

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2007 HCV00607

BETWEEN	THE GRACE THRILLERS OUTREACH MINISTRY LTD	CLAIMANT
AND	SHIRLEY WILLIS	1 <sup>ST</sup> DEFENDANT
AND	MARCIA ARCHER	2 <sup>ND</sup> DEFENDANT
AND	DIAN BARNETT STEWART	3 <sup>RD</sup> DEFENDANT
AND	SANDRA BROOKS	4 <sup>TH</sup> DEFENDANT
AND	LEROY SMITH	5 <sup>TH</sup> DEFENDANT

APPLICATION FOR INTERLOCUTORY INJUNCTION – THE TORT OF PASSING OFF.

Mrs. Michelle Champagnie and Ms. Analisa Chapman instructed by Foga Daley and Company for the Claimant

Mr. Ransford Braham and Ms. Catherine Cousins instructed by Mrs. Susan Ridsen-Foster of Livingston Alexander & Levy for 1<sup>st</sup> Defendant

Mr. Conrad Powell for 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants

**Heard on: 12<sup>th</sup> July 2007 and 30<sup>th</sup> July 2007**

Straw, J

**THE CLAIM**

By way of Notice of Application for Court Orders filed on 6<sup>th</sup> July 2007, the claimant, GRACE THRILLERS OUTREACH LTD is seeking injunctive relief against all five defendants (former members of the gospel performing group, THE GRACE THRILLERS) in the following terms:

- 1) That an injunction be entered against the defendants to restrain them and/or their servants or agents from passing off or attempting to pass off the trade marks of the claimant and the name of the claimant's group by the use in connection with the course of trade, primarily within the gospel entertainment industry, in which the claimant has and is using the said name and mark.
- 2) That an injunction be entered against the defendants to prevent them and /or their agents from using the names "THE GRACE THRILLERS" and /or "GRACE THRILLERS" and/or THRILLERS and/or any other derivations of the claimants' names and marks "THE GRACE THRILLERS" and "GRACE THRILLERS."

The claimant has relied on the affidavits of its Managing Director, Mr. Noel Willis, as well as affidavits of Latoya Hall and Astley Cooper in the presentation of their case.

The 1<sup>st</sup> defendant, Shirley Willis also gave evidence by way of affidavits and is also relying on the affidavit of Earl McFarlane.

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants have filed no affidavits but are essentially relying on the evidence presented by the 1<sup>st</sup> defendant to mount their defence.

The substantive claim is for the tort of passing off against the defendants.

### **The Law in relation to the Tort of Passing off**

In **Harrods Ltd v Harrodian School Ltd** 1996 RPC, 697, Millett LJ at paragraph 79 stated:

"It is well settled that (unless registered as a trade mark) no one has a monopoly in his brand name or get up, however familiar these may be. Passing off is a wrongful invasion of a right of property vested in the plaintiff or but the property which is

protected by an action for passing off is not the plaintiff's proprietary right in the name or get up which the defendant has misappropriated but the goodwill and reputation of his business which is likely to be harmed by the defendant's misrepresentation."

In order to succeed in an action for the tort of passing off, the claimant must prove three elements. (Per **Lord Oliver, Reckitt and Colman Products Ltd v Borden Inc. and Others** 1990, 1 ALL ER 873 at page 880).

- 1) The claimant must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get up' (whether it consists simply of a brand name or trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the 'get up' is recognized by the public as distinctive specifically of the claimant's goods or services.
- 2) The claimant must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) **leading or likely to lead the public to believe that the goods or services offered by him are** the goods or services of the claimant (emphasis added).
- 3) The claimant must demonstrate that he suffers or 'in a *quia timet* action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.

These are the substantive issues that must be adjudicated at the trial of the action. This court does not have to decide on these issues. What is required, at this stage, is

whether to grant an injunction to restrain the defendants from the use of the above-mentioned names pending the determination of the matter.

In relation to the granting of the interim relief, the court is guided by the principles as laid out in the well known case of **American Cynamid v Ethicon** 1975 1 ALL ER 504. Lord Diplock explained the objective of an interlocutory injunction in the following terms (see page 509).

“The object of an interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff’s need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff’s undertaking in damages if the uncertainty were resolved in the defendant’s favour at the trial. The Court must weigh the needs against another and determine where the balance of convenience lies.”

