

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION No. 2463613
IN THE NAME OF NEVER GIVE UP LIMITED**

**AND IN THE MATTER OF OPPOSITION No. 96827 THERETO
BY JONATHAN OAG OF JUICED UP**

**AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON
BY THE APPLICANT
AGAINST THE DECISION OF MR. M. FOLEY DATED 9 AUGUST 2010**

DECISION

Background

1. This is an appeal against a decision of Mr. Mike Foley, the Hearing Officer acting on behalf of the Registrar, dated 9 August 2010, in which he refused Trade Mark Application number 2463613 in the name of Never Give Up Limited (“the Applicant”) following a successful opposition brought by Jonathan Oag of Juiced Up (“the Opponent”).
2. Application number 2463613 was filed on 15 August 2007 pursuant to section 41 of the Trade Marks Act 1994 for a series of eight trade marks:

Juiced Up
Juiced up
juiced up
JUICED UP
Juiced Up!
Juiced up!
juiced up!
JUICED UP!

3. Registration was sought in respect of the following services in Class 43:

Provision of food and drink; restaurant, café, bar and catering services, take away and restaurant services, juice bar, smoothie bar, shakes bar, providing mineral and aerated waters and other non-alcoholic drinks, fruit drinks and fruit juices, sandwiches, healthy snacks, muffins, frozen yoghurt, muesli bars and nutritional supplements; information and advice relating to food and drink.

4. On 10 April 2008, Jonathan Oag of Juiced Up, 100 Bruntsfield Place, Edinburgh EH10 4ES filed Notice of opposition against the application. The grounds of opposition were that registration of the JUICED UP series would be contrary to:
 - (i) Section 5(4)(a) of the Act because its use in the United Kingdom was liable to be prevented by the law of passing off protecting the Opponent's earlier unregistered rights in the designation JUICED UP.
 - (ii) Section 3(6) of the Act because the Application was made in bad faith.
5. The alleged bad faith ground was amplified in the Opponent's Statement of case thus:

“Never Give Up Ltd (the applicant) has applied for trademark registration for 34 different juice related names, four of which are existing juice companies, which do not appear to be connected in any way to Never Give Up Ltd. There appear to be many other applications, which have subsequently been abandoned.

I was telephoned by John Blanchard of Never Give Up ltd in [December2007]. Mr Blanchard stated they owned the trade mark JUICED UP (which is my company's name) and demanded that I either pay a licence fee for use of the trademark or purchase the trademark from Never Give Up Ltd. The price Mr Blanchard requested for the purchase of the trademark was tens of thousands of pounds. Mr Blanchard indicated that if I did not either pay a licence fee or purchase the trade mark my company would face court action.

There was no indication during the telephone call that Never Give Up Ltd used, or had any intention of using, the trade mark JUICED UP in respect of the goods and services for which the application was made. I believe Never Give Up Ltd is using the trade mark application as a means to try and extort money from companies such as my own by threatening that if my company does not pay a licence fee or purchase fee it will bring an action for trade mark infringement. It seems apparent that the applicant is simply trying to scare companies in parting with a lot of money.”

6. The Applicant took issue with the ground of opposition in a Notice of defence and counterstatement dated 8 August 2008. Both sides filed evidence and attended (via a teleconference link) an oral hearing at which the Applicant was represented by Mr. John Blanchard¹ and the Opponent by Mrs Carole Oag.
7. The Hearing Officer issued his substantive decision on 9 August 2010 under reference number BL O/283/10 upholding the opposition under both sections 5(4)(a) and 3(6). On 10 January 2011, he issued a supplemental decision under reference number BL O/005/11, ordering the Applicant to pay the Opponent costs in the sum of £2,791.93.
8. On 7 February 2011, the Applicant filed Notice of Appeal to the Appointed Person under section 76 of the Act.

¹ The public records indicate that Mr. John Blanchard is the sole Director of Never Give Up Limited.

9. By letter dated 6 April 2011, Mr. Blanchard on behalf of the Applicant sought leave to introduce further evidence into the appeal. In accordance with my case management directions issued on 19 April 2011, the Applicant submitted in a witness statement of John Blanchard, dated 15 June 2011, the evidence it wished to have admitted, which I indicated to the parties that I would consider as a preliminary to the appeal.
10. For its part, the Opponent filed a Respondent's notice dated 4 April 2011, in which he observed that the parties had been provided with ample time to submit their evidence below and that no further evidence should be admitted into the proceedings. Otherwise, the Opponent made no comment on the additional evidence sought to be admitted and neither appeared nor was represented at the appeal hearing.
11. At the appeal hearing before me, Mr. Blanchard appeared on behalf of the Applicant.

