

O-149-05

TRADE MARKS ACT 1994

**IN THE MATTER OF AN INTERLOCUTORY HEARING HELD IN RELATION TO
REVOCATION NO: 81899 BY MILK LINK LIMITED TO REGISTRATION
NO. 2047388 IN THE NAME OF ALMIGHTY MARKETING LIMITED**

TRADE MARKS ACT 1994

**IN THE MATTER OF an interlocutory hearing held
in relation to Revocation No: 81899 by Milk Link Limited
to Registration No. 2047388 in the name of
Almighty Marketing Limited**

BACKGROUND

1. Trade Mark No. 2047388 for the words MOO JUICE is registered in Class 29 for a specification of goods reading: “Milk; milk beverages; flavoured milk; milk products; yoghurt; drinking yoghurt; flavoured yoghurt.”

The mark was applied for on 4 December 1995 and the registration procedure completed on 16 August 1996. The registration stands in the name of Almighty Marketing Limited (hereafter referred to as AM).

2. By application dated 21 October 2004, Burges Salmon (hereafter referred to as BS) acting as agents for Milk Link Limited (hereafter referred to as ML) applied for this registration to be revoked. They did so on the following basis:

“2. On the basis of enquiries made on behalf of the applicant, the Applicant believes that there has been no genuine use in the course of trade of the Mark by the proprietor or with its consent in relation to Class 29 goods since the date of registration on 16 August 1996, or in the alternative that there has been no such use since at least 17 August 1999, and furthermore that there are no proper reasons for such non-use. The Applicant can find no evidence of genuine use of the Mark by or on behalf of the proprietor in relation to the goods listed in the specification.

3. The relief sought by the Applicant is the revocation of the Mark.”

I note that in response to the questions in boxes 5 (Are you basing your application on Section 46(1)(a), 46(1)(b), or both?), 6 (If you are basing your application on Section 46(1)(b), within what 5-year period do you say the mark was not used?) and 7 (From what date do you want revocation to take effect?) of the Form TM26(N), the Applicant inserted the following:

Box 5: “Section 46(1)(a) or in the alternative section 46(1)(b)”.

Box 6: “17 August 1999-17 August 2004”.

Box 7: “16 August 2001 under s 46(1)(a); 17 August 2004 under s 46(1)(b)”.

3. On 26 October 2004, the Trade Marks Registry served the Form TM26(N) on the Registered Proprietor’s agents Brookes Batchellor (hereafter referred to as BB) who were allowed, under the provisions of rule 31(3) of the Trade Marks Rules 2000 (as amended), until 26 January 2005 to file a Form TM8 and counter-statement together with either evidence of use made of the mark, or proper reasons for non-use.

4. On 18 January 2005, BB filed a Form TM8 and counter-statement together with a number of exhibits. In an official letter dated 20 January 2005, BB were advised that the exhibits provided were not in the correct evidential format i.e. as prescribed by Section 69 of the Trade Marks Act 1994 (as amended) and rule 55 of the Trade Marks Rules 2000 (as amended) and the exhibits were returned to them; they were reminded that the period for filing evidence expired on 26 January 2005. Under cover of a letter dated 24 January 2005, BB filed Witness Statements of Mark Cooper and Victoria Martin together with a number of associated exhibits.

The Registered Proprietor's evidence of use

5. This consists of two Witness Statements. The first dated 21 January 2005, is by Mark Cooper. Mr Cooper explains that he is the Managing Director of the Registered Proprietor, Almighty Marketing Limited, a position he has held since the company's incorporation in September 2003.

In paragraph 2 of his Statement, Mr Cooper says:

“I can confirm that my company's trade mark MOO JUICE was in use in the United Kingdom on a daily basis in relation to milk up until 31 March 2001.”

Exhibit MOO 1 to his Statement consists of a copy of a letter dated 11 November 2004 from his company's chartered accountants, Crossley & Co of Rochester, Kent, addressed to BB. The text of this letter reads as follows:

Mark Cooper
Moo Juice

We act as Accountants and Taxation Advisors to the above named mutual client, and write at his request regarding the above trademark.

