

O-368-09

IN THE MATTER OF AN INTERLOCUTORY HEARING
IN RELATION TO APPLICATION NO 2416626
IN THE NAME OF MAXIMUSCLE LIMITED

AND

OPPOSITION NO 94569 THERETO
BY FOREIGN SUPPLEMENT TRADEMARK LIMITED

IN THE MATTER OF an
interlocutory hearing in respect
of application No 2416626 in the
name of Maximuscle Limited and
opposition no 94569 thereto by
Foreign Supplement Trademark Limited

Background

1. On 4 June 2009, Mr George W Salthouse, a Hearing Officer acting on behalf of the registrar, issued a decision in these proceedings. The decision, which, for reasons unknown to me, was dated 4 May 2009, was taken without the benefit of a hearing in view of the fact that both parties had indicated they did not wish to be heard but were content for a decision to be made from the papers. In his decision, the Hearing Officer found in favour of the opponent (FST) and ordered the applicant (MM) to pay FST's costs in the sum of £2700. Both parties were sent copies of his decision and were informed that the period allowed for filing any appeal against the decision would expire on 2 July 2009.

2. On 2 July 2009 Taylor Wessing, on behalf of FST, filed a Notice of appeal. The appeal was limited solely to the award of costs by the Hearing Officer. Copies of the Notice of appeal were subsequently sent to MM and the Appointed Person. I shall return to this aspect of the case later in this statement. As far as I am aware no date has yet been set for the hearing of that appeal.

3. These matters rested until, on 16 September 2009, Barlow Robbins on behalf of MM filed a request for an extension of the period for it to lodge an appeal against the registrar's decision. The request sought an extension of time until 6 October 2009. In support of the request, MM submitted the following as Annex 1:

"The Applicant in this matter, Maximuscle Limited, seeks to extend time for the appeal period from the decision of the Registrar's Hearing Officer, George W Salthouse, in Opposition No. 94569 dated 4 May 2009 and handed down on 4 June 2009. This extension of time is required to appeal the decision to the Appointed Person, extending the deadline for such appeal from 2 July 2009 to 6 October.

The Opponent, Foreign Supplement Trademark Limited, filed a TM55 Notice of appeal to the Appointed Person on 2 July 2009. The Notice of appeal was not received by the Applicant until 8 September 2009, a procedural anomaly for which the Intellectual Property Office has accepted responsibility -see letter of 7 September 2009, ref OPP 94569/Appeal/RL. Up to that point, the Applicant had chosen not to appeal, despite having strong grounds to do so. This was a commercial decision based on the perceived value and importance of the mark in issue. In particular, the costs likely to be incurred in any appeal were not warranted by the mark's modest commercial import to the Applicant. However, the commercial position has been substantially altered as a result of the Opponent's appeal, for the following reasons.

The Opponent succeeded on the substantive opposition. However it seeks to appeal the Hearing Officer's decision on costs. At paragraph 79 of his decision, the Hearing Officer awarded the Opponent £2,700 in costs on the standard scale. In the event, it is clear that the Opponent's costs have been far greater than £2,700. In its Grounds of Appeal the Opponent estimates its costs at more than £100,000. While the Applicant intends to fully resist that appeal, should the Opponent's appeal succeed, the Applicant is likely to be liable for costs in excess of £100,000.

Of course, another way to see off any potential liability for those costs would be for the Applicant to pursue and succeed on an appeal against the substantive decision on the opposition. In that event, the Applicant would be likely to obtain a contribution to its own costs, and avoid any liability at all for the costs of the Opponent. It follows that the commercial significance of such an appeal is now very much greater than just the value of the disputed mark. It now involves the total costs liability too.

By way of example, if the mark in issue were valued at £20,000, the Applicant might consider the costs of an appeal to be unmerited. If however one takes into account the value of the Opponent's appeal and the Applicant's potential costs liability the value of such an appeal might now be in excess of £120,000. In those circumstances the appeal becomes highly commercially advisable.

If permitted to bring this appeal, the Applicant's Grounds of Appeal will include matters of substantial importance relating to commercial dishonesty, namely irregularities with procedure on a finding of bad faith (s.3(6) Trade Marks Act 1994). Fairness requires that adverse findings should not ordinarily be made against a witness without the witness having the charge put to him and being given an opportunity to answer it. This basic rule was not followed in this case.

