Prima inter pares, Fürstin among equals

Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshaupmann von Wien*, Court of Justice of the European Union (Second Chamber), 22 December 2010

Jeremy Phillips

Professorial Fellow, Queen Mary Intellectual Property Research Institute; Honorary Research Fellow, Intellectual Property Institute; Intellectual Property Consultant, Olswang LLP; Blogmeister, IPKat weblog <www.ipkat.com>

While the Court of Justice of the European Union regularly rules on matters directly pertinent to Community and national trade mark law, its rulings on matters quite unrelated to trade mark law may also have unexpected consequences for traders and trade mark law. The Court's ruling in Case C 208/09 Ilonka Sayn-Wittgenstein v Landeshaupmann von Wien, relating to the legal status of an estate agent's adopted name, is a case in point.

Every so often a judicial decision emerges which has nothing to do with intellectual property – but actually has a great deal to do with it. The ruling of the Court of Justice of the European Union in Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshaupmann von Wien* is one such decision.

Ostensibly this is a ruling in response to a request for a preliminary ruling from the Austrian Verwaltungsgerichtshof on a constitutional issue: does a refusal to allow the registration of the surname of a citizen which includes a title of nobility violate her freedom of movement within the territory of the European Union under Article 21 TFEU, where that citizen is an adult adoptee who has assumed an adoptive surname which does contain a title of nobility? Trade mark lawyers are not noted for their slavish devotion to minor points of constitutional law in what looks, from the comfort and security of Lincoln's Inn Fields, like a far-flung outpost of the Holy Roman Empire. However, whenever the word 'name' is uttered, the ears of the trade mark lawyer prick up; the feral fox has detected the distant rustling of his quarry.

The social, cultural and political role played by titles of nobility in Austria and Germany, in the earlier part of the twentieth century and before that era, can scarcely be understood by the English common lawyer of the twenty-first century. The British too were great lovers of 'toffs' with titles, sometimes even respecting them too. But in the great way of British tradition their effect was neutralized by evolution, not revolution. In the first place, 'real' nobles sometimes conveyed an impression that was a little at odds with their breeding.¹ Meanwhile hereditary titles were diluted by life peerages. As if that were not enough, titles of peerage were given to ordinary folk such

1. David 'Screaming Lord' Sutch (1940–1999), founder of the Monster Raving Loony Party.

as charity workers,² athletes³ and career politicians who for one reason or another had become liabilities to the political party of their choice.⁴

In this reference Ilonka (Fürstin von) Sayn-Wittgenstein challenged an Austrian decision to disallow the registration of this name on the basis that 'Fürstin von' (in English, 'Princess of') was a title of nobility which she, as an Austrian citizen, was prohibited from retaining under Austria's Law on the Abolition of Titles of Nobility of 1919. She maintained that, as a German resident and having been adopted by a German, she was entitled to official recognition of the full princessly grandeur of her adoptive name, under which she held her German driving licence among other things. The Austrian position was that her name was unlawful under Austrian law and that the German authorities had misapplied their choice of law rules by according recognition to her title of nobility without applying the Austrian rule.

The princess-by-adoption only invoked Article 21 TFEU as establishing her entitlement to her long-form name, since this was the name under which she worked. It would be inconvenient to have to work under different names in different countries, she argued. The 'Fürstin von' was, incidentally, quite a useful asset in her line of business, which was selling stately homes and castles. The Viennese Landeshauptmann was unmoved by this entreaty: she didn't have to trade under different names in different countries since there was nothing to stop her trading in her *real* (Austrian short-form) name in every EU Member State. Any inconvenience incurred would be purely temporary anyway.

Pleasing no one but the writers of case notes, the court gave the classic answer that so often graces the final paragraph of a student's legal essay: 'It all depends'. In essence, Austria was not prohibited from actually having a Law on the Abolition of Titles of Nobility. However, whether the application of that law was legitimate depended on the principle of proportionality: was the refusal to register Ilonka Fürstin von Sayn-Wittgenstein other than as Ilonka Sayn-Wittgenstein an act of overkill in relation to whatever, in 1919 and presumably thereafter, the Law on the Abolition of Titles of Nobility was intended to achieve?

This is where common lawyers and their civil law brethren part company. The majority opinion among Germanic commentators to whom I have spoken – both German and Austrian – appears to support the line taken by the Viennese Landeshauptmann. Common lawyers, many of whom are apt to regard the whole thing as a bit of a joke, are told 'But you don't understand our history' – which indeed they don't. What they see is an increasingly united, harmonized and homogenized Europe in which both Austria and Germany are stakeholders, vibrant democracies which are unlikely to be touched by the dead hand of an apparently politically extinct nobility. When the issue of proportionality is tested in the Austrian courts, all eyes will be on the articulation of a current threat which can be abated only by excising the 'Fürstin von' from the snug security of the middle of Ilonka S-W's name where presently it resides.

The trade mark lawyer does not stop here, though. He wants to know: if Ilonka Fürstin von Sayn-Wittgenstein can not be recognized as a name in Austria, is this also a ground upon which the words ILONKA FÜRSTIN VON SAYN-WITTGENSTEIN cannot be registered as a Community trade mark? Can it be seriously argued that the

2. Baroness Delyth Morgan (elevated 2004).

3. Eg Sebastian Coe (elevated 2000).

4. Peter Mandelson (elevated 2008).

name is 'contrary to public policy or to accepted principles of morality'⁵? Does domestic Austrian law on the Abolition of Titles of Nobility serve to impose tighter public order criteria on the use of names than European trade mark law?

Other issues remain of concern to Europe's trade mark fraternity. For example, there appears at present to be no reason why the Fürstin should not trade online by means of a domain name on which her full adoptive name is touted. If it possessed, for example, a .de, .ch or .co.uk country code, Austrian websurfers would be no less able to access it, and to interact with her than if it had been an .at domain. Further down the line, would the value of the goodwill in the use of her name be compromised if she did persist in using different names in different localities? And in what circumstances would the defence to an action for trade mark infringement based on the honest commercial use of one's own name be vulnerable to the charge of 'but that's not your real name?'

Not just the outcome of the litigation before the referring court but also its impact upon intellectual property practice is a subject that we will ignore at our peril.

5. Community Trade Mark Regulation 207/2009, Article 7(1)(f).