



Neutral Citation Number: [2018] EWHC 1727 (Ch)

Case No: CH-2017-000294
And CH-2018-000062

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, 7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 06/07/2018

Before:

THE HON MR JUSTICE HENRY CARR

Between:

CONSOLIDATED DEVELOPMENTS LIMITED

CH-2017-000294
Claimant/Respondent

-and-

ANDREW ALEXANDER COOPER

Defendant/Appellant

- and -

ANDREW ALEXANDER COOPER

CH-2018-000062
Appellant/Defendant

-and-

CONSOLIDATED DEVELOPMENTS LIMITED

Respondent/Claimant

DENISE McFARLAND (instructed by **Lee Thompson LLP**) for the **Claimant/Respondent**
ROGER WYAND QC (instructed by **Kilburn & Strode LLP**) for the **Defendant/Appellant**

Hearing dates: 18th June 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HENRY CARR

Mr Justice Henry Carr:

Introduction

1. On 26 September 2016, Consolidated Developments Limited (“CDL”) applied to the Registrar to revoke four trade marks registered in the name of Mr A. A. Cooper (“Mr Cooper”). Three of those trade marks, which are the subject of these appeals, are in respect of the sign Tin Pan Alley (“the Marks”). CDL claimed that the Marks had not been put to genuine use during a five-year period between 26 September 2011 and 25 September 2016. Neither side requested a hearing, and having considered the papers, the Hearing Officer, Mr Allan James, revoked the Marks in their entirety, save for trade mark registration No 2574641 (the “641 Mark”). He decided that the 641 Mark should be revoked for non-use except in relation to: “*Class 35: providing advertising space on websites, for others*”.
2. Mr Cooper appeals from the Hearing Officer’s decision to revoke the Marks. CDL appeals from the Hearing Officer’s decision to refuse to revoke the 641 Mark in respect of the provision of advertising space on websites.

Unusual aspects of these appeals

3. Mr Cooper’s Appellant’s Notice does not challenge any of the reasons given for the Hearing Officer’s decision. Mr Wyand QC, on behalf of Mr Cooper, accepted that Mr James was correct to reach the conclusions that he did, on the evidence before him. However, Mr Cooper seeks on appeal to introduce additional evidence that was not before the Hearing Officer. He contends that, had the Hearing Officer had the opportunity to review all of the evidence that is now sought to be admitted to demonstrate use, he would have found that the Marks had been used for a much wider range of goods and services.
4. Mr Wyand, very fairly, pointed out that if the additional evidence were admitted, the case would have to be remitted to the Hearing Officer, and could not be decided at this hearing. If the High Court were to decide the case, and Mr Cooper succeeded on the basis of the additional evidence, then any appeal to the Court of Appeal by CDL would have to satisfy the test for second appeals in CPR 52.7(2). Permission would be required from the Court of Appeal and the Court of Appeal would not give permission unless it considered that:
 - “(a) the appeal would
 - (i) have a real prospect of success; and
 - (ii) raise an important point of principle or practice; or
 - (b) there is some other compelling reason for the Court of Appeal to hear it.”
5. This appeal would not satisfy that test, as Mr Wyand accepted. Had the additional evidence been adduced at the first hearing, and CDL had lost, it would have had a right of appeal to the Court or the Appointed Person. It would be unfair to deprive

CDL of that right, and enable Mr Cooper to benefit from the late filing of the additional evidence. Therefore, the case would have to be remitted to the IPO.

6. CDL's appeal does not allege that the Hearing Officer made any error of law. It is not suggested that he considered any irrelevant issue, nor failed to consider any relevant issue. Ms McFarland, in her courteous submissions, paid tribute to the thoroughness and clarity of Mr James' detailed written decision. Nonetheless, it is alleged that the Hearing Officer failed properly to analyse the evidence relating to the 641 Mark in respect of a limited part of its specification, failed to give adequate reasons for his decision, and failed to apply the principles of law (which he had accurately set out) to the facts. This amounts to a submission that no reasonable tribunal could have reached the conclusion of the Hearing Officer, insofar as he found any use of the 641 Mark during the relevant period.

