

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No. 2442910
by Sun Mark Ltd to register the trade mark
BULLDOG in Class 32**

and

**IN THE MATTER OF Opposition thereto under No. 95303
by Red Bull GmbH**

APPEAL from the decision of Mr Mark Bryant dated 8 May 2009

DECISION ON COSTS

1. By a decision dated 16 February 2010, I dismissed Red Bull's appeal from the decision of Mr Mark Bryant dated 8 May 2009. I indicated that the respondent, Sun, was entitled to a contribution towards its costs of the appeal.
2. As Sun was not legally represented, I referred the parties to the decision of Mr Richard Arnold QC, acting as the Appointed Person in *South Beck*, B/L O/160/08 (9 June 2008) and I invited Sun to provide me with a brief schedule of costs setting out any disbursements incurred, any other financial losses claimed and a statement of the time spent in dealing with the appeal.
3. Sun provided me with a breakdown by a letter dated 23 February 2010. This claimed:
 - a. 4 hours of Dr Ranger's time at £250 ph, i.e. £1000;
 - b. 30 hours of Mrs Ranger's time at £200 ph, i.e. £6000;
 - c. 40 hours of Mr Raphael's time at £175 ph, i.e. £7000.

Sun's letter added: "This breakdown has also taken into consideration the length of delay involved in allowing our application to proceed to registration, the time/cost involved in communicating to the manufacturer about the delay in producing the packaging and the product itself. Also the loss of potential business had the mark

been registered and sold." A total of £15,650 was claimed, to include the costs of £1650 awarded by the Hearing Officer.

4. Red Bull provided me with detailed comments in response dated 10 March 2010, referring me in particular to TPN 2/2000 and to the guidance given by Mr Arnold QC in *South Beck*. In that case, Mr Arnold QC confirmed that in general an award of costs in proceedings before the Registrar is not intended to compensate parties for the expense to which they have been put, but only to make a contribution towards their costs. Costs in the Registry are, in most cases, awarded according to a fairly modest scale, see TPN 4/2007 (in exceptional cases, costs may be awarded "off the scale"). For instance, the scale allows for a contribution of £1500 in respect of preparation for and attendance at a day's hearing, although plainly where a party has been professionally represented, it may have incurred considerably higher costs.
5. Mr Arnold QC also explained that where the successful party is a litigant in person, the Registrar (or the Appointed Person) will apply by analogy the principles applicable to High Court proceedings which are set out in CPR 48.6 of the Civil Procedure Rules. That Rule provides, in particular, at 48.6(2):

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

CPR 48.6(4) also provides:

"The amount of costs to be allowed to the litigant in person for any item of work claimed shall be –

- (a) where the litigant can prove financial loss, the amount that he can prove he has lost for time reasonably spent on doing the work; or
- (b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in the practice direction."

The relevant Practice Direction about costs, which supplements CPR 48, provides at Section 52 that:

"4. The amount, which may be allowed to a litigant in person under rule 46.3(5)(b) and rule 48.6(4), is £9.25 per hour."

6. The costs claimed by Sun are far higher than the scale costs, although this is not a case in which there are reasons to award costs off the scale. Applying the provisions of CPR 48, it seems to me that Sun has not proved financial loss within the meaning of CPR 48.6 (4)(a) on the basis that that Dr Ranger, Mrs Ranger and Mr Raphael's time would have been charged out at the hourly rates given. The sums given as hourly rates are not supported by any documentation. Sun's letter merely says that it has calculated the sums due at a particular hourly rate, without showing that such is either the usual rate or a reasonable rate for each of the personnel involved. Furthermore, Sun's comment that the sums claimed take into account time spent in communication with the manufacturer, etc., suggest that these are not straightforward hourly rates of pay for the time spent in preparation for the appeal.
7. Furthermore, whilst Mrs Ranger and Mr Raphael may both have spent substantial time in preparing for the appeal, it does not seem to me that the total time spent can be said to be objectively reasonable. Mrs Ranger is said to have spent 30 hours in preparation, although she had been involved in the case from the outset, and Mr Raphael is said to have spent a further 40 hours on the appeal. Such a lengthy period of preparation appears to me to be far more than objectively reasonable for the matters arising on the appeal and the submissions made orally and in writing by Sun.
8. For these reasons, it seems to me that I should award Sun an amount for the time reasonably spent on doing the work, at the rate set out in the practice direction. Red Bull submitted that a reasonably generous estimate of time spent in preparation for the appeal would have been 30 hours. Given the need for Sun to revisit the evidence and the decision of the Hearing Officer, to prepare its skeleton argument and submissions for the appeal, and prepare its additional submissions in its letter of 30 November 2009, I agree that 30 hours is a reasonable estimate. In addition, I would allow for the attendance at the appeal of Dr Ranger and Mr Raphael, say a further four hours each. At £9.25 per hour that amounts to £351.50.
9. No specific disbursements were claimed, but Red Bull appears to accept that I should award Sun a modest sum for travel costs, based on the cost of public transport from Greenford, where Sun is based, to the hearing, amounting to £16 in total.

10. I therefore order Red Bull to pay Sun £367.50 as a contribution towards its costs of the appeal, that sum is in addition to the costs of £1650 awarded by the Hearing Officer as costs of the hearing below. The Hearing Officer originally ordered that the costs below should be paid within seven days after the decision in any appeal. However, given the imminence of the Easter break, I will order the total of £2017.50 to be paid by Red Bull by 5 pm on Wednesday 14th April 2010.

Amanda Michaels
31 March 2010