We can confirm that the trademark was used on a daily basis within our client's business of which he was a Partner, up until 31st March 2001.

We trust this confirmation is of assistance to you in defending our client's position, but please do not hesitate to contact us should you require any additional information or clarification.”

Exhibit MOO 2 consists of four undated labels all of which bear the words “MOO JUICE”, the words “Nature's Natural Soft Drink” (both of which carry the ® device), together with devices of a stylised version of a cow's head and other non-trade mark matter. The labels were, it appears, for use on fresh pasteurised milk.

The second Witness Statement dated 24 January 2005 is by Victoria Jane Martin. Ms Martin explains that she is a registered Trade Mark Attorney and Partner in the firm of Brookes Batchellor. She confirms that the information in her Statement has been obtained from the Registered Proprietor or is within her personal knowledge.

Exhibit VJM 1 to her Statement consists of the Witness Statement of Mark Cooper dated 21 January 2005 and summarised above. Ms Martin notes that in paragraph 1 of his Statement

Mr Cooper states that he has held the position of Managing Director of Almighty Marketing Limited since 11 September 2003.

Ms Martin adds that by way of background, the mark the subject of these proceedings was assigned from Mark David Cooper on 17 December 2003 to Almighty Marketing Limited. Exhibit VJM 2 consists of a printout of the case details of the mark, taken from the Trade Marks Registry's database, from which Ms Martin notes that prior to December 2003 the mark stood in the name of Mark David Cooper. She concludes her Statement in the following terms:

“Therefore, the use made of the mark MOO JUICE by the Proprietor, was not by Almighty Marketing Limited, but by the Proprietor's predecessors in title, Mark David Cooper through his family partnership P A Cooper & Sons.”

6. In an official letter dated 1 February 2005, the Trade Marks Registry served the Form TM8, counter-statement and the evidence provided on BS. Under the provisions of rule 31A(1), the Applicant was allowed until 1 May 2005 to file whatever evidence it considered appropriate.

7. In a letter to the Trade Marks Registry dated 8 February 2005, BS asked the Trade Marks Registry to re-consider allowing these proceedings to continue. Having applied the guidance provided in the Hearing Officer's decision in *Carte Bleue Trade Marks* [2002] RPC 31, BS commented:

“The scarcity of facts does not allow any proper inference of use to be drawn. In all the circumstances of the case, we invite you to treat the opposition to the application as having been withdrawn and revoke the registration.”

8. In an official letter dated 15 February 2005, the Trade Marks Registry responded to BS. The Preliminary View issued indicated that the evidence filed was considered sufficient at this stage of the proceedings to mount an arguable defence and as a result the proceedings were allowed to continue. The Applicant was allowed until 1 March 2005 to request a hearing; in a letter dated 21 February 2005, BS requested a hearing.

THE INTERLOCUTORY HEARING

9. On 28 April 2005, an interlocutory hearing took place before me to consider the preliminary view expressed in the official letter of 15 February 2005. At the hearing, the Registered Proprietor was represented by Mr Iain Purvis of Counsel instructed by BB; the Applicant was represented by Mr Andrew Allan-Jones of BS.

