

O-096-08

IN THE MATTER OF A REQUEST FOR AN EXTENSION OF TIME IN WHICH TO APPEAL A DECISION OF THE REGISTRAR FOLLOWING INVALIDATION ACTIONS NOS. 81656 & 81657 FILED IN THE NAME OF O2 LIMITED AGAINST REGISTRATION NOS. 2308256 & 2325253 STANDING IN THE NAME OF PHILIP MAITLAND

AND IN THE MATTER OF AN APPEAL AGAINST A DECISION OF MR C J BOWEN DATED 12 JULY 2007

DECISION

Introduction

1. This is an appeal against a decision of Mr. C J Bowen, dated 12 July 2007, in which he rejected an application by Mr Philip Maitland retrospectively to extend the time to lodge an appeal against a decision dated 11 May 2006.

Background

2. Mr Maitland was the proprietor of two marks, registration nos: 2308256 and 2325253. They were device marks registered for the following goods in Class 33: spirits (2308256) and flavoured vodka (2325253):



3. The marks were applied for on 16 August 2002 and 3 March 2003, and registered on 28 February 2003 and 22 August 2003 respectively.
4. On 11 March 2004, O2 applied to invalidate the registrations on the basis of sections 5(2)(b), 5(3) and 5(4)(a) of the Act. In the circumstances set out below, Mr Maitland played no part in that application and in a decision dated 11 May 2006 Mr Attfield, acting on behalf of the Registrar, concluded that O2's application succeeded, albeit only under section 5(3) of the Act (see decision O-122-06). The time for appealing that decision expired on 8 June 2006, but no appeal was then filed.
5. Instead, in August 2006, Mr Maitland, who was then unrepresented, applied to have the decision set aside and the proceedings re-opened. That application proceeded to a hearing before Mrs Corbett on 30 November 2006, when his request was refused. Mr Maitland requested a statement of reasons for the refusal. That decision was dated 4 January 2007 (O/003/07) and the parties were allowed until 31 January 2007 to appeal. No appeal was filed.
6. On about 11 December 2006, Mr Maitland contacted Howes Percival LLP. It is not clear to me exactly when he instructed them to file an appeal on his behalf against the decision of 11 May 2006. However, they were certainly instructed by 2 February 2007, when they wrote to the Registry seeking copies of the complete invalidation files. On 20 February 2007, an application was filed on Form TM 9, supported by a witness statement of Mr Maitland dated 19 February 2007, seeking an extension of time in which to appeal Mr Attfield's decision of 11 May 2006.
7. The Registry, in an official letter dated 13 March 2007, issued a Preliminary View refusing the extension of time request. The application was pursued at a hearing in front of Mr Bowen on 12 April 2007, when Mr

Maitland was represented by counsel, and O2 by Mr Stobbs of their trade mark attorneys, Boulton Wade Tennant. Mr Bowen initially provided his decision by letter dated 17 April 2007; he was asked to provide full written reasons, which he did on 12 July 2007. That is the decision now under appeal.

8. Mr Bowen set out the facts at some length and I do not wish to repeat them all here. Perhaps the essence of Mr Maitland's case was as follows:

(a) Some time ago, whilst he was residing in France, he gave the Registry as his address for service in respect of these marks his mother's address at 67 Lindsay Drive, Harrow, Middlesex. When his mother died in June 2003, he returned to England and moved into a flat in London, NW3. The Lindsay Drive house was sold in autumn 2003 (contracts were exchanged on 26 September 2003) and arrangements were made for the Post Office to forward mail addressed to Lindsay Drive to the new address. It is not clear from his witness statement how long that forwarding arrangement lasted, but Mr Maitland says he received "some forwarded mail for approximately a year after I had sold the property" so perhaps to October 2004.

(b) In his witness statement of 19 February, Mr Maitland said that on 3 November 2003 he sent a Form TM21 to the Registry to effect a change of address from Lindsay Drive to his new home. This was never recorded on the Register. I deal with this point further below.