Background facts

7. CDL is the owner of and landlord for a number business premises located in central London, particularly in and around Denmark Street in Soho. This area has long been associated with the music industry. Denmark Street has for many years been colloquially referred to as "*Tin Pan Alley*". This nickname is derived from an area around New York's West 28th Street, also known as Tin Pan Alley. Many famous artists have recorded music in Denmark Street and a blue plaque was installed by the British Plaque Association in 2014, stating that "*This street was Tin Pan Alley 1911-1992 Home of the British Publishers and Songwriters*".
8. Mr Cooper has been employed in businesses on or connected with Denmark Street for more than 35 years. As a boy, Mr Cooper worked on Saturdays with his uncle, Clifford Cooper, in a business in Denmark Street. From 2006-2014 Mr Cooper owned and ran a company known as the London PA Centre, which had a store on Denmark Street. The London PA Centre was involved in the retail of music equipment and pro-audio equipment, computer software, amplifiers, merchandising (clothing) and accessories until it went into voluntary liquidation in March 2014. Mr Cooper left the premises in Denmark Street in 2014.
9. Mr Cooper and his uncle have had close associations with the Tin Pan Alley Traders Association, which is a group of shopkeepers and business owners who have the common goal of promoting Denmark Street, especially under the name Tin Pan Alley.

Reference by the Appointed Person of Mr Cooper's Appeal to the High Court

10. Mr Cooper appealed from the decision of the Hearing Officer to the Appointed Person. By a decision dated 26 February 2018, Mr Geoffrey Hobbs QC referred the appeal to the High Court pursuant to Section 76(3) of the Trade Marks Act 1994. He did so because he considered that the appeal raised certain points of general legal importance within the ambit of rule 72(5) of the Trade Mark Rules 2008. In particular he raised the following questions:
 - i) Since Mr Cooper's grounds of appeal do not question the decision reached by the Hearing Officer on the papers before him, does this appeal fall outside the statutory right of appeal under section 76 of the 1994 Act?

- ii) Insofar as it is alleged that the decision of the Appointed Person in *Gerry Webber International AG v Guccio Gucci SPA* [2015] RPC 9 (“the Gucci decision”) allows an appellant to adduce further evidence on appeal from the Registrar in a broad remedial way so as to enable the appellant to re-open proceedings in the Registry, is that approach correct?

Jurisdiction to admit additional evidence on appeal

The parties’ submissions in outline

11. In respect of the first issue identified by Mr Hobbs QC, Miss McFarland contended that the High Court did not have jurisdiction to admit the fresh evidence. Her argument was as follows:
12. Section 76(1) provides that:

“An appeal lies from any decision of the registrar under this Act, except as otherwise expressly provided by rules.

For this purpose “decision” includes any act of the registrar in exercise of a discretion vested in him by or under this Act.”
13. Miss McFarland contended that the grounds of appeal do not challenge any decision of the Registrar. On the contrary it is accepted that he was correct on the evidence before him. She argued that, although in form, an appeal, in substance, it was no more than a vehicle to have the case remitted to the IPO for a rehearing on new evidence. Therefore, the appeal falls outside the scope of the statutory right of appeal under the 1994 Act.
14. In response, Mr Wyand QC pointed out that Mr Cooper does contend in the Appellants’ Notice that the decision of the Hearing Officer to revoke the marks for non-use was wrong in the light of the further evidence. That is the whole object of the appeal. For example, paragraph 9 of the grounds of appeal asserts that:

“Had the Hearing Officer had the opportunity to review all the evidence that could have been filed to demonstrate use, he would have reached a different decision. He could and would have found that the marks had been used for a much wider range of goods and services.”

Discussion

15. If the Court (or the Appointed Person) did not have jurisdiction to admit additional evidence on appeal from the IPO in circumstances where this is the sole basis for challenging the decision at first instance, this would have far-reaching consequences. The same argument would apply in patent and registered design appeals, where appeals may be brought as of right from certain “decisions” of the first instance tribunal; see s.97(1) Patents Act 1977 and s.27A of the Registered Designs Act 1949, added by s.10(2) of the Intellectual Property Act 2014. Such a limitation on the powers of the appellate tribunal could lead to injustice. If, for example, a patent was anticipated by a prior use by the patentee, evidence of which could not have been

obtained by an applicant for revocation at the date of the first hearing, it would be unjust, and inconsistent with the overriding objective, if there was no power on appeal to admit such evidence, even if this was the only, or only sustainable, ground of appeal.

16. To assess whether the Court is nonetheless required to conclude that it lacks jurisdiction, it is necessary to consider the meaning of “decision” in section 76(1). This was addressed, in the context of opposition proceedings, by Arnold J in *Maslyukov v Diageo Distilling Ltd & Anor* [2010] EWHC 443 at [52] - [57]. He held that the “decision”, for the purposes of section 76(1), is the Hearing Officer's decision to uphold or reject the opposition, not his conclusion with regard to individual grounds of opposition.
17. By parity of reasoning, I consider that the Hearing Officer's decision in the present case is his decision to revoke the Marks for non-use i.e. the outcome of the applications, rather than the reasons that he provided for the outcome. Mr Cooper contends that the Hearing Officer's decision was wrong on the basis of the additional evidence and, in my judgment, the court has jurisdiction to admit the evidence on appeal. Whether it is appropriate to do so, in the exercise of the Court's discretion, is quite another matter.

