

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK REGISTRATION NO: 855445
IN THE NAME OF THE DIRECTOR OF PASSENGER RAIL FRANCHISING**

AND

**IN THE MATTER OF AN APPLICATION FOR REVOCATION AND A
DECLARATION OF INVALIDITY THERETO UNDER NO: 9385
BY FLYING SCOTSMAN RAILWAYS LIMITED**

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BACKGROUND

1. On 21 January 1997, Flying Scotsman Railways Limited of Oxford, England applied to revoke and have declared invalid registration No: 855445 standing in the name of The Director of Passenger Rail Franchising. The registration is in respect of the trade mark **FLYING SCOTSMAN** which stands registered for a specification of goods reading: "All goods included in Class 33". The trade mark was placed on the register on 4 March 1964.

2. The grounds of the action are as follows:-

- (a) **Under the provisions of section 46 of the Act** - the applicants allege that enquiries have revealed no genuine use of the trade mark in suit by the registered proprietor or with its consent or by any predecessor during the five years preceding the date of the application for revocation, on or in relation to, any of the goods for which the trade mark is registered
- (b) **under the provisions of section 47 of the Act** - the applicants contend that the mark should be declared invalid under:
 - S section 3(3)(b) of the Act, because the public will be deceived by use of the trade mark into believing there is an association with the locomotive called FLYING SCOTSMAN
 - S section 3(6) of the Act, because the registered proprietor is not the owner of the locomotive called FLYING SCOTSMAN
 - S under section 5(4)(a) of the Act, as use of the trade mark would imply an association with the locomotive FLYING SCOTSMAN and would therefore be preventable under the law of passing off.

3. The registered proprietor filed a counterstatement in which all of the grounds are denied. They say that the trade mark FLYING SCOTSMAN has been used during the five years preceding the date of the application for revocation.

4. Both sides seek an award of costs. Both sides filed evidence in the proceedings and the matter came to be heard on 24 May 2001, when the registered proprietors were represented by Henry Whittle of Counsel instructed by Frank B Dehn & Co, their Trade Mark Attorneys. The applicants for revocation and invalidity were not represented at the Hearing, nor did they file written submissions in lieu of attendance.

REGISTERED PROPRIETORS' EVIDENCE

5. This consists of a statutory declaration dated 28 April 1997 by Richard Woosnam. Mr Woosnam states that he is the Compliance Manager of Great North Eastern Railways Limited (GNER) and that he has been employed by GNER since 1994. The information in his declaration comes from either his own knowledge or from the records of GNER to which he has access.

6. Mr Woosnam explains that GNER, formerly InterCity East Coast Limited, is a registered licensee of the registration in suit, under the terms of a franchise from The Director of Passenger Rail Franchising (OPRAF). He adds that the FLYING SCOTSMAN mark has been used to market train services between London and Edinburgh for many years. Since 1994 it has, says Mr Woosnam, been used in conjunction with the FLYING SCOTSMAN logo to advertise a specific train service, which includes the provision of food and drink on board the train. In addition the words FLYING SCOTSMAN have been used as one of three "named trains" ie. THE FLYING SCOTSMAN, THE NORTHERN LIGHTS and THE HIGHLAND CHIEFTAIN to advertise identified train services between London and Scotland and to advertise specific services on those trains - services which, says Mr Woosnam, include the provision of food and drink. Exhibits RW1 and RW2 consist of: an extract from THE FLYING SCOTSMAN brochure from the summer of 1994 (29 May to 24 September 1994), a copy of a brochure advertising first class tickets (between 3 January and 25 February 1995), a copy of a "special offers" brochure for travellers on the named trains (dated 1995), a copy of a menu marked with the FLYING SCOTSMAN name and logo used during the periods mentioned on the named trains and which in Mr Woosnam's view includes the provision of fruit juices, mineral waters, beers, spirits and wines, together with copies of various timetables from 1996 and 1997.