Application to introduce further evidence

12. My discretion to admit further evidence on appeal is primarily guided by the three principles set out by Lord Denning in *Ladd v. Marshall* [1954] 1 WLR 1489 at 1491:

“... three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”
13. However, other factors may be relevant including the nature of the trade mark, the nature of objections to it and the public interest in not admitting onto to the Register invalid trade marks (*Hunt Wesson Inc.'s Trade Mark Application* [1996] RPC 233, *El Du Pont Nemours & Co v. ST Dupont* [2003] EWCA Civ 1368).
14. Applying those principles and on hearing the submissions of Mr. Blanchard, I allowed into the appeal Exhibit JB-APPEAL1, which comprised a witness statement of Robert Booth dated 26 May 2011. Mr. Booth's name had appeared as creator with the date 26 November 2006 on one of the drawings showing layout/design for Energy Juice TM retail units in Adobe Acrobat files at Exhibit A12 to an earlier witness statement of Mr. Blanchard. Some doubt was cast over the dates of creation of those files, which Mr. Booth addresses in his witness statement:

“2. I can confirm that the designs handed in to evidence were some of the designs I created and that the creation dates on them of 1st December 2006 for 2 of them and 22nd December 2006 for a third are correct for those versions. The one with a creation date of 22nd December was a design that had moved on from an earlier version I had drawn in November 2006 and I had not changed the box with “drawn by Robert Booth 24th November 2006” on it.”

15. Mr. Booth further explained:

“3. I created some with full backs and some you could see through as John told me it would depend on the positions the landlords gave and their own restrictions as to whether we could have full backs or needed to leave the sightlines clear.

4. I came up with the tag line “Juice up on Energy” (although I made a silly spelling error on one which I quickly changed) and thought it sounded good for his juice bar and so I put it on the designs to see what John thought. When I showed John he told me he liked it but preferred the past tense “juiced up” as he could then use it in different ways for example “get *JUICED UP* on Energy Juices”, “are you *JUICED UP*” OR “We’re all *JUICED UP*” Etc.”

16. Mr. Blanchard stated that this evidence was not available earlier because Mr. Booth had moved house and he was unable to find out Mr. Booth’s whereabouts until he saw an article in the Basingstoke Gazette of 3 February 2011 publicising with a contact telephone number an Art Draw for one of Mr. Booth’s paintings, through which Mr. Blanchard was able to track Mr. Booth down.

17. I also admitted into the appeal Exhibit JB-Appeal2 containing a copy of the article in the Basingstoke Gazette. Mr. Booth in his witness statement confirmed that he had moved house and changed his telephone number in 2008 and that Mr. Blanchard had found him: “through a local paper article published 3rd February 2011 to do with a painting of mine”.

18. Mr. Blanchard argued that the evidence of Mr. Booth went to his intent to use the trade marks applied for, which I accepted might have some influence (although not necessarily decisive) on the outcome of the appeal.

19. Exhibit JB-APPEAL8 was a copy of the case details from the IPO website for abandoned trade mark application number 2427921 JUICED UP figurative in the name of Juiced Up (Scotland) Ltd (the Opponent’s former company). I agreed to take note of this. It was not fresh evidence but a matter of public record.

20. Otherwise, I refused the Applicant permission to introduce fresh evidence:

(a) JB-APPEAL3 was an email from Marcus Ryder, Editor Investigations, BBC Scotland to John Blanchard dated 25 March 2008. I was not persuaded that it could not have been put in evidence earlier. Moreover it merely recorded what Mr. Blanchard said to Mr. Ryder in a telephone conversation earlier on the same day. That information was included in Mr. Blanchard’s witness statement of 12 May 2010 and noted by the Hearing Officer at paragraph 99 of his decision.

(b) JB-APPEAL4 consisted of screen shots showing the dates on which certain digital files exhibited to Mr. Blanchard’s witness statement dated 16 April 2010 were created/modified/accessed. The Hearing Officer granted Mr. Blanchard 14 days after the hearing within which to submit this further evidence and expressly asked for print outs of the index files with this

information. Mr. Blanchard said that he did not know how to do this but subsequently asked an IT person. He could have done that within the period allowed by the Hearing Officer. JB-APPEAL5 contained copy invoices for expenditure supposedly incurred by Mr. Blanchard in connection with obtaining JB-APPEAL3 and JB-APPEAL4 both of which I refused to admit.

