

IN THE MATTER of trade mark
registration No. 1335163

PHILOSOPHY in Class 25 in the
name of Nicholas Dynes Gracey
and

IN THE MATTER of revocation No.
9206 in the name of Alberta
Ferretti

FURTHER DECISION

1. On 4th May this year I gave an Interim Decision in this matter which is an application for revocation brought by Alberta Ferretti (Ferretti). The Trade Mark is for the word **PHILOSOPHY** registered under 1,335,163 in Class 25. Mr. Gracey is the registered proprietor.
2. The Decision of 4th May followed an oral hearing on 18th April at which Mr. St. Ville instructed by Urquhart Dykes & Lord, trade mark agents, appeared on behalf of Ferretti. Mr. Gracey appeared in person via a conference link.
3. As is apparent from that Decision, the matter in issue was whether or not Mr. Gracey was entitled to disclosure of the name of a public house in Morfa Nevyn in North Wales.

4. At the time of the hearing, it was suggested that there were two relevant pubs, The Cliffs Inn and The Tycoch Inn. I heard full argument and reserved my decision. Immediately following the hearing, on 20th April, Mr. Gracey sent me a fax, copied to Urquhart Dykes & Lord containing a map showing not two but six pubs or licensed premises in Morfa Nevyn. Since I did not consider that this information affected my decision I did not invite observations from Urquhart Dykes & Lord as to whether it would be proper for me to take it into account.

5. In my Decision I upheld the Hearing Officer's refusal to order disclosure of documents pursuant to Rule 52 of the Trade Mark Rules 1994 (as amended) which were the relevant rules at the time, (see paragraph 26 of my Decision). I went on to refuse the appeal in relation to disclosure of information under Rule 51 on two grounds. First, in paragraph 29 of my Decision, I held that the Rule did not extend to ordering a party to provide information which he did not possess and to which he did not have access by inquiry of his servants or agents. (The Interpretation Issue). Secondly, in paragraph 32, I concluded that even if my interpretation of Rule 51 was wrong, that it would be entirely inappropriate to order any such disclosure on the facts of this case. (The Proportionality Issue).

6. In paragraph 30 and 31 I stated as follows:
 30. *"What Mr. Gracey is in effect seeking is an order that the applicant require Mr. Keith to re-visit North Wales some 4 years*

after the date of the original incident to try to refresh his memory as to the name of the pub he visited.

31. Mr. Gracey realistically accepted that his was the effect of his request but said that this was, in the circumstances both fair and necessary

7. On 13th May 2000 Mr. Gracey sent a fax to the Treasury Solicitor contending that the first sentence of paragraph 31 of my Decision was "categorically other than true" and requested confirmation that his fax of 20th April 2000 was before me prior to my issuing the Decision.

8. On 16th May 2000 the Treasury Solicitor responded as follows:

"I confirm that your fax of the 20th April 2000 was received and forwarded to the appointed person. The appointed person confirms that he was in possession of your fax of 20th April 2000 before giving his decision on the 4th May 2000.

The appointed person has indicated that he does not feel it would be appropriate for him to hear further submissions on matters dealt with in his Decision.

A formal order will be issued shortly and I will send you a copy".

9. On 17th May 2000 Mr. Gracey responded to that letter in the following terms

"Before issuing the order, and specifically in relation to the Human Rights Act 1998, please advise where in the transcript, or otherwise is the basis for the first sentence of paragraph 31 of the Decision, especially ..." but said that this was, "

Warm thanks Nicholas Gracey

(p.s. if this is now agreed to be an error, in respect of The Human Rights Act, please arrange a hearing to correct the matter).

10. The matter was referred to me by the Treasury Solicitor for my consideration and on 22nd May 2000 the Treasury Solicitor responded in the following terms:

"I refer to my letter of the 17th May 2000". In your fax of the 17th May 2000 commenting on my letter of 16th May 2000 you request that a hearing be arranged to consider the comment made in paragraph 31 of the Appointed Person's decision of 4th May 2000 where it is stated:

"Mr. Gracey realistically accepted that this was the effect of his request but said that this was, in the circumstances both fair and necessary".