The court must first satisfy itself that there is a serious issue to be tried to begin the process of deliberation (See **American Cynamid**, supra). At this stage the court should not attempt to pronounce on the merits of the case. If there is a serious issue to be tried, the court is then to go on and consider whether the balance of convenience lies in the form of granting or refusing the interlocutory relief.

Before embarking on an examination of the issue as to whether there is a serious issue to try, it is important to consider the history of the group “GRACE THRILLERS.” The defendants are contending that they, and not the claimant, are entitled to the goodwill in the name, or, at the least, they are entitled to the shared goodwill along with the claimant. This is the central issue for determination. To whom does the goodwill belong?

It is a complex issue and tragically, a sad one, as the group “GRACE THRILLERS” has made a great impact on the gospel entertainment industry both locally and abroad for many years.

One would have hoped that the concept of christian love and unity would have played a central role in the resolution of this matter. However, it is still not too late. There is yet a long way to go in the final determination of the issues.

I would also like to express appreciation for counsel on both sides who presented authorities for the court’s consideration. The written submissions revealed in depth research and helped to illuminate the path leading to a decision by this court.

**History as revealed by Affidavit evidence of the parties**

1. In 1971, Mr. Noel Willis, the Managing Director of the claimant, formed a gospel singing group which consisted of two others and himself. This group was named “The Heavenly Seekers.” Reverend Wilford Shaw described them as “THE GRACE THRILLERS” and that name was subsequently adopted.
2. The group experienced membership changes over the years as some resigned due to migration or other reasons and others joined. Mr. Willis is the only original member with the group as of today’s date. Although there is some debate as to his actual role in terms of performance, there is no challenge to the fact that he has managed the group over the years and up to the time the claimant was formed as a registered company in 1981.

3. In all, there have been 50 members (past and present) including the defendants who apparently separated from the group in 2002. There is some controversy surrounding the circumstances of the separation.

Noel Willis states that they all resigned and left the group when he and his wife, the 1<sup>st</sup> defendant, Shirley Willis separated. Shirley Willis states that he told the defendants that he needed to 'fix himself,' then literally formed a new group and continued activities excluding all five defendants. The 1<sup>st</sup> defendant, however, stated in her affidavit that she continued to sing with the group associated with Mr. Willis up to 2003.

4. The exact dates as to when all five defendants joined are not agreed by the parties. The 1<sup>st</sup> defendant jointed either in 1976 (her version) or 1978 (Noel Willis' version). The other defendants joined after her.

There is no affidavit evidence in relation to the dates when they joined. The claimant's particulars of claim indicates that the 2<sup>nd</sup> defendant, Marcia Archer joined in 1988, the third defendant, Dian Stewart in 2000 (there is some debate by the claimant as to her actual status in the group)

The 4th defendant, Sandra Brooks in 1992 and the 5<sup>th</sup>, Leroy Smith, in 1981.

On the other hand, the Defence of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> defendants suggest that the 3<sup>rd</sup>, 4<sup>th</sup> and 5th joined the group in the years, 1999, 1986 and 1978 respectively.

5. After the 'separation', Noel Willis brought in new members and continued to perform under the name "GRACE THRILLERS". This name was registered as a trade mark on the claimant's behalf on May 25, 2006. The

defendants eventually came together and began to perform under the name "THRILLERS UNITED." This name was registered as a trade mark on August 23, 2006.

It cannot be denied (as evidenced by newspaper clippings and other articles attached to the affidavits of both Noel and Shirley Willis) that the group "GRACE THRILLERS" generated tremendous public approval over the past 20 to 30 years.

The first defendant has stated that the defendants were collectively members of the group for the longest period and recorded many albums up to 2002. It is also clear that, as the group continued over the years, they built an outstanding reputation in Jamaica and the other parts of the world.

In an article "Profile on the GRACE THRILLERS" attached to the affidavit of Noel Willis filed on 4<sup>th</sup> April 2007, it is reported that the first major concert was in 1979 and that it was during that same year the overseas tours started in earnest. At this time, the 1<sup>st</sup> defendant and possibly, the 5<sup>th</sup> would have already been part of the group. The article "GRACE THRILLERS" Celebrates TWENTY YEARS Of Proclaiming The Word (attached to the supplemental affidavit of Noel Willis filed on 11<sup>th</sup> July 2007) is most instructive.