- (c) JB-APPEAL6 contained copy invoices (the majority emanating from early 2007) addressed to Mr. Blanchard for items ranging from frozen yogurt to printing. Mr. Blanchard says he could not produce these copy invoices earlier because his previous accountant would not release them. Mr. Blanchard said that he could supply a witness statement from his new accountant but otherwise provided no verification. The copy invoices were not obviously related to the trade marks in suit and I was not prepared to delay the proceedings any further by admitting them.
- (d) JB-APPEAL7 was a copy print out of The Coca-Cola Company's UK trade mark registration for NEVER GIVE UP in Class 32. Although a matter of public record, it had nothing to do with the present proceedings.
- (e) JB-APPEAL9 were copy print outs of articles from the Mail Online and The Independent about fake aspects of BBC programmes. None of the articles related to a BBC report entitled "Trademark scam targets business", which the Opponent relied on in support of his section 3(6) objection. All of the articles predated the hearing below and, if wanted, could have been put before the Hearing Officer.
- (f) JB-APPEAL10 was evidence going to the character of Mr. Blanchard. Again, the proper time to adduce such evidence was during the evidence rounds.

The appeal

- 21. The appeal contained two procedural grounds first, that the Applicant was not given an opportunity to cross-examine the Opponent's witnesses, second, that the Applicant was not provided with the opportunity to submit a limited specification.
- 22. At the hearing I drew Mr. Blanchard's attention to the correspondence on file. It appears that the Registry made several attempts to set a date for the hearing. On each occasion the Applicant was sent a customary letter by the Registry setting out the date, time and arrangements for the hearing including, if desired, cross examination. The first such letter went out to the Applicant at least six months before the date of the actual hearing (Registry to Never Give Up Limited, 27 May 2009). The Applicant could have discovered information about cross examination from the IPO website. The Hearing Officer noted that the Applicant seemingly ignored the other side's offer for the BBC journalist, Mark Daly, responsible for the report entitled "Trademark scam targets business" to attend the hearing and give evidence in person.
- 23. Likewise, the correspondence from the Registry notifying close of the evidence rounds expressly drew to the Applicant's notice the possibility of submitting a limited specification (Registry to Never Give Up Limited, 1 May 2009).

Section 5(4)(a)

24. In so far as I understood it, there were two facets to the appeal under this head. The Applicant contended that first, the proper Opponent was Juiced Up (Scotland) Limited and second, any opposing goodwill in JUICED UP at the application date resided in that company. In either case, since Juiced Up (Scotland) Limited was dissolved prior to the hearing there was no opposition and any opposing goodwill had vested in the Crown *bona vacantia*.
25. In support, the Applicant relied upon the following: (a) matter headings on the Opponent's witness statements stated that the opposition was in the name of Juiced Up (Scotland) Limited; (b) Jonathan Oag's statement in the Notice of opposition and statement of grounds: "my company [Juiced Up (Scotland) Limited] has built up considerable goodwill in the name JUICED UP"; (c) Jonathan Oag's statement in his first witness statement, dated 18 November 2008: "The trade mark JUICED UP was first used in the United Kingdom in the year 2005 by Juiced Up (Scotland) Ltd"; (d) an earlier application for registration in the UK for the trade mark JUICED UP in Class 32 in the name of Juiced Up (Scotland) Limited (not pursued); (e) Jonathan Oag's reference in the Respondent's notice, dated 4 April 2011 to: "the creation of a new Ltd company, which continued to use the Juiced Up brand and the goodwill that resided with it".
26. All these points (except, of course, the last) were put by Mr. Blanchard to the Hearing Officer. Regarding the identity of the Opponent, the Hearing Officer took Mr. Blanchard to the Form TM7 Notice of opposition and statement of grounds which was clearly filed in the name of Jonathan Oag of Juiced Up and not in the name of the company Juiced Up (Scotland) Limited. The Hearing Officer recorded that: "as such the headings on all of the Witness Statements filed are incorrect but I was not going to determine a matter of public interest based on a formality".
27. As to the ownership of goodwill in the earlier right, the Hearing Officer undertook a detailed and extensive review of the evidence, which went unchallenged. He noted, *inter alia*, first:
- "60. In his first Witness Statement Mr. Oag says that through his company Juiced Up (Scotland) Ltd, he first used "JUICED UP" in the UK in 2005. He does not say what "used" actually means, but if it is a claim to use in a trading sense this is inconsistent with the evidence. The extract from the Companies house website shows the company was not incorporated until 17 January 2006 ..."
28. Second, there was independent third party evidence from Kirsty Docherty that her company Progressive Partnership first used Juiced Up in December 2005 and continued to use them for business meetings, which was corroborated by copy invoices for the provision of foodstuffs and beverages (second witness statement of Jonathan Oag dated 18 January 2010, Appendices 5 and 8).
29. Third, on the Hearing Officer's reading of the evidence: "Juiced Up (Scotland) Limited has all but been invisible. The business has operated under the trading style Juiced Up under the highly visible control of Mr. Oag."