(c) As a result, when O2 filed its invalidity proceedings, notice of the application on Form TM26 was sent to Mr Maitland at the Lindsay Drive address. He apparently never received it. Indeed, it appears from the file that a number of other documents relating to the invalidity proceedings were also sent to the Lindsay Drive address, including a letter of 16 July 2004 from

the Registry, and various documents sent by Boulton Wade Tennant. Apparently, Mr Maitland received none of them.

- (d) As Mr Maitland did not know about the proceedings, he did not file a form TM8 to oppose the application, and was treated as not opposing it.
- (e) An official letter of 23 February 2005 from the Registry to Boulton Wade Tennant offering them a hearing was not copied to Mr Maitland, nor was a letter written to offer him a hearing in relation to the Registry's decision to treat him as not opposing the application.
- (f) The application succeeded (as I have said) in his absence.
- (g) On 1 August 2006, Wragge & Co (solicitors acting on behalf of O2) wrote to Mr Maitland's company, International English Distillers Limited, at its office address, complaining that the promotion and sale of goods under the invalidated marks infringed O2's rights, and referring to the invalidation of Mr Maitland's marks. This was, Mr Maitland says, the first that he had heard of the Registry proceedings. He then took the steps described above to seek to overturn the invalidation of his marks.

The Hearing Officer's decision

9. Mr Bowen set out the main arguments of the parties and the relevant law, in particular section 76 of the 1994 Act, and Rules 33, 54, 63 and 68, the last of which deals with applications for an extension of time. He also set out TPN 3/2000 entitled: "Requests for extensions of time in which to appeal decisions" which reads:

"The prescribed periods during which appeals against decisions of the Comptroller or Registrar may be lodged may generally be extended by the Comptroller/Registrar. However, such extensions are discretionary and should not be granted lightly. In deciding whether to grant an extension the Hearing Officer needs to have full regard to the same overriding objectives as the courts, as set out in

rule 1.1 of the Civil Procedure Rules 1998, one of which is to deal with cases expeditiously and fairly.

This was underlined in a recent decision, *Whiteline Windows Limited v. Brugmann Frisoplast GmbH* (unreported). Mr Simon Thorley Q.C. sitting as the Appointed Person on a trade marks appeal, commented that whilst he accepted that the Registrar had the power to extend the appeal period, it was a matter which must be approached with the greatest caution. He stated that caution was necessary to ensure that the exercise of discretion did not undermine the purpose underlying the statutory provision. He further commented that appeals create uncertainty and as such it was in the interests of everyone to ensure that appeals are disposed of timeously. Mr Thorley concluded by stating that extensions of time in which to enter notices of appeal are therefore not to be encouraged.

Thus an extension will only be granted if there is a reason which is sufficiently strong to outweigh the potential harm to other parties or the public that may be caused by further delay.....”.

10. The Hearing Officer considered that he needed to make decisions in relation to 3 issues. These were:

(1) Was the registrar *functus officio*?

(2) If not, as this was a request for a retrospective extension of time, was he satisfied both with the explanation for the delay and was it in his view just and equitable to grant Mr Maitland’s request?

(3) Had there been a serious procedural irregularity in the TMR which ought to be corrected?

11. Mr Bowen found in favour of Mr Maitland in relation to the *functus* point. There is no cross appeal by O2, so I say no more about it.

12. Next, in dealing with the request for a retrospective extension of time, Mr Bowen referred to *Genius trade mark* [1999] RPC 741 and *Ministry of Sound Recordings Limited and Virgin Records Limited* (O/136/03) and concluded that the burden of justification is heavier in relation to a party who applies for an extension after expiry of the relevant time limit than in the case of a party who applies pre-expiry. At paragraph 19 he said:

“It is, in my view clear that to accede to Mr Maitland’s request, I needed to be satisfied with **both** the explanation for the delay that had occurred, and to consider that it would be just and equitable to allow him the additional time he sought, whilst keeping in mind that the burden of justification faced by him appeared to be heavier than if he had applied prior to the expiry of the relevant time period. ... Mr Maitland’s explanation for the delay in not appealing the decision of 11 May 2006, stemmed from: (i) him not receiving a copy of the decision, (ii) his misguided approach to what [his counsel] described as the set-aside application, and (iii) the time required for [Howes Percival] to establish the correct position before lodging the retrospective request for additional time, supporting evidence and notice of appeal.”

