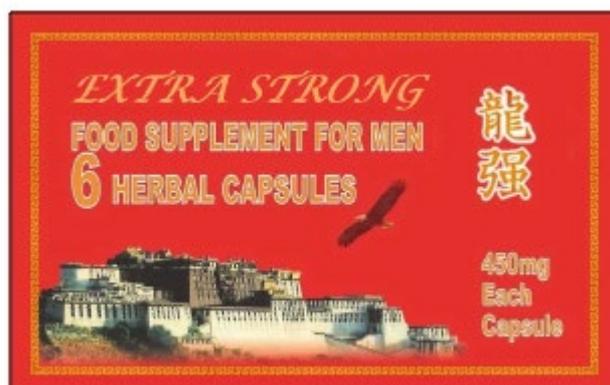


O/758/22

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK REGISTRATION NO. 3575857
IN THE NAME OF GUY LOCHNER
FOR THE TRADE MARK**



IN CLASS 5

AND

**THE LATE FILING OF FORM TM8 AND
COUNTERSTATEMENT
FILED IN DEFENCE OF THAT REGISTRATION
IN CANCELLATION PROCEEDINGS
UNDER NUMBER 504708
BY UK PACIFIC TRADING LIMITED**

BACKGROUND

1. Trade mark No. 3575857, as shown on the cover page of this decision, stands registered in the UK in the name of Guy Lochner (“the proprietor”). The application for registration was filed on 7 January 2021, and the trade mark was registered on 14 May 2021, in respect of the following goods:

Class 5: *Herbal Supplements.*

2. On 23 March 2022, Downing IP Limited, on behalf of UK Pacific Trading Limited (“the cancellation applicant”), filed an application to have this trade mark declared invalid under the provisions of section 47(2) of the Trade Marks Act 1994 (“the Act”). The application for invalidation was filed in respect of all of the goods as registered and is based on section 5(4)(a) and 3(6) of the Act.

3. On 20 April 2022, the Tribunal served the form TM26(I) (“Application to declare invalid a registration or a protected international trade mark (UK)”) by email upon the proprietor. The deadline for the proprietor to file its form TM8 (“Notice of defence and counterstatement”) was 20 June 2022, communicated by the Tribunal in the serving letter. The Tribunal’s letter contained the following:

“Please find enclosed a copy of the notice of opposition - Form TM7 - filed against your application.

If you wish to continue with your application, you need to file a notice of defence and counterstatement by completing Form TM8 - please note the important deadline below. You will find a blank Form TM8 on the IPO website, together with brief guidance on what happens after it is filed...

Rule 18(1) and 18(3) of the Trade Marks Rules 2008 require that you must file your notice of defence and counterstatement (Form TM8) within **two months** from the date of this letter. Alternatively, if both parties wish to negotiate to

resolve the dispute, they may request a “cooling off period” by filing a Form TM9c, which will extend the 2 month period in which to file a Form TM8 by up to a further seven months. Form TM9c is also available on the IPO website (above). Please note both parties must agree to enter into cooling off.

IMPORTANT DEADLINE: A completed Form TM8 (or Form TM9c) MUST be received on or before 20th June 2022.

Rule 18(2) of the Trade Marks Rules 2008 states that “*where an applicant fails to file a Form TM8 within the relevant period, the application for registration, insofar as it relates to the goods and services in respect of which the opposition is directed, shall, unless the registrar otherwise directs, be treated as abandoned.*” **It is important to understand that if the deadline date is missed, then in almost all circumstances, the application will be treated as abandoned.**” (original emphasis)

4. The proprietor, at the time the above letter was served, was unrepresented.

5. On 24 May 2022, the Tribunal received an email from the cancellation applicant which stated that the wrong form was quoted in the serving letter dated 20 April 2022:

Thank you for your letter of 20th April 2022 in relation to Cancellation No. CA000504708. Your letter states that a TM7 has been safely received, however, the form filed was a TM26(I) application to start invalidation proceedings rather than an opposition. When submitting this form on 23rd March 2022 I referred to the form as a TM21(I) in my cover letter due to a clerical error which I believe may have played a part in this confusion.

