

O-377-19

TRADE MARKS ACT 1994
IN THE MATTER OF REGISTRATION No. 3172311
STANDING IN THE NAME OF
LYNDON JAMES WADDINGHAM
AND
IN THE MATTER OF A REQUEST FOR A DECLARATION
OF INVALIDITY THERETO UNDER No.501745
BY DRAGON CONSTRUCTION NORTH WALES LIMITED

AND
IN THE MATTER OF APPLICATION No. 3192987
BY CARYS HUGHES JONES
TO REGISTER IN CLASSES 37
THE TRADE MARK
DRAGON CONSTRUCTION

AND
IN THE MATTER OF OPPOSITIONS THERETO
UNDER No. 60000578

JOINTLY BY
LYNDON JAMES WADDINGHAM &
RED DRAGON CONSTRUCTION LIMITED


AND
IN THE MATTER OF APPLICATION No. 3193019
BY CARYS HUGHES JONES
TO REGISTER IN CLASSES 37
THE TRADE MARK



AND
IN THE MATTER OF OPPOSITIONS THERETO
UNDER Nos. 60000579
JOINTLY BY
LYNDON JAMES WADDINGHAM & RED DRAGON CONSTRUCTION LIMITED

BACKGROUND

1) The following trade mark is registered in the name of Lyndon James Waddingham:

Mark	Number	Filing & registration date	Class	Specification
 <p>A series of two trade marks</p>	3172311	30.06.16 14.10.16	37	Construction, repair, maintenance and installation services of buildings; Construction of buildings and other structures.

2) By an application dated 8 May 2017 Dragon Construction North Wales Limited (hereinafter DCL) applied for a declaration of invalidity in respect of this registration. The grounds are, in summary:

- a) DCL contends that it has used the mark shown below in respect of “construction, repair, maintenance and installation or services of buildings; construction of buildings and other structures” since May 2014 and has considerable goodwill in the mark. DCL contends that use of the mark in suit will cause misrepresentation and damage through loss of sales or detriment to the repute and distinctive character of its marks. The mark in suit therefore offends against section 5(4)(a) of the Act.
- b) The registered proprietor of the mark in suit worked for DCL as a self-employed labourer between March 2015 and May 2016 and so was aware of DCL’s mark and its use. The mark in suit therefore offends against section 3(6) of the Act as it was registered in bad faith.



3) Mr Waddingham provided a counterstatement to the invalidity action, dated 25 October 2017, in which he claims that he had the logo designed in 2015 and that he was in partnership with Mr Jones. The issue of whether there was a partnership is apparently the subject of separate legal proceedings. He claims that he has been the subject of other false allegations made by Mr Jones and hence he is operating in North Yorkshire and claims that there is no danger of confusion as Mr Jones is based in North Wales.

4) On 24 October 2016, Carys Hughes Jones (hereinafter CHJ) applied to register the trade mark “Dragon Construction” and the device mark shown on page one above, both in respect of the following services in class 37: Construction.

5) The applications were examined and accepted, and subsequently published for opposition purposes on 23 December 2016 in Trade Marks Journal No.2016/052 (3192987) and 13 January 2017 in Trade Marks Journal No.2017/002 (3193019)

6) On 13 February 2017 Red Dragon Construction Ltd (hereinafter RDCL) filed identical notices of opposition. The opponent claims to be the proprietor of the trade marks shown in paragraph 1 above. There has been an assignment from RDCL to Mr Waddingham. The opposition is based upon section 5(2)(b) as it states that the marks and services are identical and also that the companies “do identical work in the same area. Although our head office is in Yorkshire our registered address is in Wales.”

7) On 21 April 2017 CHJ filed two identical counterstatements, subsequently amended, basically denying the ground of opposition. She points out that the registered mark has a slightly different name to that of Mr Waddingham’s company, and that as well as trading as Red Dragon Construction Limited he is also trading as Dragon Construction. She states she and her husband have been trading in the area under the name Dragon Construction for many years, and have been using the logo since 2014.

8) Both sides filed evidence. Both sides ask for an award of costs. Neither side wished to be heard; neither side filed written submissions. In the instant case, Mr Waddingham and his wife are the driving force /controlling minds behind RDCL, whilst Mr and Mrs Hughes Jones are the driving force/controlling minds behind DCL. I also note that the individuals on both sides accepted liability for costs in all of these consolidated cases.