30. Fourth, the above led the Hearing Officer to conclude (at para. 60):

“If there is any question about where the goodwill subsists, I consider this to be clearly with Mr. Oag. He devised the Juiced Up name, first traded and continued to trade under Juiced Up. There is nothing to show that he ever divested himself of the ownership of the name and the connected goodwill to the limited company.”

31. On my own review of the evidence, I was not persuaded that the Hearing Officer made any error of principle or was plainly wrong in arriving at those findings, which as I explained to Mr. Blanchard, was the standard of review I had to apply before interfering with the Hearing Officer’s decision on appeal (*REEF Trade Mark* [2003] RPC 101].

32. The Hearing Officer held that the Opponent, Mr. Oag, had succeeded in establishing an earlier right protected by the law of passing off at the application date in the designation JUICED UP in word and logo forms, in relation to the provision of juices and smoothies, particularly those with health-promoting properties, and also a number of hot and cold beverages, a range of snack-type foodstuffs such as soup, Panini, bagels, wraps, sandwiches, muffins, crisps, fruit salads and porridge. On the other hand, the Applicant had made no use of JUICED UP in trade prior to the date of application.

33. The Hearing Officer upheld the opposition under section 5(4)(a) of the Act and I have in turn upheld his decision on appeal. Accordingly, the first ground of appeal fails.

34. The Hearing Officer further observed (strictly unnecessarily in view of his decision as to the ownership of goodwill) that there was nothing in the evidence to indicate that on dissolution any assets of Juiced Up (Scotland) Limited had vested in the Crown *bona vacantia*. Indeed that would have required the company to have owned assets on dissolution whereas the evidence of Carole Oag was to the contrary that prior to dissolution two new companies were formed to trade as JUICED UP. Certainly, this appears to have been the case with the lease of 100 Bruntsfield Place, Edinburgh, which stood in the name of Juiced Up (Scotland) Limited but from which Jonathan Oag traded as Juiced Up before and after the date of dissolution.

35. I would add that even if the Hearing Officer had found that the earlier goodwill in Juiced Up resided in the companies (which he did not), it would have been open to him in the circumstances and provided certain conditions were satisfied to join the companies to the proceedings as Opponent so that in any event the Opponent constituted the owner of the earlier right (*TAO Trade Mark*, BL O/004/11).

Section 3(6)

36. The Applicant also appealed the Hearing Officer’s decision under section 3(6), denying that having applied for the registration of trade marks, Mr. Blanchard (the moving force behind the Applicant) approached the owners of established businesses (Callum Johnson and Jonathan Oag) demanding money in order for them to continue using those trade marks. Further, the Applicant relied on computer files containing business start up plans for juice bars as showing the Applicant’s intention to use the

trade marks in suit especially Exhibit A12 to the witness statement of John Blanchard, dated 16 April 2010. Earlier I admitted into the appeal, a witness statement of Robert Booth, dated 26 May 2011, confirming the creation dates of certain designs for mock ups of juice bars he had created in 2006 for Mr. Blanchard at Exhibit A12.