There do not appear to be any public interest reasons why the extension sought should not be granted. The Applicant has acted diligently at all times, and has been hampered by the delayed arrival of the appeal notice. The consequences of refusal to grant the extension are that the substantive proceedings in the Intellectual Property Office would be terminated, and the Applicant would thus be severely prejudiced without any proper basis for criticism of its own behaviour."

4. FST filed a letter dated 17 September setting out its reasons why MM's request for an extension of the period within which to appeal should be refused. By a letter dated 23 September 2009 MM filed comments in response. I shall refer to these as necessary in this statement.

5. On 24 September 2009, the registrar issued a letter refusing MM's request for an extension of time. The letter stated:

“The Registry is of the opinion that the reasons given do not warrant an extension of time to file an appeal, I refer you to Tribunal Practice Notice 2/2008 regarding extensions of time in which to appeal decisions.”

6. FST confirmed its agreement with the Registrar's view in a letter also dated 24 September.

7. MM subsequently requested to be heard (letter dated 1 October 2009) and the matter came before me for hearing on 12 November 2009 (a date agreed between the parties) by telephone conference. At that hearing MM was represented by Mr Fernando of Counsel. FST was represented by Ms Lane, also of Counsel.

8. Both parties filed skeleton arguments. Somewhat unusually I intend to set them out in full.

MM's skeleton arguments

9. MM's skeleton arguments take the form of written submissions which were contained in its letter of 1 October requesting a hearing. They were as follows:

1. The Applicant's full written arguments are found in Annex 1 to the TM9 form filed on 16 September 2009, Barlow Robbins' letter of 23 September 2009, and hereinbelow.
2. There is an issue of principle involved in this request. That issue is whether the Applicant ought to be entitled to be in possession of important relevant information before having finally to decide whether itself to appeal the Registrar's decision.
3. It cannot sensibly be disputed that knowledge of the Opponent's appeal of the Registrar's costs decision was relevant to the Applicant's decision to appeal (for the reasons set out in Annex 1 of the Applicant's TM9 form). Indeed, in its lengthy letter of 17 September 2009 the Opponent does not raise such a dispute. The Applicant was first aware that the Opponent was appealing the Registrar's costs decision, as opposed to just appealing, on 8 September 2009. The Applicant's application for an extension of time for its appeal was filed on 16 September 2009. It follows that so far as material, an extension of time is being sought for some 8 days. The Opponent's attempts to suggest that the Appellant's delay has been longer than this in paragraphs 3 to 5 of its letter of 17 September 2009 are, for these reasons, misconceived.
4. The Applicant has a right to a fair trial in respect of the matters in dispute in accordance with Art.6 of the ECHR. That right includes the right to be take (sic) decision in the litigation with reasonable notice of important material developments in the litigation, and in particular those adverse to its interests. The Opponent's decision to appeal the Registrar's costs decision was an important adverse material development. Accordingly, fairness demands that

Applicant be entitled to make its own election in the light of that development, and the extension sought should be granted.

5. Turning to the reasons why the extension should (sic-not?) be refused, it should be noted that the Opponent has failed to identify any prejudice to itself even in the spurious 3 month delay it attributes to the Applicant. There would *a fortiori* be no prejudice associated with the appropriate 'delay' or extension of 8 days.
6. In the absence of any prejudice, the only basis for refusing the extension is the Registry practice as set out in Tribunal Practice Notice 2/2008. That provision (paragraph 12) states expressly that the Trade Mark Rules 2000 do not allow a party to await his opponent's decision before himself deciding to appeal. This general statement must be read in the context of (i) an appreciation of the fact that the commercial merits of the great majority of appeals are unrelated to the existence of any cross-appeal, and (ii) the following provision, paragraph 13, which in express contradistinction explains that extensions can be granted.
7. The only policy discernible from the Practice Notice is found in the following quotation from *Whiteline Windows v Brugmann*: "Appeals create uncertainty and it is in the Interests of everyone that appeals are disposed of timeously"
8. That policy is strikingly inapplicable here. There will in any event be an appeal from the same Registrar's decision. That appeal will involve consideration of the same and similar issues as the Applicant's proposed appeal. The proposed appeal would in all likelihood make no difference whatsoever to the time for disposal of anything.
9. In these circumstances and for these reasons the Applicant disagrees with the preliminary view of the Registry and requests a hearing under Rule 63(1).