RDCL's Evidence

9) RDCL provided a witness statement, dated 29 March 2018, by Lyndon Waddingham. He states that he did not work for Mr & Mrs Jones, or Dragon Construction but instead was a partner in the business. Following a heated discussion with Mr Jones in May 2016 he ceased working with Dragon Construction and started his company RDCL in July 2016. He states that the logo was designed for him, by Sarah Wray. He attaches the following:

- Pages 1-7: Consists of a statement drafted for the court case between Mr Waddingham and Mr Jones, but which is unsigned, undated and unwitnessed. In the statement he claims that when he met Mr Jones in late 2014 Mr Jones was not in the building industry and that the family business run by Mr Jones' brother had entered into bankruptcy in 2012. Mr Waddingham claims that Mr Jones was giving him driving lessons and that he (Mr Waddingham) had a maintenance business as a sole trader called LW Property Maintenance. It is claimed that the two men discussed forming a joint venture on an equal basis. It is claimed that Mr Jones was inexperienced in building work and so would carry out the office functions whilst Mr Waddingham would do the actual building work. He states that the partnership was formed in March 2015 and the first job was some work that Mr Jones arranged in a carpet showroom. The partnership is then said to have purchased some land to develop. Mr Jones dealt with the legal side whilst Mr Waddingham states that he provided half of the necessary cash and was also dealing with signage for vans and advertising. He contends that his phone number was, and still is, on the leaflets etc used by Dragon Construction. He states that the reason why Mr Jones broke up the partnership was because he accused Mr Waddingham of having an affair with an employee of a client. Mr Waddingham states "I vigorously deny that I was having an extra marital affair at that time". He states that Mr Jones then made a number of accusations against Mr Waddingham to various clients in order to blacken his name and ensure that the clients

stayed with Dragon Construction. Mr Waddingham states that he is not very well educated and no formal agreement was ever signed because he trusted Mr Jones.

- Pages 8-10: Copies of invoices on RDCL headed paper for work carried out in 2016 in North Wales.
- Pages 11-12: Consists of a letter, dated 2 June 2016, from Sarah Wray (a freelance graphics artist) and is addressed to “Whom it may concern”. It shows a logo very similar to that registered. The only differences being that the one on Ms Wray’s letter has a dragon logo either side of the “roofs”, and the houses have no windows in them. The mark said to have been designed by Ms Wray also has the strapline “Building services & property renovation specialist” underneath the words “Adeiladwyr Lleol”. The letter also features a hand-written amendment which states “Artwork originated March 2015” and is apparently signed by Ms Wray. Although there seem to be differences between the two signatures. Also attached is a copy of an email dated 12 March 2015 which shows the logo as registered (apart from the presence in the email logo of a dragon device either side of the houses. Overleaf on the email are images of what the logo would look like on a van and a cost of £195 to sign a van in the manner indicated.
- Pages 13-17: Copies of emails, including one dated 12 March 2015, from Mr Waddingham to Mr Jones asking his views on an attached flyer for Dragon Construction. During the exchanges with the printing company, also on 12 March 2015, Mr Waddingham refers to Mr Jones as his “business partner”.

DCL’S EVIDENCE

10) DCL filed four witness statements. The first is a joint witness statement, dated 9 April 2018, by Steven Jones and Carys Hughes-Jones. Mr Jones states that he is the Managing Director of DCL and that the business was started by his father some 35 years ago. The company employed Mr Jones and his two brothers. He states that after his father retired he took over the running of the company and rebranded it as Dragon Construction in 2014. He also runs a driving tuition school called Dragon Drive and it was through this that he met Mr Waddingham whilst giving him driving lessons. He states that at that time Mr Waddingham had his own maintenance business but was not getting a lot of work. Mr Jones states that