7. Mr Woosnam concludes his declaration by explaining that in the period April 1995 to January 1996, InterCity East Coast Limited acquired and marketed various products under the FLYING SCOTSMAN name. One of these products was a presentation case containing a bottle of Johnnie Walker whisky and a cut glass Burns whisky tumbler engraved with the FLYING SCOTSMAN logo and name - a copy of the brochure is provided as exhibit RW3.

APPLICANTS' EVIDENCE

8. This consists of a statutory declaration dated 6 February 1998 by Anthony Brierley. Mr Brierley explains that he is a partner in the firm of Appleyard Lees, who were the applicants' professional representatives in this matter at the time the declaration was filed. Exhibit APB1 to Mr Brierley's declaration consists of a print-out from Appleyard Lees's in-house Trade Marks system, which indicates that the registration in suit had a new proprietor entered against it on 5 July 1996. Thus, says Mr Brierley, it appears that registration of the assignment

of the mark from Allied Domecq Spirits and Wine Limited to the current registered proprietor was recorded on 5 July 1996. Mr Brierley concludes his declaration by reference to a discussion with a Registry official which he says confirmed that the only Registered User that has been recorded against the registration in suit since its filing date was Long John Distilleries Limited.

REGISTERED PROPRIETORS' FURTHER EVIDENCE

9. This consists of a statutory declaration dated 31 July 1998 by Kai Hills. Mr Hills explains that he is employed as the Franchise Executive at the Office of Passenger Rail Franchising (OPRAF) a position which he has held since March 1998. Prior to this he was a Franchise Administrator (also with OPRAF). Part of Mr Kai's current duties includes responsibility for OPRAF's trade mark portfolio. It is, says Mr Kai, a function of OPRAF to hold and administer all the marks previously the property of the British Railways Board and to licence the numerous private train-operating companies (TOCs) to use the marks. The information in his declaration comes from either his own knowledge or from the records of OPRAF.

10. Mr Kia states that the registration in suit was the subject of an assignment from Allied Domecq Spirits & Wine Limited to OPRAF on 26 April 1996. This assignment took place says Mr Kai in order that all the FLYING SCOTSMAN trade marks used in association with rail services could be kept together. All of the FLYING SCOTSMAN marks held by OPRAF at that time were licensed to InterCity East Coast Limited (the TOC) now GNER. The recordal of the assignment took place in the Trade Marks Registry shortly after the assignment date. Mr Kai explains that at the time of the assignment, GNER were already recorded as licensees of the principal FLYING SCOTSMAN trade marks, Nos: 1275682, 1583537 and 1583538 in Classes 39 and 42. Exhibit KLCH1 is a copy of the licence agreement dated 10 December 1995 between The Director of Passenger Rail Franchising and InterCity East Coast Limited which has, says Mr Kai, been recorded in the Registry in respect of the marks held by OPRAF at that time.

11. Mr Kai adds that InterCity East Coast Limited (the TOC at the time) were instrumental in the assignment action and were already using the mark in relation to catering services generally. Exhibit KLCH2 consists of copies of correspondence dated 23 and 30 May 1996 concerning the assignment of the registration. All the use of any of the FLYING SCOTSMAN marks that has at any time been made by GNER or its predecessors in title in respect of any goods or services since OPRAF became the owners of the registrations and accompanying goodwill, has been with the full knowledge and consent of OPRAF.

12. That concludes my review of the evidence in so far as I think it necessary.

DECISION

13. First of all, in the absence of any evidence or submissions by the applicants in support of their allegation that the trade mark in suit is invalid, based upon the provisions of Sections 47 (Section 3 and Section 5 of the Act), I dismiss that ground of attack without further consideration.