FST's skeleton arguments

10.FST stated:

1. This hearing concerns the request of the Applicant (Maximuscle Ltd) for a retrospective extension of time to appeal against the decision of Mr Salthouse handed down on 4th June 2009 whereby he found in favour of the Opponent (Foreign Supplement Trade mark Ltd) that the mark LEUKIC ("the mark") had been applied for in bad faith and ordered the Applicant to pay the Opponent costs of £2700 on the scale.
2. The Opponent filed an appeal in relation to the decision on costs, within the time limit of 28 days, on 2nd July 2009. By form TM9, dated 16th September 2009, the Applicant requested an extension of time to appeal the substantive decision. At the time of writing, the Applicant has not filed any Grounds of Appeal. Accordingly, it seems likely that it would request at least 7 days from the date of the hearing of this request to file such a document, i.e. to 17th November 2009. Accordingly, the Applicant is,

effectively, asking for an extension of four and a half months from the date on which it should have filed its Grounds of Appeal.

3. Such an extension would be extraordinary, and is in no way warranted by the facts, for the reasons set out in more detail below.

Principles

4. The Registrar has a general discretion to extend time periods, including the time period for filing an appeal, by virtue of rule 77(1) of the Trade Mark Rules 2008.
5. However, it is clear that the discretion should only be exercised in relation to the time period for filing an appeal in very limited circumstances. The following principles, set out in TPN 2/2008 (and the authorities cited therein) apply:
 - (i) The Rules do not provide for a party to wait and see whether the other party to proceedings files an appeal before deciding whether to proceed with an appeal of their own (at [12]).
 - (ii) The discretion to extend time for filing an appeal must be approached with the “greatest caution”, is “not to be encouraged” and will not “be granted lightly” (at [14]).
 - (iii) The discretion will be exercised even more sparingly where a request to extend is made after the end of the period for filing an appeal (at [15]).

The Applicant’s arguments

6. The Applicant has made two attempts to justify its request for an extension: its form TM9 and its letter dated 23rd September 2009. In summary, it says as follows:
 - (i) It did not receive a copy of the Opponent’s Grounds of Appeal until 8th September 2009, because of a “procedural anomaly” in the IPO.
 - (ii) It only became aware at that time that the Opponent was claiming £100,000 in costs.
 - (iii) There are no public interest reasons why the extension should not be granted.
 - (iv) The Applicant has acted diligently at all times.
 - (v) It would be severely prejudiced if the extension were not granted.
 - (vi) The Appointed Person will need to consider the substantive issues in any event to decide the Opponent’s appeal on costs.

Why they are wrong

7. The Applicant’s points are misconceived for the following reasons.

(i) Late receipt of Grounds of Appeal

8. By virtue of TPN 2/2008 [12] this is irrelevant. A party should not wait and see whether or not the other party is appealing before deciding whether to do so itself.
9. In any event, the Applicant may not have had the Grounds of Appeal until 8th September 2009, but it certainly knew that the Opponent had appealed well before then, by reason of the letters from the IPO of 6th July and 6th August 2009. Moreover, the Applicant accepts in its letter of 23rd September that it was also told by the Registry (on receipt of the 6th July letter) that the Opponent had appealed.
10. The fact that the Applicant did not have the Grounds of Appeal themselves is nothing to the point. It must have been obvious that the Opponent had appealed on the costs point, since the substantive issue had been decided entirely in its favour. In addition, it must have been obvious that the only conceivable basis for an appeal on costs would be to seek costs off the scale.
11. More importantly, had the Applicant really wanted to see the Grounds of Appeal to decide whether or not to seek a prompt extension of time to put in its own appeal, there was a very simple solution-ask the Opponent. The Applicant suggests, in its letter of 23rd September that “at this time it was not possible for us to find out more about that appeal or indeed to receive a copy of the appeal documentation”, but it did not even attempt to seek that information from the Opponent.