12. In paragraph 22, Mr Bowen took the view that the reason why Mr Maitland did not receive a copy of the decision stemmed from his own failure to update his address at the Registry. Referring to the decision of Mr Hobbs QC in *Coggins* (O/340/04) he rejected Mr Maitland’s argument that it was for the Registrar to verify the currency of his address, saying that it was for Mr Maitland to check that any change of address had been recorded.
13. In paragraph 24, Mr Bowen confirmed his initial view that the delay caused by Mr Maitland’s “misguided approach” to the set-aside application stemmed from his failure to seek professional help, such that he must bear responsibility for that misjudgment.
14. On the third leg of delay, Mr Bowen concluded at paragraph 28 that this was due to an “inappropriate level of urgency” at Howes Percival.
15. Hence, strictly Mr Bowen considered it unnecessary to go on to deal with the “just and equitable” arm of the test under rule 68(5), but he did so in

any event. He concluded at paragraph 31 that the public interest implications, O2's reasonable expectations that the invalidation proceedings had been settled and the desirability of having finality in litigation, all led him to conclude that it was not 'just and equitable' to grant the extension sought.

16. Mr Bowen then turned to consider whether there had been a serious procedural irregularity in the Registry's failure to copy the letter of 23 February 2005 to Mr Maitland, or offer him the opportunity to be heard or file written submissions on the merits of the application. After reviewing the authorities, Mr Bowen concluded at paragraphs 40-41 that there *had* been a serious procedural irregularity. He considered that Mr Maitland

"should in the TMR's letter of 16 July 2004 have been offered a hearing in relation to the TMR's decision to treat the applications for invalidation as proceedings unopposed He should also have been offered the opportunity to be heard in the TMR's letter of 23 February 2005; this letter does not appear to have been copied or sent to him...

.... because Mr Maitland did not respond to the TMR's letters of 19 May 2004 which served the notices of invalidation on him, the provisions of rule 33(6) meant that the registrar was in effect treating him as not opposing the applications and as such, there was no necessity for letters etc to be sent to him. In the light of the decisions in *Coggins* and *Lowden* (which were decided after the TMR's letter of 16 July 2004 but before the TMR's letter of 23 February 2005), this approach, albeit perhaps the TMR's practice at the time, was in my view incorrect. Put simply, Mr Maitland should have been offered the opportunity to be heard in the official letters of both 16 July 2004 and 23 February 2005. As he was not, ... I accept that a procedural irregularity has occurred ..."

O2 does not challenge Mr Bowen's findings in this respect.

17. However, Mr Bowen considered (in the light of *Bat out of Hell*, O/077/02) that he also had to be satisfied that the procedural irregularities were of material effect. He concluded (at paragraph 43) that they were not, in the light of the fact that any appropriate letters/notices which ought to have been sent to Mr Maitland either *were* sent to the defunct Lindsay Drive address or *would* have been sent to that address had the appropriate procedure been followed. At paragraph 43 he said that he considered that such letters were

“... extremely unlikely to have been received by him. If the letters of 19 May and 16 July 2004 had failed to reach him during the period of the mail redirect, I saw no reason to speculate that the letter of 23 February 2005 would have. In this respect, and despite Mr Edenborough arguing strongly that, as I could not **completely** discount the possibility that the letter may have found its way to him, I should exercise my discretion in Mr Maitland’s favour, I agreed with Mr Stobbs that the possibility needed to be more than theoretical, it needed to be a realistic one. In my view it was not.

44. In summary, while there were procedural irregularities which took place before the TMR, they were not, in my view, material in their effects, the consequence of which was that it was not appropriate for me to exercise the discretion provided by rule 68(7) in Mr Maitland’s favour.”

The grounds of appeal

18. Although he was represented by counsel at the hearing before Mr Bowen, Mr Maitland conducted this appeal in person, and appears to have drafted the Grounds of Appeal himself. The Statement of the Grounds of Appeal and Mr Maitland’s skeleton arguments included a number of points which seem to me to relate purely to the merits of the invalidation proceedings. The skeletons also sought to raise a number of points which were neither raised before Mr Bowen nor included in the Grounds of Appeal, including a number of allegations of bad faith.

