

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 2453891 BY DAVID GEORGE ROBSON TO REGISTER A TRADE MARK IN CLASSES 16, 35, 36, 38, 39, 40, 41 & 42.**

**AND IN THE MATTER OF OPPOSITION NO. 95858 THERETO BY BAFF (2006) LTD TRADING AS BRITISH ARMED FORCES FEDERATION**

**APPLICANT'S APPEAL TO AN APPOINTED PERSON FROM THE DECISION OF MR G.W. SALTHOUSE DATED 24 JULY 2009**

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**DECISION**

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**Introduction**

1. This is an appeal under section 76 of the Trade Marks Act 1994 (“**the Act**”) against a decision of the Registrar’s hearing officer, Mr George W. Salthouse, by which he upheld an opposition against United Kingdom trade mark application no. 2453891.
2. The application was filed on 26 April 2007 by Mr David George Robson (“**the Applicant**”). Originally, the application was for a series of four marks, but subsequently these were reduced to just the mark depicted below (“**the Mark**”):



EST 2004

3. Registration was sought in respect of the following goods and services:

Class 16: Printed materials; book-binding material; photos; stationery; office supplies; instructional and teaching materials; printers' type.

Class 35: Advertising; business management; business administration; office functions.

Class 36: Insurance; financial affairs; real estate affairs.

Class 38: Telecommunications.

Class 39: Transport; packaging and storing goods; travel arrangements.

Class 40: Treating materials.

Class 41: Education; providing training; entertainment; sporting and cultural activities.

Class 42: Scientific and technological services; design and research relating to these services; industrial analysis and research services.

4. The application was opposed on 11 January 2008 by BAFF (2006) Ltd trading as British Armed Forces Federation (“**the Opponent**”) under section 3(5) of the Act. The Opponent claimed that the Mark should not be registered because it was a “specially protected emblem” under sections 4(1)(b), 4(1)(d) and/or 4(2)(a) of the Act. The Applicant defended the opposition in its entirety.
5. Evidence was filed by both sides and the case came on for hearing on 9 July 2009, which took place via a combination of telephone and video conference. The Applicant, Mr Robson, represented himself, and the Opponent was represented by its Executive Chairman, Mr Douglas Young. During the hearing the Opponent withdrew the ground of opposition under section 4(1)(b) of the Act.
6. The hearing officer upheld the grounds of opposition based on both sections 4(1)(d) and 4(2)(a) of the Act, ruling that the Mark should be refused registration. In his main decision of 24 July 2009 (as amended by a supplementary decision dated 5 August 2009 correcting an error in the section on costs) (“**the Decision**”), the hearing officer set out the principles that apply to ordering costs to a party that represents itself and asked the Opponent to submit a schedule of costs in order for him to assess the appropriate amount. This was done and the hearing officer issued a further decision on 23 September 2009, ordering the Applicant to pay the Opponent £1,503.91 as a contribution to its costs.
7. On 21 October 2009, the Applicant gave notice of appeal to the Appointed Person. I heard the appeal on 18 May 2010. The Applicant represented himself, attending by telephone. The Opponent was again represented by Mr Douglas Young who attended in person.

#### **Additional background**

8. The Applicant is the Secretary General of an unincorporated association called The Combined Armed Forces Federation UK (“**CAFF**”). He says that he filed the application in his own name, on behalf of CAFF, because he was told by the UK

IPO that CAFF could not be the trade mark proprietor. He has indicated some concern that this may have contributed to the negative outcome of the opposition, but I am satisfied that this was not the case. Further, the decision that I reach below would have been the same if CAFF had been an incorporated entity and had filed the application itself.

9. CAFF's raison d'être is to provide independent and impartial advice, help and representation on financial and legal matters affecting the welfare, efficiency and morale of past and present members of the United Kingdom's Armed Forces, related to conditions of service.
10. The Opponent, also referred to as "**BAFF**", claims to be an independent all-ranks professional staff association for the British armed forces which provides a range of services to its serving and ex-service members and works to develop proper representation of United Kingdom armed forces personnel.
11. Some of the evidence in the case highlighted the existence of a dispute between CAFF and BAFF, with CAFF accusing BAFF of passing off, among other complaints. In his written submissions, Mr Robson alluded to this dispute as a reason behind CAFF's application to register the Mark; and in his oral submissions, Mr Young attempted to give me further background to the dispute. I do not believe that it is necessary to set out any further details of the dispute, since they are not relevant for determining this appeal. I simply mention the additional background to give some context to the opposition and this appeal.

### **Relevant legislation**

12. Section 3 of the Act sets out various "absolute grounds" for refusal of registration of a trade mark. The relevant sub-section in this case is as follows:

3(5) A trade mark shall not be registered in the cases specified, or referred to, in section 4 (specially protected emblems).

