

O-367-16

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION 3086487 & REGISTRATION 3086476
IN THE NAME OF DAVID ARCHIBALD CAMERON
OF THE FOLLOWING TRADE MARKS IN CLASSES 31 & 44:**

Supaflake

&

Superflake

AND

**OPPOSITION & INVALIDATION THEREOF (NOs 404167 & 500921) BY
TIMOTHY WILLIAM HOWSE**

Background and pleadings

1. This dispute concerns two trade marks which stand in the name of Mr David Archibald Cameron. The first is a registered trade mark (no 3086476) for the mark **Superflake** which was filed on 17 December 2014 and registered on 22 May 2015. It is registered in respect of the following goods and services:

Class 31: Agricultural, horticultural and forestry products; live animals; fresh fruits and vegetables, seeds, natural plants and flowers; foodstuffs for animals; malt; food and beverages for animals.

Class 44: Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services; dentistry services; medical analysis for the diagnosis and treatment of persons; pharmacy advice; garden design services.

2. The second is (or more accurately, was) a trade mark application for the mark **Supaflake** which was filed on 17 December 2014 and published for opposition purposes on 13 March 2015. The mark was sought to be registered for the same list of goods and services as set out above. My use of the word “was” reflects the fact that at the end of the proceedings, Mr Cameron withdrew this application for registration. In view of this, no substantive findings are required in relation to the application, although, given that the application was consolidated with the proceedings launched against Mr Cameron’s registered mark, it will be necessary to deal with the matter of costs and, also, I may need to refer to the application for context.

3. The claimant in these proceedings is Mr Timothy William Howse. He seeks the invalidation of Mr Cameron’s registration in respect of all of the goods and services for which it is registered. His ground for doing so is based on section 5(4)(a) of the Trade Marks Act 1994 (“the Act”). Mr Howse claims that he has used the sign **supaflake** since 1995 in southern England and “now throughout the UK”. The use is claimed to have been made in relation to wood shavings (baled and loose) for horse bedding. Mr Howse adds that he has recently asked a mill, Andersons, to produce

bales, in his printed supaflake bags, and that Mr Cameron is “applying to use the same name, on the same product, from the same manufacturing plant”.

4. Mr Cameron filed a counterstatement denying the claims. I note, in particular, the following:

- Mr Cameron has been selling wood shavings since 1981 and has been supplied by Alex Anderson in Bo’ness for around 18 years.
- Mr Cameron established the trade mark SUPACHIP in 2009.
- Mr Cameron’s latest product is a flake not a chip, hence the names **SUPERFLAKE/SUPAFLAKE**.
- Given that his mark is registered, and that it is to be used in advertisements and at trade shows, Mr Cameron, on his interpretation of section 5 of the Act, considers that it is “inconceivable that an almost identical name and product would be allowed to be used by another party”.
- Mr Cameron questions Mr Howse’s claim that his mark has been used throughout the UK as he is unaware of any use in Northern England or Scotland. He will also be interested to see the evidence to substantiate the use claimed since 1995.
- Mr Cameron denies what he considers as an inference that he stole the name. He notes that he applied for his registration before Andersons started producing and baling SUPAFLAKE for Mr Howse. He notes Mr Howse’s use of the word “recently” when he referred to getting a mill to produce his bales.

5. Mr Cameron has represented himself throughout the proceedings. Mr Howse initially represented himself, but during the course of the proceedings he appointed Berry Davies LLP to represent him. Both sides filed evidence accompanied by some written submissions. Neither side asked to be heard, nor were written submissions filed in lieu of a hearing.

Mr Howse's evidence

6. Mr Howse provided a witness statement dated 12 October 2015. It was headed in relation to the opposition proceedings, but as the proceedings were consolidated, it is to be treated as evidence in common. The following emerges:

- Mr Howse states that SUPAFLAKE has been used continuously as the name of “our” wood shaving based animal bedding since at least as early as 1995.
- The name was coined by Mr Howse’s grandfather and uncle.
- A company was set up in 1995 called J&S Cayford¹ (Mr Howse’s grandfather and uncle were named John and Stephen Cayford, respectively) which traded as SUPAFLAKE supplying baled and loose wood shavings for animal bedding.
- Annual sales of the SUPAFLAKE product are stated as being:
 - 2008 - £7,118
 - 2009 - £85,597
 - 2010 - £25,387
 - 2011 - £225,611
 - 2012 - £609,041
 - 2013 - £798,276
- Since 2008, £17,065 has been spent on advertising, including print advertising in magazines such as Horse & Hounds, Horse Mart, British Equine Directory and “various Hunt publications”. The figure is not broken down per year, nor are any examples of the advertising provided.
- Mr Howse states that the sign has been used throughout the UK. He identifies seven customers “amongst others”. Two appear to be individuals, the rest

¹ There is no evidence showing that this is a registered company.

businesses. The customers are based in Berkshire, Bourton-on-Water, Warwickshire, Surrey, Milton Keynes, Hants and Oxon.