Discretion to admit fresh evidence on appeal - general principles

18. This appeal does not concern evidence that was sought to be introduced out of time in the IPO and which is then sought to be admitted on appeal; as to which the principles are set out in *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Limited (t/a Titanic Hotel)* [2016] EWHC 3103 at [34]. The additional evidence in the present case was not sought to be adduced until well after the hearing had been concluded and the decision given by the Hearing Officer.
19. As Lewison LJ memorably observed in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] F.S.R. 29 at [114], the trial is not a dress rehearsal: it is the first and last night of the show. This emphasises the need to adduce all relevant evidence at the first hearing, rather than to attempt to adduce further evidence on appeal. Once the last night of the show has finished, the audience are unlikely to be interested in additions to the script.
20. However, there may be exceptions to this general principle. In *Ladd v Marshall* [1954] 1 W.L.R 1489 at 1491 Denning LJ set out a three-part test for admission of fresh evidence on appeal. In particular:
 - i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
 - ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and
 - iii) the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

21. *Ladd v Marshall* was decided by reference to RSC Ord.59 r.10(2), which required “special grounds” to admit fresh evidence. That rule was repealed as of May 2000. The current position is set out in CPR r.52.21(2) which provides that: “Unless it orders otherwise, the appeal court will not receive: (a) oral evidence; (b) evidence which was not before the lower court.”
22. In *Hertfordshire Investments Ltd v Bubb* [2000] 1 W.L.R 2318, the Court of Appeal reviewed the *Ladd v Marshall* test in the light of the introduction of the CPR. It was held that *Ladd v Marshall* three-part test are matters which the appeal court must consider in the exercise of its discretion when deciding whether to receive fresh evidence. Hale LJ said at 2324C:

“There are, of course, strong reasons for this approach which has a long pedigree. It is in the interests of every litigant and the system as a whole that there should be an end to litigation. People should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed.”
23. In *Hamilton v Al-Fayed (Joined Party)* [2001] E.M.L.R. 15, Lord Philips MR considered the pre-CPR *Ladd v Marshall* line of authorities in the light of the overriding objective. He observed at [11:]

“We consider that under the new, as under the old, procedure special grounds must be shown to justify the introduction of fresh evidence on appeal. In a case such as this, which is governed by the transitional provisions, we do not consider that we are placed in the straightjacket of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in the light of the overriding objective of the new CPR. The old cases will, nonetheless remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective.”
24. Additional considerations apply where the admission of fresh evidence on appeal will require the case to be remitted for a retrial, so that the first instance proceedings will have to be re-opened. In *Transview Properties Ltd v City Site Properties Ltd* [2009] EWCA Civ 1255 Mummery LJ said at [25]

“The interests of the parties and of the public in fostering finality in litigation are significant. The parties have suffered the considerable stress and expense of one trial. The reception of new evidence on appeal usually leads to a re-trial, which should only be allowed if imperative in the interests of justice.”

Discretion to admit fresh evidence in trade mark appeals

25. In *Hunt-Wesson Inc. 's Trade Mark Application* [1996] R.P.C 234 Laddie J considered that a trade mark opposition was different from private litigation between two parties. An opposition might determine whether a new statutory monopoly affecting all traders in the country was to be created and a refusal to admit further evidence affected not only the opponent, but might penalise the rest of the trade. He held the proper course was to look at all the factors, including those set out in *Ladd v Marshall*, to determine whether or not on the particular facts the further evidence should be admitted.
26. He considered that the following factors were relevant to the exercise of the Court's discretion:
- i) whether the evidence could have been filed earlier and, if so, how much earlier;
 - ii) if it could have been, what explanation for the late filing had been offered to explain the delay;
 - iii) the nature of the mark;
 - iv) the nature of the objections to it;
 - v) the potential significance of the new evidence;
 - vi) whether or not the other side would be significantly prejudiced by the admission of the evidence in a way which could not be compensated, e.g. by an order for costs;
 - vii) the desirability of avoiding multiplicity of proceedings; and
 - viii) the public interest in not admitting onto the register invalid marks.
27. This approach was followed by Sir Richard Scott VC in *Club Europe Trade Mark* [2000] RPC 329. He considered that Laddie J's checklist of matters to be taken into account was useful. He said at page 338:
- “I agree that the restrictive principles expressed in *Ladd v Marshall* do not apply where the question is whether on a trade mark appeal to which Order 55 r.7(2) applies new evidence should be admitted. I agree also that the matters referred to by Laddie J are those that in most cases will be the important ones. I would caution, however, against any attempt to confine the statutory discretion within a straitjacket. The discretion under Order 55 r.7(2) should, now, be exercised in accordance with the overriding objective and, in particular, the concept of proportionality, set out in part I of the Civil Procedure Rules.”
28. However, in *Wunderkind Trade Mark* [2002] R.P.C 45 Pumfrey J considered that the introduction of Part 52 had changed the law in a significant manner and that what Laddie J had said in *Hunt-Wesson* had been overtaken by the adoption of CPR rule 52.11.