13. Sections 4(1) and (2), which are in issue in this case, provide the following:

#### **4. Specially protected emblems**

- (1) A trade mark which consists of or contains –

- (a) the Royal arms, or any of the principal armorial bearings of the Royal arms, or any insignia or device so nearly resembling the Royal arms or any such armorial bearing as to be likely to be mistaken for them, or it,

- (b) a representation of the Royal crown or any of the Royal flags,

- (c) a representation of Her Majesty or any member of the Royal family, or any colourable imitation thereof, or

(d) words, letters or devices likely to lead persons to think that the applicant either has or recently has had Royal patronage or authorisation,

shall not be registered unless it appears to the registrar that consent has been given by or on behalf of Her Majesty or, as the case may be, the relevant member of the Royal family.

(2) A trade mark which consists of or contains a representation of-

(a) the national flag of the United Kingdom (commonly known as the Union Jack), or

(b) the flag of England, Wales, Scotland, Northern Ireland or the Isle of Man,

shall not be registered if it appears to the registrar that the use of the trade mark would be misleading or grossly offensive.

Provision may be made by rules identifying the flags to which paragraph (b) applies.

14. Since one of the Applicant's grounds of appeal calls into question the fairness of a process by which it is possible for a trade mark to be held by the Registrar's examiners to be registrable and then subsequently refused following an opposition, I also set out extracts from sections 37, 38 and 40 of the Act, which relate to the relevant procedures:

#### *Registration procedure*

##### **37. Examination of application**

(1) The registrar shall examine whether an application for registration of a trade mark satisfies the requirements of this Act (including any requirements imposed by rules).

(2) For that purpose he shall carry out a search, to such extent as he considers necessary, of earlier trade marks.

(3) If it appears to the registrar that the requirements for registration are not met, he shall inform the applicant and give him an opportunity, within such period as the registrar may specify, to make representations or to amend the application.

(4) If the applicant fails to satisfy the registrar that those requirements are met, or to amend the application so as to meet them, or fails to respond before the end of the specified period, the registrar shall refuse to accept the application.

(5) If it appears to the registrar that the requirements for registration are met, he shall accept the application.

##### **38. Publication, opposition proceedings and observations**

(1) When an application for registration has been accepted, the registrar shall cause the application to be published in the prescribed manner.

(2) Any person may, within the prescribed time from the date of the publication of the application, give notice to the registrar of opposition to the registration.

The notice shall be given in writing in the prescribed manner, and shall include a statement of the grounds of opposition.

(3) Where an application has been published, any person may, at any time before the registration of the trade mark, make observations in writing to the registrar as

to whether the trade mark should be registered; and the registrar shall inform the applicant of any such observations.

A person who makes observations does not thereby become a party to the proceedings on the application.

...

#### **40. Registration**

(1) Where an application has been accepted and

(a) no notice of opposition is given within the period referred to in section 38(2), or

(b) all opposition proceedings are withdrawn or decided in favour of the applicant,

the registrar shall register the trade mark, unless it appears to him having regard to matters coming to his notice since the application was accepted that the registration requirements (other than those mentioned in section 5(1), (2) or (3)) were not met at that time.

...

### **The Decision**

15. Both sections 4(1)(d) and 4(2)(a) involve an assessment of the impact that the trade mark concerned would have on the average consumer of the goods or services in relation to which the mark is used.

16. Having reviewed the evidence and considered the parties' submissions, both in considerable detail, the hearing officer summarised the attributes of the Mark as follows:

49) The mark in suit is unusual in that the flag post is to the right of the flag, it is more usual for flags to be shown with the flag post on the left of the flag rather than the right as it is in the instant mark. Here the flag is being viewed as though one were behind it, as one can tell from the position of the red stripe within the white cross. It consists of three elements:

a) The Union Flag: often associated with Royalty and official organs of the State;

b) The words "The Combined Armed Forces Federation UK": the armed forces are, self evidently an aspect of the State, and one with which the Royal family has a well known association, particularly in relation to troop welfare organisations. .

c) A crown: this has a passing resemblance to the first of the three crowns shown on page 15, which are often used to identify official items and organisations of the State.

(I note for reference purposes that this is the second of two paragraphs numbered 49 in the Decision.)

17. Then, at paragraph 50, he set out how he thought the average consumer would react to the Mark, as follows:

50) To my mind the average consumer will react to the combination of the three elements, all of which have State and Royal connotations. It is the combination of the three elements which will lead the average consumer into thinking that the user of the mark has Royal Patronage or mislead them into believing that it is an organ of the State.

18. On that basis, he concluded that the Mark fell foul of both section 4(1)(d) and section 4(2)(b) and should therefore be refused pursuant to section 3(5) of the Act.

### **The Appeal**

19. The Applicant's Notice of Appeal (Form TM55) simply stated, "see letter dated October 19<sup>th</sup> 2009 attached (pages 1-4)" and then listed some enclosures (comprising the Decision and some other materials already on the Registry file). The letter lists numerous specific points in the Decision, with a commentary for each one, and concludes as follows:

Whilst the Registrar, Mr G.W. Salthouse may have considerable experience in the consideration of whether the Trade Marks are acceptable in accordance with the Trade Marks Act 1994 he admitted at the outset of the hearing when asked that he is not a professional lawyer.