It would appear to support the statement of the 1<sup>st</sup> defendant that herself and at least some of the other defendants helped to build the goodwill of the group over the years.

#### **THE CONTENTION OF THE PARTIES**

The claimant contends, through Mr. Noel Willis, that it is the claimant's management of the group since 1981, and the performance of the group early on that built a great name and mark before any of the defendants joined or sang with the group. He

further states that, given the success of the group, he decided to form a non profit company that would further promote evangelism through a group under the said mark and name.

Mrs. Champagne submitted on behalf of the claimant, that the structure of the group and particulars of the present case do not allow for the goodwill to vest with a particular individual save that it would properly have vested with the founder, manager and owner of the mark and group prior to 1981.

She further contends that when the company was formed, all interest including the goodwill, which is an asset of business, vested with the claimant as Mr. Willis' successor. She also submitted that the company is the one entitled to the use of the name and mark "THE GRACE THRILLERS," "GRACE THRILLERS" and the defendants should be restrained from passing off the said trade mark for use in the gospel music industry as the claimant has used the said name and mark in the same industry.

Counsel extended her submission to the use of the word "THRILLERS" as such a

**Usage has become distinctive of the group "GRACE THRILLERS"**

The article attached to the supplemental affidavit of Noel Willis filed on 11<sup>th</sup> July 2007 titled "THRILLING THRILLERS," refers to the new band managed by Noel Willis since 2002 known as the "GRACE THRILLERS." This group is still referred to as the "THRILLERS," which appears to be an abbreviated form of the group's name.

Mr. Braham submitted on three planks on behalf of the 1<sup>st</sup> defendant.

Firstly, that she has never sought to use any of the said names since the separation in 2002. Any such appellation was done by the media, or promoters (without her knowledge and consent).



Secondly, it is contended that the 'goodwill' in the mark or name rightfully belongs to herself and the other defendants as they are the ones who provided the services together under the said mark and built the goodwill associated with the name. Mr. Braham also submitted, in the alternative, that the goodwill is shared between the claimant and the defendants.

Thirdly, in relation to the use of the name "THRILLERS," Mr. Braham submitted that it is descriptive and/or laudatory and cannot be designated as the sole property of the claimant.

The following cases were cited in relation to the third point.

**Office Cleaning Services Ltd v Westminster Window and General Cleaners Ltd, 1946 63 APC, 39.**

**Coral Index Limited v Regent Index Ltd and Anor. 1970 RPC, 147**

**Furniture Land Limited v Harris and Others 1989 FSR 536**

**Jamaica Lottery Co. Ltd. v Supreme Ventures Ltd et al, Suit No. CD**

**2001 J001, decision, November 9 2001**

**Standard Ideal Co. and Standard Sanitary Manufacturing Co. 1911**

**AC 78 page 84 – 86.**

These cases basically reflect the principle expressed in **McMahon and Binchy**

**LAW OF TORTS 3<sup>rd</sup> edition (per page 806)**

"The plaintiff who alleges that an expression prima facie descriptive should be regarded as sufficiently associated with his product as to have acquired a distinctive meaning associated with his goods has a hard task. The burden of proof upon him is high and the court will tend to accept small differences between the plaintiff's and the defendant's descriptions of their respective products as adequate to justify the defendant's conduct. Nevertheless the differences must be real ones. An example of the approach favoured by the courts arose in *Raggets v Findlaler* where it was ruled that a brewer accustomed to putting on the

label of his bottles and words 'nourishing stout' had no monopoly to this expression."

It would appear that a mark which is prima facie descriptive will only be protected if it can be shown to have acquired secondary meaning i.e., if it has become distinctive of the plaintiff. (See Christopher Wadlaw, **THE LAW of Passing Off**; 2<sup>nd</sup> edition, page 382)

The author, at paragraph 3, pg 382 (supra) states as follows:

"The defendant likewise cannot be prevented from using a descriptive term in its original descriptive sense, unless it has wholly lost that descriptive sense and become distinctive of the plaintiff in every context. More usually, some vintage of descriptive meaning remains even after the term has acquired enough secondary meaning to be protected as the plaintiff's trade mark. Equivocal or ambiguous use will be restrained, and often indicates lack of good faith, but if the defendant's use of the term is clearly and accurately in a descriptive rather than a trade mark sense then there is no misrepresentation to restrain."