29. These apparently conflicting views were considered by the Court of Appeal in *EI Dupont de Nemours & Company v S.T. Dupont* [2003] EWCA. Aldous LJ said at [102] – [104]:

“103. Pumfrey J considered the question of admitting fresh evidence in a trade mark appeal under the 1994 Act in *Wunderkind Trade Mark* [2002] R.P.C. 45. He concluded that proceedings before the Registrar of Trade Marks were intended closely to resemble proceedings in court and there was nothing in the nature of the tribunal which required appeals from the Registry to be treated in any special way. He considered that the introduction of CPR Part 52 had changed the position so that what was formerly a rehearing is now a review. For reasons which I have indicated, this is in my view a change of terminology, not substance. I agree, however, with Pumfrey J that trade mark appeals should not be treated differently from other appeals. As to admitting fresh evidence, Pumfrey J considered that the introduction of Part 52 had changed the law in a significant manner and that what Laddie J had said in *Hunt-Wesson* had been overtaken by the adoption of rule 52.11. Sir Richard Scott's decision in *Club Europe* does not appear to have been drawn to Pumfrey J's attention. However that may be, Pumfrey J in my view correctly summarised the position in paragraph 57 of his judgment, where he said:

“There is no doubt that in a trade mark appeal other factors outside the *Ladd v. Marshall* criteria may well be relevant. Thus in my judgment it is legitimate to take into account such factors as those enumerated by Laddie J in *Hunt-Wesson*, provided always that it is remembered that the factors set out in *Ladd v. Marshall* are basic to the exercise of the discretion to admit fresh evidence and that those factors have peculiar weight when considering whether or not the overriding objective is to be furthered.”

104. This passage, in my view, properly recognises that the same principles apply in trade mark appeals as in any other appeal to which Part 52 applies; but that the nature of such appeals may give rise to particular application of those principles appropriate to the subject matter.

The Gucci decision

30. At [1] of the Gucci decision, Mr Alexander said:

In *La Mer Technology Inc v Laboratoires Goemar SA* [2005] EWCA Civ 978, [2006] F.S.R. 5, the Court of Appeal emphasised the importance of dotting the i's and crossing the t's in the evidence of use in proceedings where a mark is challenged on the grounds of non-use. This case emphasises the importance not just of doing that but also of doing so in the first

round of evidence and not relying on the possibility of being able to bolster inadequate evidence of use at a later stage of the proceedings.

31. At [13] Mr Alexander considered the relevant principles governing the admission of fresh evidence in trade mark appeals and cited the decision of the Court of Appeal in *El Du Pont De Nemours & Company* (supra). At [14] he stated that “[t]he *Ladd v Marshall* factors are basic to the exercise of the discretion.”
32. On the facts of the appeal, Mr Alexander considered that it was just to admit the fresh evidence and (by agreement of the parties) to remit the case to the Registry, subject to certain conditions as to payment of wasted costs. However, he stated at [79] that;

“This case is exceptional and it should not be thought that, in general, appellate tribunals in trade mark matters will permit a party to remedy an evidential deficiency on whatever terms”.

I do not consider that the *Gucci* decision departs from any of the principles which I have considered above. On the contrary, it applies them. The case does not establish that the Court or the Appointed Person should exercise a broad remedial discretion to admit fresh evidence on appeal so as to enable the appellant to re-open proceedings in the Registry. The *Gucci* decision makes clear that it is not establishing any such principle.

Summary of principles

33. The cases to which I have referred establish the following principles in respect of the admissibility of fresh evidence in trade mark appeals, sought to be introduced for the first time on appeal:
- i) the same principles apply in trade mark appeals as in any other appeal under CPR part 52. However, given the nature of such appeals, additional factors may be relevant;
 - ii) the *Ladd v Marshall* factors are basic to the exercise of the discretion, which are to be applied in the light of the overriding objective;
 - iii) it is useful to have regard to the *Hunt-Wesson* factors;
 - iv) relevant factors will vary, depending on the circumstances of each case. Neither the *Ladd v Marshall* factors nor the *Hunt-Wesson* factors are to be regarded as a straightjacket;
 - v) the admission of fresh evidence on appeal is the exception and not the rule;
 - vi) the *Gucci* decision does not establish that the Court or the Appointed Person should exercise a broad remedial discretion to admit fresh evidence on appeal so as to enable the appellant to re-open proceedings in the Registry; and
 - vii) where the admission of fresh evidence on appeal would require that the case be remitted for a rehearing at first instance, the interests of the parties and of the

public in fostering finality in litigation are particularly significant and may tip the balance against the admission of such evidence.