THE SKELETON ARGUMENTS

10. The main points emerging from the parties skeleton arguments are as follows:

The Registered Proprietor

- that until 31 March 2001, Mr Cooper's business used the MOO JUICE mark in relation to milk products, in particular on the packaging. That this is use of the mark within the relevant 5 year period in relation to goods for which the mark is registered by or with the consent of the Registered Proprietor;
- that the evidence could be longer, fuller and more detailed and the Registered Proprietor is likely to file additional evidence in due course;
- that in *Carte Bleue Trade Marks*, the Hearing Officer, when considering rule 31(2) of the Trade Marks Rules 2000, concluded that the purpose of this rule was for the Registered Proprietor to file evidence which indicates to those concerned that a proper defence is, and can be mounted, but the Hearing Officer added that the evidence filed at this stage in the proceedings need not be the totality of the Registered Proprietor's evidence, as the rules provide the Registered Proprietor with a further opportunity to file evidence later in the proceedings;
- that two further issues need to be borne in mind. The first is that the time limit for filing evidence under rule 31(3) is not extendable and secondly that the sanction for a finding that the evidence is insufficient is very serious – the Registered Proprietor will lose his mark. As a result, only where the evidence is clearly insufficient should this rule be applied against the Registered Proprietor;
- that the assertion by Mr Cooper in his Witness Statement (accompanied by a statement of truth) that the mark had been used would have sufficed in itself, but in these proceedings this is supported by the exhibits provided;
- that these proceedings differ from *Carte Bleue Trade Marks* in that: the evidence is from the person who actually used the mark; the use was in his business in the United Kingdom; and it was use within the relevant period.

The Applicant for Revocation

- that the evidence filed by the Registered Proprietor is inadequate to overcome the burden of proof set out in Section 100 of the Trade Marks Act and amounts to nothing more than a bare assertion of use. In the alternative, the opposition should be treated as having been withdrawn for everything except milk;
- that evidence under rule 31(3) of the Trade Marks Rules 2000 (as amended) should be considered on the same basis as the Hearing Officer considered evidence under rule 31(2) of the Trade Marks Rules 2000 in *Carte Bleue Trade Marks*. In particular, the following words and phrases were identified: "...I note that the word "show" is used in Section 100 which suggests in revocation proceedings evidence must be more **than mere assertion that the trade mark in question has been used, but must be actual evidence which shows how the trade mark is used.**"; "...need only show use at the outset which

indicates **clearly** to those concerned that a proper defence....”; “the sort of evidence that one would normally hope to see is copies of brochures, catalogues, pamphlets, advertisements etc.....together with some indication of the sales of goods, or the provision of services..”.

- that Ms Martin’s Statement attempts to clarify the history of the ownership of the mark and asserts that use was made by the Registered Proprietor’s predecessor in title Mark David Cooper through his family partnership P A Cooper & Sons;
- that the letter dated 11 November 2004 from the Registered Proprietor’s accountants is no more than an assertion of use. It does not explain how the mark was used, in relation to which goods and no quantities or turnover are provided;
- that the accountant’s letter mentioned above was available some two and a half months prior to the deadline for the filing of the Registered Proprietor’s evidence in these proceedings. This is not, therefore, a case where the Registered Proprietor has been unable to complete more detailed evidence in the period allowed;
- that the labels exhibited to Mr Cooper’s Witness Statement are not actual labels which have appeared on milk cartons. Notably the “use by” dates have not been completed. They appear to be unused labels which have never been applied to milk cartons;
- that the Registered Proprietor has had ample opportunity to put in proper evidence. In addition, the comments of the Appointed Person in CORGI [1999] RPC 549 should be borne in mind, namely: “....Even so, it is necessary to remember that there is a distinction to be drawn between inference and conjecture.”
- that the evidence supplied by the Registered Proprietor is nothing more than mere assertion. The opposition to the application should be treated as withdrawn and the mark revoked from 16 August 2001;
- that if the Applicant’s principal case fails, the registration should be partially revoked by deleting all goods except fresh semi-skimmed and skimmed milk.

THE INTERLOCUTORY DECISION

11. In my letter to the parties following the interlocutory hearing, my decisions were:

- to reverse the Preliminary View expressed in the official letter of 15 February 2005, the consequence of which is that the Registered Proprietor will, under the provisions of rule 31(3) of the Trade Marks Rules 2000 (as amended), be treated as not opposing the Application for Revocation;
- that the Registration would be revoked in its entirety with effect from 16 August 2001;
- to award costs to the Applicant in the amount of £900.

12. On 3 May 2005, BB filed a Form TM5 requesting a written statement of the grounds of my decision; I give this decision below.

