

O-261-20

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION NO. 2654977 IN RESPECT OF THE TRADE
MARK**

DOUGLAS OF DRUMLANRIG

IN THE NAME OF HUNTER LAING & COMPANY LIMITED

AND

**IN THE MATTER OF AN APPLICATION FOR INVALIDATION OF THE
REGISTRATION BY THE SHIELING SCOTCH WHISKY HOLDINGS LIMITED
UNDER NO. 502830**

BACKGROUND, CONTEXT AND ISSUES TO BE DECIDED

1) The application to register the trade mark no. 2654977 DOUGLAS OF DRUMLANRIG was filed on 5 March 2013 and it completed its registration procedures on 9 August 2013. It stands in the name of Hunter Laing & Company Limited (“the proprietor”).

2) On 9 October 2019, The Shieling Scotch Whisky Holdings Limited (“the applicant” or “current applicant”) applied for invalidation of the registration on grounds based upon section 3(6), section 5(4)(a) and section 5(6) of the Act (“the current action”).

3) The registration was subject to an earlier application for invalidation brought by Andrew Crombie (“the earlier action”). I issued my decision relating to this earlier action (and also the proprietor’s cross cancellation action) on 22 November 2017 under BL number O-586-17. The application failed on all the grounds (under section 3(6), section 5(2)(b), section 5(3), section 5(4)(a)). Following an appeal, the proceedings were concluded with the Mr Geoffrey Hobbs QC, sitting as the Appointed Person, upholding the first instance decision, in all respects, in his decision of 22 May 2019 under BL number O-276-19.

4) On 5 December 2019, the proprietor made an application to strike out the current action on the grounds that the applicant is estopped from bringing it and/or because it is an abuse of process. Its application is based upon the following:

- (i) Mr Crombie is the controlling mind of the applicant;
- (ii) In the earlier action, Mr Crombie relied upon the following grounds:
 - a. section 5(4)(a) where one of the earlier rights relied upon was the goodwill attached to the DOUGLAS OF DRUMLANRIG sign;
 - b. section 3(6), the application to register the trade mark was filed in bad faith.

5) The proprietor referred to authorities relating to estoppel and abuse of process to support its claim and concluded that it should not be vexed twice by the same cancellation action brought by parties with privity of interest.

6) The applicant in the current action also relies upon a ground based upon section 5(6). The proprietor asserts that “this plainly could with reasonable diligence and should in all the circumstances have been raised by Mr Crombie in the [first action]”.

7) The parties are both based in Glasgow and the applicant submits that the issues relating to estoppel and abuse of process should be decided under Scottish law. By written submissions of 8 January 2020, the applicant criticised the proprietor’s approach insofar that it relied upon the English law concept of estoppel claiming that the doctrine of estoppel is not part of Scottish law and that it appears in no Scottish legal dictionary. It was also submitted that the proprietor’s arguments have been tested in the Scottish Court and failed and that the UKIPO administrative tribunal has no Scottish basis to reverse that decision¹ that was applied in the Glasgow Sheriff Court² in a case that also concerned a plea of *res judicata* as a basis for summary judgment.

8) The applicant also submits that it is an impermissible extension of English estoppel through “privity of interest” on the basis that it “contravenes company law by lifting the impenetrable corporate veil”³.

9) The proprietor takes no issue regarding the Scottish law being applicable. However, it submits that in doing so, it makes no difference to the outcome. In respect of the applicant’s reliance upon the *Dojo* decision of the Glasgow Sheriff Court, the proprietor submits that the current case is easily distinguished from that case. The proprietor identifies the authoritative statement of Scottish law on *res judicata*, as referenced in *Dojo*, as being:

“The exercise of jurisdiction is excluded where the court sustains a plea of *res judicata*. The rule may be stated thus: when a matter has been the subject of judicial determination pronounced in *faro contentioso* by a competent tribunal, that determination excludes any subsequent action in regard to the same matter between the same parties or their authors, and on the same grounds.

¹ *Anderson v Wilson* 1972 SC 147 [152]

² In *Dojo Design Limited v Dojo Design Studio Limited* (2015) GLW-CA6-15 [10]

³ Mr Hannay’s written submissions of 8 January 2020

"The plea is common to most legal systems, and is based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis." It is the interest of the state that there should be an end to litigation, and it is a hardship that a man should be vexed twice for the same cause. (...) For the plea to succeed, the five conditions referred to in the following paragraphs must be satisfied.

(...)