19. It seems that Mr Maitland wishes to complain that Mr Bowen exercised his discretion in a way that was wrong, unjust or unreasonable and, in particular did not take into account (or give sufficient weight to) a number of arguments made on Mr Maitland's behalf. I think that his complaints can fairly be summarised as follows:

- (a) it was through the negligence of the Registrar that his new address was not recorded on the Register, and Mr Bowen was wrong to find that Mr Maitland had not kept his address up to date;
- (b) the Registrar should have searched for an address for him when he did not respond to letters sent to the Lindsay Drive address;
- (c) O2 knew of his business address and should have used it in the invalidation proceedings; this was a matter upon which Mr Maitland expanded in his skeleton arguments, with particular reference to O2 having instructed Boulton Wade Tennant and Wragge & Co at different stages in this dispute;
- (d) the initial delay was caused by Mr Maitland's reliance on informal advice given to him by Registry staff; later delay was due to his professional advisers rather than himself;
- (e) it was wrong, having found that there was a procedural irregularity, to dismiss it on the speculative basis that post sent to the Lindsay Drive address would not have reached him;
- (f) the merits of his defence to the invalidation proceedings were ignored; and
- (g) there had been a breach of Mr Maitland's right to a fair trial. This point echoed a point made in slightly different terms by Mr Maitland's counsel at the hearing before Mr Bowen, that there had been a serious procedural irregularity which had perpetrated a miscarriage of justice, such that the invalidation decision should be set aside in any event.

Standard of review

20. This appeal is a review of the Hearing Officer's decision. That decision with regard to each of the issues in this case involved a multi-factorial assessment of the kind to which the approach set out by Robert Walker LJ in *REEF TM* [2002] EWCA Civ 763, [2003] RPC 5 at [28] applies:

“In such circumstances an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. A decision does not contain an error of principle merely because it could have been better expressed.”

Merits of the appeal

21. I shall deal with each of the points listed in paragraph 19 above in turn:

22. I do not consider that Mr Maitland's argument that he had given notification of his change of address, and Mr Bowen was wrong to reject this evidence, has any substance, for these reasons:

(i) Mr Maitland's evidence on this point was very unsatisfactory. First, in a letter dated 4 August 2006 to the Registry Mr Maitland said: "In Nov 2003 we had filed a TM 21 change of address See attached. It would seem that records have not been updated." He attached to that letter a completed Form TM21 in relation to mark number 2308256, which has the word "copy" written at the top of the form.

(ii) However, despite the implication that the document sent with the letter was a reprographic copy of the form which he claimed to have sent to the Registry, clearly it was nothing of the kind, because that form of TM21 only dated from October 2004. When the Registry made that point to Mr Maitland, and confirmed that there was no record on file of any request for a change of address, Mr Maitland responded that he had a note that he

sent the form on 3 November 2003, but had not kept a copy of the form itself.

(iii) Mrs Corbett for her part concluded (paragraph 34 of her decision) that no TM21 or other documentation seeking a change of address was filed respect of either of Mr Maitland's registrations.

(iv) In his witness statement of 19 February 2007, Mr Maitland stated that he was sure that he had sent the notice on that date, because he made a contemporaneous handwritten note and placed it on his personal trade mark file. He exhibited to the witness statement a document consisting of an A4 page, which is blank apart from the handwritten words "Memo, 3/11/03 sent PO new address at Well Walk." He described this document to me, at the hearing of the appeal, as "an entry in my diary" but that is not consistent with his witness statement, nor is there anything on the page which suggests to me that it was a diary entry as I would understand that term. I do not find that the document corroborates Mr Maitland's claim to have sent a change of address notification to the Registry on that date.

(v) Mr Bowen referred to Mrs Corbett's conclusions and noted the unsatisfactory nature of the note produced by Mr Maitland in paragraph 21 of his decision. It seems to me that, to the extent that Mr Bowen made any findings about this matter which Mr Maitland would like to appeal, no criticism can be made of Mr Bowen's decision, and I reject the appeal if put on this basis.