I have referred your fax to Mr. Thorley and he has considered the matter further.

In my letter to your of 3rd August 1999 in this matter, I stated that Mr. Thorley remained unpersuaded that he has the power to alter a decision once it has been given save perhaps in exceptional circumstances. However, accepting for present purposes that he may have such a power, he is, as at present advised, wholly unsatisfied that the facts of this case would merit him altering his Decision.

In his Decision he concluded that the Registrar did not have power under Rule 51 to order a party to provide information which he does not possess and to which he does not have access by inquiring of his servants or agents (see paragraphs 27 - 29). He went on in the following paragraphs to conclude that, even if the Registrar had power that, in this case, the steps necessary to obtain the relevant information would be disproportionate.

Even if you were able to satisfy him that the conclusion as to disproportionality were to be wrong, in that there were some quick and cheap method of obtaining the relevant information without a trip to Wales, the fundamental objection to the powers of the Registrar under Rule 51 would remain. Any further hearing accordingly would not result in a different Order being made.

For these reasons the Appointed Person remains of the view that it would be inappropriate for him to hear further submissions on the matters dealt with in his Decision. Nonetheless he is aware that there is no right of appeal from his decision (see section 76(4) of the Trade Marks Act 1994) and is therefore not going to rule against a further hearing without giving you the opportunity, if you are so minded, to make submissions as to why such a hearing should take place.

Such submissions must deal:

- (i) With the issue of whether the Appointed Person has the power to alter a Decision, once given*
- (ii) If he has, with the circumstances in which he should exercise that power and*
- (iii) With the reasons why those circumstances are met on the facts of this case.*

Mr. Thorley has asked me to send copies of this letter together with your recent faxes and my letter of 16th May 2000 to the representatives of Alberta Ferretti. If you seek a further hearing, Alberta Ferretti's representatives will plainly be entitled to attend. This obviously raises concern over the costs of any further hearing and Mr. Thorley has asked you to consider carefully the question of costs before asking for any further hearing.

In your fax of 17th May 2000 you make repeated reference to the Human Rights Act. You are no doubt aware that the Act is not yet in force in England and Mr. Thorley has asked that I draw your attention to the report in the Times of Wednesday May 17th 2000 in the case of Daniels -v- Walker. I enclose a copy for your convenience.

I await hearing from you and confirm that the Order will not be signed for a period of 7 days to allow you to consider the matter".

11. This letter crossed with a fax from Mr. Gracey dated 22nd May 2000 which amplified his contention that there was an error in the first sentence of paragraph 31 of my decision. On 31st May 2000 Mr. Gracey sent a further fax which made a formal request for a re-hearing and made reference to the Judgment of the Court of Appeal in *Stewart -v- Engel* (Wednesday 17th May 2000) as being authority for the proposition that I could re-open my Decision before the Order was signed.

12. A further hearing was therefore arranged to take place on Monday 17th July 2000. On 12th July Mr. Gracey sent another fax to the Treasury Solicitor referring to a transcript of a hearing before the Registrar's Hearing Officer (Mr. Rowan) on Thursday 23rd September 1999 with a request that I should read this transcript in advance of the hearing. He followed this up with a fax dated 16th

July which enclosed a bundle of documents which were sent by first class post and arrived on the morning of the hearing.

The Power of the Appointed Person to Re-Open a Hearing.

13. I turn first to the question of the power of the Appointed Person to revisit a Decision once given but before the Order relating thereto has been signed. I received helpful submissions in writing both from Mr. Gracey and from Mr. St. Ville. There were substantially in agreement and coincided with my researches. I therefore did not invite either party to amplify upon those submissions at the hearing.