GROUNDS OF DECISION

13. For the purpose of this decision, the applicable sections of the Trade Marks Act 1994 (as amended) and the portions of the relevant rules contained in the Trade Marks Rules 2000 (as amended) are reproduced below:

“46. - (1) The registration of a trade mark may be revoked on any of the following grounds -

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c)....

(d) ...

(2) For the purpose of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made.

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4)...

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from-

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existing at an

earlier date, that date.”

Section 100 of the Act (in relation to the burden of proving use), is relevant and reads:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

Rules 31 and 31A which deal with Applications for Revocation on the grounds of non-use read:

Rule 31:

“(1) An application to the registrar for revocation of a trade mark under section 46, on the grounds set out in section 46(1)(a) or (b), shall be made on Form TM26(N) and be accompanied by a statement of the grounds on which the application is made.

(2) The registrar shall send a copy of Form TM26(N) and the statement of the grounds on which the application is made to the proprietor.

(3) The proprietor shall, within three months of the date on which he was sent a copy of Form TM26(N) and the statement by the registrar, file a Form TM8, which shall include a counter-statement, and be accompanied by -

(a) two copies of evidence of use of the mark; or

(b) reasons for non-use of the mark,

otherwise the registrar may treat him as not opposing the application.

(4) The evidence of use of the mark shall -

(a) cover the period of non-use alleged by the applicant on Form TM26(N), or

(b) where the proprietor intends to rely on section 46(3), show that use of the mark commenced or resumed after the end of that period but before the application for revocation was made.

(5) The reasons for non-use of the mark shall cover the period of non-use alleged by the applicant on Form TM26(N).

(6) The registrar shall send a copy of Form TM8 and any evidence of use, or reasons for non-use, filed by the proprietor to the applicant and the date upon which this is sent shall, for the purposes of rule 31A, be the "initiation date.”

Rule 31A:

“(1) The applicant may, within three months of the initiation date, file any evidence he may consider necessary to adduce in support of the grounds on which the application was made.

(2) Where the applicant files no evidence under paragraph (1), the registrar shall notify the proprietor that no evidence was filed.

(3) The proprietor may, within the relevant period, file such evidence as he may consider necessary to adduce in support of his case.

(4) The relevant period -

(a) where the applicant files evidence under paragraph (1), is the period beginning on the date on which a copy of the evidence is filed and ending three months after that date; or

(b) where the applicant does not file evidence under paragraph (1), is the period beginning on the date on which the registrar sent the proprietor a notification under paragraph (2) that no evidence was filed and ending three months after that date.

(5) Where the proprietor files evidence under paragraph (3), the applicant may, within three months of such evidence being filed, file any evidence in reply; such evidence shall be confined to matters strictly in reply to the proprietor's evidence.

(6) The registrar may, at any time if she thinks fit, give leave to either party to file evidence upon such terms as she thinks fit.”

14. The scheme of the Act and Rules provided above, makes it clear that when an Application for Revocation is filed, the Trade Marks Registry will (having scrutinised the Application), send a copy to the Registered Proprietor. As the wording of Section 100 of the Act places the burden of proving use of the trade mark on the Registered Proprietor, under the provisions of rule 31(3), the Registered Proprietor then has a period of three months from the date on which he was sent a copy of the Application to file a Form TM8 and counterstatement and either two copies of evidence of use of the mark or alternatively proper reasons for non-use. In order to discharge this initial burden, the Registered Proprietor in these proceedings filed the evidence summarised in paragraph (5) above.

15. In their skeleton arguments and at the hearing, both parties agreed that it was appropriate to consider the Hearing Officer's decision in *Carte Bleue Trade Marks*, when deciding whether the first round of evidence filed by a Registered Proprietor in a non-use revocation action was sufficient to allow the proceedings to continue. Although that decision was made, *inter alia*, under the provisions of rule 31(2) of the Trade Marks Rules 2000, the wording of rule 31(3) of the Trade Marks Rules 2000 (as amended) is effectively the same.