#### **The submissions for 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants**

Mr. Powell adopted the submissions of learned Counsel, Mr. Braham on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

What is clear to this court is that, even if the claimant was successful in proving that the goodwill vested in the said company after 1981, it does not automatically follow that the name or mark "Thrillers" would form part of the goodwill.

#### **Is there a serious Issue to be tried?**

As was indicated previously, the central issue for resolution is in relation to the entitlement to the goodwill. In relation to the other two elements of the tort of passing off, i.e., the issue of misrepresentation and damage suffered or likely to be suffered, the claimant has established a sufficiency of evidence to convince the court that there is a serious issue to be tried.

The evidence in relation to misrepresentation is based on the fliers exhibited to the affidavits of Noel Willis. These include a flier featuring "THE REUNION OF THE ORIGINAL GRACE THRILLERS now known as THRILLERS UNITED."

The defendants were never the original three member team called the "GRACE THRILLERS."

There is also a newsletter titled 'DONNIE McCLURKIN and GRACE THRILLERS in Jamaica, May 27 2006.' The reference is to the group THRILLERS UNITED, former members of the "GRACE THRILLERS."

There is also a flier titled "Shirley Willis and GRACE THRILLERS, 8<sup>th</sup> July 2006."

At that time, the 1<sup>st</sup> defendant would no longer have been a member of the group "GRACE THRILLERS" managed by Noel Willis.

Although she has indicated she was not responsible for the promotion of these events, it is not necessary that the claimant prove that the misrepresentation was intentional.

In relation to the issue of damages, the claimant must demonstrate that it has suffered or that it is likely to suffer damage by reason of the erroneous belief engendered by the defendants' misrepresentation.

While the claimant has not demonstrated that damages have been suffered, Mrs. Champagnie has submitted that the likelihood of injury to the business or goodwill of the claimant is a reasonable foreseeable consequence of the misrepresentation.

It is necessary, however, for the court to examine the issue of the goodwill as this is the crux of the claimant's case.

## THE GOODWILL

In **IRC v Muller and Co. 1901, 217** at 224 Lord Macnaghten defined goodwill as follows:

“... is the benefit and advantage of the good name, reputation and connection of a business. IT IS THE ATTRACTIVE Force that brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start. The goodwill of a business emanates from a particular center or source... However, widely or extended or diffused it's influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates.” (Emphasis added)

I do not think that there can be any dispute that such goodwill exists in the name “GRACE THRILLERS.” Both parties attest to this fact. It is clear also that the goodwill has grown tremendously between the years 1978 and 2002. The affidavit of Shirley Willis states that the defendants were the artists “most responsible for the character and quality of the services as they were the ones who had to perform for the public and they were the focus of the beloved singing group.”

Mrs. Willis also speaks to the accolades heaped upon her in relation to her melodious singing voice, the several ‘hit’ songs in which she featured as the lead singer and her recognition by members of the public (per paragraphs 17, 19, 24, 25, 39, 31, also affidavit of Earl McFarlane filed on 11<sup>th</sup> July 2007).

Mr. Noel Willis, on the other hand, focused on the fact that he is an original and founding member of the group, the fact that the purpose of the group went beyond individual ambition and recognition; that it was the expert management and promotion of the group by the claimant which contributed significantly to the maintenance and development of the reputation of the “GRACE THRILLERS.”

The affidavit of Ashley Cooper, who is a Musical Director and Director of the claimant, speaks to the primary focus of the group being the quality, lyrics, theme, vocal delivery and overall harmony of the sound and the message. He also states that the focus is not “on individual members but rather on their collaborative efforts.”

In his submissions, Mr. Braham referred to Wadlaw (supra) at page 117 under the heading **WRITERS and PUBLISHERS; ARTISTS AND IMPRESARIOS:**

“An exception to the foregoing rule may exist in the name of writers, artists, performers and the like. The goodwill associated with the name, real or assumed, under which the individual produces his work prima facie belongs to the individual, rather than to any publisher, impresario or even employer through whom the work reaches the public. This rule was apparently developed in the context of authors and performers who were independent contractors rather than employees, and in that connection is satisfactory.”