14. The power of a High Court Judge to reopen in these circumstances was recently considered by the Court of Appeal in *Stewart -v- Engel* (Wednesday 17th May 2000). In that case, in the period between the handing down of the Judgment and the making of the Order, an application was made to the trial judge to re-open the matter by permitting an amendment to the pleading to allow a new cause of action in conversion to be raised with a request that that claim in conversion be substituted for the claims in negligence and breach of contract which had been dismissed by the Judge's judgment.

15. The primary question before the Court of Appeal was whether the jurisdiction of the court to re-open hearings in the circumstances defined in *Re: Barrell Enterprises* [1973] 1 WLR 19 survived the

introduction of the CPR. The leading Judgment was given by Sir Christopher Slade and he stated:

"I accept that it is possible that the Barrell jurisdiction falls to be regarded as a rule of practice rather than law and was capable of being abrogated by the introduction of the CPR. Nevertheless I am satisfied that there is nothing in the CRP which obliges us to hold that it was so abrogated and that we should not reach any such conclusion. On the contrary, the jurisdiction, if very cautiously and sparing exercised, in my judgment serves a useful purpose, fully in accord with the overriding objective of enabling the Court to deal with cases "justly", as particularised in Rule 1.1 of the CPR ..."

"Consistently with the existence of the Barrell jurisdiction, RSC Order 59 Rule 4(1) provides that the time for appeal from a decision of the High Court begins to run from "the date on which the judgment or order of the court below was sealed or otherwise perfected. Up to that date, in my judgment, the Barrell jurisdiction continues to subsist, though, as I would explain later the discretion thereby conferred on the Court is in my Judgment severely restricted." (emphasis added).

16. Sir Christopher Slade then went on to consider the way in which the discretion should be exercised and stated

"Since there must to some finality in litigation and litigants cannot be allowed unlimited bites at the cherry, it is not surprising that, according to the authorities, there are stringent limits to the exercise of the discretion conferred on the court by the Barrell jurisdiction. In that case itself, Russell L.J., delivering the Judgment of the Court of Appeal, said (Supra at p. 23 - 24):

"When oral judgments have been given, either in a court of First Instance or on appeal, the successful party ought, save in the most exceptional circumstances, to be able to assume that the judgment is a valid and effective one." (emphasis added)

Russell L.J. went on to say (at p. 24)

"The cases to which we were referred in which judgments in civil courts have been varied after delivery were all cases in which some most unusual element was present."

This principle must apply a fortiori where the judgment is a formal written judgment in final form, handed down after the parties had been given the opportunity to consider it in draft and make representations on the draft. The principle recognises that the doing of justice requires justice to both parties in litigation, not merely one".

Clarke L.J. reached the same conclusion on the power of the Court to reopen a hearing prior to the formal order being entered but did so on the basis of the consideration of the CRP rather than the antecedent authorities under the RSC.

In approaching the question of discretion Clarke L.J. drew attention to the considerations outlined by Neuberger J. in Charlesworth v. Relay Roads [1999] 4 All ER 397 at 405 which I think should be repeated here.

(1) *The court has jurisdiction to grant an application to amend the pleadings to raise new points and/or to call fresh and/or to hear fresh argument*

(2) *The court must clearly exercise its discretion in relation to such an application in a way best designed to achieve justice.*

(3) *The general rule relating to amendment applies so that (a) while it is no doubt desirable in general that a litigant should be permitted to take any reasonably arguable point, it should by no means be assumed that the court will accede to an application merely because the other party can, in financial terms, be compensated in costs (b) as with any other application for leave to amend, consideration must be given to the anxieties and legitimate expectations of the other*

party, the efficient conduct of litigation, and the inconvenience caused to other litigants.

(4) Quite apart from, and over and above, those principles because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the Court was prepared to accede to an application where the applicant could not satisfy the three requirements in Ladd v. Marshall.

(5) Almost inevitably, each case will have particular features which the court will think it right to take into account when deciding how to dispose of the application before it.