37. It is well established that the test of bad faith includes not only dishonesty but also “dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined” (*Gromax Plasticulture Ltd v. Don & Low Nonwovens Ltd* [1999] RPC 367 at 379).
38. The tribunal is charged with *subjectively* determining what was or ought from the circumstances to have been known to the applicant at the time of the application and, in the light of that knowledge, *objectively* assessing whether the applicant was acting in accordance with acceptable commercial standards in making the application (*IAN ADAM Trade Mark*, BL O/094/11, *AJIT WEEKLY Trade Mark* [2006] RPC 633).
39. Matters occurring after the date of the application may assist in determining the applicant’s state of mind at the date of the application (*Ferrero SpA’s Trade Marks* [2004] RPC 583, *Tesco Stores Ltd’s Trade Mark Applications* [2005] RPC 361). Intending to prevent or to profit from an existing business using an identical sign may be factors indicating that the conditions of section 3(6) are made out (Case C-529/07, *Chocoladefabriken Lindt & Sprüngli AG v. Franz Hauswirth GmbH* [2009] ECR I-4893). An applicant’s belief that his or her conduct is justified is not necessarily telling (*DEMONALE Trade Marks* [2000] RPC 345).
40. The Hearing Officer’s assessments of and findings on the evidence for the purposes of section 3(6) were as follows:

“84. Mr Blanchard is silent on how he came to apply to register trade marks consisting of the names of two existing businesses, both of which had been operating for several years prior to the applications being made. The names were not ordinary descriptive English words or commonplace phrases where their aptness for use created a likelihood of them being coincidentally adopted by a number of people. Even more coincidentally, Mr Blanchard was seeking registration of these names in the same area of trade.

85. Mr Blanchard claims that “...I was made aware of Mr J Oag using the name Juiced Up Ltd...” in December 2007 which is a few months after the date on which he made the application. He does not explain the circumstances that made him “aware”, which would have been useful given that he is located in Basingstoke and the traders are centred on Edinburgh with limited exposure much beyond this area.

86. In his Witness Statement he says that “Before applying for the trade mark on 15 August 2007 I checked the Intellectual Property Office website ...I did a search for “Juiced Up” and found the application made by Mr J Oag in a different class...” In fact the application had been made in the name of Juiced Up (Scotland) Limited and not Mr Oag, and in Class 32 in respect of “fruit juices and smoothies”, the self-same goods that the evidence shows that he intends to sell through the provision of his services.

87. So by his own words, Mr Blanchard was aware of Mr Oag/Juiced Up (Scotland) Limited some time before 15 August 2007. There was enough information available to alert the uniformed (let alone someone savvy enough to check the Intellectual Property Office website in the first place) that they need to make investigations into this other business before proceeding with the application.

88. Mr Oag asserts that in December 2007, John Blanchard of Never Give Up Ltd (the applicant) telephoned to inform him that his company owned the trade mark JUICED UP. Mr Oag says that Mr Blanchard demanded that he either pay a licence fee or purchase the trademark indicating that if he did not, his company would face court action. Mr Oag says that Mr Blanchard was asking for tens of thousands of pounds.

89. In the Counterstatement Mr Blanchard says that in December 2007 he was made aware of a company using his trade mark "JUICED UP" and approached them to ask them not to use it. This, at least confirms that a telephone call was made to Mr Oag, if not the content of the discussion. Mr Blanchard states that we (which I take to be either him or someone connected with Never Give Up Ltd) "...have never tried to extort money from companies." This is not quite the same as saying "I did not ask Mr Oag for any money"; I cannot imagine that Mr Blanchard would say that he was trying to obtain money through dubious means. Mr Blanchard says that Mr Oag is making an allegation of commercial fraud which is very serious and that "we will be persuing him about this." There is no evidence of Mr Blanchard or Never Give Up Limited doing anything.

90. One particular piece of evidence contested by Mr Blanchard is the extract from the website of BBC News 24 provided as part of Exhibits A4. Mr Blanchard refutes the version of events set out in the article, challenging the opponents to provide a full transcript. He subsequently widened this to wanting a transcript of every communication, a request which I have already said was refused. From his responses and the shifting ground of his requests, I suspect that even had a transcript of every contact between the BBC (in which I include any employee) and Mr Blanchard been provided, Mr Blanchard would have asserted that they are incomplete or had been edited in some way.

91. Mrs Oag says that the BBC was prepared to obtain permission from the Court in order to release the transcripts, but this was not done because of time constraints and costs. Mr Blanchard responded saying that he "...sees no reason why the BBC would need to go to court to allow the transcripts to be released..." In the absence of evidence to the contrary I see no reason to doubt the veracity of what Mrs Oag says based on a personal belief. In her later submissions Mrs Oag changes this to say that it would not have been the BBC, but Mr Oag or herself that would have needed to apply to the court as the BBC does not, as a matter of course, release material that has not been broadcasted. She points out that the option of going to the court to obtain the transcript would have been open to Mr Blanchard.

