIMS

64. A declaration that all copyright in the Works belongs to the Claimant.
65. An injunction restraining the Defendants and each of them (whether acting by their directors, officers, servants, agents or otherwise howsoever) from reproducing the Works.
66. An injunction restraining the Defendants and each of them (whether acting by their directors, officers, servants, agents or otherwise howsoever) from passing off directed towards the Claimant whether through reproduction of the amended flyer or otherwise.
67. An inquiry as to damages or at the Claimant's option an account of profits together with interest thereon pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period as the as the court sees fit.
68. Additional damages by virtue of s.97(2) of the Copyright Designs and Patents Act 1988.
69. Exemplary damages in addition to the compensatory / restitutionary financial relief requested above by virtue of Article 13 of Directive 2004/48/EC of the Enforcement Directive.


70. An order for dissemination and publication of the judgment at the expense of the Defendants.

71. Costs

72. Further or other relief.

STATEMENT OF TRUTH

I believe that the facts stated in these Particulars of Claim are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. I am duly authorised by the Claimant to sign this statement.

Signed:


For and on behalf of the Claimant

AARON WOOD

BRANDSMITHS SL LIMITED

SERVED this day of December 2021 by Brandsmiths SL Limited of Old Pump House, 19 Hooper Street, London E1 8BU