Mr. Braham also cited the following cases:

**Landar v Greenberg 1908 24 TLR 441**

**Hines and Winnick 1947 64 RPC, 113**

**FORBES and KENSLEY NEWSPAPER LTD 1951 68 RPC,  
183.**

All the above mentioned authorities involve individuals who wrote columns or broadcast programs under a certain pseudonym. These pseudonyms were not necessarily created by the individual but by the employer. In all, it was held that the individual artist was entitled to the goodwill in the various names.

In **Hines v Winnick** (supra) at page 116, Vaisley J referred to **Landar v Greenberg** (supra) and stated:

“After all, we are not dealing here with a wholly commercial matter, we are dealing with a personal matter connected with an art, and if a man, be he musician, portrait painter, or writer of articles in newspapers, gets to be known under a particular

name, that name becomes inevitably part of his stock in trade and apart from some special contract or anything of that kind, he is entitled to say that it is his name and that anyone who adopts or causes the adoption of that name by some other person is inflicting upon him an injury.”

A distinction can easily be observed between the cases cited above and the present case. These cases involved an individual, not several members (which has changed over the years) of a performing band.

Mrs. Champagnie cited several cases including **Byford and Oliver 2003 EWHC 295 (Ch) and IN THE MATTER OF TRADE MARK APPLICATION no 235994 in the name of FRANKIE GOES TO HOLLYWOOD LTD to REGISTER THE TRADE MARK FRANKIE GOES TO HOLLYWOOD in classes 9, 16, 25, 41 and in the matter of OPPOSITION HERETO under No 93033 in the name of PETER GILL, MARK O'TOOLE, PAUL RUTHERFORD AND BRIAN NASH.**

Both cases involved a performing band. The determination as to the rights to the goodwill depended substantially on the particular history of the groups and whether contractual arrangements had been put in place in relation to the said goodwill. Having said this, the histories of the cases are quite lengthy and I have no intention of reciting the facts. There are, however, several principles garnered from the cases that are instructive and relevant to the present proceedings.

**Principles in Byford and Oliver (SAXON)**

- 1) The original band (original members), barring any special arrangements would be a partnership at will. The name and goodwill would be assets of the partnership, but that did not mean that individuals owned the assets themselves. On dissolution of the partnership (when the first band member or members departed, he or they and the other partners

would have been entitled to ask for the partnership assets to be realized and their value divided between them in accordance with their respective partnership shares unless they have made special arrangements to the contrary. In relation to the shared value, this would not have entitled each partner to a severed share of the goodwill of the partnership.

- 2) Where a second unrelated band started performing under the same name as the first, the first could sue in passing off to prevent the second from performing under that same name provided that its reputation and goodwill still existed and had not evaporated or been abandoned.
- 3) If the first band was a partnership, the goodwill would be owned by the partnership and such proceedings would have to be brought by or on behalf of the partnership.
- 4) If the two bands, (first and subsequent) contained common members, the band formed after the departure of at least one of the original members would be a separate partnership at will and a separate legal entity even though a majority of the members of the first band were members of the second band. The second band would have acquired separate rights in the goodwill it generated which could be used against 3<sup>rd</sup> parties.
- 5) The reputation and goodwill of a band could be built up by partnerships of which a particular person was not a member, in which case he would have no interest in that reputation or goodwill.

**Principles drawn from 'Frankie goes to Hollywood' (supra)**

- 1) The act of inventing a name does not, of itself, bring the inventor any rights but goodwill will be created by use of the name in connection with some commercial activity in relation to goods or services (per paragraph 68).
- 2) Although the lead singer of a band may be the 'most well known' it does not mean that any resulting goodwill gravitates to him and him alone (per paragraph 68).
- 3) An individual may claim ownership of a name but it does not automatically include any goodwill derived from its use by the band, this being invested in the partnership. It is also possibly that contractual relations put in place could show an intent to vest the goodwill away from the partnership (per paragraph 71)
- 4) If there is no evidence of any contractual arrangements being put in place between the individual band members, it would seem that there is a strong inference to be drawn that the relationship is a partnership at will.

In the **SAXON** (Case) (supra) Laddie J stated at paragraph 19, that if a special provision in the partnership agreement was absent, the partners had an interest in the realized value of the partnership assets but none of them owned the name **SAXON** (or the goodwill built up under it) on dissolution of the original partnership. He went on to state as follows:

“The position would be very different if all the members of the original group had been performing together, not as partners, but as independent traders. In such a case each may well have acquired a discrete interest in the name and reputation which he could use against third parties but not the other owners.”



