

BL O/0128/26

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3758673 IN THE NAME OF FALL CREEK FARM AND NURSERY, INC.

AND OPPOSITION NO. 433339 THERETO BY RUSTICAS DEL GUADALQUIVIR S.L.

AND IN APPLICATION FOR REVOCATION UNDER NO. 505583 BY FALL CREEK FARM AND NURSERY, INC. AGAINST TRADE MARK REGISTRATION NO. UK00905866074 IN THE NAME OF RUSTICAS DEL GUADALQUIVIR S.L.

DECISION

Introduction

1. This is a cross-appeal by Fall Creek Farm and Nursery, Inc (“*the applicant*”) against the Decision of Mark King, acting on behalf of the Registrar of Trade Marks, dated 24 February 2025 (O-0163-25)(“*the Decision*”). In that Decision the opposition brought by Rūsticas Del Guadalquiver S.L.(“*the opponent*”) was held to be unsuccessful; and the application for revocation brought by the applicant, with respect to the opponent’s earlier mark, SEQUOĪA, relied upon for the proposes of the opposition, was found to be only partially successful.
2. In my decision dated 28 July 2025 (O-0701/25) the appeal brought by the opponent was dismissed (“*Appeal Decision 1*”). In the context of that appeal the applicant filed a Respondent’s Notice in which it sought not only to uphold the findings of the Hearing Officer that the opposition should have been rejected but also sought to challenge the findings made on the application for revocation maintaining that the application for revocation should have been successful in its entirety.
3. At the hearing of the appeal, the opponent submitted for the first time that the challenge to the Hearing Officer’s decision on the application for revocation was not properly an issue that could be raised in the context of a Respondent’s Notice but rather should properly have been brought by way of a cross-appeal. At that hearing the applicant rightly accepted that this was correct. This point was dealt with by way of a Preliminary Matter at paragraphs [19] to [24] of Appeal Decision 1 and directions given at paragraphs [47] to [49] of the Appeal Decision 1.
4. This is the decision on the Cross-Appeal for which the applicant was granted an extension of time by the Registrar to file the TM55P together with Grounds of Appeal (“*Appeal Decision 2*”).

5. The background to the dispute is set out in paragraphs [2] to [12] of Appeal Decision 1. However, for present purposes the key finding of the Hearing Officer below was that use of the opponent's earlier mark had been established with respect to 'cherries' but not otherwise and the mark was therefore revoked with effect from 1 March 2013 save with respect to 'cherries' in class 31 (see paragraphs [38] and [39] of the Decision).

The Grounds of Cross-Appeal

6. As noted above the Registrar granted an extension of time to the Applicant for the filing of the TM55P and Grounds of Appeal. The Cross-Appeal is directed to the finding that the opponent had proved genuine use of the its earlier mark with respect to 'cherries' and that the registration should be maintained so far as it related to 'cherries' in class 31.
7. In summary, the basis for the challenge to that finding was identified by the applicant as follows *'[i]f properly directed the Hearing Officer could only have concluded that the [opponent] had failed to demonstrate genuine use as it failed to establish by the evidence that the sign is used as a trade mark'*. On that basis it was maintained that the opponent's earlier mark should be revoked for non-use.
8. No Respondent's Notice to the Cross-Appeal was filed on behalf of the opponent.
9. At the hearing of the cross-appeal which took place via video link the applicant was represented by Mr Stuart Brooks of CMS Cameron McKenna Nabarro Olswang LLP. The opponent did not appear was not represented at any stage of the Cross-Appeal.

The Standard of Review

10. There was no dispute as the standard of review to be applied in appeals to the Appointed Person. Thomas Mitcheson KC sitting as the Appointed Person in SOCIAL WORK NEWS (O-0050-24) at paragraph [13] summarised the case law from Britain Ltd v. Tesco Stores Ltd [2024] EWCA Civ 262 and Lifestyle Equities CV v. Amazon UK Services Ltd [2024] UKSC 8 as follows (emphasis as in the original):

To paraphrase, an appeal should only be allowed where the decision of the lower court was "wrong". Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "*outside the bounds within which reasonable disagreement is possible*". In the case of a multifactorial assessment and in the absence of a distinct error of principle, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere.

11. See further the more recent guidance provided by the Supreme Court in Iconix Luxembourg Holdings SARL v. Dream Paris Europe Inc [2025] UKSC 25 at [93] to [95] (set out in paragraph [17] of Appeal Decision 1).
12. I have kept these principles in mind when considering the present appeal.