In order to clarify this case I kindly request you re-issue your letter of 20th April 2022 to reflect the particulars of the case as an application for invalidity against a registration rather than an opposition against a pending trade mark application. I confirm the representatives of the trade mark owner are included in this correspondence.

6. On 06 June 2022, the Tribunal responded to the cancellation applicant as follows, with a copy of the same sent to the proprietor. The deadline for the proprietor to file its form TM8 remained as 20 June 2022:

“I acknowledge receipt of your email dated 24th May 2022, in which you note the clerical error made on the official letter sent to yourselves dated 20th April 2022, in relation to the relevant Form being filed.

Please accept my apologies for any confusion caused, please see below the amended official letter.

I acknowledge receipt of the TM26(l) received on 23rd March 2022.

A copy of the form and accompanying statement of grounds has today been sent to the applicant for registration. In accordance with Rules 18(1) and 18(3) of the Trade Marks Rules 2008, the applicant now has **two months** in which to file a TM8 and counterstatement at the Trade Marks Registry.

If the parties wish to seek a negotiated settlement and avoid the cost of preparing and submitting evidence or submissions, a Form TM9C ‘Request for a cooling off period’ (no fee required), which will extend the period for the filing of the applicant’s defence for a further seven months, **must** be filed. Both parties **must** agree to enter into cooling off.

The TM8 and counterstatement, or TM9C must be received on or before 20th June 2022.

If no TM8, or TM9c is filed on or before the date given above, the application shall, in accordance with rule 18(2) of the Trade Marks Rules 2008, be treated as abandoned in whole or part unless the registrar otherwise directs.”

7. On 08 June 2022, the Tribunal received an email from Wilson Gunn confirming that they had been appointed to represent the proprietor in these proceedings. Accordingly, form TM33 was attached to the email. The Tribunal responded on 14 June 2022, stating that:

“I acknowledge receipt of the Form TM33 filed on 8 June 2022 requesting to be recorded as the agent of the applicant for the purpose of the above cancellation

The details of the cancellation applicant’s agent are as follows:

...

For your convenience, please find enclosed a copy of the notice of opposition filed against the above application as well as the letter from the Registry giving the proprietor its deadline to file a Form TM8 and counterstatement.

Please note a Form TM8 and counterstatement is due to be filed on or before 20th June 2022.”

8. On 21 June 2022, Wilson Gunn on behalf of the proprietor filed form TM8. The counterstatement contained the following:

We apologise for the late filing of this TM8, we have only recently been appointed as the representative and due to an administrative delay on our part the deadline of 20 June 2022 had only recently been entered onto our diary system. We hope that as we have taken this remedial action within one day the TM8 will be accepted.

9. On 13 July 2022, the Tribunal wrote to the proprietor to acknowledge receipt of the TM8. In the official letter, sent by email, the Tribunal stated that:

“I acknowledge receipt of the Form TM8 and counterstatement dated 21st June 2022.

It is noted, the period for filing the Form TM8 and counterstatement was the 20th June 2022, please note this is a non-extendable deadline, therefore, it is the preliminary view to deny the late TM8 and counterstatement.

Please note, a hearing can be requested to challenge the preliminary view and if a hearing is requested a witness statement together with a late form TM8 would need to be submitted. However, if the Hearing Officer maintains the preliminary view, the applicant may be required to contribute to the other party's costs. This is not intended to dissuade you requesting a hearing, but merely to inform you of the potential consequences should you be unsuccessful in overturning the preliminary view.

If you disagree with the preliminary view you must provide full written reasons and request a hearing on, or before, **20th July 2022**. This must be accompanied by a Witness Statement setting out the reasons as to why the TM8 and counterstatement are being filed outside of the prescribed period.”