(6) The court should be astute to discourage applications which involve parties seeking to put in late evidence, but cases where new evidence is found after judgment is given and before the order is drawn up will be comparatively rare".

17. Clarke L.J. concluded that these were relevant considerations but that each case must depend upon the circumstances. In the

circumstances of that case, Clarke L.J. saw fit to dissent from the other two Judges and I think it is relevant to identify the reason for his dissent. He stated this:

"The Judge has been criticised for drawing a distinction between this case and cases like Re: Barrell Enterprises. I do not think that criticism is justified. He was to my mind right to say that what he was being asked to do was of a different nature from the situations which, as he put it, were mainly in mind in the earlier cases. He was being asked not to revisit any of the questions which he had decided, but to allow the Claimant to put forward a point which the Judge thought might be open to her, but which had not yet been taken." (emphasis added).

18. The Learned Lord Justice therefore saw that there was a distinction to be drawn between an amendment which raised an entirely new cause of action and an application to revisit a question which had already been decided. As I understand it he concluded that, in the latter case, exceptional circumstances would be required.

19. Roch L.J. agreed with Sir Christopher Slade and on the subject of discretion stated as follows:

"The power of a court to re-open, whether by revocation or variation, its judgment or order must be exercised sparingly

in my judgment, if it is to be exercised in accordance with the overriding principles of the CPR"

20. It is plain from the above that the Court of Appeal were recognizing the strong public interest in achieving finality in litigation. Decisions once made should not lightly be re-opened, there must be exceptional circumstances and a matter should only be re-opened when the interest of justice demand it. In particular proceedings should not be unnecessarily protracted and it is therefore incumbent on the parties to raise at the hearing, and to raise clearly and fully, each issue and each point on that issue which they believe is pertinent to their case. In many proceedings decisions are issued in advance of judgment being formally given and very often there is a delay in the drawing up of an order. It cannot be that any power of the courts to re-consider their decisions can become a means for enabling the dissatisfied party to have a further bite at the cherry before the Judge issuing that decision.

21. I am unable to see that any different considerations apply to an appeal to the Appointed Person, nor did either party suggest that it should. I am therefore satisfied that the Appointed Person does have power, in exceptional circumstances, to reopen a decision once given before the Order has been signed. However this will only be done in exceptional circumstances. In my judgment the same considerations as to the exercise of that discretion should

apply as in the High Court and that the reasoning in Stewart v. Engle is equally applicable.

22. As was pointed out by Clarke, L.J. each case must depend on its own circumstances but, in my judgment, a fundamental consideration must reside in ascertaining whether or not, if the particular issue in question were to be re-opened, a different decision on that issue would result in the Order being made in consequence being varied. There can be no point, and it would therefore be contrary to the interests of justice, for time and money to be expended and uncertainty created if, in the final event, the re-hearing could not result in a different order.

The Exercise of Discretion in this Case

23. Returning then to the circumstances in the present case; what are the factors which Mr. Gracey puts forward as being of such importance to the outcome of this appeal that the interests of justice demand that I should reopen the hearing and re-consider my Decision? What are the exceptional circumstances?
24. Initially, as can be seen from the documents referred to above, Mr. Gracey's complaint lay in an alleged error in the first sentence of paragraph 31 of my Decision. He contends that I misunderstood his submissions and that had I appreciated fully the nature of his submissions I would have ruled in his favour on the Proportionality Issue.

25. However, as is pointed out in the Treasury Solicitor's letter of 22nd May 2000, the ratio of my decision under Rule 51 was on the Interpretation Issue where I held that the Registrar did not have power to order a party to provide information which he did not possess or have access to by enquiring of his servants or agents. Changing my Decision on the proportionality issue would not result in an order in favour of Mr. Gracey.
26. In order to meet this Mr. Gracey sought to contend that that my decision of the Interpretation Issue was contrary to The Human Rights Act and the European Convention on Human Rights.
27. After clarification in the course of his oral submissions, Mr. Gracey put forward three lines of argument:
- (1) My conclusion on the Interpretation Issue was not in accordance with the proper interpretation of the Human Rights Act and should therefore be set aside.
- (2) My conclusion on the Proportionality Issue was based on an erroneous assumption, being the assumption set out in the first sentence of paragraph 31, and that there was a simple and proportionate means by which the name of the pub could be identified.