16. In *Carte Bleue*, the Hearing Officer said:

“29. In my view, taking the Act and the Rules together, they seem to me to envisage that when challenged there is an onus upon the registered proprietor at the outset to provide some evidence that the trade mark the subject of the application for revocation was in use during the relevant period. In that connection, in particular I note that the word "show" is used in section 100 which suggests in revocation proceedings

evidence must be more than mere assertion that the trade mark in question has been used, but must be actual evidence which shows how the trade mark is used.....”

And:

“31. I do not consider therefore that the regime requires the registered proprietor to submit within the three-month unextendable period allowed for filing the form TM8, counter-statement and evidence of use, the entirety of their evidence. In many respects that would be unrealistic in a number of cases. For example, as I indicated during the hearing, if the registered proprietor had licensed use of the registered trade mark which may be registered for, say, tinned fruit, on the basis of exclusive licences, to half a dozen others who each produced a particular type of tinned fruit then it may take more than three months to gather together evidence or, should I say, complete evidence of use of the trade mark. Therefore it seems to me that the Act and the Rules indicate that at least initially the registered proprietor in seeking to defend himself against an allegation of non-use need only show use at the outset which indicates clearly to those concerned that a proper defence is, and can be, mounted in relation to the allegation that the trade mark has not been used.

32. Mr Engelman pointed out to me that the Trade Marks Registry Work Manual sets out the sorts of material that might be acceptable. There has also been a decision by one of the registrar's hearing officers in a case known as ADRENALIN Trade Mark O/336/99 which also sets out examples of the sorts of things that the registrar, or, more particularly, the other side might accept and consider as evidence of use of the trade mark.

33. From my point of view I would simply reinforce what has been said in these decisions and in the Manual, that the sort of evidence that one would normally hope to see is copies of brochures, catalogues, pamphlets, advertisements, etc., all of which show use of the trade mark in question, together with some indication of the sales of goods, or the provision of services during the relevant period. Clearly this cannot be an exhaustive list and is merely an example of the material which might be sent in.”

17. From these comments, I conclude that in order to clear the hurdles imposed by Section 100 of the Act and rule 31(3) of the Trade Marks Rules, it is necessary for a Registered Proprietor, when challenged, to provide evidence which shows to those concerned i.e. the Applicant and the Trade Marks Registry that a proper defence can be mounted to the allegation that the trade mark has not been used. I also note that the Hearing Officer in *Carte Bleue* commented that as the period to file initial evidence in a non-use revocation action was not extendable, that this need not be the totality of the Registered Proprietor's evidence. He did so for the practical reasons outlined in paragraph 31 of his decision, but also, of course, because once the Registered Proprietor has joined the proceedings he has another opportunity to file evidence under rule 31A(3).

18. In light of the guidance provided in *Carte Bleue*, was the evidence provided by the Registered Proprietor sufficient to allow these proceedings to continue? In my view it was not. Section 100 of the Act includes the word “show”; the Hearing Officer's view on how this

word should be interpreted in the context of non-use revocation proceedings are contained in paragraph 29 of his decision. In his skeleton argument and at the hearing, Mr Allan-Jones focused on the nature of the Registered Proprietor's evidence and why, in his view, it consisted of assertions rather than actual evidence of use of the mark.

19. The Registered Proprietor relies on the Witness Statements of Mr Cooper and Ms Martin and the associated exhibits. In his skeleton argument Mr Purvis argued:

“...A simple assertion by Mr Cooper in a witness statement bearing a statement of truth that the mark had been used by himself in a particular way in relation to the goods covered by the registration at the relevant time would in fact have sufficed in itself....”

And at the hearing he said:

“..However, it is also important to remember what evidence and how evidence is received in the courts in the United Kingdom. Evidence is received in the courts, and indeed, in the Registry, in the form of witness statements by witnesses who are able to speak to the events of which they give evidence. That evidence is still evidence whether or not it is backed up by hard documentary material.”

