

1 UK INTELLECTUAL PROPERTY OFFICE

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

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Tuesday, 7th January 2014

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Before:

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MR. GEOFFREY HOBBS QC
(Sitting as the Appointed Person)

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In the Matter of an Appeal to the Appointed Person

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-and-

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In the Matter of the Trade Marks Act 1994

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-and-

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In the Matter of the Trade Mark Applications Nos. 2602483 and
2602561 in the name of PETER COOKE

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14

-and-

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Opposition thereto by AVION SPIRITS LLC under Nos. 103202 and
103208

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(Transcript of the Stenograph notes of Marten Walsh Cherer
Ltd. 1st Floor, Quality House, 6-9 Quality Court,
Chancery Lane, London, WC2A 1HP.
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email: info@martenwalshcherer.com. www.martenwalshcherer.com)

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THE APPLICANT was not present and not represented.

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DECISION

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1 THE APPOINTED PERSON: On 25th November 2011 Mr. Peter Cooke
2 applied under number 2602483 to register the designation AVON
3 VODKA as a trade mark for use in relation to gin-based
4 beverages in class 33. He also applied under number 2602561
5 on 26th November 2011 to register the designation AVON GIN as
6 a trade mark for use in relation to such goods. Both
7 applications were opposed by Avion Spirits LLC on absolute
8 grounds under sections 3(1)(b), 3(1)(c) and 3(3)(b) of the
9 Trade Marks Act 1994 and on relative grounds raised under
10 section 5(2)(b) of the Act on the basis of the rights to which
11 it was entitled as proprietor of three earlier trade marks
12 containing or consisting of the word AVION registered in
13 respect of goods in class 33.

14 It is not necessary for present purposes to go into the
15 details of the grounds of opposition.

16 In both cases Mr. Cooke failed to defend the opposition
17 by filing a form TM8 and counterstatement within the period of
18 two months prescribed by Rule 18 of the Trade Marks Rules
19 2008. The Registry therefore notified him that it was minded
20 to treat his applications for registration as abandoned for
21 default of defence to the oppositions which had been filed on
22 behalf of Avion Spirits LLC.

23 Mr. Cooke was offered and accepted the opportunity to
24 make representations at an inter partes hearing as to why his
25 applications for registration should not be deemed abandoned.

1 The hearing took place on 25th September 2012 before
2 Mr. C.J. Bowen, acting on behalf of the Registrar of Trade
3 Marks. The course of events at that hearing and the outcome
4 of it are described in the hearing officer's decision letter
5 of the same date:

6 "1. I refer to the joint hearing which took place before
7 me today, by telephone conference, in connection with the
8 above oppositions. The hearing was held to consider the
9 preliminary view expressed most recently in the official
10 letter of 19 July 2012 i.e. that in the circumstances of these
11 cases the exercise of discretion to allow these proceedings to
12 continue was not appropriate. At the hearing, you represented
13 yourself; the opponent was represented by Ms. Sofia Arenal of
14 Mewburn Ellis LLP.

15 "2. As both parties attended the hearing there is no
16 need for me to record the submissions here in any detail.
17 Following a brief discussion in which I explained to you what
18 could and could not be achieved at the hearing (i.e. it was
19 not possible for you to amend the trade marks the subject of
20 the applications). You decided that you wished to abandon the
21 applications. Having explained to you that once taken such
22 a decision was irrevocable, I gave you an opportunity to
23 reflect upon this course of action. Having done so, you
24 reiterated your desire to abandon the applications. As a
25 consequence of that decision, the applications will be deemed

1 abandoned and, subject to the issues of costs (see below), the
2 proceedings will be considered closed. As the decision to
3 abandon the applications was your own (and as pointed out by
4 Ms. Arenal at the hearing), your decision cannot form the
5 basis of any subsequent appeal.

6 "3. The only remaining issue was costs. At the hearing,
7 Ms. Arenal indicated that her client was seeking costs in
8 respect of the proceedings to date, and, given the manner in
9 which Ms. Arenal felt you had conducted these proceedings, she
10 considered an award of actual costs was appropriate. In
11 response, you explained that you felt you had done your utmost
12 to resolve the issue and that any delay that had occurred had
13 resulted from inaction on the opponent's part.

14 "4. Awards of costs are governed by Annex A of Tribunal
15 Practice Notice 4 of 2007 (a copy of which is attached for
16 information). As the decision taken by you at the hearing
17 results in the opponent achieving its objectives, it is
18 entitled to an award of costs. Bearing the submissions at the
19 hearing in mind, the timing of your decision to abandon the
20 applications and using the TPN mentioned above as a guide,
21 I award costs to the opponent on the following basis:

22 £300 for the preparation of the notices of opposition
23 (this sum reflects the fact that although two notices of
24 opposition were filed they were substantially the same);

25 2 x £200 in respect of the official fees for filing the

1 oppositions i.e. £400 in total;

2 £300 in respect of Ms. Arenal's preparation for and
3 attendance at the hearing.

4 Total: £1000

5 "5. I order you to pay Avion Spirits LLC the sum of
6 £1000. This sum is to be paid within seven days of the expiry
7 of the appeal period or within seven days of the final
8 determination of this case if any appeal against this decision
9 is unsuccessful.

10 Appeal

11 "6. As explained at the hearing, under the provisions of
12 the Trade Marks Act 1994, either party may appeal against my
13 decision to either the 'Appointed Person' or to 'the court'.
14 An Appeal to the Appointed Person will need to be made on
15 a TM55 form (which incorporates the Statement of Grounds)
16 required by The Trade Marks (Amendment) Rules 2008.