(1) The prior determination must have been made by a competent tribunal, which may be a foreign or an inferior court, or a statutory tribunal or an arbiter.

(2) The prior determination must have been pronounced in *faro contentioso*, without fraud or collusion. (...) The plea cannot be based on a decree in absence or a decree of dismissal.

(3) The subject-matter of the two actions must be the same.

(4) The *media concludendi* or points in controversy between the parties, in the two actions must be the same. The *media concludendi* are not the same unless the specific point raised in the second action has been directly raised and decided in the first. (...) Whether the *media concludendi* are the same will appear from a study of the pleadings and decision in the previous action: the court looks at the essence and reality of the matter rather than the technical form and considers the question, what was litigated and what was decided.

(5) Except where the earlier decree is a decree in rem, the parties to the second action must be identical with, or representative of, the parties to the first action, or have the same interest. When considering who are the parties to the second action, the court has regard to the reality and the substance of that action. Where the first judgment is a judgment in rem, which includes for this purpose a judgment affecting status, a plea of res judicata will be upheld

not only against the original parties but against any other person who desires to litigate with regard to the same matter.”⁴

10) The proprietor also drew my attention to the following summary of the Scottish law of *res judicata*⁵

“The principle of *res judicata* can be applied in either a negative or a positive way. In the former, it acts as a plea of bar to prevent a litigation which mirrors an earlier one whose merits have already determined. In the latter it operates to allow facts, which have been established in earlier litigation, to be founded upon conclusively to support a subsequent action based upon those facts. As was said in *Grahame v Secretary of State for Scotland* 1951 SC 368 (LP (Cooper) at 387):

“The plea is common to most legal systems, and is based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis”.

The reference to the "same parties" should not be construed too strictly. It is sufficient if the interest of the parties in the first and second action is the same (*Gray v McHardy* (1862) 24 M 1043, LJC (Inglis) at 1047; *Glasgow Shipowners' Association v Clyde Navigation Trs* (1885) 12 R 695, Lord Shand at 699; *Allen v McCombie's Trs* 1909 SC 710, LP (Dunedin) at 715). Equally, in relation to the *media concludendi*, excessive concentration on the precise nature of the remedies sought in each action should be avoided in favour of a simple inquiry into "What was litigated and what was decided?" (*Grahame v Secretary of State for Scotland* (supra) at 387).”

11) Philip Hannay, acting for the applicant did not challenge the position of the proprietor regarding the applicable Scottish law relating to the principle of *res*

⁴ *McPhail – Sheriff Court Practice*

⁵ Provided in *RG v Glasgow City Council* [2019] CSIH 45 at [27]

judicata. The principle exists in Scottish law and one of the effects of the principle is that it “acts as a plea of bar to prevent a litigation which mirrors an earlier one whose merits have already been determined”. I should add that despite the parties being based in Scotland, there is a good argument that the location of the tribunal means that the law of England and Wales applies and the law of *res judicata* cannot depend on the location of the parties. However, as the point is not in dispute, and the relevant law in Scotland appears to be substantially the same as the law in England and Wales, I accept that for the purposes of this case that the parties are correct.

12) Taking all of the above into account, I proceed to decide the issue of whether the principle of *res judicata* applies to the circumstances of the current action and, if so, to what extent.

13) On 12 March 2020, the Registry issued a letter confirming that it would consider the issues relating to the strike out application by reference to Scottish law and communicated the following preliminary views to the parties:

- “(1) The invalidation should be struck out in respect of the grounds based upon section 5(4)(a) and section 3(6), and;
- (2) The proceedings should be joined in respect of the grounds based upon section 5(6).”

14) The applicant challenged the first of these preliminary views and the proprietor challenged the second. The issues came to be heard at a joint telephone hearing before me on 2 April 2020 where the proprietor was represented by Chris Aikens of counsel, instructed by Murgitroyd, and the applicant was represented by Mr Hannay of Cloch Solicitors.

DECISION

Same Interest

15) As I have already noted, the applicant contends that it is a different party to the applicant in the previous action. It also submits that it is not permissible to lift the

“corporate veil” because it contravenes company law as specifically referred to in my decision relating to the earlier action and by the Appointed Person⁶ in Mr Crombie’s appeal in the earlier action. The Appointed Person’s comments were made in the context of identifying the legal owner of goodwill and the applicant’s submissions in those proceedings to the effect that it made no difference whether it was the current applicant or Mr Crombie who owned the goodwill. The Appointed Person found that “for these purposes” “it would not be permissible to pierce the corporate veil and equate or assimilate [Mr Crombie] and [the current applicant]”. However, the purposes before me now relate to establishing whether Mr Crombie and the current applicant share the “same interest”. This cannot be ascertained without establishing what the “interest” is of both. In that sense it is wholly appropriate to pierce any corporate veil that may hinder the establishment of their respective interests.