20. In *Carte Bleue* the Hearing Officer commented that the use of the word “show” suggests that evidence must be more than mere assertion and must be sufficient to demonstrate to those concerned that a proper defence can be mounted; I agree. In paragraphs (32) and (33) of his decision he outlines the sort of documentation and information which might be provided whilst recognising that these are only examples.

21. In paragraph 2 of his Witness Statement Mr Cooper confirms that his company's MOO JUICE trade mark was used in the United Kingdom on a daily basis in relation to milk up until 31 March 2001. If Mr Purvis is correct, this is sufficient to demonstrate use of the mark within the relevant period. However, if the word “show” is to be given the meaning ascribed to it by the Hearing Officer in *Carte Bleue* (as in my view it should), what documentary material has been provided by the Registered Proprietor to support this claim?

22. Exhibit MOO 1 to Mr Cooper's Statement consists of the letter dated 11 November 2004 from Crossley & Co, who act as accountants and tax advisors to Mark Cooper. To begin with, I doubt that the information contained in this letter is presented in an appropriate evidential form (as prescribed by Section 69 of the Act and rule 55 of the Trade Marks Rules 2000 (as amended)) to allow it to be considered in these proceedings. If the Registered Proprietor wished to rely on the statements contained in the letter, it should have been filed in the correct format i.e. as a Statutory Declaration, Affidavit or Witness Statement. However, if I am wrong in this respect, what evidence does Crossley & Co's letter provide? In paragraph 2 of the letter they say:

“We can confirm that the trademark was used on a daily basis within our client's business of which he was a Partner, up until 31st March 2001.”

Of this letter, Mr Allan-Jones says in his skeleton argument:

“...Once again, the accountant’s letter can be no more than a mere assertion of use. The letter does not state what matters the accountants have considered to inform themselves that use was made. Or whether they are merely writing on the basis of an assertion provided to them by Mr Cooper. It does not explain how the Mark was used, in relation to which goods, any quantities, turnover, profit or marketing costs associated with the Mark. These are all matters of which one might expect an accountant to be aware. The letter does not even assert that there has been use in the course of trade, merely “within our client’s business.”

23. Exhibit MOO 2 to Mr Cooper’s Statement consists of the labels I have described in paragraph (5) above. Of this exhibit, Mr Allan-Jones says in his skeleton argument:

“Mr Cooper’s witness statement also exhibits some labels showing Moo Juice apparently for fresh pasteurised semi skimmed and skimmed milk. Importantly, these are not actual labels which have appeared on milk cartons providing evidence of use within the 5 year period; they appear to be unused labels which have never been applied to milk cartons. Notably, the “use by” dates have not been completed.”

Having commented at the hearing that in his view the existence of these labels were:

“...more compelling in many ways than a mere brochure because you do not produce labels and stick them on goods and then somehow not use the mark. It shows on the face of it an active trade, which is exactly what he is deposing to”,

Mr Purvis also said:

“..that my learned friend makes the point that these labels are not dated in the sense they do not have a use by date therefore plainly they are not actual labels applied to bottles of milk sold in the relevant period. Realistically, we are looking at a relevant period which expired four years ago. It is unlikely in the extreme that anyone would have retained a bottle of milk for that period of time....It is not the kind of product that is going to hang around for years. One can draw no inference..”

24. Ms Martin’s Statement simply provides background to the assignment of the mark that took place from Mark David Cooper to Almighty Marketing Limited in December 2003; it provides no evidence of use of the mark in the context of the Hearing Officer’s decision in *Carte Bleue*.

