BL O/0402/26

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NUMBER 3926866 IN THE NAME OF XAN LABS INTERNATIONAL LTD

AND IN THE MATTER OF THE OPPOSITION UNDER NO 443,633 IN THE NAME OF SKY UK LIMITED

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF ROSIE LE BRETON (O/1168/25) DATED 16 DECEMBER 2025

DECISION

Introduction

1. On Tuesday 13 April 2026 at 6.27am the Appellant sent an email to the Secretariat of the Appointed Person, copying in the Respondent's representatives, indicating that it wished to withdraw its appeal. Later the same day, at 11.07am, it asked for that email to be ignored and said a skeleton would follow for the hearing on 17 April 2026.

2. I was notified of the withdrawal, and then subsequently the request to ignore the email. It was apparent to me that it was not possible simply to "ignore" the 6.27am email. I therefore directed the parties that the hearing on the 17 April 2026 would become a procedural hearing to determine whether the withdrawal was effective and, if so, whether and on what basis it might be possible to continue to hear the appeal. I indicated that if the appeal were still existent then a hearing would be fixed for the substantive appeal in due course.

The withdrawal

3. Mr Buehrlen, for the Appellant, submits that the withdrawal was not effective until it was acknowledged by the Secretariat. Mr Selmi, for the Respondent, says that a withdrawal is a unilateral act that requires no acknowledgement. He draws a parallel with a notice of discontinuance.

4. It is clear that an Appellant has a right to withdraw an appeal at any time. Any such withdrawal of an appeal (or an application) has to be clear, unequivocal and unambiguous.

5. Mr Buehrlen says in his Witness Statement that at 6.27am he withdrew the appeal because he believed (at that time) that his client did not want to incur the costs of an appeal. Upon obtaining further instructions from his client later in the morning, it

became clear to him that they wished to have the appeal heard. He therefore sent the second email.

6. It is evident that Mr Buehrlen intended to withdraw the appeal at 6.27am, but even if that were not the case, the wording of his email ("…Xan Labs International Ltd withdraws the appeal and shall allow the original decision to stand") is sufficient to do so. Indeed, Mr Buehrlen does not argue otherwise; rather, he suggests that the withdrawal has to be acknowledged before it was effective. He does not put forward any substantive basis for this submission.

7. I do not accept his submission. There is no reason why an acknowledgement provides a safeguard to any party to the proceedings where there has been an otherwise effective withdrawal. There is no set time for responses from the Secretariat and so such an approach would be somewhat arbitrary. The length of time to retract a withdrawal might depend on the time of day or whether it is a busy day or not. In some instances, an acknowledgement might be almost instantaneous (ie a reply to an email straight away) and in other cases it could be much longer. This is hardly a satisfactory safeguard.

8. Further, Mr Buehrlen did not spell out anything that needed to be stated in the acknowledgement to make it effective. This might suggest that an automated reply would be sufficient and if this is right then any acknowledgement would be meaningless. And if the text were the same as that which could be automated then it provides no further safeguard.

9. Accordingly, it is my view that once a withdrawal has been emailed to the Secretariat it is effective. It does not need to be acknowledged or for there to be any steps taken by the Secretariat or the Appointed Person. As a matter of good practice, the Respondent (or its representatives) should be copied into the email (as occurred in this case), however I see no reason in principle why a failure to do this would materially change the nature of a unilateral act indicating a desire to withdraw proceedings.

10. The appeal was therefore withdrawn the moment it was sent at 6.27am.

Can withdrawn appeal proceedings be reinstated?

11. Mr Buehrlen argues that I can reinstate the appeal because I share the powers of the registrar or, alternatively, based on the Appointed Person's inherent power to regulate its own proceedings.