10. On 18 July 2022, the Tribunal received an email from the proprietor requesting a hearing.¹ The email request was accompanied by a witness statement signed by Andrew Marsden of Wilson Gunn, the pertinent section is as follows:

2. Our firm's representation in this matter was confirmed after the cancellation was filed. We therefore received the documentation relating to the cancellation later than we would have if we were the representative at the time the cancellation was filed. There was an administrative delay in entering the case details onto our in-house records and this resulted in a late entry of the deadline on our diary system. Following a telephone call I had with the UKIPO, I had mistakenly thought that the deadline was 20 June 2022 to file the TM8. When I realised my error, I took immediate action to file the TM8.

11. A hearing was scheduled for 31 August 2022, the details of which were sent by the Tribunal to both parties in an official letter dated 16 August 2022. The cancellation applicant confirmed attendance on 23 August 2022 and filed its skeleton arguments on 26 August 2022. On 30 August 2022, the following email was sent to the proprietor requesting confirmation of attendance:

¹ I note that in the email, the request is for “a CMC to discuss the late filing of the TM8”. However, as outlined in the official letter dated 13 July 2022, I understand that in this instance the request for a CMC (Case Management Conference) can be taken as a request for a procedural hearing to challenge the preliminary view that the late filed TM8 should not be admitted.

Further to our letter dated 16 August 2022 regarding the joint hearing that has been appointed for Wednesday 31 August 2022, we have not received confirmation from the Proprietor who will be attending or any submissions or skeleton arguments which were due by yesterday.

Please confirm attendance, otherwise we will vacate the hearing and the preliminary view not to admit the late filed TM8 will stand.

12. An email from the proprietor confirming attendance was received by return, however, no submissions or skeleton arguments were received.

THE JOINT HEARING

13. The hearing took place before me, via Microsoft TEAMS telephone conference, on Wednesday 31 August 2022. Mr Andrew Marsden of Wilson Gunn represented the proprietor, and Ms Hazel MacLean of Downing IP Limited represented the cancellation applicant.

14. At the hearing, I explained to both parties that the purpose of the hearing was to consider whether the late filed defence should be admitted into the proceedings, and as such, I would need to establish whether there were any extenuating circumstances leading to the late filing of Form TM8. I clarified that the purpose of the hearing was not to consider evidence or submissions on the merits of any pleaded grounds. I further confirmed that I had received the skeleton arguments from the cancellation applicant, and that I had read all the relevant documents to the case before me. I do not consider it appropriate or necessary to reproduce the skeleton arguments here, but I will refer to them to the extent I consider necessary in the course of this decision.

15. Mr Marsden began by saying that it was clear from the previous correspondence that Mr Lochner was defending his position and that Wilson Gunn were already representing the proprietor in the related proceedings under OP430079. He said that the delay was caused by the fact that they (Wilson Gunn) were not appointed to represent the proprietor in these proceedings until “after the event” leading to an administrative “mix up”, for which he apologised, saying that under normal circumstances, the dates are added to the diary system well in advance, but in this

case, because of the late appointment of Wilson Gunn as representatives, the date was added to the system later than usual. Referring to paragraph 12 of the skeleton arguments filed by the cancellation applicant, Mr Marsden said that he was aware that in the witness statement he had mistakenly said that he thought the deadline was the 20th June (being the correct deadline), but that this should have read as 21st (June). He said that as soon as he became aware of the deadline, he took immediate action, filing the form TM8 a day late. He added that he knew that the deadline for the TM8 was not an extendable term, but a strict deadline, however this was a simple administrative error which was remedied at the first opportunity. He pointed out that he had seen many instances where late filed documents had been accepted, including those filed much later than by just one day.

16. Mr Marsden continued that he could see nothing in the (skeleton) arguments to support a case to refuse the late filing of the TM8. He felt that his client's actions in appointing representatives late in previous proceedings (Points 3, 9 and 10 of the skeleton arguments) were irrelevant and how Mr Lochner had conducted himself previously had nothing to do with this case, with the delay being a clerical administrative mistake on the part of the representatives. He said he understood that UK Pacific wanted to conclude the proceedings quickly, and he agreed that would be in everyone's interest, but that it was unfair to do it "in this way", as it would effectively lead to Mr Lochner's registration being cancelled.