25. The evidence provided does, as Mr Allan-Jones argued, consist of a number of assertions. For example, Mr Cooper confirms that the mark has been used but provides only a copy of a letter from his accountants who in turn also confirm that the mark has been used. However, the only documentary material provided to support these assertions are the undated labels provided as exhibit MOO 2. Ms Martin asserts that use of the mark was made by the Registered Proprietor’s predecessor in title, but once again no documentary material is provided to support this claim. Whilst I accept Mr Purvis’s submission regarding the labels i.e. that as use of the mark ceased some time ago and given the nature of the goods concerned, it was most unlikely that actual examples would remain, it was still in my view, incumbent on the Registered Proprietor to provide other information (of the sort mentioned in *Carte Bleue*) such as brochures, catalogues, pamphlets, advertisements etc together with an indication of the sales of goods achieved under the mark during the relevant period, which would

demonstrate that the mark had been used. As mentioned above, this did not need to be the totality of the Registered Proprietor's evidence; it simply had to be enough to establish that a proper defence to the Application could be mounted. In the event no such information was provided.

26. Having applied the guidance provided in *Carte Bleue*, I came to the conclusion that the evidence provided by the Registered Proprietor in these proceedings was not sufficient to demonstrate to the Applicant and the Trade Marks Registry that a defence to the Application could be mounted. In reaching this conclusion, I was mindful of the comments of Mr Purvis mentioned in paragraph (19) above. However, in my view, the use of the word "show" appearing in Section 100 is clear. It requires a Registered Proprietor (under the provisions of rule 31(3)) to provide evidence from the outset of the sort mentioned by the Hearing Officer in *Carte Bleue*. Clearly, the sorts of evidence mentioned by the Hearing Officer were only examples of the sort of evidence that could be provided to demonstrate that use had taken place within the relevant period. However, it is clearly preferable, in my view, for any evidence provided by a Registered Proprietor seeking to defend themselves against a non-use attack, to include information of the sort identified by the Hearing Officer; it is as a result of the scrutiny of this sort of information that the Applicant and the Trade Marks Registry can, as a practical matter, satisfy themselves that the mark has been used and in relation to what goods and/or services. When one considers the Registered Proprietor's evidence in the light of these comments, it falls some considerable way short of establishing that a defence to the Application can be mounted.

27. That of course is not an end to the matter; rule 31(3) also contains the following wording:

"...otherwise the registrar may treat him as not opposing the application..."

The use of the word "may" appearing in rule 31(3) clearly confers on the registrar a discretion to treat the Registered Proprietor as opposing the Application, notwithstanding that no evidence of use of the mark had been provided. No request was made for me to exercise my discretion in the Registered Proprietor's favour, and I was not made aware of any circumstances in these proceedings which suggests that an exercise of discretion would be appropriate in any event.

28. The consequence of my findings above, is that in the absence of evidence sufficient to allow these proceedings to continue, the Application for Revocation succeeds. The combined effect of the Applicant's requests (contained in boxes 5, 6 and 7 of the Form TM26(N)), is that revocation was sought under Section 46(1)(a) from 16 August 2001 i.e. five years following the completion of the registration procedure. Consequently, the registration will be revoked in its entirety with effect from 16 August 2001.

29. Finally, I made an award of costs to the Applicant. I did so on the basis that the Applicant had been successful and my decision would terminate the proceedings. I ordered the Registered Proprietor to pay to the Applicant the sum of £900. This sum had been arrived at having applied the guidance provided in Tribunal Practice Notice 2 of 2000 and was made up as follows: £300 for the Application and the accompanying statement, £200 for the statutory fee, £200 for considering the statement of case and evidence in reply and £200 as a contribution for the preparation for and attendance at the interlocutory hearing.

Conclusions

30. In summary, I have concluded that:

- the evidence of use provided by the Registered Proprietor under the provisions of rule 31(3) of the Trade Marks Rules 2000 (as amended) was insufficient to mount a defence to the Application;
- in the absence of submissions to the contrary, the Registered Proprietor will be treated as not opposing the Application;
- the registration will be revoked in its entirety with effect from 16 August 2001;
- the Registered Proprietor should pay costs to the Applicant in the amount of £900.

Dated this 3rd Day of June 2005

**C J BOWEN
For the Registrar
The Comptroller-General**