- The earliest supply contracts for the raw materials were with Travis Perkins Feeder Mills in Swindon and with Gloucester Docks Mill. The latter mill, apparently, still supplies a limited amount of product today. Mr Howse states that the product was baled and packaged and branded with the SUPAFLAKE name in a distinctive green and yellow bag. A picture of the branding is shown in Exhibit TWH 1, as follows:



- Mr Howse's grandfather and uncle retired from the business in 2001. Mr Howse states that he then took over the business continuing to source shavings from the mill in Gloucester, the Swindon mill having closed. Further contracts with mills in Southampton and Ireland were signed in 2003 and 2006 respectively.
- In 2011 Mr Howse entered a contract with a Belgian company called Bardoel Hippofan to supply large wood shavings which he continued to sell as SUPAFLAKE. This continued until 18 April 2014 when production ceased due to a fire at the Belgian plant.

- In view of the above, Mr Howse then approached Alex Anderson to secure continued supply of product and to make up the shortfall in his supply chain. Mr Howse states that he had been using Alex Anderson since 2009.
- The move to Alex Anderson was accompanied by a decision to “freshen” the packaging design. The design that was commissioned is shown in Exhibit TWH 2 which I depict below (three different colour version are presented, but it is only necessary to depict one):



- The above design was created by MBM Europe Limited. An invoice from them to “William Howse, Cotswold Trading Limited” is provided in Exhibit TWH3 dated 30 November 2014. The same exhibit also provides an email exchange about the artwork between a representative of MBM and someone called Sylvia using an email address at equisupplies.co.uk.
- Exhibit TWH4 contains an email exchange between Mr Howse (using an equisupplies.co.uk email) and a representative of a business called Coveris, who Mr Howse explains is a packaging manufacturer. The email is dated 11 December 2014. Mr Howse sent a PDF file (which he states is a copy of the new design) which is responded to the same day with the statement from Coveris of:

“This looks ok to me and I will be going to see Alan Anderson [of Alex Anderson] to get his “tick in the box” in the next day or two. I will assume you are happy with this unless I hear otherwise.”

- Mr Howse states that Mr Cameron is also a customer of Alex Anderson. Mr Anderson apparently advised Mr Howse that Mr Cameron would have seen the above design. This statement is hearsay. There is also very little basis on which the hearsay statement is made in terms of why Mr Cameron would have seen the design, and, if he did, when. Mr Howse says it cannot be coincidental that Mr Cameron filed for the subject trade mark on 17 December 2014, a very short time after the packaging was sent (packaging which Coveris was planning to show Mr Anderson).
- Exhibit TWH 5 contains domain name information for supaflake.co.uk which was registered to J and S Cayford on 11 November 1999.
- Exhibit TWH 6 contains archive web prints as follows, which Mr Howse states show that the SUPAFLAKE name has been in use for many years:
 - A print from the website supaflake.co.uk dated 21 November 2003. It is headed SUPAFLAKE WOODSHAVINGS. Despite apparently retiring in 2001, an email address of j.cayford@hotmail.com is used as the contact point.
 - A similar print from the same website dated 4 May 2007 with the same contact point. There is, though, no use of SUPAFLAKE on this page, other than in the domain name and a copyright notice reading “Copyright © 2000 SUPAFLAKE WOODSHAVINGS”.
 - A print from the website equisupplies.co.uk dated 14 May 2012. The print is about horse bedding and what this business can supply. The main product on the page is called SAFEMIX. However, at the bottom of the page it is stated that “Other products available are White Woodshavings, Supaflake Woodshavings and Flax bedding”.
 - A similar print to the above from 15 February 2013. The only product depicted is a product called HIPPOFAN. However, Supaflake is again listed at the bottom of the page as another product that is available.