Powers shared with registrar

12. Mr Buehrlen initially suggested that I could exercise the power in rule 74 of the Trade Marks Rules 2008 to correct an irregularity in proceedings. This is a power which is available to the registrar and has actually been used to reinstate proceedings. In *Isdin SA v GlaxoSmithKline Consumer Healthcare (UK) IP Ltd* [2024] RPC 21, a paralegal accidently withdrew the wrong trade mark application. Geoffrey Hobbs KC, sitting as an Appointed Person, held that the registrar could rely on rule 74 to reinstate the application and continue the opposition.

13. A similar power in the CPR 3.10 was used by Roth J in *Toplain v Orange Retail* [2012] EWHC 4254 (Ch) to reinstate proceedings before the courts following a notice of discontinuance where a client had had two different claims and their representative withdrew the wrong one.

14. The difficulty with this argument is that rule 73(4), which gives the Appointed Person certain powers granted to the registrar, does not include rule 74. Accordingly, I do not have power to grant relief under rule 74 even if I thought this were an appropriate case.

15. Furthermore, while not raised by the parties, I likewise do not have power to extend the time limit for an appeal under rule 71 (whereas the registrar does have such a power: r 77). I therefore am unable to treat the attempt to reinstate the appeal as a (new) late appeal (and I make no comment as to whether it would be appropriate to do so had I the power).

Inherent power to regulate proceedings

16. It is well-established that the Appointed Person, the registrar, and tribunals in general have an inherent power to regulate their own proceedings: *Langley v North West Water Authority* [1991] 3 All ER 610, 613-614; *Pharmedica TM Application* [2000] RPC 536, 541, *Rhone-Poulenc Rorer International Holdings Inc v Yeda Research and Development Co Ltd* [2006] EWHC 160 (Ch), [45]; *ACADEMY TM* [2000] RPC 35, [32].

17. This power is not, however, without limit. As it was put by the Supreme Court in *Al-Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531, [18]: "…there is no doubt that the court's inherent power to regulate its own procedures is not unlimited. For example, the power may not be exercised in *contravention* of legislation or rules of court."

18. In *Al-Rawi* the Supreme Court endorsed an extract from the following passage in Sir Jack Jacob's famous article entitled "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23, 24:

    > The source of the statutory jurisdiction of the court is of course the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the court is derived from its nature as a court of law, so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition.

19. As this article demonstrates, the ability of the court to regulate its procedure has been far reaching and its breath extends, at least somewhat, to the Appointed Person. For instance in *MIDEM* (O/333/05), [25], Richard Arnold QC, sitting as the Appointed Person, held that there is power to be exercised in exceptional circumstances to reconsider a decision already handed down. It is also the case that the Appointed Person, like the registrar, can use an inherent jurisdiction to strike out a claim for being an abuse of process or to grant summary judgment: see *Tribunal Manual*, [4.19]. The reason this does not often happen in practice is that it is rarely cost effective to make such an application, not because there is no power.

20. Notwithstanding the potential reach of the inherent power of a tribunal to regulate its own proceedings, I do not believe that it extends to reinstating an appeal. I take this view for the following reasons.

21. First, the Court of Appeal in *Khan v Heywood & Middleton Primary Care Trust* [2006] EWCA Civ 1087, [70] held that the Employment Tribunal had no such power notwithstanding it (like the Appointed Person) is meant to have an informal procedure. It was expressed thus by Wall LJ:

> In the first place, in my judgment, the ET is a creature of Statute and its procedure is specifically governed by the 2004 Regulations. It is much used by litigants in person. Its procedures are governed by what is meant to be an informal, but clearly understood code. Thus, whilst at first blush, and particularly given the tight time-limits for instituting proceedings, it might seem sensible to have a procedure by means of which a litigant who had mistakenly withdrawn a claim should be allowed to revive it, I am satisfied that, for such a procedure to exist, it would need to be set out expressly in the rules. I therefore regard the absence of any such express provision in the rules as important.