(3) My decision on costs did not properly take into account the conduct of Ferretti.

28. I heard full submissions from Mr. Gracey on these three points. Having heard them, I reached the clear conclusion that his submissions under points (1) and (3) did not entitle me to reopen the hearing. I therefore did not require Mr. St. Ville to assist me on those matters. I did invite him to assist me on the second issue for reasons I shall come to in due course.

29. Logically I should start with the first submission. The substance of Mr. Gracey's argument was that, although he accepted the Human Rights Act was not in force, I should seek to interpret the Trade Mark Rules and the CPR consistently with the requirements of the Act. Be that as it may, he did not satisfy me that any argument of that nature could not have been put forward at the original hearing. It was plain from the Hearing Officer's Decision that the interpretation of Rule 51 was going to be at the forefront of the appeal which resulted in my Decision of 4th May 2000. In my judgment any argument based upon the Human Rights Act could and should have been put forward at that hearing. Arguments under the Human Rights Act are not the last resort of the desperate and should not be used as a means to have a second bite at the cherry.

30. I am wholly unsatisfied that a perception that an interpretation placed upon a legislative provision by someone acting in a judicial capacity is not in accordance with the Human Rights Act could constitute the necessary exceptional circumstances for reopening the question of interpretation before that judicial officer. If the issue of interpretation fell for argument at the original hearing and was argued, any questions relating to the Human Rights Act should have been raised at that hearing. I am therefore not prepared to re-open the hearing on the question of the interpretation of Rule 51.
31. Since my interpretation led to the conclusion that the Registrar did not have power to accede to Mr. Gracey's application, this is sufficient dispose of this application. Any re-opening of the Proportionality Issue cannot serve to achieve a variation of my order.
32. However it is plain that Mr. Gracey regards this as a matter of some significance and it is right therefore that I express, I hope briefly, my views on the second point raised by Mr. Gracey and it was for this reason that I asked Mr. St. Ville to address me. To my mind three questions potentially arise on this issue:
- (i) Was there an error in the first sentence of paragraph 31?
 - (ii) Does this error constitute "exceptional circumstances" which demands that the application be reopened?

(iii) If it does, should my Decision be changed?

33. As to the first of these, like Mr. Gracey, I have now had an opportunity of re-reading the transcript. At the very end of Mr. St. Ville's submissions to me the following interchange took place:

"Mr. Thorley : What I want to know is, if that Order were to be made, how would you comply with it?"

Mr. St. Ville: The only way of doing it would be to go back and search for the pub and to say what the results were;

Mr. Thorley: I think you must be right.

Mr. St. Ville: Those are my submissions on the order in the application for disclosure.

Mr. Thorley: Thank you very much".

34. It is correct, on re-reading Mr. Gracey's submissions, to say that he did not expressly accept that the effect of his request was that a visit to North Wales would be necessary. However he did not expressly challenge Mr. St. Ville's assertion that it was necessary.

35. I believe the position is accurately assessed in a letter from Urquhart Dykes and Lord to Mr. Gracey of 14th July 2000 which reads as follows:

"We write regarding to the forthcoming hearing on 17th July 2000. Our clients will be represented at the hearing and will of course be applying for its costs should your application not succeed.

For the purpose of this hearing, having read the transcript we are prepared to accept that the first sentence of paragraph 31 of the Decision is not entirely accurate and that you did not expressly accept that the effect of your request was to require Mr. Keith to revisit North Wales.