The acceptability of the CAFF UK Trade Mark and applied for Sections have now been meticulously scrutinised for acceptance, in relation to Trade Mark Law, at a cost of nearly £1000, by the following.

1. The Search and Advisory Service
2. The IPO Trade Mark Examiners
3. The Senior IPO Trade Mark Examiners
4. The IPO Sections Trade Mark Examiners
5. Counsel on behalf of the CAFF UK

Had the stated objections to the Trade Mark and Logo for the CAFF UK been made at the examination stages as with the Lord Chamberlains office, we would have been prepared to consider an alternative design if regarded as necessary.

We submit that the Registrar's decision rejecting the CAFF UK Trade Mark and Logo for the reasons given are based on misconceived assumptions and not facts, both by the opposition, and himself.

We therefore request that the Registrars decisions should be overturned and set aside and that this Appeal should be upheld.

We submit Mr G.W. Salthouse was:

1. Wrong in law to claim the Crown in the CAFF UK Trade Mark will be visualised in the Public Domain as the 'Royal' Crown. Recognition of the 'Royal' Crown is constantly displayed daily in the Public domain by the Royal Mail Service.
2. Wrong in law to claim the CAFF UK Trade Mark implies it is a 'Principal' in the supply of goods and services or, implies it has any official approval. Federations are not official authorities.

20. The Applicant filed a written skeleton argument in advance of the hearing, which was copied to the Opponent. This presented the Applicant's arguments in a rather different order and structure from the letter. The Applicant then emphasised the points he felt to be of particular importance during the course of oral submission. As a preliminary matter, the Opponent argued that some of the points made in the Applicant's skeleton and oral argument had not been foreshadowed in the letter attached to the Notice of appeal and therefore should not be taken into account. However, I believe that the correct approach where a party is unrepresented is to ensure that all potential grounds that can be identified from the totality of his submissions should be explored, provided that the Opponent has had the opportunity to respond. In this case, I also have to bear in mind the fact that the Opponent also had no professional representation. (See the comments of Iain Purvis QC sitting as the Appointed Person in *HYPNOTIZER*, BL O-115-10, at paras 16-17.)
21. A few days after the hearing, the Applicant sent me a letter which he said "detailed the essence" of the final comments that he had wished to make at the end of the hearing, commenting that I had wished to consider them at the beginning of the hearing instead. An inference might be drawn from this that I had prevented the Applicant from presenting all of the arguments that he wished to rely on, and the Opponent has expressed concern that this might be used as a basis for taking the case further. I believe that it can easily be demonstrated from the transcript that the Applicant was given every opportunity to make all submissions that he wished to, and I set out the relevant extracts below.
22. After some introductory exchanges, the proceedings went as follows (on page 4-5 of the transcript):
- THE APPOINTED PERSON: ...With that, I think I will just let you fire away. You have first shot. Then Mr. Young can respond and you will get a final go at the end.
- MR. ROBSON: Good.
- THE APPOINTED PERSON: So it is over to you.
- MR. ROBSON: My appeal is set out in the grounds of appeal and in the skeleton arguments. I have some final comments that I would like to make at the end, but, apart from that, at the moment I have not really got anything further to say.
- THE APPOINTED PERSON: My view is that the primary basis for the decision is really set out in paragraph 50 and the surrounding paragraphs of the decision which is where Mr. Salthouse decided how he thought the average consumer would react to your trade mark, being a combination of the words and the flag and the Crown in the centre.
- MR ROBSON: Yes. Like I said, I have some final comments to make in that respect when we get to the end of the hearing.

THE APPOINTED PERSON: I think I would prefer it if you could make those remarks now. Obviously I have read your skeleton. I have read both side's (sic.) skeletons, I have read the decision and been through the evidence. But this is your opportunity to sort of put to me - - I will take into account all of the written material, but this is your opportunity to put to me orally what you see as your best points as to why the hearing officer got it wrong.

MR ROBSON: All right. I will read them out to you if you wish.

APPOINTED PERSON: Go ahead.

MR ROBSON: My final comments are that ....

23. The Applicant made his submissions and Mr Young then responded on behalf of the Opponent. The proceedings then continued as follows (at page 26 of the transcript):

THE APPOINTED PERSON: ....Mr. Robson, I am going to give you the chance to respond to anything that Mr. Young has said which you feel you want to come back on. I do not feel the need [Note: I think I said "Don't feel the need"] to repeat things you have said before. I think I have all your points but if there is anything that you really want to say in reply to his comments, then now is the time.

24. The Applicant proceeded to make further submissions in reply. There were some problems with the telephone line being cut off, but communication was restored on each occasion, and I repeatedly asked the Applicant if he wished to make any further submissions. The final exchange was as follows (transcript, page 29-30):

THE APPOINTED PERSON: ....Did you want to say anything more on it before - - - -

MR. ROBSON: Not really, no. I think the skeleton arguments and what I have said this afternoon sums up my claims regarding the Registrar's decision. I think they are contrary to law and not supported by the legislation in the Trade Marks Act 1994.