Could the fresh evidence have been filed earlier and, if so, how much earlier?

34. It was accepted by Mr Wyand that “*it would theoretically have been possible for Mr Cooper to have collected and filed the new evidence before the hearing in the UKIPO.*” (Skeleton Argument on behalf of Mr Cooper at [25]). In my judgment, this concession was necessarily made, but does not go far enough. The additional evidence (considered further below) consists of witness statements from Mr Cooper himself, from his uncle Clifford, his current trade mark attorney and from several persons who were familiar with Mr Cooper’s business in Denmark Street. Mr Cooper was represented in the revocation proceedings in the IPO by a different firm of trade mark attorneys, who submitted a witness statement on his behalf (together with a substantial exhibit) and who prepared written submissions which were considered by the Hearing Officer.
35. The additional evidence could, in my judgment, have been filed by 21 March 2017, when the evidence in support of Mr Cooper’s trade mark registrations was filed. There is no suggestion that any material in Mr Cooper’s new statement was unknown to him at the time. He could have given the names of other witnesses to his trade mark attorneys, and there is no evidence that they could not have obtained those statements by 21 March 2017, had they been given proper instructions. The Hearing Officer gave his decision on 21 November 2017 and the additional evidence was served several months after that decision.

What explanation for the late filing had been offered to explain the delay?

36. Relying upon the additional Witness Statement of Mr Cooper, Mr Wyand explained that as a result of the liquidation of the company, Mr Cooper was unable to access company records and documentation. It was only recently that, following efforts to elicit information from the liquidator, he had been able to establish what has happened to the evidence. He now understands that all information held by the liquidator has been destroyed.
37. This does not explain the delay in filing the evidence now relied upon, nor was it advanced as an explanation. Since it is said that all documents have now been destroyed, none of the additional evidence exhibits any such documents. Nor does it include any information obtained from the liquidator. Mr Wyand explained on instructions that the liquidator was not contacted by Mr Cooper until March 2018, approximately 4 months after the decision by the Hearing Officer. There is no evidence as to when the documents were destroyed, nor whether they could have been obtained had the liquidator been approached earlier in these proceedings.
38. Mr Cooper’s explanation as for the delay in filing the additional evidence was as follows: The liquidation of the company was highly distressing given his long-term involvement with it and with Denmark Street. It also left him in debt to his bank and put his family home at risk. The extreme financial pressures on Mr Cooper as a result of the liquidation of the company caused him to suffer severe depression and he became suicidal. Adding to this, in early 2017 his wife was diagnosed with cancer

and, as a result, Mr Cooper was forced to deal not only with domestic financial difficulties but also to care for her.

39. Mr Cooper was the sole director of the company and has since operated as a sole trader. He has no associates or employees who could have assisted with the provision of evidence for the purposes of defending the Applications. Furthermore, the severe financial limitations imposed on Mr Cooper by the liquidation of the company and his domestic financial situation left him poorly resourced to fight the Applications. He explained at [33] of his Witness Statement that following the liquidation of the company, he entered into a debt management plan as he had a personal guarantee to the bank and credit card debts of over £100,000 which he still owes. He stated that “*I am deemed un-creditworthy, and I cannot remortgage or obtain credit cards or anything which requires credit.*”
40. As a result of all of the above, Mr Cooper claims that he was unable to focus properly on the Applications. It is said that his mental state left him unable to think straight and to consider what evidence he might have sourced from third parties.
41. I have no hesitation in accepting that Mr Cooper’s subjective account of the desperation and grief that he has felt as a result of the grave misfortunes that he has experienced. However, there was no medical evidence to establish Mr Cooper’s mental state, in spite of a request from CDL’s solicitors for such evidence. Mr Wyand explained on instructions that Mr Cooper had not seen a doctor about his condition; many people suffering from depression do not take this step.
42. Nonetheless, medical evidence would, in my view, be required to establish causality in the present case. There can be no suggestion that Mr Cooper lacked capacity. He instructed legal representatives and filed evidence in opposition to the revocation applications, which was coherent. The assertion that his failure to file the additional evidence was caused by a particular medical condition, and that, subsequent to the decision, he has recovered sufficiently to appreciate the relevance of this evidence, would require support from a suitably qualified medical practitioner.
43. This does not mean that it would be right to ignore Mr Cooper’s explanation for the late filing of the additional evidence. However, the absence of medical evidence goes to the weight to which I can attach to this evidence, when balancing it against other factors which I must consider.