Decision on the Cross-Appeal

13. The Hearing Officer addressed the issue of the application for revocation of the opponent's earlier mark at paragraphs [18] to [49] of the Decision.
14. The Hearing Officer first identified the relevant case law to be applied to the question as to whether there had been genuine use at paragraph [20] of the Decision by reference to the summary of the relevant jurisprudence in the judgment of Arnold LJ in easyGroup Ltd v. Nuclei Ltd [2023] EWCA Civ 1247. The Hearing Officer then went on to consider the question of the burden of proof and the approach to the assessment of the evidence filed in support of a claim to genuine use at paragraph [21]. No criticism is made with respect to these paragraphs.
15. The Hearing Officer then addressed the evidence of use filed on behalf of the opponent in support of the claim to genuine use at paragraphs [23] to [33]. Whilst these findings were not challenged *per se* it was this section of the Decision that was the subject of criticism on the Cross-Appeal.
16. In summary, the applicant on this appeal maintains that the Hearing Officer failed to consider two key factors when assessing the evidence of use. First, whether the evidence showed use as trade mark. In particular it is maintained that the Hearing Officer failed to address the applicant's submissions with regard to the particular considerations that arise where the sign is said to be a variety of fruit. Second, the Hearing Officer failed to take into consideration the circumstances of the relevant market such that the Decision proceeded on the basis that any use of the variety name SEQUOIA amounted to trade mark use.
17. In support of these propositions the applicant made the following points:
 - (1) That a number of the documents relied upon by the opponent showed the sign SEQUOIA displayed in positions and fields titled '*species*' or '*variety*'.
 - (2) Whilst some varieties of plant/fruit are also registered as trade marks, it does not follow that all uses of a variety name will amount to trade mark use.
 - (3) In the circumstances, in order to demonstrate that the sign SEQUOIA has been used as a trade mark, the opponent's evidence must show that the sign is understood as a trade mark, and/or that the way the sign is presented is sufficient to communicate its trade mark significance to relevant consumers.

- (4) As the opponent's evidence failed to demonstrate that the sign SEQUOÏA had been used as a trade mark, it was not open to the Hearing Officer to find that the evidence presented by the applicant demonstrated genuine use.
18. With respect to the points made above it seems to me that there is force in the points made on the Cross-Appeal. In particular I note that (1) there is no reference in the Decision to the sign SEQUOÏA being used to designate a variety of fruit; and (2) in setting out the evidence under the heading '*The evidence, has there been genuine use?*' no reference is made to the evidence filed on behalf of the applicant or to the submissions made on behalf of the applicant on the plant variety issue.
19. That there is no reference to the sign being used as designation of a variety of fruit is surprising given the evidence that was filed on behalf of the opponent in which the sign SEQUOÏA was used to refer to a type or variety of fruit. By way of example on some of the invoices exhibited by the opponent's witnesses, the royalty agreement in Exhibit PB1, on some of the packaging of product and in the witness statements filed on behalf of the opponent.
20. Of additional concern is the content of paragraph [26] of the Decision. In that paragraph the Hearing Officer stated as follows (footnotes excluded):

26. The two remaining exhibits are a royalty agreement dated January 2007 between the opponent and a company called FRESHROYAL SL, "being the main company marketer in Spain and the rest of Europe of the production of fruit varieties of bone and berries "SEQUOÏA" whose suppliers are the producers to whom Rusticas del Guadalquivir S.L they are authorized to use their SEQUOÏA name." The remaining exhibit is an extract from the applicant's website and therefore, as identified by the applicant, is irrelevant to the question of use made by the opponent.

However, paragraph 3f. of the witness statement of Mr Boutin in fact reads as follows (emphasis added):

In January 2007, FRESHROYAL SL was established, being the main company marketer in Spain and the rest of Europe of the production of fruit varieties of bone and berries "SEQUOÏA" whose suppliers are the producers to whom Rústicas del Guadalquivir S.L. they are authorised to use their SEQUOÏA **varieties**.

Moreover, I further note that the royalty agreement at Exhibit PB1 which was referred to by the Hearing Officer in paragraph [26] of the Decision was (1) dated 23 July 2009; (2) made between Rusticas del Guadalquivir S.L. and SAT No. 4301 Rio Cinca;

(3) was headed a Licence Contract for the Exploitation of a Protected Plant Variety;
(4) was limited to the territory of Spain; and (5) made no explicit reference to the ‘SEQUOIA name’ as referred to by the Hearing Officer.

21. Against this background it seems to me that there has been a material error by the Hearing Officer in (1) failing to consider the variety of fruit issue; and/or (2) errors in their analysis of the evidence which had been filed by the opponent in support of its contention that there had been genuine use of Trade Mark Registration No. UK00905866074.

Conclusion

22. For the reasons set out above the Cross-Appeal is allowed. Given the particular basis upon which I have taken this view it seems to me that the appropriate course is for the application for Revocation No 505583 of Trade Mark Registration No. UK00905866074 to be remitted to the Registrar for determination by a different Hearing Officer. In that connection it will be a matter for the Hearing Officer to consider the appropriate order for costs at first instance having regard to those previously ordered by the Hearing Officer in the Decision.
23. That leaves the question of costs of the Appeal and the Cross-Appeal. At paragraph [49] of Appeal Decision 1 the costs of the Appeal and any cross-appeal were reserved. As the Appeal was dismissed and the Cross-Appeal allowed the applicant is clearly entitled to a contribution towards its costs of both.
24. Having regard to the circumstances of the Appeal, my observations and directions on the preliminary matter set out in paragraphs [19] to [24] of Appeal Decision 1, and the circumstances of the Cross-Appeal, my preliminary view is that Rústicas del Guadalquivir S.L. should pay to Fall Creek Farm and Nursery, Inc. the sum of £2,000 as a contribution towards its costs of the Appeal and Cross-Appeal.
25. Unless either party requests a hearing on the question of the costs of the Appeal and Cross-Appeal on or before 4pm on 3 March 2026 that preliminary view will become final and the sum of £2,000 will become payable by Rústicas del Guadalquivir S.L. to Fall Creek Farm and Nursery, Inc. on or before 10 March 2026.

EMMA HIMSWORTH KC

Appointed Person

17 February 2026