he was able to offer Mr Waddingham some work as a self-employed labourer. In mid-2015 Mr Jones states that he began to hear rumours that Mr Waddingham was claiming to have a significant role in running the company and even represented himself as the Managing Director of the company to a container hire firm. When confronted with these concerns Mr Waddingham denied representing himself in this manner. Mr Jones states that Mr Waddingham purchased clothes with the company logo on for himself, had business cards printed up and even had his van sign-written all with the company name and logo, without seeking Mr Jones' permission. When questioned Mr Waddingham, it is claimed, simply stated that the more work the company got the better it was for him. It was made clear to Mr Waddingham that the company would not reimburse these un-authorized purchases, and he accepted the situation. In September 2015 Mr Waddingham was assaulted by a member of the public whilst working on a client's premises, due to issues in his personal life. Mr Waddingham was removed from the site and the relationship between the parties began to break down. In June 2016 Mr Waddingham was informed that he would no longer be offered work by DCL. Shortly after, Mr Waddingham set up his own company RDCL although he did not alter the livery on his van which still referred to DCL. Following this it is alleged that Mr Waddingham registered the mark "Dragon construction" and then sent "cease and desist" letters to DCL, he also approached existing DCL client's and suppliers informing them that DCL was trading illegally and posted disparaging comments regarding the legitimacy of DCL on social media, including suggesting that DCL's Public Liability Insurance was void because they were "illegally" trading under the DCL name. Mr Jones states that DCL changed their logo only for Mr Waddingham to file a trade mark application to register it (UK 3190589). DCL changed its logo again and sought to register it and it is subject to opposition by RDCL. Mr Jones states that Red Dragon Construction (company number 10260333) was dissolved on 7 November 2017, but another company (DC) Dragon Construction (company number 1046091) was registered on 3 November 2017. He provides a number of exhibits.

- Exhibit 1: A cheque dated 27 May 2014, which shows the account name as Mr S J Jones t/a Dragon Construction.
- Exhibit 2: An email dated 17 October 2015 from Lockload Storage stating that Mr Waddingham had claimed to them that he was the Managing Director of DCL. This

email was copied to Mr Waddingham by Mr Jones, and in reply Mr Waddingham denied ever making such a claim.

- Exhibit 3: Copies of emails between the two parties which makes it clear that DCL attempted to get Mr Waddingham to remove the DCL decals from his van and to stop representing himself as DCL. Mr Waddingham states that he will remove the decals in due course and states that he is getting new business cards and stationery printed. He denies representing RDCL as a renaming of DCL. Reference is made by Mr Jones to “his” or “my” business when referring to DCL and asking Mr Waddingham to stop linking “his” new venture (RDCL) with DCL. At no point during these exchanges in July 2016 does Mr Waddingham claim to have been a partner or officer of DCL.

11) The other three witness statements are all by employees or ex-employees of Dragon Construction. The statements are all dated 13 April 2018 and by Robert Johnson, Richard Jones and David Jones. All three men state that Lyndon Waddingham worked on site with them as a labourer employed by DCL during the period February 2015 to October 2015. They all identify Stephen Jones as the owner of DCL.

12) That concludes my summary of the evidence filed, insofar as I consider it necessary.

DECISION

13) The invalidity is brought under Section 47 of the Trade Marks Act 1994 (“The Act”) which reads:

“47. - (1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

(2) The registration of a trade mark may be declared invalid on the ground-

- (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or
- (b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(2A) But the registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

- (a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,
- (b) the registration procedure for the earlier trade mark was not completed before that date, or
- (c) the use conditions are met.

(2B) The use conditions are met if –

- (a) within the period of five years ending with the date of the application for the declaration the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) it has not been so used, but there are proper reasons for non-use.

(2C) For these purposes –

- (a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(2D) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (2B) or (2C) to the United Kingdom shall be construed as a reference to the European Union.

(2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c)

(3) An application for a declaration of invalidity may be made by any person, and may be made either to the registrar or to the court, except that-

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(4) In the case of bad faith in the registration of a trade mark, the registrar himself may apply to the court for a declaration of the invalidity of the registration.

(5) Where the grounds of invalidity exists in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made.

Provided that this shall not affect transactions past and closed.”

14) The first ground of invalidity is under Section 3(6) which reads:

“3.(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

15) The law in relation to section 3(6) of the Act (“bad faith”) was summarised by Arnold J. in *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch), as follows:

“130. A number of general principles concerning bad faith for the purposes of section 3(6) of the 1994 Act/Article 3(2)(d) of the Directive/Article 52(1)(b) of the Regulation are now fairly well established. (For a helpful discussion of many of these points, see N.M. Dawson, “Bad faith in European trade mark law” [2011] IPQ 229.)

131. First, the relevant date for assessing whether an application to register a trade mark was made in bad faith is the application date: see Case C- 529/07 *Chocoladenfabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* [2009] ECR I-4893 at [35].

132. Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2008] EWHC 3032 (Ch), [2009] RPC 9 at [167] and cf. Case C-259/02 *La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 at [31] and Case C-192/03 *Alcon Inc v OHIM* [2004] ECR I-8993 at [41].