25. While I intend to take account of all of the grounds relied on and complaints made by the Applicant in relation to the Decision up to and including his final oral submissions at the hearing, I do not think it is fair to the Opponent to factor in the subsequent letter. The substantive part of the proceedings closed at the end of the hearing, and the letter does not point to anything that has happened since then, which makes it necessary or appropriate to take account of later submissions. Having read them, I do not believe that they would have assisted the Applicant in any event.

26. Based on the letter attached to the Notice of appeal, the written skeleton argument and the oral submissions made by the Applicant, the grounds of appeal can be summarised as follows:

- (1) The Decision is inconsistent with the approval of the Mark previously given by the IPO's own trade mark examiners and the Lord Chamberlain's office.

- (2) The hearing officer was wrong to find that the crown in the Mark would be perceived by the relevant public as the Royal crown.
- (3) The hearing officer wrongly assumed that the Applicant would supply goods and services under the Mark as principal, whereas it would only do so as an agent, and this mistake led to the incorrect conclusion that the Mark would give the impression that the goods/services concerned had official approval.
- (4) The Decision is based on other misconceived assumptions, as set out in the letter attached to the Notice of Appeal, which caused the hearing officer to reach the wrong conclusion.

27. I will consider each of these grounds in turn, taking account of all of the more detailed submissions made by the Applicant. In doing so, I must bear in mind that my role is to review the Decision, not to re-hear the case. I should be reluctant to interfere with the outcome unless I am persuaded that the hearing officer made a distinct and material error of principle, or was clearly wrong: *Reef Trade Mark* [2003] RPC 5 at [28].

(1) Inconsistency with previous approval by IPO and Lord Chamberlain

28. To understand this ground of appeal, it is necessary to go through the history of the application for the Mark, which is apparent from the evidence and correspondence on the Registry file relating to the application. The hearing officer summarised the relevant material that was in evidence (at paragraphs 12-22 of the Decision) and then set out a brief chronology (at paragraph 41). I amalgamate the two, having reviewed the evidence and the Registry file myself, as follows:

- pre-13.03.07      The Applicant submitted a request to the Trade Marks Registry Search and Advisory Service (SAS) for advice in relation to the registrability in Classes 36 and 45 of a range of potential trade marks. One of the trade marks was essentially the same as the Mark, except that the crown in the centre was different.
- 13.03.07      The SAS issued a report to the Applicant, stating:
  - “ ... your mark would not be acceptable for registration under this section because it includes a representation of the Royal Crown which appears to be the property of someone else.*
  - It is therefore likely to be objected to under section 3(5) of the Act if you apply to register it.*
  - The objection can be avoided if you get written consent to register your mark from the Lord Chamberlain.”*
- 19.03.07      The Applicant wrote to the Lord Chamberlain’s Office (LCO) to seek consent to registration. (This letter is not in evidence.)

- 29.03.07 The Deputy Comptroller of the LCO responded as follows:  
*“The Lord Chamberlain has asked me to reply to your letter to him dated 19 March concerning your request to register your logo as a trade mark following advice you have received from the Patent Office*  
*The Royal Crown is a constituent element of the Royal Arms which, as the personal property of the Sovereign, may not be registered as a trade mark or any part of a trade mark. I am therefore very sorry that we cannot consent for the registration to proceed.*  
*In seeking alternative ideas, I enclose a set of crown designs which are sufficiently different from the design of the royal Crown and which we would therefore have no objection to being registered as a trade mark...”*
- 26.04.07 The Applicant filed his application to register the Mark, originally as one of a series of four marks.
- 26.06.07 The Registry issued an examination report, raising an objection under section 3(5) of the Act.
- 12.07.07 The Applicant wrote back to the LCO, stating that CAFF had chosen a logo which no longer featured the Royal crown (as per the Mark) and asking whether the Lord Chamberlain had any further objections.
- 16.07.07 The Deputy Comptroller of the LCO responded to Mr Robson in the following terms:  
*“Thank you for your letter dated 12 July enclosing a copy of the proposed revised logo to include a crown chosen from the illustrations provided by the Royal Warrant Holders Association.*  
*I can confirm that there would be no objection from here to your using the design of crown as part of the logo for the Combined Armed Forces Federation UK.”*
- 19.07.07 The Applicant wrote to the examiner, notifying of the LCO’s position, and pushing for registration of the Mark. By then the other three marks in the series had been dropped.
- 14.08.07 Letter from the examiner stating, “Having discussed matters at more senior level, it has been agreed that the (remaining) mark is acceptable ...” and asking for a camera-ready copy of the Mark for the purpose of publication.
- 12.10.07 The application was published for opposition.