16) For obvious reasons, the concept of a “corporate veil” cannot apply when establishing whether the applicants in the earlier and current actions have the same interest. If it did apply, it would become very difficult if not impossible to demonstrate “same interest” in any proceedings. This would clearly run contrary to application of the principle of *res judicata*. I find that the cloak of a corporate veil cannot, in these circumstances, prevent a proper analysis of whether the applicant in the earlier action and the applicant in the current action have the “same interest”. Therefore, I dismiss the applicant’s submission.

17) I reproduce the key passage in *McPhail* again here:

“The reference to the “same parties” should not be construed too strictly. It is sufficient if the interest of the parties in the first and second action is the same (*Gray v McHardy* (1862) 24 M 1043, LJC (Inglis) at 1047; *Glasgow Shipowners’ Association v Clyde Navigation Trs* (1885) 12 R 695, Lord Shand at 699; *Allen v McCombie’s Trs* 1909 SC 710, LP (Dunedin) at 715). Equally, in relation to the *media concludendi*, excessive concentration on the precise nature of the remedies sought in each action should be avoided in favour of a

⁶ At [21] of his decision

simple inquiry into "What was litigated and what was decided?" (*Grahame v Secretary of State for Scotland* (supra) at 387)."

18) I note that the reference to "same parties" should not be construed too strictly and that it is sufficient if the interest of the parties in the first and second action is the same. Mr Aikens submitted that because Mr Crombie is the sole director and owner of the applicant, they have the same interest. I also record that Mr Crombie's case in the first action was brought, in part, in the belief that there was no real distinction between himself and the current applicant as a legal entity. As sole director and owner, Mr Crombie has no obvious different interest to the applicant in bringing proceedings and I agree with Mr Aikens that the applicant and Mr Crombie are regarded as having the "same interest" for the purposes of the issues before me.

19) Mr Hannay's submissions at the hearing focussed upon the interpretation of the question: "What was litigated and what was decided?". He argued that this restricts the application of *res judicata* to situations where the point in the earlier action was both (a) litigated and (b) decided upon. Therefore, it should not apply in circumstances where it was not originally litigated or where something was decided but not specifically litigated. There should not be excessive concentration on the precise nature of the remedies sought. The reference to "what was litigated and what was decided" must be considered in the context of this guidance. When this is done, it is clear that the phrase should not be interpreted in the narrow way suggested by Mr Hannay. It appears to me that my enquiry must consider what was really covered by the earlier decision, i.e. the substance not the form.

Effect of the applicant being struck-off the Companies Register in 2009

20) This is a key issue that will assist and inform my decision as to whether each or all of the individual grounds of invalidation should be struck out under the principle of *res judicata*. At the hearing, in the context of the grounds under section 3(6), Mr Hannay submitted that insofar as I made any determination, in the earlier action, regarding the effect of the applicant being struck off in 2009, because it was not a point litigated it is not caught by the by principle of "What was litigated and what was decided?". I dismissed Mr Hannay's narrow application of this principle, above. If a

point is raised at first instance, to argue now that the point was never formally litigated would be to focus on form over substance. The point clearly was litigated and decided.

21) Mr Hannay made a second submission to the effect that a separate and distinct enquiry is required (separate to the enquiries dealt with in the first action) into the circumstances and effect of the applicant's strike off in 2009 and what happens to the goodwill vested in the company at that time. He submitted that both my decision and that of the Appointed Person stopped short of making a finding of what happened to the goodwill after that time other than to find that it did not vest in Mr Crombie, therefore, a new and separate enquiry is justified now. I do not agree. In my decision regarding the earlier action I made the following comments (with my added emphasis):

[85(a)] "With Shieling⁷ being struck-off in 2009, the goodwill was lost. This remained the position as of the relevant date in these proceedings, namely 5 March 2013. ..."

[88] "... the evidence points to any such goodwill being retained by Shieling until it was struck off." (at [21] of the Appointed Person's decision, this finding was described as a "fair and accurate appraisal")

[94] "... I found earlier ... the goodwill associated with any DOUGLAS marks ... resided with Shieling up to the point it was struck off in 2009. ..."