17 "7. The period for appeal to the Appointed Person and to
18 the High Court in England and Wales is 28 days beginning with
19 the date of my decision that is a period ending on 22 October
20 2012".

21 Mr. Cooke appealed to an Appointed Person under section
22 76 of the Act in respect of the order for costs that had been
23 made against him. His grounds of appeal stated as follows:

24 "1. I made a Right Start Application for both trade
25 marks which were accepted and I paid the balance of £100 for

1 each. I was surprised and annoyed therefore to receive
2 opposition from 'Avion Spirits LLC'.

3 "2. I do not consider my complaints to Mr. Gittings and
4 John Alty were considered adequately. All I sought from
5 Mr. Gittings was 'general advice and guidance' as described in
6 Mr. Alty's letter.

7 "3. Prior to the hearing I agreed to amend my
8 applications to replace 'Avon' with 'Avonside' with Ms. Arenal
9 of Mewburn Ellis LLP. She did not make any suggestion about
10 cancellation of the hearing.

11 "4. At the hearing she asked for costs 'in excess of
12 £6,000'. It was then I realised why she did not suggest
13 cancelling the hearing.

14 "5. My comments in my letter of 8th August 2012 to John
15 Alty proved to be sadly 100% correct. These comments
16 concerned the avaricious and 'excessive charges' of trade mark
17 attorneys and their approach to clients and potential clients.

18 "6. I will not be paying anything to Mewburn Ellis".

19 On 24th October 2013 the parties were notified that the
20 appeal had been listed for hearing at 10.30 on Tuesday, 7th
21 January 2014, i.e. today.

22 Mr. Cooke responded on 25th October 2013, saying: "I am
23 mystified by your message and attached letter. I have no
24 recollection or record of appealing the decision concerning
25 these two applications. My decision to abandon my

1 applications and the fact this was irrevocable is recorded in
2 paragraph 2 of a letter from the IPO to me dated 25th
3 September 2012. I have nothing to appeal. Life and my
4 business has moved on to other pastures. How you proceed from
5 here is up to you but I will not be able to participate in any
6 hearing".

7 Later the same day the tribunal sent a scanned copy of
8 his notice and grounds of appeal attached to an e-mail
9 informing him that he was being treated as the appellant in
10 a pending appeal which would, if it was not withdrawn, proceed
11 to a determination under section 76 of the Trade Marks Act
12 1994 with a date set for the hearing being as previously
13 notified to him. He was informed that if he wished to
14 withdraw the appeal he should provide the tribunal with
15 confirmation in writing to that effect.

16 Nothing further was heard from Mr. Cooke until 23rd
17 December 2013 when he wrote saying that he had had no official
18 notification of the hearing and that it was his intention to
19 withdraw his appeal, but that he had changed his mind due to
20 the attitude of and intentions of the respondent. He said
21 that he now had absolutely no intention of paying anything
22 whatsoever to the respondents. He indicated for the first
23 time that he was not able to attend a hearing on 7th January
24 "as I am representing my wife at an employment tribunal on
25 that date". He went on to suggest that the hearing of 7th

1 January should be postponed.

2 The tribunal informed him twice in correspondence, on
3 23rd December 2013 and again on 3rd January 2014, that: "The
4 Appointed Person considers that your vague and unsubstantiated
5 statement about representing your wife at an Employment
6 Tribunal on that day provides no sufficient or proper basis
7 for: (i) disregarding the Notice of Hearing that was sent to
8 you in October 2013; or (ii) treating non-attendance by you at
9 that hearing as anything other than a voluntary act on your
10 part". He was informed that in the circumstances he should
11 proceed on the basis that the date for the hearing still
12 stood.

13 The listing for the hearing of the appeal has remained
14 in place. Mr. Cooke is not present and has provided no
15 written submissions for consideration in support of his
16 appeal. The respondent has elected not to attend on the basis
17 that it regards the hearing officer's decision on costs as
18 entirely reasonable and not liable to be reversed on appeal.

19 I am not satisfied that there is any sufficient or
20 proper basis for Mr. Cooke's non-attendance at the hearing of
21 his own appeal. It appears to me that the appeal, and more
22 recently his move to have it adjourned, are delaying tactics.
23 I do not think it would be an act of kindness to either party
24 to allow these proceedings to drag on any longer. In my view
25 the hearing officer was right to make an order for costs

1 against Mr. Cooke in respect of the proceedings in the
2 Registry. The sum that he awarded does not appear to me to
3 have been either disproportionate or unreasonable relative to
4 the work and expenditure with reference to which it was
5 assessed. The grounds of appeal disclose no basis for setting
6 aside or modifying the hearing officer's order for costs. For
7 the reasons I have given, the appeal will be dismissed.

8 In an e-mail sent on behalf of the respondent on 16th
9 December 2013 it was submitted that if the Appointed Person
10 was minded to change the award of costs in any way it should
11 be to increase it by £300 in view of the appellant's
12 subsequent conduct in first filing an appeal and then creating
13 an uncertainty as to whether or not it was being pursued,
14 incurring further cost for the respondent. I have not changed
15 the hearing officer's order for costs in any way. I also have
16 no reason to assume, or any information to the effect, that
17 the respondent has incurred costs of any real significance in
18 defence of the appeal. In the circumstances I make no order
19 as to costs in respect of the appeal.

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G. Hobbs QC
7th January 2014