23. Mr Maitland complained that the Registry should have checked his address. Mr Bowen dealt with the obligations of the Registrar in this respect in paragraph 21 of his decision and, in reliance on *Coggins*, (*OIOI Trade Mark*, O/340/04) rejected this complaint. I note too the decision of Mr Richard Arnold QC sitting as the Appointed Person in *Moviestar Trade Mark* [2005] R.P.C. 26, especially at paragraph 32, in which he agreed

with this aspect of the decision in *Coggins*, saying “there can be no burden on the Registrar to verify that the documents have been received... just as there can be no duty on the Registrar to verify the currency of the address for service...” In the circumstances, I find no error of law or principle in that element of Mr Bowen’s decision and I reject the appeal in this respect.

24. Mr Maitland reiterated that as O2 knew of his business address, it should have used it in the invalidation proceedings. He relied on the fact that when Wragge & Co wrote to his company on 1 August 2006, they wrote to the office address, and on 7 August they sent him copies of letters that had been sent by Boulton Wade Tennant to him and the company at that address on 11 March 2004. I note that, oddly enough, Mr Maitland denied having received those letters until they were copied to him in August 2006.
25. This was a matter upon which Mr Maitland expanded in his skeleton arguments, with reference to O2 having used Boulton Wade Tennant and Wragge & Co at different stages in this dispute. Mr Maitland was confused about the reasons why two firms were involved in the matter, but I think that this was completely irrelevant to the issues on the appeal. There was no evidence at all before me which I consider justified the complaints on this front, nor justifying the implicit allegations of bad faith arising from them, which were (I think) raised for the first time on the appeal by Mr. Maitland. I do not consider that the Hearing Officer erred in law or principle in finding that there was no obligation to use the office address.
26. Mr Bowen carefully considered the reasons given by Mr Maitland for his delay in making an application to appeal out of time. I am satisfied that he appears to have considered all of the relevant factors, and it does not seem to me that the Hearing Officer erred in law or principle in exercising his discretion.

27. Nonetheless, Mr Maitland argued that as he had found that there was a procedural irregularity, the Hearing Officer was wrong to refuse him the opportunity to re-open the invalidity proceedings on the basis that the irregularity had no material effect. His point was that it was wrong or speculative to say that post sent to the Lindsay Drive address would not have reached him.

28. The irregularity identified by Mr Bowen was the Registrar's failure to inform Mr Maitland of his right to a hearing – see paragraph 16 above. This was required under Rule 54:

“54. - (1) Without prejudice to any provisions of the Act or these Rules requiring the registrar to hear any party to proceedings under the Act or these Rules, or to give such party an opportunity to be heard, the registrar shall, before taking any decision on any matter under the Act or these Rules which is or may be adverse to any party to any proceedings before her, give that party an opportunity to be heard.

(2) The registrar shall give that party at least fourteen days' notice of the time when he may be heard unless that party consents to shorter notice.”

Mr Bowen was being asked to exercise the Registrar's discretion under Rule 68(7) which provides:

“(7) Without prejudice to the above, in the case of any irregularity or prospective irregularity in or before the Office or the registrar which-

(a) consists of a failure to comply with any limitation as to times or periods specified in the Act or these Rules ... which has occurred or appears to the registrar as likely to occur in the absence of a direction under this rule, and

(b) is attributable wholly or in part to an error, default or omission on the part of the Office or the registrar and which it appears to her should be rectified,

she may direct that the time or period in question shall be altered in such manner as she may specify upon such terms as she may direct.”

29. First, it is plain that Mr Bowen was right in the light of the authorities to conclude that there had been a serious procedural irregularity in the Registry's failure to notify Mr Maitland of his right to be heard. In this

respect I note that Mr Arnold QC said, at paragraphs 39-40 of *Moviestar Trade Mark*:

“39 There is, however, a more fundamental objection to the hearing officer's decision, which is that, as in *OIOI Trade Mark*, he took a decision under r.31(3) adverse to the registered proprietor without giving the registered proprietor an opportunity to be heard, contrary to r.54. ...