The nature of the Marks and the nature of the objections to them

44. There was some suggestion by CDL that because the Marks had a geographical connotation, and might restrict traders in the area from using the designation Tin Pan Alley, this was a factor which supported a refusal to admit the additional evidence. I do not accept this. CDL is itself applying for registrations of the mark Tin Pan Alley. If those registrations are granted, they will not be infringed by mere geographic designations. If I considered that it is otherwise just to admit the additional evidence, the nature of the marks and the nature of the objections to them would make no difference.

The potential significance of the additional evidence

45. I shall briefly summarise the content of the additional evidence and then consider the criticisms that were made of it. The additional evidence comprises the following:
- i) The Witness Statement of Andrew Cooper which:
 - a) claims use of Tin Pan Alley on merchandise such as t-shirts, pens, stickers, plectrums, mousemats, and notepads during the relevant period and provides some undated photographs showing examples of such merchandise; and
 - b) provides an explanation of his personal difficulties and mental state.
 - ii) The Witness Statement of Clifford Sydney Cooper which:
 - a) supports Mr Cooper's assertion in 1(a) (above) as to use in relation to merchandise;
 - b) states that Mr Cooper's business premises featured the sign "Tin Pan Alley Sales";
 - c) states that Clifford Cooper's company (Orange Music and Electronic Co Ltd) rented space during the relevant period from Mr Cooper to use as a music venue;
 - d) states that in 2013 a US company known as "Peavey" rented space from Mr Cooper for a product demonstration and that on that occasion "TPA" branded merchandise was sold to the audience at Mr Cooper's premises; and
 - e) supports Mr Cooper's claim as to his mental state.
 - iii) The Witness Statement of Benjamin Scarfield, who is a trade mark attorney and employee of Kilburn and Strode. Mr Scarfield:
 - a) gives evidence of conversations with unidentified Denmark Street traders who, he alleges, are unwilling to be named in evidence due to fear of reprisals from CDL (an allegation which is strongly denied);
 - b) asserts use of the mark in relation to the activities of the Tin Pan Alley Traders Association;
 - c) asserts that the mark was used in promoting the Tin Pan Alley music festival (although this festival did not take place (see w/s of Philip Straker para 9)); and
 - d) asserts that the mark was used on large metal arches at each end of Denmark Street.
 - iv) The Witness Statement of David Hunt, who is European Sales Manager of Peavey Electronics UK. Mr Hunt:

- a) supports Clifford Cooper's claim regarding use of the mark on signs in Mr Cooper's business premises and sales of merchandise to the audience at a live music performance; and
 - b) states that Peavey hired Mr Cooper's business in 2012 to facilitate a live demonstration of Peavey equipment.
- v) The Witness Statement of Philip Straker who is the owner and director of Saxaphones Ltd, which owned retail premises in Denmark Street between 2011-2014. Mr Straker:
- a) states that the Tin Pan Alley Traders Association used the mark with the consent of Mr Cooper; and
 - b) supports Mr Cooper's assertion in 1(i) above as to use in relation to merchandise.
- vi) The Witness Statement of Dean Mitchell, who is a sales representative for a music goods supplier who has been visiting and supplying companies on Denmark Street for 25 to 30 years. Mr Mitchell states that Mr Cooper's shop bore signage bearing the Mark.
- vii) The Witness Statement of Sam Cakebread. Mr Cakebread worked on Denmark Street between 1998 to 2016. Originally, he worked for Clifford Cooper at one of his music stores and then managed another store on Denmark Street. Mr Cakebread:
- a) asserts that Mr Cooper's shop bore signage bearing the mark; and
 - b) supports Mr Cooper's assertion in 1(a) (above) as to use in relation to merchandise.
- viii) The Witness Statement of Nick Jackson who managed Mr Cooper's London PA store in Denmark Street some 15 years ago. Mr Jackson:
- a) asserts that Mr Cooper's shop bore signage bearing the mark; and
 - b) supports Mr Cooper's claim in 1(a) (above) as to use in relation to merchandise.
- ix) The Witness Statement of Sean Atkinson who is a supplier and manager of stock control software who supplied Mr Cooper's London PA store on Denmark Street from 2007 until 2014. Mr Atkinson states that the name Tin Pan Alley was used for stock and that he saw the name within the software that he supplied for the shop, making reference to branded items sold in the shop, including t-shirts and other products and merchandise. He states that "*I have the data from the software backed up and can provide it if it is useful*". However, no such data has been provided.
- x) The Witness Statement of Richard Crediton-Hughes who worked with Mr Cooper in setting up the Tin Pan Alley website which he designed in 2011.