29. The Applicant points out that the Mark was accepted for registration having been scrutinised by the LCO and four levels of personnel within the UK-IPO: the SAS, trade mark examiners, senior trade mark examiners and what he refers to as “the IPO Sections Trade Mark Examiners”. It is not entirely clear to me whether three different levels of examiners really did consider and approve the Mark, but I am prepared to assume that this was the case for the sake of argument. It is also not quite clear whether the Applicant’s complaint was merely about lack of consistency in approach or was more to do with a perceived lack of fairness at the Mark being

rejected following the effort and lengths to which he went in order to persuade all of these people ultimately to accept the Mark. I shall deal with both possibilities.

30. Starting with the SAS, this was a service offered by the so-called “commercial arm” of the UK-IPO at the relevant time, whereby a potential trade mark applicant could submit a copy of his trade mark, along with a list of goods and/or services for which protection was required, and obtain quick and confidential advice on whether the mark was registrable. This was a relatively inexpensive service which was aimed primarily at applicants who did not have their own professional advisers in the trade mark field.
31. While the service was designed to improve the chances of inexperienced trade mark applicants getting their trade marks registered, it did not guarantee success, and the reports issued by the SAS to potential applicants made it clear that their opinion was not binding on the Registrar. The correspondence in this case between the Applicant and the SAS is not in evidence in the opposition, nor is it published, and so it does not form part of the proceedings. It is not even clear that the Applicant was advised by the SAS that the Mark was registrable once the revised crown was inserted. Even if that was the case, as stated above, no guarantee would have been made.
32. Turning to the examiners involved in the formal examination of the Mark, I know from many years of dealing with trade mark matters before the Registrar that it is common practice for the Registrar’s examiners to consult one another in cases of doubt or difficulty, including referring particular points up the chain of seniority. Indeed, practitioners who are unhappy with an examination report sometimes specifically ask for this to be done, in the hope that a junior examiner who is inclined to reject an application may be overruled before a refusal has been formally issued. The examiners’ collective aim is to reach the correct decision in each case, on behalf of the Registrar, and they increase the chances of doing so by such internal consultation. However, as in any case where the outcome of such consultation is inherently not final, there is always the possibility that even the most senior examiner may be overruled at the next stage.
33. The fact that the examination process is not final is clear from the extracts from sections 37, 38 and 40 that I have reproduced above. One can see from section 40(1) that, even where there is no opposition, a late objection can be raised by the Registrar after the expiry of the opposition period. Further, the provisions in section 38 as to the filing of oppositions and making of observations would be pointless if the outcome of the examination process up to that point were final.
34. If the Applicant’s complaint concerns consistency, my first observation is that it is not the case that everyone below the level of the hearing officer was consistent in concluding that the Mark was registrable. Objections were raised and only overcome

after consultation at a senior level. Further, it is not clear that all of the objections raised by the Opponent and considered by the hearing officer in the opposition were previously considered by the examiners. The system itself provides for the possibility for an opponent to persuade the Registrar that a trade mark which has been accepted for opposition purposes is not in fact registrable.

35. On the question of fairness, one can understand the Applicant's disappointment at having spent money not only on the application fee, but also on the initial advisory service and on fighting and losing the opposition. However, it must have been clear to him from both the SAS report and the initial examination report that his was not the most straightforward of applications. And his position is no worse than it would have been had he gone to an independent advisor, rather than the SAS, for advice on registrability and been advised that the Mark ought to be capable of registration. It is inevitable in a system which allows interested parties to object to another person's trade marks that evidence and arguments may be submitted and developed which were not considered during the ex parte application process, and that the hearing officer may reach a different decision for that or other reasons.
36. Turning to the involvement of the LCO, as the SAS advised the Applicant, the Lord Chamberlain was the appropriate person to approach in order to seek consent on behalf of Her Majesty The Queen to the inclusion of the Royal crown in the mark which the Applicant initially hoped to adopt, and thereby overcome any objection to use of the Royal crown under section 4(1)(b) of the Act. However, he was only qualified to consider that aspect of the mark, and indeed all he did (through his Deputy Comptroller) was to say that he had no objection to the inclusion of the chosen alternative crown. The Lord Chamberlain did not purport to authorise the whole of the Mark in its final form, either for use or for registration.
37. The Applicant objects to the hearing officer's statement (at paragraph 52) that "[the Lord Chamberlain] does not have any expertise in trade mark issues", and submits that this was an assumption which may not have been correct. But the important point here is not whether the Lord Chamberlain/LCO do or do not have trade mark expertise; it is that they have no role in the trade mark examination process, save specifically (for the purposes of this case) to provide or refuse the consent required for the inclusion of the Royal crown in a trade mark (or to say if they think that an alternative crown device is unacceptably close to the Royal crown). It is not for the Lord Chancellor/LCO to approve trade marks for registration to the extent that they include other matter.
38. Accordingly, I find no merit in the first ground of appeal.

(2) Incorrect finding of perception of Royal crown

39. As mentioned above, the Opponent withdrew its section 4(1)(b) objection to the Mark, which had been based on the claim that the Mark contained a representation of the Royal crown. Nevertheless, it maintained the position that the crown in the Mark would be difficult to distinguish from a Royal crown.