40 Like Mr Hobbs, I consider that this is a serious procedural irregularity. Rule 54 is an application of the fundamental common law principle of *audi alteram partem* and of parties' rights to a fair hearing under Art.6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is therefore important that it be complied with. Furthermore, it is only by complying with r.54 that the Registrar can deal justly with what Mr Thorley in *OMITEC Trade Mark* described as the "apparently draconian" effect of r.68(3) in a case where the registered proprietor's failure to comply with the time limit under r.31(2) is due to circumstances outside its control.”

30. Rather similarly, in *Gillette trade mark* (O/375/01) Mr Hobbs QC, sitting as the Appointed Person, had to consider the effect of a failure by the Registrar to give the appellant adequate notice of a hearing date. He held:

“53. It may be demonstrable that the process by which a decision has been reached was good enough, even if it involved a breach of procedure, to leave no room for any real doubt as to the rectitude of the determination. If so, the breach of procedure may be regarded as immaterial in the context of proceedings by way of appeal: *Lloyds Bank plc v. Dix* (26 October 2000).

54. The *Lloyds Bank* case exemplifies the immunising effect of this approach to materiality. The question for consideration was whether an application for an adjournment made on the date fixed

as the first day of a trial was wrongly refused by the trial judge. The refusal of an adjournment was said to have deprived the defendants of their right to a fair trial under Article 6(1) of the European Convention on Human Rights. Their appeal was rejected by the Court of Appeal. In paragraphs 31 and 32 of his judgment, Laws LJ observed.

“31. If I considered that an adjournment on 1st November 1999 would or reasonably might have made a material difference to the outcome of the litigation. I should for my part be prepared to order a new trial.

32. However [counsel] ... was at length disposed to accept that in a case where no procedural guarantees (or indulgences) could save a party from an inevitable conclusion on the merits that his case was truly hopeless, this court should not somehow allow him to go back into the fray because there had been some failure of fairness along the way. That would be for the court to act in vain, which it does not do. Nor, I should add, does Art. 6 of the European Convention on Human Rights require it to do so; though I would accept that that provision may raise nice questions as to the balance to be struck, case by case, between the force of a procedural defect on the one hand and the force of an apparently secure result, not flowing from any such defect, on the other. Those questions do not arise, however, where the litigation has only one possible result. And as I shall shortly demonstrate that, in my judgment, is the position here.”

Lord Phillips MR and May LJ agreed. The refusal to grant an adjournment was regarded as a matter of no materiality relative to the determination that the court was required to make. For present purposes, I think it is important to note that the decision to refuse an adjournment was taken by the trial judge at a duly appointed

hearing, in the exercise of a discretion he undoubtedly possessed, in the presence of the defendants and after considering representations made on their behalf.

55. It is clear that the denial of a right to be heard will not readily be regarded as an immaterial breach of procedure. ...”

31. In *Moviestar*, Mr Arnold was not considering the applicability of rule 68(7), but the discretion conferred on the Registrar by rule 31(3). I note that he held at paragraph 50 that:

“If a registered proprietor establishes that (a) it has not complied with the time limit under rule 31(2) for a good reason, such as not receiving the application for revocation, (b) it has a real prospect of successfully defending the application or that there is some other good reason why it should be permitted to defend and (c) there is no other good discretionary reason why it should be denied relief, then I consider that the tribunal’s discretion under rule 31(3) should be exercised in its favour so as to permit it to defend the application. In my judgment, a system which did not permit a registered proprietor to defend an application for revocation in such circumstances would not comply with Article 6 ECHR since it would unjustifiably deprive the registered proprietor of its right to a hearing on the merits of the application: cf. *Cachia v Faluyi* [2001] EWCA Civ 998, [2001] 1 WLR 1966, *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 WLR 1828 and *Beer v Austria* (Application No. 30428/96, European Court of Human Rights, Judgment of 6 February 2001) and contrast *CIBC Mellon Trust Co Ltd v Stolzenberg* [2004] EWCA Civ 827 at [161].”