- An identical print to that above, albeit this is dated 27 May 2014.
- Exhibit TWH 7 contains what Mr Howse describes as an early bank invoice which was routinely used by his “successors” (I assume Mr Howse means predecessors) in title. It is headed with the word Supaflake in an italic script. Mr Howse notes that the telephone number is an old dialling code which was replaced in 1995. He adds that the invoice was printed by a small village printer called Tylor & Son who have not traded since at least as early as 2002 (a print is provided in Exhibit TWH 8 from the website Duedil.co.uk showing that its last accounts were made up in 2000).
- Mr Howse believes that the longstanding use made by him and his family means that SUPAFLAKE is well known especially to buyers of animal bedding in the UK and is uniquely associated with his family and in particular with his business which trades as Equisupplies.

7. In a second witness statement dated 26 November 2015, headed in relation to the invalidation proceedings, much of the same evidence is provided. The witness statement contains some submissions which I bear in mind but will not summarise here. I additionally note:

- Mr Howse specifically states that he is the successor in title to the business known as J&S Crayford, trading as SUPAFLAKE.
- Mr Howse states that he is the owner of Cotswold Trading Limited which also trades as Equisupplies. Publically available information on the Companies House website shows that Cotswold Trading Limited was incorporated in July 2008.

Mr Cameron's evidence

8. Mr Cameron filed a witness statement dated 22 February 2016. He categorically denies knowing that Mr Howse (or any of his connected businesses) had any

intention of using, or had any association with, the name Supaflake. He gives hearsay evidence that Mr Alex Anderson and Mr Alan Anderson now accept this. In exhibits 1, 2, 3 & 4 he provides evidence of memos and business notes which, he says, date to 2009 and which contain handwritten references to his plan to use Superflake/Supaflake.

9. Mr Cameron notes that even on Mr Howse's own dates, they had 20 years to register the mark but did not do so. He states that he applied for his mark(s) in good faith. He finds the suggestion that he would want someone else's name and risk alienating his supplier (Andersons) to be preposterous.

10. In his accompanying written submissions, Mr Cameron makes a number of criticisms of Mr Howse's evidence. I will return to some of them shortly.

Section 5(4)(a) – passing off

11. Section 5(4)(a) of the Act reads:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b)...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

12. Halsbury's Laws of England (4th Edition) Vol. 48 (1995 reissue) at paragraph 165 provides the following analysis of the law of passing-off. The analysis is based on guidance given in the speeches in the House of Lords in *Reckitt & Colman*

Products Ltd v. Borden Inc. [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731. It is (with footnotes omitted) as follows:

“The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

(1) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House’s previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of passing off, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.”

13. Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:

“To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

(a) the nature and extent of the reputation relied upon;

(b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;

(c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;

(d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances."

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action."

The relevant date

14. In the *SWORDERS* case ², Mr Allan James, acting for the Registrar, considered the relevant date for the purposes of section 5(4)(a) of the Act and concluded that:

“Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.”

15. This analysis was subsequently approved by Mr Daniel Alexander QC as the Appointed Person in *Advanced Perimeter Systems Limited v Multisys Computers Limited*³. Kitchen L.J. made similar findings in relation to the relevant date for determining the validity of a Community Trade Mark in analogous circumstances: see *Maier v ASOS*⁴. The filing date of the subject trade mark is 17 December 2014. There is no evidence of any actual use by Mr Cameron before the filing date. Consequently, that is the only date that need be considered.

Intention

16. The intention of the party against whom passing-off is alleged may be a relevant factor. In *Office Cleaning Services Limited v Westminster Window & General Cleaners Limited* [1946] RPC 39 (HOL), Lord Simonds stated that:

² BL O-212-06

³ BL O-410-11

⁴ [2015] EWCA Civ 377

“Confusion innocently caused will yet be restrained. But, if the intention to deceive is found, it will be readily inferred that deception will result. Who knows better than the trader the mysteries of his trade.”

17. Both sides have commented upon the intention of Mr Cameron, with Mr Howse highlighting the timing of his application, it being filed shortly after Mr Howse’s new packaging design was to be shown to his suppliers at Andersons, a business which also supplies Mr Cameron. Both Mr Howse and Mr Cameron have given hearsay evidence in relation to something which Alan/Alex Anderson told them. The evidence to support that Mr Cameron intended to pass-off is flimsy. The hearsay evidence provided by Mr Howse lacks detail. Hearsay evidence of this nature is also limited in weight. The timing point is speculative. Mr Cameron has provided his own hearsay evidence (from the same source) which, whilst similarly limited in weight, at least counters that of Mr Cameron. He also provides some business memos which, whilst they are not altogether clear, support the proposition that he has been considering the SUPERFLAKE/SUPAFLAKE name for some time. Such a name would be a natural extension of his previous product name. I therefore accept Mr Cameron’s evidence that when he filed the subject trade mark he was not aware of any use of SUPAFLAKE by Mr Howse (or his related businesses) and, therefore, there was no intention to pass off.