14. Mr Whittle on behalf of the registered proprietors made submissions on the burden of proof in actions for revocation, based upon non-use, before the Trade Marks Registry. In his view an applicant for revocation had an obligation to file evidence in support of allegations made, even in cases where the proceedings were based upon non-use of the trade mark where Section 100 of the Act and the Trade Marks Rules (all versions) placed an onus on registered proprietors to show, when challenged, what use they had made of a trade mark in relation to the goods and services for which it is registered. In this case the applicants had alleged in their statement of case 'Enquiries have revealed no genuine use of the trade mark FLYING SCOTSMAN by the registered proprietor or with its consent or by any predecessor during the five years preceding the date of this application for revocation, on or in relation to any goods for which the trade mark is registered. The registration should therefore be revoked.' But no evidence had been submitted by the applicants in support. On the basis that more than mere assertion was necessary to get things off the ground even in non-use revocation actions I was asked by Mr Whittle to deem the application for revocation withdrawn under the provision of the Trade Mark Rules, which allows the Registrar to do so under her discretion, because the applicant for revocation had filed no evidence going directly to the allegation.

15. As Mr Whittle rightly submitted the applicants for revocation's evidence in this case consists of no more than details of the proprietorship of the trade mark in suit and some hearsay evidence about a Registered User. There is no mention of what enquiries were made or where to ascertain that there had been no genuine use of the trade mark. But is that sufficient reason to deem this application for revocation abandoned?

16. Section 100 of the Act states:

"100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

17. This, in my view, provides a very clear indication that it is the registered proprietor who must when challenged about the use of the trade mark either before the Registrar of Trade Marks or the Court show what use has been made of the trade mark in relation to the goods and/or services for which it is registered (within the relevant period). Once this has been established it must be for the applicant to decide whether to seek to continue the action, with or without evidence of their own, or withdraw in the face of the registered proprietor's evidence. In many cases written or oral submissions by the applicant based upon the registered proprietors evidence will be sufficient to show, for example, that the trade mark has not been used across the full range of goods and services of the registration and therefore partial revocation should result. The fact that an applicant does not file evidence directly in support of an allegation of non-use is not, prime facie, sufficient to deem such an application abandoned. There must be consideration of the nature of the case, the nature of the registered proprietor's evidence and that of the applicants if any. Account must also be taken of the timing of any such request.

18. In this case the registered proprietors have submitted evidence which, they claim, shows use of the trade mark on relevant goods over the period covered by the application for revocation. The applicants' evidence claims to show that the registered proprietor acquired

the trade mark only in May 1996 and thus they did not own the trade mark for much of the period in question. In my view both claims merit investigation but, as indicated above, the principal burden is on the registered proprietor. The request for the application to be deemed withdrawn is therefore refused (not least because it comes some four years after the application was made, after evidence was filed and only at the start of the Hearing for determination of the substantive issue).

19. The issues here, are based upon Section 46 of the Act which states:

46.-(1) The registration of a trade mark may be revoked on any of the following grounds-

- (a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;
- (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
- (c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;
- (d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purposes of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that-

- (a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and
 - (b) if in any case the application is made to the registrar, he may at any stage of the proceedings refer to the application to the court.
- (5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.
- (6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from-
- (a) the date of the application for revocation, or
 - (b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date."

20. The registered proprietors are thus required to show genuine use of the trade mark within the relevant period if they are to successfully defend their registration. There is no claim in this case that there were proper reasons for non-use or that the trade mark used differed from that registered but the different elements did not alter its distinctive character. The relevant period under Section 46(1)(a) would be five years from the date the trade mark was placed on the register 4 March 1964 to 3 March 1969. But as no allegation has been made directly on that basis I will assume that this application was made under Section 46(1)(b) and therefore that the relevant period is ie. the five years preceding the date of the application ie. from 22 January 1992.