This supports Mr Cooper's evidence that Mr Cooper hosted the Tin Pan Alley website on which he provided links to other traders' websites.

- xi) The Witness Statement of Carlo Mattiucci. Mr Mattiucci worked in and around Denmark Street for a number of years and owned a live music venue known as the 12 Bar Club which was open from 1994 to 2015. He also ran Tin Pan Alley Studios Ltd on Denmark place. Mr Mattiucci:
 - a) states that Mr Cooper's shop bore signage bearing the mark; and
 - b) states that he used the mark, with Mr Cooper's consent, in "Tin Pan Alley Studios", his company name.
- 46. The additional evidence was criticised on several grounds. First, it is said that the additional evidence is largely anecdotal, lacks any detail as to dates and quantities of use, and takes the case no further than the original evidence of Mr Cooper, which was considered by Mr James in his decision.
- 47. Secondly, it is said that the additional evidence shows use as a geographic indication rather than use as a trade mark. Reliance was placed upon [45] of the Hearing Officer's decision, which has not been appealed. Mr James referred to an advertisement during the relevant period and found that the words "Tin Pan Alley" were used merely to identify the physical location of Mr Cooper's store in Denmark Street. It was contended that he would reach the same conclusion about the additional evidence if the case were remitted to him.
- 48. Thirdly, it was contended that the additional evidence does not support Mr Cooper's revised specification, which still includes a vast range of goods and services.
- 49. Fourthly, it was said that Mr Scarfield's Witness Statement contains inadmissible hearsay from unattributed sources. His claim that relations between CDL and its tenants were "*already tense and (the tenants) did not want to attract further trouble*" is strongly denied by Mr Richard Metcalfe on behalf of CDL and would require cross examination if it were to be pursued. This would considerably expand the scope of any further hearing in the IPO. In the absence of confirmation from any of the tenants, it was most unlikely that this allegation could be proved.
- 50. In my judgment there is force in these criticisms. I think it may well be that, although the evidence is relevant and credible (save the evidence of Mr Scarfield which is inadmissible) if the case were remitted to the Hearing Officer, he would reach the same conclusions as set out in his decision. In reaching this view, I have considered the witness statements in totality, as well as on an individual basis, but I am not satisfied that the evidence would probably have an important influence on the result of the case.

Whether CDL would be significantly prejudiced by the admission of the evidence in a way which could not be compensated, e.g. by an order for costs

- 51. In this regard, CDL relied upon the Witness Statement of Richard Metcalfe, a senior property consultant in its employment. Mr Metcalfe explained that CDL has owned and operated Denmark Street for over 20 years and has made the preservation of the

street's heritage and cultural significance a priority. It has made continuous efforts to keep the nickname Tin Pan Alley in use and to promote it in relation to the musical heritage of the area.

52. His evidence was that CDL's goal, to further promote the street's significance under the Tin Pan Alley Mark, would be significantly prejudiced if the additional evidence were admitted and the case were remitted to the IPO. This would add considerable delay to the eventual determination of the issue. The trade mark issues would remain unresolved and would, or could, deter CDL from fulfilling its commercial plans, which include use of and reference to the Tin Pan Alley Mark. Furthermore, CDL would not be compensated in costs because Mr Cooper's evidence is that he is heavily in debt and impecunious.
53. I accept this evidence and consider that CDL would be significantly prejudiced if the additional evidence were to be admitted into these proceedings.

The desirability of avoiding multiplicity of proceedings

54. In my judgment, this is a very important factor in the present case. If the additional evidence were admitted into the proceedings, the case which the Hearing Officer has already decided would have to be heard for a second time. There has to be finality in litigation. CDL should not be required to fight, for a second time, a battle which it has already won in the IPO. Furthermore, other litigants wish for their cases to be heard. If the IPO is required to decide cases for a second time, on the basis of evidence which could and should have been adduced on the first occasion, other hearings will be delayed.

Conclusion

55. I take account of Mr Cooper's explanation as to why the additional evidence was not served earlier. I also have regard to the fact that most of the evidence is relevant and credible. On the other hand, the additional evidence could and should have been obtained before the first hearing. I do not accept that it would probably have an important influence on the result of the case, and its introduction would require the case to be remitted to the IPO for a fresh hearing. In all the circumstances, I have reached the conclusion that the additional evidence should not be admitted.