17. Turning to Ms MacLean, she began by saying that with reference to the incorrect date on Mr Marsden's witness statement, she accepted that this was a typo, but wanted to raise it in the skeleton arguments as the witness statement formed the reasons put forward for why the late TM8 should be allowed. She said that the Registry had prescribed a clear TM8 deadline which was consistent in the letters dated 20 April and 6 June, both of which were in the knowledge of Mr Lochner, and notwithstanding the reissuing of the serving letter, it was clear from the written correspondence that the defence deadline was 20 June. She said that she felt that an administrative error was not a convincing reason for the hearing officer to exercise discretion in allowing the late TM8, rather that it was a direct result of Mr Lochner

consistently appointing representatives late into proceedings which seemed to have led to an important deadline being missed, and which was delaying the case at hand.

18. Turning to paragraph 5 of the skeleton arguments, Ms MacLean said that the preceding table outlining the timeline of events showed that Mr Lochner was familiar with cancellation proceedings, having previously filed defences within set time frames, and that he was also familiar with the Registry issuing letters which have requirements in them of deadlines which must be met. She said that she felt that the second table under paragraph 9 of the arguments was also relevant as it shows that there are four of the proprietor's applications which are undergoing opposition and so Mr Lochner is not naïve to the requirements for contested proceedings before the Registry. She added that while he is free to appoint representatives as and when he sees fit, it was clear that if you want a representative to handle a case, then they will need to be told in good time what the deadlines are so none are missed. She felt that the crux of the matter was that despite familiarity with the need for meeting deadlines, he did not appoint a representative until well after the cancellation proceedings had begun, which did not allow the representative time to receive the instructions, advise the client and then act upon those instructions within the deadline, and which resulted in the mistake being made by the representative. She added that in this instance, Wilson Gunn had 8 working days before the deadline in which to file the TM8, which was clearly not enough time to confirm the date and enter it onto their systems and file the necessary response, adding that the TM8 deadline is non-extendable for good reason, being a "make or break" deadline.

19. Turning to the hearing itself, Ms MacLean submitted that both parties need to be punctual, however, the deadline to confirm attendance was also missed on the part of the proprietor, and that no skeleton arguments were submitted by the other side. She concluded by saying that the effect the delays have had on her client is that they are still uncertain whether they can use their trade mark and has meant incurred costs. She said that she felt that no persuasive reasons had been given to allow the hearing officer to exercise discretion to allow the late filed TM8 into proceedings and that the preliminary view should be upheld.

20. Mr Marsden responded by reiterating that the deadline was missed by only one day. He stated that the clerical error in the official letter dated 20 April whereby the application for invalidation was referred to as an opposition meant that the defence period should have been reset. He went on to say that Ms MacLean's submissions that Mr Lochner was familiar with opposition and cancellation proceedings had no bearing on the matter, the mistake being on his (Mr Marsden's) part, and that was the only relevant factor, although he added that they had much less time than if they had been instructed from the beginning of proceedings, but that this was "no excuse". He then stated that the preliminary view had been to accept the late TM8 and that the additional time and costs incurred was down to the other side objecting to the late filed TM8. He added that if the TM8 was not accepted into proceedings, then this would be a serious issue for his client which far outweighed a single day's delay, and that it didn't seem equitable or in the interests of anyone other than UK Pacific to not accept the TM8.

21. I responded to Mr Marsden by clarifying that the Tribunal had issued the preliminary view that the late TM8 should **not** be accepted, being a non-extendable deadline, rather than through any such objection from the other party, to which he apologised, saying that he meant that the other side had an opportunity to disagree with the preliminary view, but hadn't done so.