21. The first question to arise is what is meant by 'genuine use'? Jacob J considered the matter in the following passage from *Euromarket Designs Incorporated v Peters and another* 2000 All ER (D) 1050 (the *Crate & Barrel* case):

"50. Assume, however there were these three things, namely the packaging on a few items posted at the US customer's request to the UK, gift registry sales, and a tiny amount of spillover advertisements in what the reader in the UK would know are US journals. Do they individually or collectively amount to "genuine use" of the UK registered mark? Miss Vitoria contends they do. She says the reference to "genuine" is merely in contradistinction to "sham". Small though the use may have been, there was nothing fake about it. The mark appeared in the UK in connection with genuine transactions and that is enough.

51. I disagree. It seems to me that "genuine use" must involve that which a trader or consumer would regard as a real or genuine trade in this country. This involves quantity as well as the nature of the use. In part it is a question of degree and there may be cases on the borderline. If that were not so, if Miss Vitoria were right, a single advertisement intended for local consumption in just one US city in a journal which happened to have a tiny UK distribution would be enough to save a trade mark

monopoly in this country. Yet the advertisement would not be "sham." This to my mind shows that Miss Vitoria's gloss on the meaning of "genuine" is not enough. And the only stopping place after that is real trade in this country. I think all the examples relied upon are examples of trade just in the US."

22. The matter of what acts can constitute use of a trade mark was raised in this case. The Act, at Section 46 does not specify any restrictions on the type of use that can qualify, though it does expressly include use on goods for export (Section 46(2)) but my attention was drawn to Section 10(4) which states

"For the purposes of this section a person uses a sign if, in particular, he-

- (a) affixes it to goods or the packaging thereof;
- (b) offers or exposes goods for sale, puts them on the market or stocks them for those purposes under the sign, or offers or supplies services under the sign;
- (c) imports or exports goods under the sign;
- (d) uses the sign on business papers or in advertising."

23. Kerly's Law of Trade Marks and Trade Names, Thirteenth Edition at 9-53 states

"Despite the fact that Section 10(4) is expressed to apply for the purposes of Section 10 (only), the types of use set out are the principal ways in which a trade mark is used. These types of use are equally applicable when considering the ways in which a trade mark is alleged to have been used for the purposes of Section 46.

Generally, it is suggested that "use" in section 46 should be construed broadly and encompasses any use of the trade mark for the purposes of trade. To put the matter another way, if the alleged use for Section 46(1)(a) or (b) had been made without the consent of the proprietor, constituted use as a trade mark and constituted Section 10(1) infringement, it is suggested that use ought to be taken into account under Section 46."

24. Section 10(4) is concerned with infringement of registered trade marks and not revocation on grounds of non-use. The above passage from Kerly's acknowledges the difficulty inherent in relying on the construction placed on terms in one Section of the Act in interpreting provisions elsewhere in the Act. Jacob J also considered and acknowledged the separate nature and purposes of the provisions in Section 10(4) and Section 46 in the *Crate & Barrel* case referred to above though I do not think he was intending to express a fully considered view on the matter in what was an application for summary judgment in an infringement action. In any case, even to the extent that Section 10(4) is indicative of what may constitute use of a sign, I note that the four categories are prefaced by the words 'in particular'. The list is therefore illustrative rather than exhaustive. But it is reasonable to suppose that the examples given are considered to be the most obvious ways in which use of a sign is likely to occur.

25. The trade mark FLYING SCOTSMAN is registered in the name of The Director of Passenger Rail Franchising who has licensed its use to GNER who hold the franchise for

operating services between London and Scotland on the east coast train line. One of these train services is called the Flying Scotsman. The Flying Scotsman is a premier train service which has a significant reputation as such. The GNER is the user of the trade mark for such services and are also licenced to use other trade marks including the one shown below:



26. This is registered for catering services in Class 42 and it is this trade mark upon which Mr Whittle relies to defend the registered proprietors' registration in suit. This was because the use of the trade mark shown above (which I will refer to as the FLYING SCOTSMAN and thistle device) utilised the FLYING SCOTSMAN trade mark in connection with a service as part of which goods covered by the registration in suit were provided. Examples were provided of the FLYING SCOTSMAN and thistle device which appeared on brochures and price lists advertising and publicising the catering services provided on the Flying Scotsman train service. In Mr Whittles view there was a category of trade marks - which he called dealers' trade marks - which indicated the seller of the goods rather than the manufacturer; the use of such trade marks in association with the goods therefore accrued to the person providing the goods and not the manufacturer of those goods. In this connection I allowed Mr Whittle time to put in written submissions on the point and he did so. My comments below take these into account, though I have ignored his submission on the position under the Trade Marks Act 1938 (as amended). That Act has been repealed and is not relevant here.