[95] "... This lends support to any residual goodwill still owned by Shieling being abandoned as a result of Shieling being struck- off, or at the least, that is how it would have been perceived by Frederick Laing, Douglas Laing and Party B."

[101] "... With Shieling being struck off in 2009, any goodwill that it may have licenced to Douglas Laing was abandoned. ..."

⁷ Shieling is a reference to the same entity that is the applicant in the current action

... it would be reasonable for Douglas Laing to proceed on the basis that any goodwill that would have been licenced to it had been abandoned following Shieling being struck off.”

22) These comments reflect my view that the evidence demonstrated that any goodwill that the applicant may have held existed only up to when it was struck off in 2009, at which point it was abandoned. This position remained the same up to the relevant date, namely, 5 March 2013. I reject the applicant’s claim that it is necessary that I now consider the position regarding the goodwill after 2009.

23) I keep this in mind when considering the claim for strike-out in respect of each of the grounds.

SECTION 3(6)

24) The applicant’s pleading in the current action was based upon two limbs, the first of which has fallen away in light of the proprietor’s voluntary restriction of its specification of goods. The second limb is reproduced below:

Second, ... (1) There existed a commercial cooperation and a fiduciary relationship between The Shieling Scotch Whisky Holdings Limited ("Shieling") and those behind the Application or from those they claim to have derived right, title and interest. The filing of the Application was in breach of that duty of trust and loyalty as regards the interests of the TM owner and its successors and permitted assignees, and/or (2) The Application acts as a "blocking mechanism" or delictually interferes with Shieling's business (for example, with the Dukes of Buccleuch and Queensberry) ...

25) Mr Aikens submitted that:

- in the first action it was found that the proprietor did not show dishonesty nor did it undertake dealings that fell short of the standards of acceptable commercial behaviour;

- no new facts have been pointed to in the current action.

26) Mr Hannay submitted that the earlier action was decided by reference to a proprietorship point and a goodwill point and that the claim is now to do with the expectation that the parties had had pre-contractual negotiations. Mr Hannay pointed out that it was accepted in the earlier action that the proprietor had had dealing with the current applicant and he relied upon the following argument (together with Mr Hannay's emphasis):

*“There is bad faith when the proprietor intends through registration to lay its hands on the trade mark of a third party **with whom it had contractual or pre-contractual relations or any kind of relationship where good faith applies and imposes on the proprietor the duty of fair play in relation to the legitimate interests and expectations of the other party** (13/11/2007, R 336/2007-2, CLAIRE FISHER / CLAIRE FISHER, § 24). And, such a relationship exists if the parties have entered into **contractual or pre-contractual negotiations** which, inter alia, concern the sign in question (EAST SIDE MARIO'S, § 23).”*

27) Firstly, I agree with Mr Aikens when he submitted that no new facts have been pointed to in the current action. The existence of some kind of relationship between the proprietor and both Mr Crombie and the applicant in the current action was relied upon by Mr Crombie in the earlier action and recorded at [94] 2nd – 4th bullet points, [95] and [101] 1st and 2nd bullet points of my decision. Therefore, in the first action, the potential existence of a relationship between the proprietor and the current applicant was factored into my decision.

28) Secondly, the general proposition that attempting to lay hands upon a trade mark of someone with whom you have any kind of relationship is mitigated in the earlier action because the evidence illustrated no contact between Mr Crombie (acting for the current applicant) and the proprietor since 2006. The applicant was struck off in 2009. I therefore found that it was reasonable for the proprietor, in 2013, to proceed on the basis that any goodwill that the applicant may have had, had been abandoned (see [101] second bullet point of my decision in the earlier action and the discussion

earlier in this decision). The proprietor was under no obligation to the applicant at the relevant date. This same finding would defeat the applicant's new angle based upon the pre-contractual arrangement argument.

29) At [19] and [20] of his decision, the Appointed Person identified the following four points that fell to be decided in the appeal against my decision in the earlier action:

- (1) the alleged acquisition of rights by assignment from Shieling to the Applicant in 2008;
- (2) the alleged assignment of rights to the Applicant with retroactive effect to 2008 following the restoration of Shieling to the Register of Companies in 2016;
- (3) the alleged failure of the Proprietor to acquire rights in and to the trade mark DOUGLAS OF DRUMLANRIG under and by virtue of the demerger from DLC in 2013; and
- (4) *"The issue of Mr. Laing's negligent incognisance"*.