133. Thirdly, a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. The standard of proof is on the balance of probabilities but cogent evidence is required due to the seriousness of the allegation. It is not enough to prove facts which are also consistent with good faith: see *BRUTT Trade Marks* [2007] RPC 19 at [29], *von Rossum v Heinrich Mack Nachf. GmbH & Co KG* (Case R 336/207-2, OHIM Second Board of Appeal, 13 November 2007) at [22] and *Funke Kunststoffe*

GmbH v Astral Property Pty Ltd (Case R 1621/2006-4, OHIM Fourth Board of Appeal, 21 December 2009) at [22].

134. Fourthly, bad faith includes not only dishonesty, but also "some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined": see *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 at 379 and *DAAWAT Trade Mark* (Case C000659037/1, OHIM Cancellation Division, 28 June 2004) at [8].

135. Fifthly, section 3(6) of the 1994 Act, Article 3(2)(d) of the Directive and Article 52(1)(b) of the Regulation are intended to prevent abuse of the trade mark system: see *Melly's Trade Mark Application* [2008] RPC 20 at [51] and *CHOOSI Trade Mark* (Case R 633/2007-2, OHIM Second Board of Appeal, 29 February 2008) at [21]. As the case law makes clear, there are two main classes of abuse. The first concerns abuse vis-à-vis the relevant office, for example where the applicant knowingly supplies untrue or misleading information in support of his application; and the second concerns abuse vis-à-vis third parties: see *Cipriani* at [185].

136. Sixthly, in order to determine whether the applicant acted in bad faith, the tribunal must make an overall assessment, taking into account all the factors relevant to the particular case: see *Lindt v Hauswirth* at [37].

137. Seventhly, the tribunal must first ascertain what the defendant knew about the matters in question and then decide whether, in the light of that knowledge, the defendant's conduct is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people. The applicant's own standards of honesty (or acceptable commercial behaviour) are irrelevant to the enquiry: see *AJIT WEEKLY Trade Mark* [2006] RPC 25 at [35]-[41], *GERSON Trade Mark* (Case R 916/2004-1, OHIM First Board of Appeal, 4 June 2009) at [53] and *Campbell v Hughes* [2011] RPC 21 at [36].

138. Eighthly, consideration must be given to the applicant's intention. As the CJEU stated in *Lindt v Hauswirth*:

"41. ... in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration.

42. It must be observed in that regard that, as the Advocate General states in point 58 of her Opinion, the applicant's intention at the relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case.

43. Accordingly, the intention to prevent a third party from marketing a product may, in certain circumstances, be an element of bad faith on the part of the applicant.

44. That is in particular the case when it becomes apparent, subsequently, that the applicant applied for registration of a sign as a Community trade mark without intending to use it, his sole objective being to prevent a third party from entering the market.

45. In such a case, the mark does not fulfil its essential function, namely that of ensuring that the consumer or end-user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those of different origin, without any confusion (see, inter alia, Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 48)."

16) I take into account the comments in *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited* and others [2009] RPC 9 (approved by the COA in [2010] RPC 16), where Arnold J. stated that:

"189. In my judgment it follows from the foregoing considerations that it does not constitute bad faith for a party to apply to register a Community trade mark merely because he knows that third parties are using the same mark in relation to identical goods or services, let alone where the third parties are using similar marks and/or

are using them in relation to similar goods or services. The applicant may believe that he has a superior right to registration and use of the mark. For example, it is not uncommon for prospective claimants who intend to sue a prospective defendant for passing off first to file an application for registration to strengthen their position. Even if the applicant does not believe that he has a superior right to registration and use of the mark, he may still believe that he is entitled to registration. The applicant may not intend to seek to enforce the trade mark against the third parties and/or may know or believe that the third parties would have a defence to a claim for infringement on one of the bases discussed above. In particular, the applicant may wish to secure exclusivity in the bulk of the Community while knowing that third parties have local rights in certain areas. An applicant who proceeds on the basis explicitly provided for in Article 107 can hardly be said to be abusing the Community trade mark system.”

17) I also take into account the comments of Mr Arnold Q.C (as he was) when acting as the Appointed Person in *Extreme* BL/161/07 where he commented on the issue of unchallenged evidence and cross examination:

“Unchallenged evidence

33. *Phipson on Evidence* (16th ed) states at paragraph 12-12:

In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases as it does in criminal. In general the CPR does not alter that position.

This rules [sic] serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficult in submitting that the evidence should be rejected.

However the rule is not an inflexible one...