92. Mrs Oag says that the BBC agreed that Mr Daly "...could transcribe the relevant conversations and provide the detail in a signed Witness Statement" without a court order because Mr Blanchard was making allegations about their story. This may, or may not be the case, but the only known fact is that Mr Daly did complete a Witness Statement in which he confirms that he had recorded conversations with Mr Blanchard and that the text he provides is an "accurate transcription of part of that transcript of part of that recording..."

93. The article that resulted from Mr Daly's investigations primarily recounts an interview with Callum Johnson, the founder of a juice bar business trading under the name Juiceling, but also has quotes from Mr Oag. Mr Johnson is reported as saying that he had been contacted by Mr Blanchard who notified him that he represented a company that owns the trade mark Juiceling, and that if he did not pay either to licence or purchase the mark his company would face court action. He says that Mr Blanchard was asking for tens of thousands of pounds. The parallel with Mr Oag's version of events as set out in the article is plain to see.

94. In his Witness Statement Mr Blanchard states that Mr Daly approached him, which is confirmed by Mr Daly, but avoids the fact that this was as a result of Mr Blanchard having contacted Mr Johnson and Mr Oag. Mr Daly says that when he called Mr Blanchard to say he was interested in buying the Juiceling trademark, Mr Blanchard invited him to make an offer, upon which Mr Daly says he suggested the amount quoted to Mr Johnson, that is, in the region of £25,000. Mr Daly states that Mr Blanchard warned him that if he did not settle, Juiceling would be taken to court and sued for damages. I can see no inconsistencies so far.

95. Mr Daly recounts the next conversation which he says he recorded. He says that Mr Blanchard told him that £25,000 would not be enough and that the people he represents were now looking for £65,000. Mr Daly states that at the end of this conversation he said he would go and speak to his client. He says that Mr Blanchard sent him several texts over the next few days making an offer of £58,000, plus vat, which Mr Daly says he accepted. On 20 March 2008 Mr Daly had another conversation with Mr Blanchard, during which Mr Blanchard confirmed that if Juiceling were to continue trading they would be taken to court "... not just for them trading now, but that they have been trading since we informed them" which could result in millions in damages. A meeting was arranged at which Mr Daly was to hand over the £58,000 (plus vat). The article reports that when Mr Daly "unmasked himself" as a reporter, Mr Blanchard is said to have denied any wrongdoing claiming to have registered the trade marks in good faith, and denying having ever threatened the juice bars with court action.

96. Mr Blanchard took the opportunity to answer the evidence from Mr Daly through his Witness Statement of 12 May 2010. His main criticism is that the partial transcript in Mr Daly's Witness Statement distorts the true picture that a full transcript would give. In my opinion the partial transcript leaves little scope for interpretation; Mr Blanchard sought money on threat of court

action, and that is the case regardless of whatever else was said. In his Witness Statement (which I have taken as written submissions) Mr Blanchard states:

“Mr Daly’s Statement does not show that I wanted £000’s for the trade mark “Juiced Up” as Mark Daly had approached me to buy a different trade mark for a company and the “Juiced Up” trade mark was never discussed. Mr C Johnston never had a claim to the trademark in the report “Juiceling” which is why I had informed him that we had applied for the trademark he never opposed it.”

97. From this there can be no doubt that Mr Blanchard contacted Mr Johnson and sought money on the terms mentioned, nor that he told Mr Johnson that he could be taken to court if he did not pay up, one way or another.

98. Whilst Mr Blanchard is correct when he says that he and Mr Daly never discussed the sale of Juiced Up, in what seems to be an example of his carefully chosen words Mr Blanchard avoids saying anything about whether he approached Mr Oag on the same terms in relation to Juiced Up, but there is no denial either. It does not seem unreasonable to take Mr Blanchard’s behaviour in respect of the Juiceling trade mark to be indicative of his business ethics and what he is more likely to have done than not. In short, I consider there to be sufficient evidence to be able to infer, with some degree of certainty, that Mr Blanchard recognised the unregistered Juiced Up mark as an opportunity, and sought to register it with the intention of leveraging considerable financial gain from Mr Oag.