40. This begs the question of who needs to do the distinguishing. The relevant person is the well-known “average consumer” through whose eyes and ears trade marks must be seen and heard. On this subject, the hearing officer said the following:

43) There was some discussion as to who the relevant consumer would be with regard to the goods and services that the applicant is seeking to register. The opponent believed that it should be restricted to current and ex-servicemen and women, whilst the applicant clearly thought that members of the general public, in particular potential recruits to the armed forces, should also be taken into account. To my mind, both groups are potential consumers as there is no restriction in the specification. The types of services included in the specification are not purchased without some consideration of who is providing them. Advice on such things as insurance, financial affairs, travel etc are decisions made after some consideration. In this context this issue of whether the average consumer will view the mark in suit as suggesting that the applicant has official endorsement is particularly crucial.

41. Neither party suggested before me that the hearing officer had got this point wrong. Looking at the specification for the Mark, most of the goods and services listed are of the type consumed by members of the general public. As the hearing officer said, this would include, but would not be limited to, current and ex-servicemen and women and potential recruits. I also agree that the average consumer would take some care in choosing its supplier of some of the services listed (for example, insurance and real estate services), though others are more everyday consumer goods and services which would be purchased with less care and attention.

42. The hearing officer said the following in relation to the crown element of the Mark:

45) Firstly, I accept that the crown shown in the middle of the Union Jack is not the Royal Crown. This has been confirmed by the Lord Chamberlain, and accepted by the opponent. However, one issue that I have to consider is whether the average consumer would be aware that the device shown was not the Royal crown. When one has the conventional representations of the Royal crown available for a direct comparison then the differences are clear. To illustrate this I provide below the conventional representations of the Royal Crown.



46) When both the mark applied for and the conventional representations are seen in such a large scale it is clear that there are differences. The issue I have to consider is whether the average consumer knows what the Royal crown looks like in sufficient detail to know that the crown shown in the mark in suit is not the Royal crown. This task will be made more difficult when the mark in suit is used in a smaller scale, which is extremely likely. The average member of the general public will, I believe, have an imperfect idea of what the Royal crown looks like from the occasions when it is worn such as the opening of Parliament, which is televised. They may also have seen a representation used on the reverse of some coins, usually in conjunction with other items such as the lion, a thistle etc. However, the image of Her Majesty as used on the obverse of coins, on postage stamps and bank notes show her wearing a totally different crown to the Royal crown. Thus, to my mind, the public would be aware that there are a number of different crowns worn for different occasions by the Queen all of which are “royal” in some manner.

47) When considering the same issue with regard to current and ex members of the armed forces all of the above will apply. They are perhaps more likely to be aware of the form of the Royal crown, if only because they have a version of the crown incorporated into their uniform, often in the form of a metallic badge. They too will be aware that there are a number of crowns worn by Her Majesty.

48) On its own the use of a crown will not be taken as a sign of Royal patronage, partly because the average member of the public will be unsure of precisely what the Royal crown does look like.

49) Both groups of consumers will be aware that companies who work regularly for government departments can be placed on an approved list. This is often used in their marketing as if they are “approved” by the government it lends a cache to their organisation. Both groups of consumers will also be aware that all of the royal family, with the odd exception, hold military rank and that they are incredibly supportive of the armed forces and are patrons of organisations which are concerned with the welfare of the armed forces and their families, including ex-service personnel.

43. Then, in the second paragraph numbered 49, already reproduced above, the hearing officer said of the crown that it had “a passing resemblance to the first of the three crowns shown [in the extract quoted above], which are often used to identify official items and organisations of the State”.

44. The Applicant’s detailed critique of the Decision attached to the Notice of appeal does not contain any comment on the above five paragraphs. His main point, made in his skeleton and oral submissions, is that the only crown referred to in section 4(1) is the Royal crown, and therefore the crown in the Mark – which was accepted by the Opponent and hearing officer not to be the Royal crown – should not be refused as an element of a trade mark. The Applicant points out that the Royal crown is an iconic image which is well-known to the public, in particular through its appearance on Royal Mail vehicles.

45. I am unable to find any error in the hearing officer’s approach to assessing what impact the appearance of the crown element of the Mark would have on the average consumer, and I agree with his findings that:

- (1) the crown shown in the middle of the Union Jack is not the Royal Crown (paragraph 45);
- (2) but it does have a passing resemblance to one of the conventional representations of the Royal crown (paragraph 49(c));
- (3) the average member of the general public will have an imperfect idea of what the Royal crown looks like (paragraph 46);
- (4) current and ex members of the armed forces are more likely to be aware of the form of the Royal crown (paragraph 47); and
- (5) on its own the use of a crown will not be taken as a sign of Royal patronage (paragraph 48).