However we should point out that your submissions did give that impression. As well as referring to making telephone calls, you suggested that Mr. Keith ought to be able to distinguish between "the pub on the beach" or "the pub on the hill" (Transcript page 17₁₇₋₂₀) and that "they are both memorable locations and it is reasonably easy to find out which is which if it is a question of time and effort and money and reasonably disposing of the proceedings". (Transcript page 18₁₃₋₁₄). The Appointed Person's overall

appreciation of the position is therefore accurate and we do not believe that his decision ought to be changed".

36. As appears from my Decision, undoubtedly Mr. Gracey's submissions did give me the impression that he accepted that in the final event a visit to North Wales would be necessary. Nothing that has been said at either hearing has satisfied me that it would be possible to comply with the order sought by Mr. Gracey other than by instructing Mr. Keith to revisit North Wales. In the circumstances, the only possible error in paragraph 31 was my failure to include at that beginning of the first sentence the words "***My impression was that Mr. Gracey realistically accepted that this was the effect of his request.....***".

37. To this extent, but only to this extent, can it be said that my decision was in error. The error was in failing to perceive that the impression that Mr. Gracey had created in my mind was not the impression that he wished to create.

38. I turn then to the second question on this issue as to whether this error constitutes, in the circumstances of this case, exceptional circumstances which merit re-opening the hearing. Setting aside for one moment the overriding effect of my decision on the Interpretation Issue, if the only issue were to be the Proportionality Issue, I do not believe that an error of this sort can justify reopening a hearing. To do so would be to permit an advocate to have a second bite of the cherry by re-arguing a

matter in circumstances where his original arguments have created the wrong impression on the Judge. Whilst I accept that a plain mistake on the part of the Court (see Neuberger J. in Re: Blenheim Leisure (Restaurants) Limited (No. 3) [The Times 9th November 1999] - cited by Sir Christopher Slade in Stewart v- Engle, might constitute a case where the jurisdiction to re-open a case could be invoked, I am not satisfied that, in the circumstances of this case, any failure on my part fully to comprehend the nature of Mr. Gracey's submissions constituted a plain mistake on the part of the Court of sufficient materiality to meet the requirements necessary to re-open a hearing. These are not exceptional circumstances.

39. For these reasons also therefore I am satisfied that it would be inappropriate to re-open this hearing and it is therefore not necessary for me to consider the third point on the Proportionality Issue.

Costs in my Earlier Decision

40. At the end of the hearing on 18th April 2000 I indicated that I intended to reserve my decision but invited the parties to make submissions as to costs. This they did and in paragraphs 34-38 of my decision I considered the question of costs and gave a ruling. Plainly if Mr. Gracey had succeeded on this application it would have been necessary to re-visit the question of costs. He has not

done so but, as I understood him, contended that in any event I should revisit the question of costs.

41. It was plain to me that this was a further attempt to have a second bite at the cherry. If he wished to make any particular representation with regard to costs, he should have done so at the end of the hearing on 18th April 2000. I therefore do not propose to re-open the subject of the costs award made in my previous Decision.

The Costs of this Application

42. It is however necessary that I should consider the costs of this further application. For the reasons given above, the application to reopen the hearing has been wholly unsuccessful. I do not believe that it can be said that Mr. Gracey was left in any doubt as to the hurdles he needed to overcome in order to succeed on this application both having regard to the contents of the Treasury Solicitors' letter of 22nd May 2000 and on the basis of his own identification of the relevance of the decision of the Court of Appeal in *Stewart v. Engle* which was first drawn to my attention by him in his fax of 31st May 2000. I have concluded that he acted unwisely in pursuing this application to a further hearing and that in doing so he amply appreciated both that Ferretti's representatives would incur costs and that they would seek an award of costs from Mr. Gracey, as is plainly set out in the

passage in Urquhart Dykes & Lord's letter of 14th July 2000 referred to above.