18. Regardless of the above, passing-off that is unintentional must still be considered. The first stage is to consider whether Mr Howse had the requisite goodwill at the relevant date.

Goodwill

19. In *Inland Revenue Commissioners v Muller & Co’s Margarine Ltd* [1901] AC 217 (HOL), the Court stated:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing

which distinguishes an old-established business from a new business at its first start.”

20. In *Hart v Relentless Records* [2003] FSR 36, Jacob J. (as he then was) stated that:

“62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in BALI Trade Mark [1969] R.P.C. 472. The whole point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used ‘but had not acquired any significant reputation’ (the trial judge’s finding). Again that shows one is looking for more than a minimal reputation.”

21. However, a small business which has more than a trivial goodwill can protect signs which are distinctive of that business under the law of passing-off even though its reputation may be small. In *Stacey v 2020 Communications* [1991] FSR 49, Millett J. stated that:

“There is also evidence that Mr. Stacey has an established reputation, although it may be on a small scale, in the name, and that that reputation preceded that of the defendant. There is, therefore, a serious question to be tried, and I have to dispose of this motion on the basis of the balance of convenience.”

See also: *Stannard v Reay* [1967] FSR 140 (HC); *Teleworks v Telework Group* [2002] RPC 27 (HC); *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590 (COA)

22. In terms of what is required to establish goodwill, I note that in *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

“27. There is one major problem in assessing a passing of claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

23. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J. stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be

answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

24. Whilst goodwill exists in a business, as opposed to a mark or name per se, the name which is relied upon by the opponent must be associated with, and be distinctive of, that business. Goodwill relates essentially to custom. It is therefore not a good start that Mr Howse has failed to provide a single invoice showing sales of any goods, let alone the more relevant sales of SUPAFLAKE goods. He gives the names of seven customers, but no more information than that such as when, and how much, product they purchased. Further, whilst Mr Howse states that advertising has occurred in various publications, this does little to strengthen the opponent's position because:

- i) It is not stated whether such advertising is for the business as a whole or whether it is for SUPAFLAKE products alone.
- ii) If the advertising did feature SUPAFLAKE in some capacity, the impact of the name cannot be assessed because not a single example of the claimed advertising has been provided.
- iii) The advertising spend is quite low given that the claimed figure of £17,000 is spread over a period in excess of 6 years (the advertising spend is said to date from 2008 - I have taken the end point to be the date on which Mr Howse completed his witness statement).

25. Various archive web-prints have been provided. Whilst most contain the word SUPAFLAKE, such use per se is limited in impact given that most of it is detailed in smaller font at the bottom of the webpage in a list of products that are also available. No prints are provided showing that the website actually lists SUPAFLAKE in the

products area of the website from which the goods may be purchased, or at least their attributes identified. I note that SUPAFLAKE does appear more prominently on the older archive webpages (or at least one of them), however, these date to a time prior to the first sales figures provided by Mr Howse. The first sales figures from 2008 are, on the face of it, low, equating to just over £7000. Who knows what sales were being made at the even earlier dates, sales which could have been extremely minimal. It is also noteworthy that on these earlier web-prints, J Cayford is given as the email address to contact with regard to any enquiries, despite Mr Howse's evidence that J Cayford retired in 2001. This brings in to doubt whether the business was actually trading through the website at the respective points in time. The website evidence will have had minimal, if any, impact.

26. Mr Howse has, though, stated that sales have been made. The figures rise from just over £7000 in 2008 to just under £800,000 in 2013. Certainly, figures which rise to the amount suggested by Mr Howse are consistent with a goodwill of a more than a trivial level. However, Mr Cameron has called into question the figures provided. He firstly highlights that there is no explanation for the sudden increase in sales, but this, in and of itself, is not a strong reason to doubt the figures. However, he goes on to express his concern that the figures could relate to all bedding provided by the business, as opposed to SUPAFLAKE sales. This is not an unreasonable challenge to make, particularly bearing in mind what I have already described as the minimal impact of the website(s), the lack of any advertising examples and the lack of any sales invoices. There is also a further reason flagged by Mr Cameron which at least brings the evidence provided by Mr Howse into question. Between 2011 and April 2014 Mr Howse was supplied (at least in part) by a Belgian company called Bardoel Hippofan. The relationship ended due to a fire at the Belgian plant. Mr Howse states that the shavings supplied to him were sold as SUPAFLAKE. This, however, appears to contradict the website evidence which shows that EQUISUPPLIES were promoting wood shavings branded as HIPPOFAN. Whilst it is not impossible for Mr Howse's business to sell the Belgian companies own HIPPOFAN wood shavings whilst also selling wood shavings provided by the Belgian company to be sold under the name SUPAFLAKE, the whole picture certainly leaves me with more questions than answers. This is particularly so considering that Mr Howse had the opportunity to file reply evidence in order to provide corroborative documentation or, at least, to

explain the position himself. He did not avail himself of such an opportunity. This is important given the words of Mr Richard Arnold QC sitting as the Appointed Person in *Extreme* BL O/161/07 where he stated:

"36. Where, however, evidence is given in a witness statement filed on behalf of a party to registry proceedings which is not obviously incredible and the opposing party has neither given the witness advance notice that his evidence is to be challenged nor challenged his evidence in cross-examination nor adduced evidence to contradict the witness's evidence despite having had the opportunity to do so, then I consider that the rule in *Brown v Dunn* applies and it is not open to the opposing party to invite the tribunal to disbelieve the witness's evidence.

37. Despite this, it is not an uncommon experience to find parties in registry hearings making submissions about such unchallenged evidence which amount to cross-examination of the witness in his absence and an invitation to the hearing officer to disbelieve or discount his evidence. There have been a number of cases in which appeals have been allowed against the decisions of hearing officers who have accepted such submissions. Two recent examples where this appears to have happened which were cited by counsel for the proprietor are *Score Draw Ltd v Finch* [2007] EWHC 462 (Ch), [2007] BusLR 864 and *EINSTEIN Trade Mark* (O/068/07). Another recent example is *Scholl Ltd's Application* (O/199/06). I consider that hearing officers should guard themselves against being beguiled by such submissions (which is not, of course, to say that they should assess evidence uncritically)."

27. Even without the challenges/questions raised by Mr Cameron, I would have been able to look at Mr Howse' evidence critically. Some of the issues Mr Cameron flagged will no doubt have led me to having reservations about the evidence of Mr Howse. However, given the questions that have been raised, questions which have failed to facilitate any form of response, I consider it right to treat the sales figures (in so far as they are claimed to relate solely to the sale of SUPAFLAKE products) as lacking credibility. They are far from consistent with the rest of the evidence. As I have already said, the website evidence and advertising evidence is not compelling.

On the basis of the evidence provided, I am not satisfied that the opponent had at the relevant date a goodwill of more than a trivial nature associated with the sign SUPAFLAKE. **The claim, therefore, fails at the first hurdle and the invalidation action is dismissed.**

28. For sake of completeness, I make the following further observations:

- i) Whilst Mr Howse has commented upon the historical use of SUPAFLAKE by J&C Cayford, I do not consider that this assists given the lack of evidence showing the extent of use and, thus, whether any goodwill that did exist was of more than a trivial level.
- ii) Mr Cameron commented upon the different entities referred to in the evidence of Mr Howse. Mr Howse is himself the applicant for invalidation, but he operates through a company called Cotswold Trading Limited, an entity which trades as EQUISUPPLIES. The latter name is just a trading name so this is not relevant. What does matter, though, is whether any goodwill would have accrued to Mr Howse personally or whether it would accrue to Cotswold Trading Limited. Given my substantive finding, the point is academic. However, in case of appeal, I would observe that in the normal course of events the goodwill generated through a company would accrue to that company not to an individual associated with that company, even if they are the sole shareholder. Thus, this may have represented a further reason that Mr Howse's application for invalidation would have failed. If an appeal is lodged, Cotswold Company Trading may wish to consider making a request to join the proceedings. Mr Howse could, of course, have generated goodwill in his own name from the point at which he took over the business of J&C Cayford to the point at which the business was conducted through Cotswold Trading Limited, however, this is not particularly pertinent due to the lack of evidence from before 2008, as per my comments in the preceding paragraph.

Conclusion

29. The invalidation fails and the registration may remain on the register.

Costs

30. Mr Cameron has succeeded and is entitled to a contribution towards his costs. I take into account that Mr Cameron was not legally represented and would not, therefore, have incurred any legal fees. Also, although two cases were involved for much of the proceedings, the evidence etc was essentially duplicated. My assessment is set out below:

Preparing statements and considering the other side's statements - £150

Filing/considering evidence and written submissions - £300

Total - £450

31. I order Mr Timothy William Howse to pay Mr David Archibald Cameron the sum of £450 within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 3rd day of August 2016

Oliver Morris

For the Registrar,

The Comptroller-General