CDL's appeal

56. At paragraph 8 of his Witness Statement dated 20 March 2017, which was before the Hearing Officer, Mr Cooper stated that he had been hosting and maintaining links to the websites of various establishments since at least 2012. He exhibited invoices for the services provided to several traders. He said that the invoices specifically state that he traded as Tin Pan Alley.
57. The Hearing Officer dealt with this issue at [47] - [53] of his decision. He accepted that hosting and maintaining links to third-party websites could constitute a form of advertising service within class 35. He then dealt with various criticisms of the evidence advanced on behalf of CDL.

58. The Hearing Officer noted CDL's observation that the copies of invoices in evidence were consecutively numbered and all issued on the same day. He considered that this appeared to call into question the authenticity of the evidence, and the truth of Mr Cooper's claim to have provided such services since 2012. However, CDL had not sought to cross examine Mr Cooper on his evidence. The Hearing Officer considered that there was nothing about the invoices themselves which was self-evidently incredible. Therefore, he accepted Mr Cooper's evidence on this issue.
59. He then concluded that the advertising service was provided under the contested Marks. The customers for the advertising service were the businesses whose brands appeared on Mr Cooper's website. The end users of the service included those members the public who visited the proprietor's website and saw the advertisements for third-party websites with associated links.
60. He recorded that the only evidence of use of the contested marks with customers was the use of Tin Pan Alley on the 10 invoices issued in July 2012. These were issued on headed notepaper which identified the proprietor as "*Andrew Cooper T/A Tin Pan Alley*" the services were described as "*hosting and maintenance of website, including link from TPA site*". He noted that the total income from these invoices appeared to have been about £2100, and that this was the only recorded transaction of this kind during the relevant period. Therefore, the commercial value of the links from the Tin Pan Alley website as an advertising service appeared to have been very small.
61. However, the Hearing Officer considered that the service appeared to have been real in the sense that it was a serious effort to create or maintain a market for such services. Further, as Mr Cooper identified himself as trading as Tin Pan Alley, Mr James was satisfied that the services were provided under the Mark. He did not consider that this conclusion was undermined by the fact that the Mark was also used as the trading name of the proprietor's business, as that is quite commonly the case where a business provides services to others.
62. Mr James also took into account that there was no evidence as to the number of end-users concerned, to whom the advertising services were directed. Nonetheless, he considered that if 10 businesses were prepared to pay Mr Cooper to include their links on his website, it was reasonable to infer that they must have expected there to be sufficient visitors to the website to justify their investment. He also considered that although the invoices referred to the proprietor's website as "TPA", this was plainly shorthand for Tin Pan Alley.
63. The Hearing Officer's decision was criticised by CDL on the following grounds:
 - i) Mr Cooper had neither asserted nor confirmed whether the alleged invoices were ever sent to anyone or what, if anything, he actually did with them;
 - ii) there was no assertion that the sums referred to in the documents were ever paid. No bank, VAT or other details were given, which suggested that they were not commercially relevant documents;
 - iii) the documents were claimed to be invoices, but they also stated that the sums had been paid by bank transfer, which was more consistent with them being a receipt;

- iv) none of the companies to whom the invoices were directed had given evidence to corroborate what was said by Mr Cooper;
 - v) the wording used on the alleged invoices did not support the conclusion that they had been used to provide advertising space. They referred to hosting and maintenance of the website; and
 - vi) the companies named on the invoices were not the same as those listed in paragraph 7 of Mr Cooper's witness statement.
64. In my judgment, none of these grounds of appeal has any substance. Questions about the invoices were only relevant if it were to be suggested that the documents exhibited by Mr Cooper were not genuine invoices, and that his evidence was to be disbelieved. The Hearing Officer was quite right to conclude that, if CDL wish to impugn the honesty of Mr Cooper, procedural fairness would have required him to be cross-examined, and to be given the opportunity to answer such allegations. I agree with the Hearing Officer that there was nothing in Mr Cooper's evidence, or in the exhibited documents, which was inherently incredible. Therefore, the Hearing Officer was entitled to accept his evidence. As to the other objections, he took a sensible approach to the evidence, rather than requiring proof of facts to the nth degree. He gave full reasons for his conclusions which, in my view, adequately addressed all of the points raised by CDL.
65. It should be borne in mind that appeals from the IPO are not to be regarded as opportunities to run the same arguments for a second time, in the hope of obtaining a better result. Generally, a distinct and material error of law or principle must be identified. No such error was identified in the present case.

Result of the appeals

66. For the reasons set out above, Mr Cooper's appeal and CDL's appeal are both dismissed.