

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION No. 723200
IN THE NAME OF OMEGA SA (OMEGA AG) (OMEGA LTD)**

**AND IN THE MATTER OF AN APPLICATION FOR REVOCATION No. 81325
BY OMEGA ENGINEERING INC**

**AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON
BY THE REGISTERED PROPRIETOR
AGAINST THE DECISION OF MR D. LANDAU
DATED 13 JANUARY 2005**

DECISION

Introduction

1. This is an appeal against a decision of Mr. D. Landau, the Hearing Officer acting on behalf of the Registrar, dated 13 January 2005 (BL O/017/05), in which he partially revoked UK Trade Mark Registration No. 723200 in the name of Omega SA (Omega AG) (Omega Ltd) on grounds of non-use with effect from 3 October 1965. I heard the appeal together with an appeal against another decision of Mr. Landau, dated 11 January 2005 (BL O/007/05), in which he partially revoked again for non-use UK Trade Mark Registration No. 699058 in the name of the same proprietor. The cases were not consolidated. Although the cases share certain features, they involve different trade marks and raise different issues.
2. UK Trade Mark Registration No. 723200 is for the words OMEGA CONSTELLATION. The mark was registered as from 1 April 1954 but the registration procedure was not completed until 3 October 1960. The mark was registered for all goods included in Class 14.
3. On 27 June 2003, Omega Engineering Inc. applied to revoke the registration on the grounds in section 46(1)(a) and (b) of the Trade Marks Act 1994 ("TMA") that the mark had not been put to genuine use in the United Kingdom for goods in Class 14 except wristwatches and parts and fittings therefor.
4. In their counterstatement filed on 23 October 2003, the registered proprietors claimed genuine use of the mark in relation to precious metals and their alloys and goods in precious metals or coated therewith, not included in other classes; jewellery, precious stones; horological and chronometric instruments. On 24 December 2003 and 7 December 2004, the registered proprietors filed partial surrenders of goods within the registration. The upshot is that they seek to maintain the registration in Class 14 only in respect of horological instruments; parts and fittings therefor.
5. The Hearing Officer perceived the issues in dispute to be whether there was evidence of genuine use in relation to clocks, what would be a fair description of any goods that were not the subject of revocation or were not revoked and whether the use of the trade mark shown was use in a form which does not alter the distinctive character of the mark in the form in which it was registered. He did not understand the registered

proprietors to argue that there was any use outside watches and clocks and confined his consideration of the evidence to that relating to clocks.

6. The Hearing Officer's conclusions were, in brief:
 - (i) The use shown on invoices for, and pictures of, clocks was not use of the trade mark as registered or 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 so did not constitute use for the purposes of section 46(1) and (2) of the TMA.
 - (ii) In any event, the use shown in relation to clocks was not genuine use. The use on invoices for clocks represented internal use between parent and subsidiary company [sic]. Moreover, the clocks were used to promote the registered proprietors' watches and not to establish or maintain a market for clocks per se.
7. On 10 February 2005, the registered proprietors filed notice of appeal against the Hearing Officer's decision to an Appointed Person under section 76 of the TMA. The statement of grounds of appeal announced the registered proprietors' intention to seek leave to introduce further evidence on appeal concerning use of the registration in respect of clocks. I heard that application as a preliminary to the hearing of the appeal. At the hearing of the appeal, the registered proprietors were represented by Ms. Sofia Arenal, Mewburn Ellis LLP. Mr. David Crouch, Bromhead Johnson appeared on behalf of the applicants. The Hearing Officer referred to the registered proprietors as "Swiss" and the applicants as "US" and I shall do the same.