(ii) Level of costs sought

12. As already indicated, the nature of the Opponent’s appeal should have been obvious to the Applicant, even in the absence of the Grounds of Appeal. Equally, the magnitude of the costs sought should have been evident to a firm with the experience of the Applicant’s solicitors. Furthermore, the parties had previously corresponded about the possible size of a cost order off the scale (in the context of a potential application for security for costs by the Applicant), with the Applicant’s solicitors indicating a ball park figure of £75,000 in connection with the costs of the series of related oppositions between these parties at the date of that correspondence, in July 2008. (The relevant correspondence is attached hereto.) It would have been plain that the first opposition in the series (this one) would incur the majority of the costs. Moreover, following this correspondence, additional evidence was served which would not have been anticipated at the date the costs estimate was given. In the circumstances, the Applicant must have realised that the costs sought on the appeal would be very significant.
13. It goes without saying, that the Applicant will have the opportunity in the course of the appeal itself to address the size of the bill of costs. It does not need an extension of time for a substantive appeal for this purpose.

(iii) No public interest reasons why the extension should not be granted

14. This argument is totally misconceived. For the reasons set out in the *Whiteline Windows* authority, cited in TPN 2/2008, it is in the public interest for appeals to be disposed of timeously and for extensions of time to be discouraged. The public interest is entirely against an extension of time of four and a half months to file an appeal. It will be recalled, that in this authority, the Appointed Person labelled an extension of three months as “almost extraordinary”.

(iv) The Applicant has acted diligently

15. The Opponent is unable to agree that the Applicant has acted diligently. It has certainly not done so at all times.

16. Prior to 8th September, it could and should have filed an appeal in any event, in accordance with TPN 2/2008. It could and should have asked the Opponent for sight of a copy of the Grounds of Appeal.

17. After 8th September, it could and should have filed Grounds of Appeal, either immediately, or with its form TM9 or at some earlier time prior to this hearing.

18. In the proceedings generally, the Applicant has sought various extensions of time either very close to or after the relevant deadline.

(v) The Applicant would be prejudiced

19. As already indicated, the Applicant will have the opportunity to address the size of the bill of costs in the Opponent’s appeal. It will also have the opportunity to address the principle of awarding costs off the scale. The only prejudice to the Applicant in not being allowed to appeal is that it cannot challenge the substance of the decision, which it had the opportunity to do before the 2nd July, but chose not to take.

20. In fact, following the decision the Applicant had clearly decided to concede the substantive point, since it withdrew a related application for the mark MAXI LEUKIC.

21. If prejudice were the sole deciding factor, then every party requesting an extension would be granted one. It is plain from TPN 2/2008 and the authorities cited therein, that this is not the primary consideration in deciding whether to grant an extension of time to appeal.

(vi) The Appointed Person will need to consider the substantive issues anyway

22. This is not necessarily the case. One possible option, implicit in the Grounds of Appeal, is that the matter could be remitted to the original

Hearing Officer, on the basis that he did not invite or receive full submissions on the costs issue before making his decision.

23. In any case, it is plain that on an appeal in relation to costs, the Appointed Person will need to spend far less time on the substantive issues than he would if there was also an appeal on the main decision.

Costs of this request

24. In the event that the extension is refused, the Opponent will seek its costs of this request off the scale. A statement of costs will be made available before the hearing.

11. Having taken all matters into consideration I refused MM's request for an extension of the period within which to appeal. Following the hearing I issued a letter advising the parties of my decision. The relevant part of my letter was as follows:

"Both sides filed skeleton arguments. Having considered these, and the oral submissions made at the hearing, my decision is to refuse the request. The period for lodging an appeal against the substantive decision expired on 2 July 2009. The request for an extension of that period was filed on 16 September 2009, some 11 weeks later. It sought an extension to 6 October 2009. I was not satisfied that the reasons given in support of the request nor indeed the reasons given to explain its lateness, justified the exercise of my discretion.

The applicant sought an award of costs off the scale in relation to the hearing and supplied a schedule of costs totalling £7669.40. Whilst it is not disputed that the registrar has a wide discretion to award costs, the amount claimed appears to me to be excessive in relation to a hearing to determine an extension of time, albeit one relating to an extension of the period allowed for appeal. In my view, whilst an award of costs to the opponent is appropriate, an award off the scale is not.

I therefore determine that an award in the sum of £500 represents an appropriate contribution to the opponent's costs in respect of today's hearing. Subject to any appeal against my decision, an order for costs in this amount, will follow in due course."