43. I asked Urquhart Dykes & Lord to provide me with a skeleton bill of costs which they did on 18th July. It amounts to £2,205.47.
44. It has always been the practice in this Tribunal to follow the practice in the Trade Mark Registry of only ordering a contribution as to costs rather than making an award of costs more akin to those in the High Court.
45. The same attitude towards costs exists in the Patent Office and was reviewed in *Rizla Limited's Application (1993) RPC 365*. In that case, on Appeal to the Patents Court, Mr. Watson Q.C. dealt with the jurisdiction of the Patent Office in the following terms

"I deal first with the question of jurisdiction. The wording of section 107 could not in my view be clearer and confers on the Comptroller a very wide discretion with no fetter other than the overriding one that he must act judicially. I see no reason why the previously adopted practice could not be altered by the Comptroller in the same way as from time to time an important decision leaves the courts to adopt a different attitude to what had previously been accepted practice. Thus, if the Comptroller felt it was appropriate, a form of compensatory costs could become the norm.

However it would appear from the decision, and in particular from the passage quoted above, that the Superintending Examiner was not proceeding on the basis that there should be a change in the established practice but rather he appears to have regarded this case as an exceptional case demanding a special and very different treatment of costs, namely the change from a contribution basis to a quasi-taxed compensation basis.

As a matter of jurisdiction, I entertain no doubt that if the Comptroller were of the view that a case had been brought without any bona fide belief that it was soundly based or if in any other way he was satisfied that his jurisdiction was being used other than for the purpose of resolving genuine disputes, he has the power to order compensatory costs. It would be a strange result if the Comptroller were powerless to order more than a contribution from a party who had clearly abused the Comptroller's jurisdiction. I conclude therefore that, insofar as the Appeal is based on the argument the compensatory costs order made was beyond the Comptroller's jurisdiction, it should fail.

However the Appellant has a second argument, namely that even if there is jurisdiction, the Superintending Examiner had no good grounds for finding the Appellant's conduct to be so unreasonable that a special and, by the established

standards of the Office, draconian costs order should be made against him".

46. I have found these observations helpful in assessing the question of costs on this application. I have no reason to doubt Mr. Gracey's bona fide's in concluding that my decision was wrong and that it could and should be reversed. For the reasons given I believe his conclusions were wrong and that he was misguided in not identifying that they were wrong. This however does not constitute mala fides or improper motive. Nonetheless his conduct has been such as to cause Ferretti to incur costs.
47. In the final event, whilst I do not believe that Mr. Gracey has behaved wholly reasonably, I am unable to conclude that his conduct has constituted an abuse of the process nor that it is so unreasonable as to warrant a significant change from the established practice. I have accordingly reached the conclusion, not without considerable hesitation, that it would be inappropriate to make an order for costs in relation to this application other than on a contribution basis. I am however satisfied that the contribution should be a high one and I propose therefore to make a further Order that Mr. Gracey do pay Ferretti a further sum of £800 by way of contribution to the costs of this application. As with the award made in my Decision of 4th May 2000, this sum shall not be payable until after the final hearing of the revocation

application when it can be either added to or set off against any award of costs made by the Hearing Officer.

48. As a postscript, I should record that by fax received late in the evening of 23rd July 2000 Mr. Gracey sent an 18 page "request" to which were annexed some 20 pages of supporting documentation. I read these only briefly to satisfy myself that they did not relate in any material sense to the bill of costs sent by Urquhart Dykes & Lord on 18th July. Save for this, I have not read the documents in detail and have not taken any aspect of them into account in reaching this Decision. I believe, in the circumstances, it would be entirely wrong to do so.

49. In the final event therefore, this application stands to be dismissed. Mr. Gracey will pay the sum of £800 to Ferretti by way of a contribution to the costs of this application, such costs to be either set off against or added to any award of costs made as a result of the final hearing. The final hearing should take place as soon as possible.

Simon Thorley Q.C.

1st August 2000.