22. Finally, in response, Ms MacLean said that she wanted to reiterate the point that, in her view, the late appointment of representatives contributed to the fact that the deadline was missed and she felt that this repeated behaviour by Mr Lochner showed that he was not taking these proceedings as seriously as he could in order to reach a timely and equitable outcome. She acknowledged the consequences to Mr Lochner should the preliminary view be upheld, but added that this was all the more reason to have a representative on board in good time for them to be able to defend the client's position.

23. At the conclusion of the hearing, I confirmed that I would reserve my decision to allow myself time to give due consideration to the submissions made by both parties, however, the decision would be issued in writing via email in due course.

DECISION

24. The filing of a Form TM8 and counterstatement in cancellation proceedings is governed by Rule 41(6) of the Trade Marks Rules 2008 (“the Rules”). The relevant parts read as follows:

“(6) The proprietor shall, within two months of the date on which a copy of Form TM26(I) and the statement was sent by the registrar, file a Form TM8, which shall include a counter-statement, otherwise the registrar may treat the proprietor as not opposing the application and registration of the mark shall, unless the registrar otherwise directs, be declared invalid.”

25. The combined effect of Rules 77(1), 77(5) and Schedule 1 of the Rules mean that the time limit in Rule 41(6), which sets the period in which the defence must be filed, is non-extensible other than in the circumstances identified in Rule 77(5) which states:

“A time limit listed in Schedule 1 (whether it has already expired or not) may be extended under paragraph (1) if, and only if—

(a) the irregularity or prospective irregularity is attributable, wholly or in part, to a default, omission or other error by the registrar, the Office or the International Bureau; and

(b) it appears to the registrar that the irregularity should be rectified.”

26. In the official letter dated 20 April 2022, the proprietor was incorrectly notified that a notice of opposition – form TM7 – had been filed against it. Following correspondence from the cancellation applicant pointing out the error, this was

corrected in the letter dated 06 June, which acknowledged the error and confirmed receipt of the TM26(l) against the proprietor's registration. As per Rule 77(5), I do not consider that there has been any irregularity on the part of the Tribunal which should have been rectified in relation to the deadline for the defence. There has been no material effect on either party as the deadline is the same for filing a defence in both sets of proceedings. Consequently, the only basis on which the proprietor may be allowed to defend the application for a declaration of invalidity is if I exercise in its favour the discretion afforded to me by the use of the words "unless the registrar otherwise directs" in Rule 41(6).

27. In approaching the exercise of discretion in these circumstances, I take into account the decisions of the Appointed Person in *Kickz AG v Wicked Vision Limited* (BL O-035-11) and *Mark James Holland v Mercury Wealth Management Limited* (BL O-050-12) i.e. I have to be satisfied that there are extenuating circumstances which justify the exercise of the discretion in the proprietor's favour.

28. In *Music Choice Ltd's Trade Mark* [2005] RPC 18, the Court indicated that a consideration of the following factors (shown below in bold and underlined) is likely to be of assistance in reaching a conclusion as to whether or not discretion should be exercised in favour of a party in default. That is the approach I intend to adopt, referring to the parties' submissions to the extent that I consider it necessary to do so.

The circumstances relating to the missing of the deadline including reasons why it was missed and the extent to which it was missed:

29. As noted above, the stipulated deadline for the filing of the applicant's Form TM8 and counterstatement was 20 June 2022. The Form TM8 and counterstatement was filed by the applicant on 21 June 2021. Therefore, the deadline was missed by 1 day. The proprietor's written explanation as to why the deadline was missed, i.e. due to an administrative delay on the part of the proprietor's representative, is summarized above, while during the hearing discussions, it was admitted that the delay in filing

the TM8 was caused by the representatives being appointed when the cancellation proceedings were already underway, which lead directly to the delay in entering the details onto the diary system, resulting in the failure to meet the deadline.

The nature of the cancellation applicant's allegations in its statement of grounds

30. The application for a declaration of invalidity is brought under section 5(4)(a) and section 3(6) of the Act. Whilst it is not for the present hearing to determine the merits of the case, there is nothing to suggest that there is not an arguable case to be determined.