27. The Trade Marks Act 1994 is based upon EC Directive 89/104 recital No. 10 of which defines the function of a trade mark as "to guarantee the trade mark as an indication of origin". This has been confirmed in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc [1999] E.T.M.R. 1*. Thus the purpose of a trade mark is as a badge of origin of the goods or services provided under it. In his written submissions Mr Whittle stated

"Fundamentally, the purpose of registering trade marks is to protect the owners of those marks and the public against misrepresentations made by misuse of those marks by others. A dealer in umbrellas is entitled to a trade mark in relation to umbrellas, notwithstanding that all the umbrellas he sells are made by others and notwithstanding

that they may carry manufacturers' marks. He is entitled to distinguish goods of his undertaking (ie. umbrellas supplied by him) from goods supplied by others. He is entitled to complain if someone else uses his mark when selling umbrellas, because that would suggest that those umbrellas are being supplied by him and would take advantage of his trading goodwill. There is no basis for believing that the Act was not intended to protect the trading goodwill of a substantial sector of the business community.

It makes no difference that a retailer may also now be able to obtain registration of a trade mark for providing "retail services". Strictly, the registration is for use of the mark as an indication of the source of those services, not of the source of the goods. In most retail situations, of course, the actual use of a trade mark will be use in relation to both the services and the goods. But, for example, a commercial undertaking might provide a large hypermarket with extensive facilities and lease space to individual traders for different types of goods. The operator of the hypermarket would be entitled to a mark for retail services, even though it supplies no goods. The individual traders would be entitled to marks for goods. It may be convenient to allow marks for retail services, but it does not exclude marks for goods.

In the present case, the mark indicates that the wines and spirits are sold and supplied by the proprietor of the FLYING SCOTSMAN mark, whoever made them. If the wine is corked, the purchaser will expect a refund or replacement from the proprietor, not from the manufacturer. If the price list had carried another mark, say "Trust House Forte", the public would know that the wines and spirits were being supplied by someone else."

28. The dealer (in Mr Whittles' example in umbrellas) is not automatically entitled to registration of a trade mark for umbrellas because he is a wholesaler or retailer of them. Any goodwill he may have would be protectable in relation to the service he provides (and which he is the origin of) in the supply of the goods, umbrellas, which originate from another party. Thus the dealer could secure a registration of their trade mark for the retailing of umbrellas, repairing umbrellas etc. But the mere fact that someone sells or deals in an article does not mean that for the purposes of trade mark registration they are the origin of them.

29. Mr Whittle suggests that as faulty goods can be or are returned to the 'dealer' then they are the source of origin as they become responsible for the quality of the goods. But in such a situation the dealer and the purchaser have a commercial contract under consumer protection legislation outwith the provisions of trade mark legislation.

30. If a supplier or dealer in goods provides as part of that service the goods of others then the supplier or dealer cannot claim that their trade mark is used in relation to the goods of those others. For example, a trade mark owner's distributor's function is to distribute the owners goods. If all they do is provide that service in relation to the goods of the principal they do not acquire responsibility for the source or quality of the goods.

31. In this case, the registered proprietor has licensed the trade mark in suit with others to a franchisee who uses them in connection with a train service which provides a catering service.