I have gone into some detail in relation to the issue of goodwill in order to provide a basis for the parties to understand my reasons for judgment. There are no simple formulas to apply. The history of the group, when the defendants joined and left, how they left, the goodwill built by that particular partnership, the presence or absence of contractual arrangements are all germane to the issue. If the trial court does not make a positive determination in relation to the vesting of the goodwill in the claimant, then all, are some of, the defendants may be considered as partners along with Mr. Noel Willis and the other members, if any, who existed during their tenure with the group. I am of the opinion that it cannot be inferred that the goodwill as well as the management was automatically transferred to the company in 1981.

It is instructive also, that when the company was formed, none of its objectives included specifically promoting musical groups. The Amended Memorandum of Association dated 15<sup>th</sup> September 1990, lists at paragraph 4 (c) the following:

(c) "to promote Christian unity and growth and the spiritual welfare of Christians to propagate the Christian gospel by means of singing..."

All the defendants save the 3<sup>rd</sup> Dian Stewart, were subscribers to the memorandum at the time.

**Could it be inferred that they intended to vest the goodwill in the name "GRACE THRILLERS" to the Claimant?**

**Could they be partners at will with an interest in the realized value of the partnership assets on dissolution of that partnership in 2002 or 2003? Would they have any claim against this new group now performing under the name "GRACE THRILLERS"?** The question as to whether there is a serious issue to be tried must be answered in the affirmative.

### **Balance of convenience**

The Court must next decide whether the balance of convenience lies in the **form of granting or refusing the interlocutory relief.** (per **American Cyanamid**, supra). In assessing where the balance of convenience lies, the court must examine several factors.

Firstly, if the claimant were to succeed at trial, would damages be adequate and the defendant be in a financial position to pay? If these questions can be answered positively, then the injunction ought not to be granted.

In relation to this issue, the court bears in mind that at this present time, the claimant, is now the registered proprietor of the trade mark "GRACE THRILLERS." The company is the only one legally entitled to the use of the name at this time. It may be difficult to assess damages for possible misrepresentation that apparently centers around the year 2006 and there is no evidence as to the financial capacity of the defendants. However, there is nothing to suggest that damages would be substantial. However, if the defendants are not restrained from the use of the word THRILLERS, it may likely cause damage to any continued goodwill in the present group.

On the other hand, if damages would not be an adequate remedy for the claimant, the court should then go on to consider whether damages would be adequate compensation for the defendants under the claimant's undertaking.

Again, there is no evidence in relation to the financial capacity of the claimant. It is a company limited by guarantee and several of the defendants are subscribers to the memorandum. The court also considers that the defendants had not sought to use the name "GRACE THRILLERS" after 2002 – 2003. They are also now the registered proprietors of the trade mark THRILLERS UNITED. To restrain them from the use of the word 'Thrillers' at this time might affect any potential right they may have to any

realized value of the partnership assets. It may be difficult to calculate damages under these circumstances.

Since there is doubt as to the adequacy of the remedies available to the parties, the court is to consider the relative strength of each party's case without embarking on a trial of the action. The strength must be apparent on the facts disclosed by evidence to which there is no credible dispute.

There are complex issues to be taken into consideration in relation to this case. As was stated earlier, the possibilities are varied in relation to the issue of goodwill and it is extremely difficult to assess the strength of each party's case until there is a full hearing on the merits. It is a possibility that the goodwill may be a shared asset of the partnership between Noel Willis and the defendants or even the claimant and the defendants.

Having considered all the special factors of this case this court is of the opinion that the status quo is to be left as is.

The court has come to this conclusion bearing in mind the overall objective to do justice between the parties whichever way the decision goes at trial. The least necessary interference to the freedom of both parties is a tremendous factor in this case. Both are free to pursue and express their artistic integrity in relation to the trade marks registered at the present time.

They should seek to be identified clearly to the public at all times. This is a case that cries out for resolution between the parties in light of the history and objectives for the group's existence. Unfortunately, relationships will break down, but every effort should be made to achieve a level of peace and mutual respect and understanding in the context of Christian charity, even if total reconciliation is no longer possible.

The Application for interlocutory injunction is therefore refused. Costs to the defendants to be agreed or taxed.

Leave to appeal granted.