The consequences of treating the proprietor as defending or not defending the application for invalidation;

31. If the proprietor is permitted to defend the application, the proceedings will continue, with the parties given an opportunity to file evidence and the matters will be determined on their merits. However, if the proprietor is not allowed to defend the application, the registration in its entirety will be declared invalid, with the further consequence that, as detailed below, the proprietor would no longer be able to rely on the earlier mark in its opposition in the related proceedings.

Any prejudice caused to the cancellation applicant by the delay;

32. At the hearing, Ms MacLean on behalf of the cancellation applicant outlined the effect the delay was having on her client in terms of both the uncertainty on whether they are able to continue to use their mark, as well as the associated costs associated with the unnecessary delays. In the skeleton argument, Ms MacLean states that her client wishes to settle the matter quickly to enable them to continue using the mark they have traded under in the UK since 2016 with confidence, and that allowing Mr Lochner's late defence will delay the conclusion of these proceedings.

Any other relevant considerations such as the existence of related proceedings between the parties;

33. At the hearing, Mr Marsden made mention of the related opposition proceedings under OP430079 whereby the applicant is UK Pacific Trading Limited, being the cancellation applicant in these proceedings, with the proprietor as the opponent, and who is relying on the same earlier registration to which the application for invalidation pertains in these proceedings, being UK3575857. The related case has been suspended, however, if the preliminary view in the case before me is upheld, meaning that the registration is declared invalid, then the opposition in the related case will fall away.

Considerations

34. The cancellation applicant maintained that since the deadline was missed, albeit by only one day, the failure on the part of the proprietor to appoint a representative in a timely manner, which resulted in the mistake made by the representative, does not constitute persuasive reasons sufficient to permit the Registrar to exercise its discretion. It therefore submits that the preliminary view of the Registrar to refuse to admit the TM8 and counterstatement and to treat the registration invalid should be made final.

35. In the official letters dated 20 April 2022 and 6 June 2022, the Tribunal made it very clear that failure to file a form TM8 by the deadline would, in most circumstances, result in the application being treated as abandoned. The deadline was reiterated in the official letter dated 8 June 2022 in which the Tribunal confirmed that Wilson Gunn had been recorded as representative to the proprietor.

36. I note Mr Marsden's submissions during the hearing that the deadline for filing the defence should have been reset following the reissue of the serving letter on 6 June 2022. However, no request by the proprietor to so do was received, and, as previously mentioned, the clerical error in the original letter, which quoted form TM7 rather than

form TM26(l), did not affect the deadline date by which the defence was required to be filed.

37. At the hearing, Mr Marsden admitted responsibility for mistaking the deadline as being 21 June rather than 20 June 2022. Although at one point he stated that the late appointment of Wilson Gunn as representatives had no bearing on the delay in filing the TM8, which he said was merely a clerical mistake, he had previously said that as a consequence of the late appointment there was insufficient time for the diary system to be updated which lead to the deadline being missed.

38. I acknowledge that the deadline for filing the form TM8 was missed by only one day and that human error played a part. However, I also consider that had the proprietor instructed the representatives to act on his behalf earlier in the proceedings, the issue surrounding the diary system would not have arisen and the deadline is less likely to have been missed. I further note that as well as missing the deadline for filing the defence, the proprietor, having disagreed with the preliminary view that late filed TM8 should not be admitted, requested a hearing, but did not respond accordingly to the Tribunal's letter dated 16 August 2022, which requested that the parties confirm attendance at the hearing within 7 days, as follows:

“Unless you have already done so, I would be grateful if you could inform the Registrar within 7 days from the date of this letter (my emphasis) who will represent your clients at the above Hearing. Please provide a contact telephone number and email address for all attendees then we can send the appointment. Should you wish to provide the Hearing Officer with written submissions, please send them for the urgent attention of the Hearings Clerk to tribunalhearings@ipo.gov.uk. Any submissions should be filed at least two working days prior to the hearing – **Monday 29 August 2022** and copied to the other side; late submissions will not be taken into account if they do not reach the Hearing Officer in time for the hearing.