Under the latter services alcoholic beverages bearing others trade marks are sold. There is no claim that the trade mark appears on anything other than price lists, brochures etc. and therefore no evidence that the trade mark FLYING SCOTSMAN has been used on the goods themselves - there is no FLYING SCOTSMAN house wine or FLYING SCOTSMAN whisky for example. In the circumstances whilst there is evidence of use of the FLYING SCOTSMAN and thistle device trade mark used on catering services that use does embrace genuine use on the goods covered by the registration in suit. Accordingly, the application for revocation under Section 46(1)(b) succeeds.

32. There were some points covered at the hearing which it is worth mentioning. The first covers the evidence of use provided in this case. Many of the price lists and brochures produced on behalf of the registered proprietors are dated prior to 1996, when they acquired the FLYING SCOTSMAN trade mark. If I had accepted Mr Whittle's submissions that use of the trade mark on catering services amounted to use on alcoholic beverages for example then much of the registered proprietors' claimed use would have been 'infringing use' because, by their own admission, they were using a registered trade mark belonging to another. In those circumstances I doubt whether such use could be taken into account in a case such as this.

33. Mr Whittle also commented that the applicants' actions were unfair in that the registered proprietor acquired the trade mark only a short while before the predatory application for revocation was made. I do not accept that it is outwith the scope of any assignment agreement for the assignor to have to help defend a registration in the face of a non-use attack ie to provide evidence of use that they as registered proprietor made of the trade mark. Nor is it beyond the possibility that a defence on the basis of proper reasons for non-use (as envisaged by Sections 46(1)(a) and (b)) could be claimed.

34. Next I turn to the question of whether use of the trade mark claimed is use of the trade mark the subject of the registration. This again was a matter on which I invited written submissions and those subsequently provided by Mr Whittle are taken into account in reaching my decision.

35. Under Section 46(1) the registered proprietor, when challenged, must show what use they have made of it (the registered trade mark) and in that connection Section 46(2) states that use can include use in a form differing in elements which do not alter the distinctive character of it (the registered trade mark). Mr Whittle's submissions, with reference to Elle [1997] FSR 529, were based upon the fact that the trade mark used included the whole of the registered trade mark whereas in the Elle case important elements of the registered trade mark had not been used. In this case therefore the use included additional elements.

36. In the Elle case, Lloyd J was considering the omission of some elements but at page 533 he said:

"..... one comes back to the question whether by omitting the device and by converting the four letters of the word from lower to upper case something has been done which alters the distinctive character of the mark from the registered form. In my judgment it has."

37. In this case the trade marks involved are as follows

as registered

FLYING SCOTSMAN

as used:



38. In my view, it can not simply be argued in a case such as this that the trade mark used encompasses the whole of the registered trade mark. For that would be to disapply the ordinary words of the English language which appear in Section 46 which requires the Registrar or the Court to look at the registered trade mark and the trade mark used to determine whether the former differs in any material way from the latter. This is because the statute requires consideration of the actual trade mark as registered against the trade mark used.

39. Applying the reasoning in the Elle case, does the addition of the thistle device and making the term FLYING SCOTSMAN the definite article alter the distinctive character of the trade mark from the registered form? In my judgement it does. The device of a thistle imparts an element which has a very great impact upon the eye which is drawn to it by the position of the term The FLYING SCOTSMAN around it. Thus whilst I accept that this case represents the opposite of the Elle case I can not ignore the simple considerations Lloyd J suggests are applied in the comparisons of marks registered and used. Having so applied those considerations, in my view the trade mark used is different; the addition of the thistle and the presentation of the words amounts to a significant and substantial difference to the distinctive character of the registered trade mark. Thus, the registered proprietor has not shown use of the registered trade mark and for this reason too the application for revocation is successful.

40. The applicant for revocation having been successful they are entitled to an award of costs. However, as can be gathered they played little part in this case. In the circumstances I order the registered proprietor to pay to them the sum of £250 towards the costs of making the application and filing evidence. This sum is to be paid within seven days of the expiry of the

appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 14th day of August 2001

**M KNIGHT
For the Registrar
the Comptroller-General**