12. On 13 November MM filed a Form TM5 seeking a statement of the reasons for my decision. These I now give.

Statement of reasons

13. The rules relevant to my decision are the Trade Marks Rules 2008, rule 71 of which states:

“71.-(1) Notice of appeal to the person appointed under section 76 shall be filed on Form TM55 which shall include the appellant’s grounds of appeal and his case in support of the appeal.

(2) Such notice shall be filed with the registrar within the period of 28 days beginning with the date of the registrar’s decision which is the subject of the appeal (“The original decision”).

(3) The registrar shall send the notice and the statement to the person appointed.

(4) Where any person other than the appellant was a party to the proceedings before the registrar in which the original decision was made (“the respondent”), the registrar shall send to the respondent a copy of the notice and the statement and the respondent may, within the period of 21 days beginning with the date on which the notice and statement was sent, file a notice responding to the notice of appeal.”

14. Rule 71 makes no express reference to any extension of the 28 day period set out in rule 71(2), however, the alteration of time limits is provided for by way of rule 77 which states:

“77.-(1) Subject to paragraphs (4) and (5), the registrar may, at the request of the person or party concerned or at the registrar’s own initiative extend a time or period prescribed by these Rules or a time or period specified by the registrar for doing any act and any extension under this paragraph shall be made subject to such conditions as the registrar may direct.

(2) A request for an extension under this rule may be made before or after the time or period in question has expired and shall be made-

(a) Where the application for registration has not been published and the request for an extension is made before the time or period in question has expired, in writing; and

(b) In any other case, on Form TM9.

(3) Where an extension under paragraph (1) is requested in relation to proceedings before the registrar, the party seeking the extension shall send a copy of the request to every other person who is a party to the proceedings.”

15. In Tribunal Practice Notice (TPN) 2/2008, the registrar issued specific guidance in relation to appeals made to the Appointed Person in inter partes proceedings. In relation to extensions of time within which to appeal it states:

“Extensions of time for appeal

12.: The Rules do not provide for a party to wait to see whether the other party to proceedings files an appeal before deciding whether to proceed with an appeal of their own with a view to reversing, setting aside or varying some aspect of the Registrar’s decision.

13: However, the Rules do provide power for the Registrar to grant extensions of time for the filing of appeals to the Appointed Person.

14: In exercising that discretion the Registrar will take account of the following comments of the Appointed Person in *Whiteline Windows Limited v. Brugmann Frisoplast GmbH* (BL O/299/00):

“Whilst I accept that the Registry has power under.....the current Trade Marks Rules 2000, rule 68, to extend the time of 28 days provided for an appeal, this is a matter which must be approached with the greatest caution so as to ensure that the exercise of discretion does not undermine the purpose underlying the statutory provision. Appeals create uncertainty and it is in the interests of everyone that appeals are disposed of timeously. Extensions of time in which to enter notices of appeal are therefore not to be encouraged.”

and

“.....I should not like it to be thought that extensions of time for serving appeal documents will be granted lightly.”

15: These comments carry even more force where a request to extend the period for filing an appeal is made after the end of the relevant period.

16: Each case will be decided on its own merits. An extension of time for appealing may, in appropriate circumstances, be allowed after expiry of the 28 days period: *Virgin Records Ltd v Ministry of Sound Recordings Ltd* (BL O/136/03).”

16. MM’s request for an extension of the period within which to appeal was made on Form TM9 as required by rule 77(2)(b) and was accompanied by the appropriate fee. In line with the requirements of rule 77(3), it was copied to FST at its address for service. Being satisfied that the required formalities had been met, I went on to consider the request.