34. The authority cited in support of this statement of the law is the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67. The relevant passages from the speeches are set out in the judgment of Hunt J in *Allied Pastoral Holdings v Federal Commissioner of Taxation* (1983) 44 ALR 607, the material parts of which are quoted in the judgment of the Court of Appeal in *Markem Corp v Zipher Ltd* [205] EWCA Civ 267, [2005] RPC 31 at [59]-[60].

35. In my judgment the learned editors of *Phipson* are correct to say that the rule is not an inflexible one. There are at least two well-established exceptions to it. The first is that, as the speech of Lord Herschell LC in *Browne v Dunn* makes clear, it may not be necessary to cross-examine on a point if the witness has been given full notice of it before making his statement. As I pointed out in *BRUTT Trade Marks* [2007] RPC 19 at [23], this may be significant in registry proceedings where evidence is given sequentially. The second is that a court is not obliged to accept a witness's evidence in the absence of cross-examination if it is obviously incredible: see *National Westminster Bank plc v Daniel* [1993] 1 WLR 1453.

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).”

18) I note that Mr Waddingham has, other than by assertion, offered no evidence that he was a partner or even an officer of DCL. He has not fully responded to the various assertions in the evidence of DCL, in particular to the evidence of the cheque book and the witness statements of co-workers during the relevant period. The fact that he has not challenged or even denied the evidence of the three independent witnesses that he was employed alongside them as a labourer by DCL and that Mr Jones was the owner of the company.

19) I therefore have come to the conclusion that Mr Waddingham was indeed engaged as a freelance labourer by DCL during the period October 2014 to July 2015 and would have been well aware of the logo and name used by the company. Following his dismissal it would appear that Mr Waddingham decided to form his own company using the identical or virtually identical logo and a name that is highly similar, whilst working in exactly the same geographical area and business sector. Even when DCL changes its logo Mr Waddingham registered the new design with his company name upon it and hence owns three registrations all around the same theme, although his other two marks 3194062 and 3190589 are not the subject of invalidity actions consolidated with this case. Having registered his marks Mr Waddingham then attempted to prevent DCL using its trading name and logo/s. The allegations that he contacted DCL’s clients and suppliers and tried to prevent them from dealing with DCL via threats that to do so would be illegal as he, Mr Waddingham, owned the rights to various trading names and logos are somewhat thin. To my mind, his behaviour in completing the application fell short of the standards of acceptable commercial behaviour as judged by ordinary standards of honest people. The trade mark 3172311 was therefore applied for in bad faith and offends against section 3(6) of the Trade Marks Act.

20) Given this conclusion I decline to consider the ground of opposition under section 5(4)(a) although I will observe that DCL’s evidence might struggle to meet the requirements regarding goodwill in this ground of invalidity.

CONCLUSION

21) Trade mark 3172311 will be struck from the Register and deemed never to have been made. As a result of this decision the oppositions 600000578 and 600000579 to applications 3192987 and 3193019 respectively must fail as Mr Waddingham /RDCL no longer have an earlier right to rely upon. Both applications will proceed to registration. Had the invalidity action failed then I would have been bound to have found that there was a likelihood of confusion between the mark and goods and services.

COSTS

22) As DCL has been successful it is entitled to a contribution towards its costs. They have represented themselves during the course of this action. In *Adrenalin Trade Mark*, BL O/040/02, Simon Thorley Q.C. sitting as the Appointed Person on appeal, observed that:

“It is correct to point out that the Registrar’s practice on costs does not specifically relate to litigants in person but in my judgement it could not be that a litigant in person before the Trade Mark Registry could be placed in any more favourable position than a litigant in person before the High Court as governed by the CPR [Civil Procedure Rules]. The correct approach to making an award of costs in the case of a litigant in person is considered in CPR Part 48.6.”

Part 48.6 of the Civil Procedure Rules referred to in the above passage provides as follows:

“48.6 – (1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that costs of a litigant in person are to be paid by any other person.

(2) The costs allowed under this Rule must not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.”

23) DCL has provided a breakdown of its time and expenses which amount to seventy hours and £270. This amounts, at £19 per hour, to a total of £1,600, which is less than two-

thirds of the amount I would have awarded under the Registry scale costs to a professionally represented company. I find the amount of time spent to be reasonable I order Lyndon Waddingham to pay Dragon Construction North Wales Limited the sum of £1,600. This sum to be paid 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 8th day of July 2019

G W Salthouse
For the Registrar
the Comptroller-General