22. The differences between the Employment Tribunal and the Appointed Person are such that I do not think that *Khan* provides a complete answer, however. This is because there is not really a procedural "code" applying to hearings before the Appointed Person (or registrar) in the same way as for those before the Employment Tribunal. Put another way, there are more gaps in the procedural rules that need to be filed by the inherent power to regulate proceedings.

23. But I put great weight on the fact that the Appointed Person, like the Employment Tribunal, is meant to be informal and useable by litigants-in-person. Indeed, Mr Buehrlen made much of the informal nature of proceedings before the Appointed Person. But as *Khan* shows, this is not a reason in itself to allow an appeal to be reinstated.

24. Furthermore, the Court of Appeal held that reinstatement was not a power which fell within the (express) general power to manage proceedings found in the then current Employment Tribunal Rules: *Khan*, [76]. This once more suggests that reinstating an appeal is well beyond the normal regulation of a tribunal.

25. Secondly, there are tribunals which have specific rules to allow for reinstatement of appeals following a withdrawal: for instance, the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273), r 17(3). This indicates that such a power should, as *Khan* suggests, be granted in statute.

26. Thirdly, the two powers which do exist in the Trade Marks Rules 2008 and which could have (potentially) facilitated a withdrawn appeal continuing are explicitly not granted to the Appointed Person. This suggests the rule maker's intention was to preclude the Appointed Person having both the power to correct irregularities in proceedings and to extend the time limit for an appeal. It appears to me, therefore, that to use the inherent power to regulate procedure to reinstate an appeal would not be filling in "gaps in the statutory provisions" but rather "circumventing them": *MIDEM*, [9].

27. Finally, the withdrawal of an appeal without a judicial determination does not determine the appeal. It is still possible for a party to appeal the original Hearing Officer's decision. This would, of course, require a party to overcome the incredibly high hurdle of persuading the registrar to exercise the discretion to extend the time limit for filing an appeal (r 77).

28. In short, I conclude that I do not have the power to reinstate the appeal. It therefore remains withdrawn.

Costs

29. As held by Tom Mitcheson QC, sitting as the Appointed Person, in *Ice Cool* (O/660/21) (and similarly in *Glo Glu* (O/97/17) and *Dance UK Dance* (O/108/19)) following the withdrawal of an appeal, the respondent is entitled to costs up until the date of that withdrawal.

30. In this case, the Respondent goes further and suggests that the Appellant should be required to pay so called off-scale costs largely because, it is said, the appeal could have been withdrawn earlier.

31. I do not accept that a withdrawal of an appeal should in itself occasion off-scale costs even if it were delayed. Indeed, there is a very strong policy against adopting such an approach because it would discourage withdrawals and lead to proceedings going ahead simply to avoid higher adverse costs. It is my view that any award of costs following the withdrawal of an appeal should normally be on a contribution basis.

32. I am informed that by the time of the withdrawal the Respondent had prepared a skeleton argument for the substantive appeal, and it is my view that the costs order should reflect this fact. Therefore, in relation to the costs incurred up until the withdrawal of the appeal, I order that the Appellant pay the Respondent a contribution of £2,000.

33. The Respondent argues that the application to reinstate the appeal was itself unreasonable and so should lead to off-scale costs in relation to the additional costs it occasioned. In light of the fact of an absence of any authority on the matter, I cannot accept the application was unreasonable. Nevertheless, in view of my findings, the Respondent is entitled to a contribution towards its costs in resisting the application. I therefore award another £2,500 in relation to those costs.

34. In total the Appellant has to pay £4,500 to the Respondent for the proceedings before me in addition to costs of £1,280 for those before the registrar. The total of £5,780 has to be paid by the Appellant to the Respondent by 4pm on 25 May 2026.

PHILLIP JOHNSON
THE APPOINTED PERSON
9 May 2026

Representatives:
For the Appellant: Mr Rowland Buehrlen (of Beck Greener LLP)

For the Respondent: Mr Daniel Selmi (instructed by Dentons)