99. If the report is false or inaccurate Mr Blanchard had the option of filing a complaint with the BBC. Mr Blanchard says that when he became aware of the article he did speak with a person from the BBC “...and ...offered for them to see all of our business plans, bids on site locations and branded items but they refused”. He does not say to who he spoke with or when. Mr Blanchard later says that he “contacted his [Mr Daly’s] boss marcus.ryder@bbc.co.uk and offered for him to meet with me and look at all of our branded materials, business plan, presentation and leasing proposals etc but he refused.” He does not say how he knows of Mr Ryder or that he would possibly oversee the work of Mr Daly, but I take judicial note that such information [would be] readily available via the BBC website. Mr Blanchard lists the e-mail address for Mr Ryder from which it is reasonable to infer that he made contact by this means, and presumably how Mr Ryder would have responded. No emails have been provided raising the complaint. Likewise, no mail showing the refusal from Mr Ryder or the BBC has been provided.

100. Mr Daly states that Mr Blanchard did not complain to the BBC. It is of course possible that Mr Blanchard did so, and Mr Daly was not made aware of this. Given the seriousness of the allegation and possible legal consequences, the balance of probability suggests that an investigation involving Mr Daly would have been made. Significantly, Mrs Oag says in her Statement that “Mr Daly has asked me to let you know that he would make himself available to

attend a hearing/court of law to prove the accuracy of his report...”. Mr Blanchard has either not seen this offer or has chosen to ignore it.

101. Earlier in this decision I concluded that at the relevant date the opponents possessed a goodwill and reputation in the name JUICED UP, both in the logo form and as the words alone, in relation to the provision of a range of beverages and foodstuffs.

102. I further stated that notwithstanding the applicant’s evidence of a plan to use Juice Up there is no evidence that they ever used that sign (or Juiced Up) in a trade in relation to any goods or services prior to the date of application, the consequence of which is that it enjoyed no legal protection at the relevant date. Accordingly the preparations relied upon are both irrelevant in that they relate to a different sign, and a sham because they are being used simply to cover up the applicants manifest bad faith.

103. On the balance of probabilities I am satisfied that at the time of making the application Mr Blanchard was fully aware of Mr Oag and his use of Juiced Up as a trade mark in connection with a business engaged in the sale of foodstuffs and beverages. There is sufficient evidence to also say that in all probability Mr Blanchard made the application with the intention of inducing Mr Oag to part with money in order to be able to continue the use of Juiced Up. In applying for the mark in the light of all the surrounding circumstances Mr Blanchard’s actions are clearly contrary to normally accepted standards of honest conduct by persons adopting proper standards. The ground of opposition under Section 3(6) therefore succeeds.”

41. Earlier in his decision, the Hearing Officer had noted that Callum Johnson was apparently approached by Mr. Blanchard in June 2007, i.e., before the date of the application in suit (witness statement of Jonathan Oag, dated 18 January 2010, Appendix 10)². Also the business plans exhibited to John Blanchard’s witness statement, dated 16 April 2010 related to proposals for juice bars under the “energy” or “energy juices” brand (Exhibits A5 – A12). I note that the proposal and presentation to Westfield were in the name of Energy Juices Limited (Exhibit A10), and other “energy juices” material gave the name of Mr. Blanchard or www.feelgoodfast.co.uk. The designs relied upon by Mr. Blanchard and created by Robert Booth in 2006 (Exhibit A12) showed the phrase “juice up on energy” written on the back right hand wall of one of the mock units.
42. I have reviewed the evidence carefully in relation to the section 3(6) objection particularly the evidence of Robert Booth, which I admitted late into the proceedings but which after due consideration I concluded was not decisive. In my judgment, even taking Mr. Booth’s confirmations into account, there was sufficient evidence to entitle the Hearing Officer on the balance of probabilities to decide that the ground of opposition under section 3(6) of the Act had been made out.

² Mr. Oag stated at paragraph 8 of his witness statement that Mr. Johnson had agreed to give evidence in person if required.

Conclusion

43. In the result, the Applicant's appeal against the Hearing Officer's decision has failed. The Opponent filed a Respondent's notice but otherwise made no further submissions and neither attended nor was represented at the appeal hearing. The Hearing Officer awarded the Opponent litigant in person costs of £2,791.73. Given that the Opponent will have needed to expend further effort in considering the Applicant's grounds of appeal, submitting his Respondent's notice and deciding whether further to respond to the Applicant's request to adduce additional evidence, I will order the Applicant to pay Mr. Oag the further sum of £48.75 in respect of his costs of this appeal.

Professor Ruth Annand, 12 October 2011

Mr. John Blanchard appeared on behalf of the Applicant

The Opponent did not appear and was not represented