17. There is no dispute that the request for an extension of time was made after the expiry of the 28 day period set out in rule 71(2). TPN 2/2008 refers to the case of *Virgin Records Ltd v Ministry of Sound Recordings Ltd* (BL O/136/03). In this case Mr Geoffrey Hobbs Q.C. sitting as the Appointed Person said:

“The general discretion conferred by rule 68(1) is qualified in relation to requests made after the expiry of the 28 day period by rule 68(5) which provides that “the registrar may, at her discretion, extend the period or time if she is satisfied with the explanation for the delay in requesting the extension and it appears to her to be just and equitable to do so”. The burden of justification thus appears to be heavier in relation to a party who applies for an extension after expiry of the relevant time limit than in a case of a party who applies pre-expiry”

18. In *Liquid Force* [1999] RPC 429, Mr Hobbs Q.C., again sitting as the Appointed Person, said:

“...it is for the party in default to satisfy the court that despite his default, the discretion to extend time should nevertheless be exercised in his favour, for which purposes he could rely on any relevant circumstances”

19. Whilst the above decisions were determined under previous rules and so cannot be completely equated to the position under rule 77, they still form the basis of the registrar’s guidance that requests for extensions of time filed after the expiry of the relevant period impose a heavier burden on the requestor to justify that request.

20. Despite its claim in Annex 1 filed with the request on 16 September that it sought an extension from 2 July to 6 October, MM later submitted that it was, in effect, seeking an extension of just 8 days calculating its start date as the date it received a copy of FST’s own appeal. As I indicated above, MM says that “The Notice of [FST’s] appeal was not received by the Applicant until 8 September 2009, a procedural anomaly for which the Intellectual Property Office has accepted responsibility”.

21. The 28 day period for appeal is set out in rule 71(2) and, in this case, expired on 2 July 2009. FST’s notice of appeal was filed on that date. In accordance with the requirements of rule 71(3), a copy of the notice and accompanying documents were sent to the Appointed Person. This was done under cover of a letter dated 7 September. That same day, a copy was sent to the applicant at his address for service and MM received it the following day.

22. Rule 71(3) does not set any time limit within which the relevant papers must be copied to the Appointed Person by the registrar. In the normal course of events I understand it takes the registrar approximately 6 weeks to do this. In this case, it took approximately 2 months. Whilst I accept that FST’s Notice of Appeal could, and perhaps should, have been copied to the Appointed Person and the parties sooner than it was, I do not accept that there was any “procedural anomaly” involved. The covering letter sent to the parties (and indeed the Appointed Person) on 7 September stated: “Please accept our apologies for the delay in processing.” In my view that is all that this was, a delay, and a slight one at that. But even if the registrar had copied FST’s Notice of appeal to the relevant parties somewhat earlier, the period for appeal would already have expired given that FST’s appeal was filed on the last day of that period.

23. In any event, I disagree with MM’s submission that it is seeking an extension of just 8 days. As is set out in the TPN, the rules do not provide a party with the opportunity to ‘wait and see’ whether the other party files an appeal or not before it decides whether or not to file an appeal itself. In line with rule 71(2) the period for filing an appeal against the Hearing Officer’s decision is clear and begins on the date of that decision (which I take to be the date it is issued) and, in this case expired, as indicated above, on 2 July 2009, some 28 days later. It was not until 16 September, some 104 days after the issue of the decision (and some 11 weeks after the expiry of the original appeal period), that the applicant filed its request to extend the period for lodging appeal. It sought an extension until 6 October which, if granted, would have extended the period for lodging an appeal from 28 days to some 124 days. In my

view that **is** an “extraordinary” length of time and is one which is only ever likely to be justified in equally extraordinary circumstances. I do not consider that the circumstances of this case constitute such circumstances. In my view MM’s request is effectively asking for it to be allowed to “wait and see” FST’s appeal and then to change its mind having already consciously decided not to appeal.

24. Whilst many decisions of the registrar are accepted without challenge, the filing of an appeal is not an unusual event. It is a matter for the party concerned to decide whether or not it wishes to appeal a decision. MM chose not to appeal the substantive decision in these proceedings “despite having strong grounds to do so”. FST did appeal. Mr Fernando submitted that the basis for FST’s appeal was a material factor which justified the grant of the request for an extension of the period for appeal despite its lateness and indeed was justified in its own right.

25. As I indicated above, FST’s appeal is directed solely at the award of costs made by the Hearing Officer. It is not necessary for me to set out the full details of that appeal, suffice to say there is no dispute that FST seeks an award off the standard scale and therefore in excess of the amount ordered by the Hearing Officer. FST submitted that it should have been obvious to MM (especially as MM is professionally represented) that the appeal could only have been made on the grounds of the award of costs as it had been successful on the substantive issue. I do not know what knowledge MM had but, whilst it might seem somewhat surprising, it is not unheard of even for a successful party to appeal the substantive decision. In short, the only way of being certain of the grounds on which a party intends to appeal is to see them. That said, given that parties are not entitled to “wait and see” I do not think this potential lack of certainty supports any request for an extension of the appeal period.