32. In the light of these authorities I consider that the Hearing Officer was right to say that a party must not be prevented from defending a case/application by reason of a procedural irregularity which has a material effect. On the other hand, the tribunal should consider whether

compliance with procedural rule that has been breached would have made “a material difference to the outcome of the litigation”. If not, the tribunal may be justified in refusing the application designed to remedy the irregularity. It therefore seems to me that Mr Bowen did not make any error of principle in considering whether the irregularity which he had identified had made a material difference to the invalidity proceedings.

33. In my judgment, it cannot be said that the Hearing Officer erred in relation to the facts which he took into consideration in coming to his conclusion that the irregularity had no material impact on the case. The irregularity in this case was two-fold: failing to offer Mr Maitland the opportunity to be heard in the official letter of 16 July 2004 (which was sent to the registered Lindsay Drive address) and failing to send a similar letter in 23 February 2005. Any such letter would also, of course, have been sent to Mr Maitland at Lindsay Drive. Mr Bowen took the view that as the July 2004 letter was sent to the right address but did not reach Mr Maitland, a letter sent in February 2005 to that address would not have reached him either. Mr Maitland’s evidence was that mail sent to that address ceased to reach him about a year after he sold it, that is some 5 months before February 2005. In the light of that evidence and Mr Maitland’s non-receipt of letters sent to him at that address in May and July 2004, the Hearing Officer’s conclusion seems to me to be one which he was fully entitled to reach on the basis of the evidence before him. I reject the appeal on this basis also. I note too that in the passage cited above from *Moviestar* it is clear that Mr Arnold took into account the fact that there were good reasons for the appellant’s failure to comply with the rules. For all the reasons given above, the same cannot be said here.

34. Mr Maitland argued that he had lost his human right to a fair trial. As *Moviestar* and the *Lloyds Bank* case cited above show, this argument raises the same issues as those dealt with in paragraphs 27 to 33 above. I do not consider that this is a reason to allow the appeal.

35. Lastly, Mr Maitland argued that the merits of his defence to the invalidation proceedings were ignored by Mr Bowen. I do not think that this is justified criticism of the decision, as Mr Bowen considered the point in the context of the competing arguments about prejudice made to him by both parties' representatives when considering whether it was "just and equitable" to grant the extension of time sought.
36. For all these reasons, the appeal fails.

Costs

37. O2 sought an Order for its costs of the appeal, which in my view ought to follow the event.
38. There are two specific points to deal with on costs. First, Mr Maitland was unfortunately too unwell to conduct the hearing of the appeal which was initially set down for 7 December 2007. He did not provide me (as requested) with medical evidence prior to the hearing, but on 7th December I granted him an adjournment, and reserved the question of the costs thrown away. Mr Stobbs sought an order for those costs, and I think it right to make some allowance for them now.
39. Secondly, Mr Stobbs argued that if the appeal failed, I should award O2 its costs on a more generous basis than is usual in interlocutory matters, on the basis that this was an exceptional case and one in which the appeal was misguided. I agree that this appeal was misguided. It had no realistic prospect of success. I have some sympathy for O2's position, given the large sums which I was told had been spent upon the appeal. In case O/055/08, *VIRGIN SMILE*, (17 January 2008), the Appointed Person, Mr Richard Arnold QC was also faced with an appeal which he described as "not only an appeal against a case management decision on an extension

of time but also an appeal that had no realistic prospect of success.” Mr Arnold went on to say:

“In my judgment, appeals against case management decisions in the registry, particularly decisions about extensions of time, are to be discouraged save where there is a real reason and justification for such an appeal. In the circumstances of the present case, I do not consider that there was such justification. Accordingly, I consider that it is right to approach this case on the footing that an award of costs that more closely approximates to the applicant for a declaration of invalidity's actual costs is justified. That does not mean that an indemnity award is necessarily appropriate. Considering matters in the round, I propose to order that the registered proprietor pay the applicant for a declaration of invalidity the sum of £500 as a contribution to its costs.”

40. Taking into account the points set out above, I order Mr Maitland to pay O2 £850 as a contribution towards its costs, within 28 days.

Amanda Michaels
2 April 2008

Mr Maitland appeared in person.
Mr Julius Stobbs of Boulton Wade Tennant appeared on behalf of O2