Preliminary issue – the application to introduce fresh evidence on appeal

8. Swiss's additional evidence comprises a witness statement of Bettina Irene Devereux dated 28 July 2005. Ms. Devereux is the Finance Director and Company Secretary of Swatch Group (UK) Limited, positions she has occupied since 1994. As such, she has a good overview of her company's business. She makes her statement from her own knowledge and from the company's records. She explains that in the past months she has had serious health issues and only returned to full-time work on 4 July 2005. She is also frequently out of the office. She has done her best to collate the additional evidence quickly but delays have been inevitable not least because the company's archives are located elsewhere and older papers have been destroyed.
9. Ms. Devereux refers to the witness statement of her colleague John Frederick Moody in the proceedings dated 23 October 2003. Mr. Moody is the Quality Control and Training Supervisor of Swatch Group (UK) Limited. Ms. Devereux confirms Mr. Moody's statements at paragraph 10 of his witness statement that: "Over the years, Omega SA [Swiss] have sold clocks of various kinds under the trade mark OMEGA CONSTELLATION via the appropriate affiliated company in the UK. These include table clocks and wall clocks." and "... We tend to refer to these internally ... for example in invoices [as] CONSTELLATION, or even just CO"; and in paragraph 11 "... My company sells these clocks e.g. to jewellery retailers throughout the UK."
10. Ms. Devereux exhibits examples of OMEGA CONSTELLATION clocks her company sells to jewellers (BID1). In fact, as Ms. Devereux recognises, these are the same pictures as were exhibited to the witness statement of Mr. Moody at JFM6. At BID2, Ms. Devereux exhibits a printout of her company's transactions relating to clocks in the period November 1997 to March 2003. She underlines those transactions that she says specifically refer to OMEGA CONSTELLATION clocks but she adds that many of the clocks sold by her company are branded OMEGA CONSTELLATION, often also with the Greek letter O, even if they are not always listed on documentation as OMEGA CONSTELLATION clocks.

11. Ms. Devereux explains that the OMEGA CONSTELLATION branded clocks that are sold in the UK by Swatch Group (UK) Limited are bought from Swiss. Her company places orders with Swiss, Swiss send the products and invoices her company. Swatch Group (UK) Limited in turn invoices the ultimate purchaser e.g. a jeweller. Ms. Devereux says that sometimes her company does not recoup the full cost of a clock from a venue or outlet with which her company is seeking to establish a commercial relationship. Thus, her company's turnover in relation to clocks in the period November 1997 to March 2003 amounted to around £265,000 (BID2) of which onward sales came to about £23,000. Ms. Devereux further explains that accounting systems, by convention, reflect sales as a negative amount, or credit in the books of account.
12. Ms. Devereux exhibits at BD3 a copy of exhibit JFM7 to Mr. Moody's witness statement. She says this consists of over 50 invoices showing sales of clocks between 1993 and 2003 most of which were OMEGA CONSTELLATION branded clocks as can be seen from the references "CONST." or "CONSTELLATION". She notes that the reference numbers on the clock pictures at BID1 match those on the invoices in BID3 and proceeds to give examples by reference to six invoices re-exhibited at BID4.
13. Ms. Devereux says that her company sells clocks not only to retailers but also, e.g., to organisers of sports events particularly golf tournaments where the clocks are prominently displayed. She mentions a number of golf courses by name and also a football club. She exhibits at BID5 photographs of clocks in situ from 2001 to date at Forest Hills, near Leicester. She says that OMEGA CONSTELLATION appears on the face of the clock. Ms. Devereux includes at BID6 a list of clock sales by her company in the period April 1998 to May 2002 and some 2000/2001 invoices to, inter alia, jewellers. At least some of these were sold under the OMEGA CONSTELLATION brand. Finally she exhibits at BID7 an e-mail dated 6 December 2004 (which she acknowledges is after the relevant date) containing a list of clocks currently maintained and serviced by Signs by Design, a company employed by Swatch Group (UK) Limited for that purpose. She says some of the clocks are OMEGA CONSTELLATION clocks.
14. Ms. Devereux admits that the sale of clocks is not her company's primary business. Nevertheless, her company does sell clocks and this was included as one of the annual objectives of her company's sales managers during the period 1998-2003.
15. Ms. Devereux concludes her statement by dealing with the relationship between Swiss and Swatch Group (UK) Limited (formerly SMH (UK) Limited), i.e., that they are both subsidiary companies of The Swatch Group Limited, Switzerland. She remarks that Swiss and Swatch Group (UK) Limited are totally separate legal entities with different personnel and that transactions between the companies are all at arm's length. Her company pays the same price for a clock from Swiss as any other company would.