46. These findings show that the Opponent took the right course when it withdrew the ground of opposition based on section 4(1)(b) of the Act, since that prohibits registration of “a representation of the Royal crown” and does not extend to crowns having only a passing resemblance to the Royal crown. However, the section 4(1)(d) ground is not limited to Royal crowns, but is a more general prohibition on the registration of “words, letters or devices likely to lead persons to think that the applicant either has or recently has had Royal patronage or authorisation”, and it was the combination of crown, flag and words which led the hearing officer to his conclusion that this provision was satisfied, notwithstanding the fact that the crown was perceptibly not the Royal crown.

47. I therefore reject the ground of appeal that specifically relates to the hearing officer’s approach to the crown element of the Mark and go on to consider the other errors he is alleged to have made in reaching his overall conclusion.

### (3) Incorrect assumption that the Applicant supplies goods/services as Principal

48. The Applicant contends that CAFF does not manufacture goods or supply goods or services as principal, but does so as agent; he says that the hearing officer did not appreciate this fact, but incorrectly assumed that the goods and services in the specification would be supplied as a principal. He submits that, had the hearing officer realised that CAFF’s involvement in goods and services under the Mark was only as agent, he would not have concluded that the average consumer would perceive them as having been officially endorsed.

49. I tried to explore this ground of appeal with the Applicant during the hearing to see how or why it should affect the outcome. From that discussion and the written submissions, it was apparent that the Applicant was focusing on some specific ways in which CAFF would be involved in procuring services for its members, which – in

his view – would be done in such a way that those members would not assume that CAFF had been officially endorsed.

50. This is not the correct approach. Instead, what the hearing officer had to do was to assume that the Mark would be used in the course of trade in a normal and fair manner to distinguish any and all of the goods and services listed in the specification as being goods and services originating from or licensed by the Applicant, and to consider how the average consumer of such goods and services (being a member of the general public) would perceive the Mark.
51. I am satisfied that this is what he did, and that he was right not to take account of the principal/agency issue put forward by the Applicant.

#### (4) Other misconceived assumptions

52. In this section, I deal with the additional “misconceived assumptions” which the Applicant contends were made by the hearing officer in concluding that the Mark would mislead consumers into thinking that its user has Royal Patronage or is an organ of State.
53. First, the Applicant contends that the inclusion of the word “Federation” in the name element of the Mark automatically informs a consumer that there is no official endorsement, since federations play no part in Government or Local Authority official businesses. The hearing officer did not deal with this point in the Decision (and I am unaware whether it was made at first instance). The Opponent’s response is that there are a number of bodies containing the word “Federation”, which clearly are officially endorsed. Mr Young listed the following examples, which he says are all established by statute: the Police Federation of England and Wales, the Scottish Police Federation, the Police Federation of Northern Ireland, the British Transport Police Federation and the Defence Police Federation.
54. I do not need to go into the precise status of the federations listed, because the important point for the purposes of this decision is how the average consumer would react to the presence of the word “Federation” in the Mark. I reject the Applicant’s submission that its presence would tell them that the Applicant was not officially endorsed. In my view, the word is at best neutral as to whether the Applicant, or the goods/services supplied under the Mark, has/have official status, and is more likely to contribute to the perception of official authorisation than to detract from it.
55. In apparent contradiction to the above submission, the Applicant argues that The Queens Regulations 5<sup>th</sup> Edition – 2004 give authority to CAFF to be a representative body for the Armed Forces UK. Here, it seems that the Applicant is saying that, to the extent that the Mark conveys the impression of official authorisation, it does in

fact have such authorisation. The extract from these Regulations on which the Applicant relies comes under the heading, “J1011. Trade Unions”, and states:

(1) Regular Service personnel may become members of civilian trade unions and professional associations in order to enhance their trade skills and professional knowledge and as an aid to resettlement into civilian life ...

56. The hearing officer dealt with this submission at first instance as follows:

52) ... As to the Queen’s Regulations these give service personnel the right to join a Trade Union or Professional Association. Mr Robson states that “all Trade Unions and Professional Associations of representation are automatically authorised by the United Kingdom’s Government...The Combined Armed Forces Federation UK is a Professional Association.” Whilst the government may recognise such organisations, in that they will deal with them and authorise service personnel who wish to belong to them it does not mean that it endorses such organisations. There is a considerable difference between recognition and authorisation/endorsement.

57. The Applicant disagreed with the last sentence, pointing out that the words, “recognition”, “authorisation” and “endorsement” all have similar connotations, according to Roget’s Thesaurus. In certain contexts, it may be that these words could be used interchangeably. But I agree with the hearing officer that, in this case, the fact that the existence and activities of CAFF are recognised as being legitimate in order to assist current and ex-service personnel is not sufficient to meet the requirement in section 4(1)(d) that Her Majesty’s consent has been given to the use of a Mark that conveys the impression of Royal patronage or authorisation. In fact, the only consent that was given related specifically to the crown element of the Mark, and so this requirement was not met. Nor does it avoid the objection under section 4(2)(a) that the Mark is misleading, because it does not simply convey the message that the Applicant is a legitimate body, but suggests that he/CAFF is an organ of the State.