30) Mr Hannay submitted that none of these four points dealt with the existence of commercial agreements between the proprietor and the current applicant. I dismiss this as evidence that the "commercial agreement argument" should be permitted to run in the current action. It merely reflects how the Mr Crombie chose to run his case on appeal. For the reasons set out above, the factual matrix presented in the first action provided mitigation against there being some relationship with the current applicant up to when it was struck off (or possibly only until 2006, when Mr Crombie last had contact with the proprietor's predecessor, Douglas Laing).

31) For the same reasons, the claim in the current action that the proprietor's registration is acting as "blocking mechanism" to the applicant would be equally defeated. In the earlier action it was found that, at the relevant date, there was no earlier legally protected right or goodwill. In these circumstances the 'blocking' effect of a trade mark registration on the current applicant is no more than the inevitable effect a trade mark registration has on all third parties who wish to use the same or similar marks.

32) Finally, Mr Hannay submitted that the proprietor acted unfairly because the applicant was “incapax” at the relevant date and if it was aware of this, the correct legal route for it to obtain the contested mark was to purchase it from the Crown. Mr Aikens submitted that the term “incapax” in Scottish law means a “lack of mental capacity” and cannot apply to a struck-off company and that, the legal reality is that, at the relevant date, the applicant did not exist and was incapable of owning assets. Mr Hannay did not challenge the meaning of “incapax” or its application to a struck-off company. Further, this submission is just another attempt to find a different angle to explain the same factual matrix considered in the original action in a way that seeks to cast the proprietor in a poor light when looked through the prism of a bad faith case. This argument was open to Mr Crombie to run in the original action as part of its bad faith allegation, which was rejected. It is not now open to the current applicant to attempt to run it now.

33) Taking all of the above into account, I find that the applicant is prohibited from attempting to run the bad faith case pleaded and is contrary to the principle of *res judicata* as set out in *Grahame v Secretary of State* because the current action mirrors the earlier action and the merits of that case have already been determined.

SECTION 5(4)(A)

34) The pleadings in respect of this ground of invalidation introduces a claim that the position should be assessed as to the position at the date of the start of the behaviour complained about and that in the circumstances, passing off should be assessed as at late 2007. Mr Hannay submitted that this is a different point of controversy to that in the earlier action and that the dispute should be summarily decided in favour of the applicant “for reasons of public policy, equity & common sense”. Mr Aikens submitted that the relevant date for assessing the passing-off case has already been decided⁸ as being the filing date of the contested registration and that any other date is only applicable where the proprietor claims earlier use. In

⁸ [81] of my decision in the earlier action

this case, there is no earlier use claimed by the proprietor. Mr Aiken's approach is consistent with the guidance of the courts and the Appointed Persons⁹.

35) Mr Hannay submitted that because the current applicant is the originator and controller of the unregistered mark, unauthorised mimicking constitutes misrepresentation liable to mislead consumers. In my earlier decision, I pointed out¹⁰ that:

“... An unregistered mark is not a property right as such. Further, although the goodwill identified by an unregistered mark is a property right, it is tied to a particular business and cannot be licensed in the way that registered marks can. ...”

When this is considered together with my comments in my earlier decision in respect to the fate of the business of the current applicant in 2009 and the fate of any goodwill it may have held, it is clear that I have already made findings that cover and would defeat this latest pleading.

36) Mr Hannay also made the following additional points:

- In the earlier action, both the proprietor and myself accepted that there was goodwill identified by the contested mark that was owned by the current applicant;
- My determination regarding who owned the goodwill was restricted to excluding Mr Crombie;
- The earlier action was not in connection with the current applicant and the position remains open to determination;
- The fundamental question has still to be determined, namely, if Mr Crombie does not own goodwill, who does?

⁹ See, for example, *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, in particular [43]

¹⁰ At [101] 2nd bullet point

37) All of these submissions can be dismissed based upon my comments regarding the overarching issue set out on paragraphs 21 - 23, above. I reject these limbs of Mr Hannay's submissions on that basis.

38) Mr Aikens described the applicant's approach to the issue as "paradigm mischief that the doctrine of *res judicata* is intended to prohibit" and submitted that because section 5(4)(a) was rejected in the earlier action it is not open to the applicant to reopen this issue. He also pointed to the fact that the applicant wishes to rely on the evidence in the earlier action and that this is prohibited by the doctrine of *res judicata* in order to prevent treading the same ground again. I concur with all of this and, for all the reasons set out above, I reject the applicant's arguments and find that this ground should be struck-out.