...

In line with the Tribunal Practice Notice TPN 1/2004, the Trade Marks Registry will require all parties professionally represented at Hearings to submit a skeleton argument. Please see Annex A for guidance on skeleton arguments. Please note that Annex B is a list of authorities readily available to the Hearing Officer therefore, if referred to by either party, copies are not required. Skeleton arguments should be received by 14.00, 2 working days before the hearing. That is on or before **Monday 29 August 2022.**”

39. An email confirming the attendance by Mr Marsden was received on 30 August 2022, being the day before the hearing, and which was only received following a further request for confirmation of attendance issued by the Tribunal on the same date. I also note the absence of skeleton arguments on the part of the proprietor, however, as outlined in 6.7.2 of the Tribunal section of the Manual of trade marks practice, skeleton arguments are not normally required prior to a procedural hearing.

40. I note that in her skeleton arguments, Ms MacLean submits that there are 32 trade marks on the register under Mr Lochner’s name, and she provides a timeline of events which highlight details of a prior cancellation case between the same parties as this current case. While this other case has no relevance to the matter before me *per se*, I acknowledge Ms MacLean’s submissions that it shows that Mr Lochner was already familiar with cancellation proceedings prior to the filing of form TM26(I) against his registration in this present case. As such, I would expect him to be fully aware of the requirement to file a defence by the given deadline in any subsequent proceedings. Further, having appointed Wilson Gunn as representative in earlier oppositions, including in the related proceedings outlined under paragraph 33 of this decision, it seems that Mr Lochner would have made an informed choice not to appoint a representative until 8 June 2022, being only 12 days prior to the deadline for filing the Form TM8 and counterstatement.

41. In my view, the proprietor would have been conscious of the consequences of non-compliance with the non-extendable deadline, but chose to appoint representation at

a late stage in the proceedings which has proved insufficient to allow time to defend his registration against the application for invalidation. In reaching my decision, I have carefully considered the seriousness of the resulting impact if discretion is not exercised in the proprietor's favour, i.e. the registration will be declared invalid. Further, I recognise that this will affect the related proceedings and will mean that the opposition in said proceedings will also fall away. However, as this is a consequence of the failure to comply with the non-extendable deadline to file form TM8, (of which the proprietor's representative, being the same in both cases, would be well aware), I do not consider this to be a compelling factor or extenuating circumstance sufficient to justify me exercising my discretion in the proprietor's favour. I am reminded that in dismissing the appeal in *Kickz AG*, Geoffrey Hobbs Q.C., sitting as Appointed Person, found that the applicant "had been the author of his own misfortune"². I find that to also be true of the proprietor in the case before me.

42. Having considered the proprietor's reasons for its failure to file a TM8 by the given deadline, I find no single reason or combination of reasons sufficient to constitute extenuating circumstances or compelling reasons to enable me to exercise my limited discretion in the proprietor's favour under Rule 41(6) to admit the late-filed TM8 and counterstatement into these proceedings.

OUTCOME

43. The preliminary view is upheld and the late form TM8 and counterstatement is not to be admitted into the proceedings. Subject to any appeal, the proprietor's mark will be declared invalid in respect of all goods.

COSTS

44. Given that the outcome of this decision has terminated the proceedings, the cancellation applicant is entitled to a contribution towards its costs, based on the scale

² See paragraph 15.

published in the TPN (Tribunal Practice Notice) 2/2016. Applying the TPN as a guide, I assess costs as follows:

Official fee:	£200
Preparing the statement of case:	£200
Preparing for and attending the hearing, including filing skeleton arguments:	£300
Total:	£700

45. I therefore order Guy Lochner to pay UK Pacific Trading Limited the sum of £700. This sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 5th day of September 2022

Suzanne Hitchings
For the Registrar,
the Comptroller-General