58. In summary, the Applicant has failed to persuade me that the hearing officer erred in his approach or was obviously wrong when he concluded that the Mark as a whole is likely to lead persons to think that the Applicant has Royal patronage or mislead them into believing that it is an organ of the State. The conclusion in relation to Royal patronage was sufficient to rule out registration under section 4(1)(d) of the Act. The fact that the Mark contains a representation of the Union Jack and, as a whole, would be misleading means that section 4(2)(a) also results in prohibition of registration under that provision. The hearing officer was therefore right to uphold the opposition under section 3(5) of the Act.

### **Costs**

59. At paragraphs 54 to 56 of the Decision (as amended), the hearing officer set out the principles that apply to determining an appropriate level of costs where a litigant in person appears in Registry proceedings, relying in particular on two previous

Appointed Person decisions, *Adrenalin Trade Mark* BL O-040-02 and *South Beck* BL O-160-08, both of which refer to relevant provisions of the Civil Procedure Rules (“CPR”) for guidance as well as to the usual approach to costs in the Registry.

60. By his supplementary costs decision, the hearing officer ordered the Applicant to pay £1,503.91 as a contribution to the Opponent’s costs at first instance. This sum was derived from a schedule of costs from the Opponent showing time spent on the proceedings as 53 hours and 55 minutes, multiplied by the rate of £9.25 per hour, which is the appropriate rate for litigants in person prescribed by section 52.4 of the Costs Practice Direction under Part 48 of the Civil Procedure Rules. This gave a sum of £498.76, to which disbursements of £1,005.15 were added. The requirement to pay was deferred until seven days after either the appeal period (in the absence of an appeal) or the final determination of an unsuccessful appeal.
61. Mr Young pointed out to me that there had been an accidental error in procedure at the time of filing the Opponent’s schedule of costs, in that it had not been copied to the Applicant. He explained that he had subsequently sent a copy of the schedule to the Applicant, admitting to the procedural irregularity, and inviting comments on the schedule, but that none had been forthcoming. Mr Robson did not raise any objection to the schedule either at that point or by way of appeal against the supplementary costs decision. The amount awarded appears to be reasonable, and I see no reason to vary the resultant order, except that I would extend the time for payment to 14 days from notification of this decision.
62. The Opponent’s schedule of costs in relation to the appeal sets out a detailed description of work done, and claims for 37 hours of time spent on the matter. Mr Young travelled from Inverness to attend the hearing in London. This took him away from his base for 48 hours, of which the schedule states that he spent 30 hours in actual preparation for and attendance at the hearing. However, the Opponent’s claim for that aspect of the work is limited to 15 hours, which seems to me to be a helpful reduction in the claim. With that concession, I believe that the overall amount of time claimed is reasonable. At the rate of £9.25 per hour, this gives a total of £342.25.
63. The Opponent’s disbursements in relation to the appeal come to £406.41 and also seem reasonable. This brings the total amount claimed in respect of the Opponent’s costs of the appeal to £748.66. Overall, this seems to me to be a reasonable amount. It certainly is not more than two-thirds of the costs that would be likely to have been awarded if the Opponent had instructed a professional representative to appear, which has to be guarded against pursuant to CPR r. 48.6(2). It is also more than £300 less than the amount that the Applicant would have claimed had he won the appeal,

according to his schedule of appeal costs. I will therefore order the Applicant to pay £748.66 to the Opponent.

64. Before I conclude, I record the fact that Mr Young expressed concern at the hearing that Mr Robson might be personally liable under a costs award, whereas the application was made and the opposition defended on behalf of CAFF and not purely for himself. Since Mr Robson is the Applicant and has defended the opposition and brought the appeal himself, I have no alternative to making the costs order against Mr Robson personally. It is for him to seek reimbursement from CAFF funds, if appropriate. BAFF is of course free to forego its right to receive payment under the costs orders, should it wish to do so, whether as part of a compromise of the wider dispute between the parties or otherwise.

### **Conclusion**

65. The result is that:

- (1) I uphold the hearing officer's decision to allow the opposition under section 3(5), based on both sections 4(1)(d) and 4(2)(a) of the Act, and I dismiss the appeal;
- (2) I leave in place the hearing officer's order that the Applicant must pay £1,503.91 to the Opponent as a contribution to its first instance costs, subject to the variation that payment must be made within fourteen (not seven) days of notification of this decision; and
- (3) I make a further order that the Applicant must pay £748.66 to the Opponent in respect of the costs of the appeal, also within 14 days of receiving notice of this decision.

66. I am grateful to Mr Robson and Mr Young for their helpful submissions and I would like to express my hope that the wider dispute between the parties may be resolved amicably in the near future.



ANNA CARBONI

15 July 2010

The Appellant (Applicant), Mr David Robson, appeared in person.

The Respondent (Opponent) was represented by its Executive Chairman, Mr Douglas Young.