SECTION 5(6)

39) In the applicant's statement of case this ground is expressed as follows:

"...

There existed a commercial cooperation and a fiduciary relationship between [the applicant] and the owners and directors of the [proprietor] ... with the aim of [the proprietor's predecessor providing services to [the applicant], including, but not limited to, the production and supply of [the applicant's] "Douglas of Drumlanrig" whisky.

The unjustified and purported assignment of rights to the [proprietor] (which is contested) without the consent of [the applicant] does not circumvent the duty of trust and loyalty as regards the interests of the TM owner and its successors and permitted assignees.

..."

40) Mr Hannay submitted that the Trade Mark Regulations 2018 (SI 2018/825) came into force on 14 January 2019 and, thus, section 5(6) could not have been raised

earlier. I dismiss this. Whilst these regulations introduced new aspects to the Trade Mark Act, it also resulted in some mere re-ordering. The addition of section 5(6) falls into the latter category and comprises a provision that existed previously in section 60 of the Act as also recognised by the applicant in its statement of case.

41) In its application to strike out the current action, the proprietor claims that this ground could, and with reasonable diligence, should have been raised by Mr Crombie in the earlier action because the particular facts relied upon in the current applicant's pleading are the same as in the earlier action. At the hearing, Mr Aikens submitted that the relationship between the applicant and Douglas Laing was a central pillar of Mr Crombie's case in the earlier action and that this ground is substantially the same issue that has already been litigated. He highlighted the fact that, in my decision relating to the earlier action, I found that the applicant had abandoned its goodwill when it was struck-off in 2009 and that it did not own anything as of the relevant date in 2013. He concluded that there could not have been a relationship at the relevant date. Mr Aikens also submitted that the issue could and should have been raised earlier. I agree with Mr Aikens that Mr Crombie's case in the earlier action was based on the history of the relationship between the current applicant and the proprietor's predecessor, Douglas Laing and that the essence and reality of that action is the same as new action brought under section 5(6).

42) Mr Hannay relied on the fact, discussed earlier, that the applicant was incapax when the earlier action was raised. I have already dismissed the argument. Mr Hannay relies upon this as a reason why a section 5(6) ground (or its predecessor, section 60) could not have been raised by Mr Crombie in the earlier action. It has already been found that, at the relevant date, there was no proprietor to seek consent and that any fiduciary relationship or commercial agreement must have ended when the applicant was struck off in 2009. Therefore, for the same reasons as already discussed, I reject this argument.

43) Mr Hannay criticised, what he described as the proprietor's "could and should" submission, claiming that it would result in every litigant having to select every ground to avoid a later claim that it should have been raised earlier, which he

submitted is ridiculous and against accepted practice. Mr Aikens submitted that if it was believed that, at the time of the first action, there existed a commercial cooperation and a fiduciary relationship between the proprietor and the current applicant (or as was believed at the time, Mr Crombie) it was incumbent upon Mr Crombie to raise such an objection in the earlier action. I agree, there is a duty to bring forward the best case available to you at the time of commencing proceedings. Further, the issue of a relationship between the current applicant and the proprietor's predecessor, Douglas Laing was expressly considered in my decision relating to the earlier action and my finding were such as to also decide the issue now pleaded under section 5(6). At a risk of repeating myself, in the earlier action, I found that the current applicant's rights were abandoned in 2009 and that Mr Crombie (who was found to be acting on behalf of the current applicant) had had no contact with Douglas Laing since 2006. In such circumstances, a factual matrix has been decided in the earlier action that would defeat this section 5(6) pleading.

44) In summary, I dismiss all of the applicant's submissions and find that this ground is struck-out

Outcome

45) I find that the *media concludendi* are the same in both the earlier action and the current action and, in reality, the matters are the same. The preliminary view that the invalidation should be struck out in respect of the grounds based upon section 5(4)(a) and section 3(6) is confirmed. The preliminary view that the proceedings should be joined in respect of the grounds based upon is overturned. As a consequence of this, the application to invalidate the registration 2654977 DOUGLAS OF DRUMLANRIG is struck out in its entirety.

Costs

46) The parties are invited to make written submissions on costs within 28 days of the date of this decision. Any request for off-scale costs should be accompanied by a breakdown of costs. I will then issue a supplementary decision on costs.

47) The period for appeal commences from the date of this decision.

Dated this 27th day of April 2020

Mark Bryant

For the Registrar,

The Comptroller-General