Fresh evidence on appeal – applicable principles

16. The *Ladd v. Marshall* [1954] 1 WLR 1489 at 1491 criteria are basic to the exercise of the discretion of an Appointed Person to admit fresh evidence on appeal but other factors such as those set out by Laddie J. in *Hunt-Wesson Inc's Trade Mark Application (SWISS MISS)* [1996] RPC 233 at 242 may also be relevant (*LABEL ROUGE Trade Mark* [2003] FSR 13, *DU PONT Trade Mark* [2004] FSR 15).
17. The three conditions stated by Denning L.J in *Ladd v. Marshall* are:

"... first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible".

The additional *SWISS MISS* factors are, the nature of the trade mark, the nature of the objections to it, whether or not the other side will be significantly prejudiced by the admission of the new evidence in a way that cannot be compensated, e.g., by an order of costs, the desirability of avoiding multiplicity of proceedings and the public interest concerned.

18. US's primary objection to the admission of Ms. Devereux's evidence is delay. Someone other than Ms. Devereux could surely have provided the evidence. US note that much of Ms. Devereux's evidence was filed during the normal evidence rounds so that it was at least available to put to the Hearing Officer. US also point to the public policy behind section 46(1)(a) and (b) of the TMA, i.e., that marks which are not in use for five years ought to be removed from the register. Moreover, the burden is on the registered proprietor to prove genuine use (section 100 TMA). Swiss argue that the additional evidence further supports the evidence previously provided in the proceedings in relation to points that arise on appeal. In particular, the significance attached by the Hearing Officer to documented evidence of sales to jewellery retailers and his misconception that Swiss was the parent of Swatch Group (UK) Limited could not have been envisaged before the hearing below. Swiss say that it has been recognised in the courts that time "is the centre of gravity"¹ of Swiss's business. Given the Hearing Officer's finding of internal use, the additional evidence has obvious importance to the outcome of the case. Swiss say they have exercised reasonable diligence in obtaining the further evidence. Ms. Devereux because of her position within Swatch Group (UK) Limited was considered the best person to give the evidence. Once she had been chosen it was difficult to replace her with another whilst she was receiving treatment although work did continue on her evidence in the meantime. Swiss add that US will suffer no prejudice in Swiss's registration accurately reflecting the scope of their trade. US can adequately be compensated for any perceived delay by an appropriate award of costs.
19. Having considered the additional evidence and the arguments of the parties, I decided that the just course was to admit Ms. Devereux's evidence into the appeal. My reasons for so doing (in no particular order of significance) were as follows:
 - (i) The additional evidence has a clear bearing on the question of internal use. It is obviously important to the outcome of the case although my decision in the appeal may prove that it is not decisive.
 - (ii) Even though the witness statement of John Frederick Moody dated 23 October 2003 states the relationship between Swiss and Swatch Group (UK) Limited as subsidiary or affiliated companies within The Swatch Group, the Hearing Officer mistook that relationship to be one of parent and subsidiary. Swiss's evidence of use comprised a number of invoices for clocks from Swiss to Swatch Group (UK) Limited (or its predecessor in title SMH (UK) Limited)). The Hearing Officer's finding that those invoices evidenced internal rather than genuine use thus proceeded, at least in part, upon an assumption (albeit mistaken) that Swiss could not have appreciated until issuance of the Hearing Officer's decision.
 - (iii) The Hearing Officer appeared to attach great importance to the lack of retail invoices. Ms. Arenal says that invoices such as those adduced by Swiss in the present action have been accepted in prior legal proceedings in the UK and before OHIM as genuine use of the mark in suit. The additional evidence is again in answer to the Hearing Officer's decision. I cannot comment upon proceedings to which I was not privy. Moreover, the question of what amounts to genuine use is one of the issues raised by the appeal. At this stage, it is sufficient to observe that in my view the authorities on the meaning of genuine

¹ Pumfrey J. in *Omega SA v. Omega Engineering Limited* [2002] EWHC 2620 (Ch).

use (Case C-40/01 *Ansul BV v. Ajax Brandveiliging BV* [2003] ECR I-2439 and Case C-259/02 *La Mer Technology Inc. v. Laboratoires Goemar SA* [2004] FSR 785) do not indicate that:

- (a) sales on the retail market as opposed to, e.g., the wholesale market are a prerequisite to proving genuine use of a mark for the purposes of section 46 of the TMA; or
- (b) transactions in trade marked products between companies in the same group are necessarily internal.

Instead, according to those authorities, whether there has been genuine use in any given situation depends upon all the circumstances of the case.