26. Clearly MM has concerns about the possibility of the award of costs made against it being increased as a result of FST’s appeal. It is not surprising that it should want to avoid the possibility of that award being increased if it can. It has confirmed that it “intends to fully resist” FST’s appeal and indeed filed a respondent’s notice within the statutory period allowed to. But it submits that filing its own appeal against the substantive decision is another way to “see off” any potential liability. I do not consider the grant of the requested extension is in any way justified on this basis. Whilst, on the one hand, defending FST’s appeal and, on the other, lodging its own appeal on the substantive decision could perhaps lead to the same end result (in the sense that it might limit, reduce or even avoid any award of costs against MM), that does not make the two actions direct alternatives. Self-evidently one relates solely to costs, the other the substantive issues. I was not persuaded by its submissions that it had been deprived of the opportunity to consider whether to appeal “in the light of all relevant factors”. If, as MM indicates, it disagreed with the substantive decision issued on 4 June, it could have filed an appeal against it within the period allowed. For whatever reason, it chose not to do so.

27. MM submits that if the extension is allowed, its appeal would include a claim that its witness should have been given the opportunity to answer the charges against him. Whilst that issue is not one for me to determine, I was not persuaded that this argument justified the grant of the requested extension. MM knew the basis of the case against it and saw the evidence that had been filed in support of that case. It

filed a counterstatement and a significant amount of evidence in response. It had the opportunity to attend a hearing (which could have included cross-examination of witnesses if appropriate) but chose not to. It then saw the other side's initial and additional written submissions in lieu of attendance at a hearing and filed its own.

28. From all the material before me, it seems to me that MM's concern centres solely on the effect of any award of costs which may result from FST's appeal. It is still open to MM to defend itself against FST's appeal (and it has indicated it intends so do so). On that basis I do not see that MM is likely to suffer any prejudice by the refusal of the extension. On the contrary, were the extension to be granted, it is likely there would be prejudice to FST who, given the length of time which has passed since the substantive decision was handed down, have a legitimate expectation that it had been accepted by MM. Neither was I persuaded with MM's submission that there is no reason from a public interest perspective, not to grant the extension. On the contrary the public interest is in not granting the extension. As was said in *Whiteline Windows* "it is in the interests of everyone that appeals are disposed of timeously".

29. Mr Fernando submitted that the substantive issue was still a live one and went on to say that the appeal currently before the Appointed Person would require the parties to rehearse the substantive issues in order for him/her to determine that appeal. Again, I was not persuaded by these submissions. Whilst a determination of an appeal on the issue of an award of costs might involve consideration of, *inter alia*, the nature of the grounds of opposition, the nature of the evidence and the conduct of the parties, it does not mean the substantive issues will have to be revisited.

30. Taking all matters into account I was not satisfied that the reasons given for the delay in making the request, nor the reasons for the request itself, justified the grant of the extension. I therefore refused the request.

31. For completeness and the benefit of any appellate tribunal I should also mention one further matter. The request before me sought an extension of time until 6 October. The hearing took place on 12 November, more than 5 weeks after that date but despite this Mr Fernando submitted that MM had taken no action to prepare any notice of appeal. Even if I had granted the extension request, a further request, again retrospective, would have had to have been requested in order for MM to be able to lodge any appeal against the substantive decision. Taking the date of the hearing into account, this would have led to the period for filing an appeal being extended to an absolute minimum of 162 days.

32. Finally, as to the issue of costs in relation to the hearing before me, FST sought an award in the sum of £7669.40. It filed a schedule of costs in support of that claim. Whilst FST had every right to attend the hearing before me, the onus in justifying the request for an extension of time for filing an appeal remained firmly with MM. That said, it is clear that FST would have been put to some expense as a result of the request and attending the hearing and is entitled to an award of costs as a

contribution to those expenses. Taking all matters into account, it seemed to me that an award in the sum of £500 was an appropriate award.

Dated this 24th day of November 2009

Ann Corbett
For The Registrar
The Comptroller-General