- (iv) The additional evidence largely repeats that which was already in the proceedings.
- (v) It is indeed unfortunate that due to Ms. Devereux's serious health issues the additional evidence was not forthcoming until shortly before the hearing of the appeal. Nevertheless, I am satisfied that any prejudice suffered by US can adequately be compensated in costs.
- (vi) As US identifies, the public interest behind non-use proceedings is that marks which are in use for five year periods should be removed from the Register (Recital 8 of the Preamble to Council Directive 89/104/EEC ("the Directive")). The corollary is that the Register should accurately reflect the scope of those marks in use.
- (vii) I have been given no reason to doubt the veracity of Ms. Devereux's evidence.

La Mer Technology Inc. v. Laboratoires Goemar SA

- 20. On the same day as the hearing of this appeal, the Court of Appeal gave judgment in *La Mer Technology Inc. v. Laboratoires Goemar SA* [2005] EWCA Civ 978, 29 July 2005. I invited the parties to make further submissions in writing on the basis of that judgment and postponed the writing of my decision accordingly.
- 21. In *La Mer*, the Court of Appeal held, on return from a reference to the Court of Justice of the European Communities² ("ECJ"):
 - (i) Nothing in the Directive, in the jurisprudence of the ECJ or in principle signifies that the retail or end user market is the only relevant market on which a trade mark is used for the purpose of determining whether use of the mark is genuine.
 - (ii) The essential question is whether the mark is communicated to a third party in such a way as can be said to be consistent with the primary origin function of a trade mark.
 - (iii) An arms-length bona fide sale and shipment of trade marked goods by a foreign manufacturer to an independent wholesaler in the UK can constitute genuine use of the mark for the purposes of section 46 of the TMA even though the quantities of goods involved are small and, due to the

² Jacob J. referred questions to the ECJ for a ruling pursuant to Article 234 EC Treaty at [2002] FSR 51. The ECJ responded by reasoned Order [2004] FSR 785. The case returned to High Court, Blackburne J. at [2005] FSR 668.

disappearance of the wholesaler, the goods never reach the consumer or end user.

The appeal

22. An appeal to the Appointed Person is by way of review and not rehearing. In a case such as the present involving a multi-factorial decision on the part of the Hearing Officer the appellate tribunal should show a real reluctance, but not the very highest degree of reluctance to interfere in the absence of a distinct and material error of principle (*REEF Trade Mark* [2003] RPC 101 at 109 – 110, per Robert Walker L.J.).
23. Swiss appeal against the Hearing Officer's first finding that the use shown for clocks was not use in a form, which does not alter the distinctive character of the mark in the form in which it was registered and so is not use for the purposes of section 46(1) and (2) of the TMA. Section 46(2) of the TMA states in so far as relevant:

“For the purposes 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 ...”

24. The Hearing Officer instructed himself by reference to paragraphs 40 – 45 of the Court of Appeal's judgement in *BUD and BUDWEISER BUDBRÄU Trade Marks* [2003] RPC 477 at 489 – 490, per Walker L.J.:

“40 These points are uncontroversial, not to say pedestrian, but they do to my mind help to show what is the right approach to the language of s.46(2) of the Act, which is at the heart of the first appeal:

“... 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.”

(This language is word for word the same as the English language version of Art.10.2(a) of the Directive.)

41 The word “elements” can be used, and often is used, to refer to the basics or essentials of a matter. However it can hardly have that meaning in s.46(2), since a basic or essential difference in the form in which a trade mark is used would be very likely to alter its distinctive character. In s.46(2) “elements” must have a weaker sense (of “features or even, as Mr Bloch came close to submitting, “details”).

42 The deputy judge touched on this and some related points in paras [18-22] of his judgment. He stated that the elements of a mark must be assessed separately. He also stated (or at least implied) that only some of the elements might contribute to the distinctive character of the mark. He pointed out that the inquiry was as to whether the mark's distinctive character was altered (not substantially altered).

43 I have no wish to be overcritical of the way in which the deputy judge expressed himself, especially since I think he was a little overcritical of the way in which the hearing officer had expressed himself. But I am inclined to think that the deputy judge made the issue rather more complicated than it is. The first part of the necessary inquiry is, what are the points of difference between the mark as used and the mark as registered? Once those differences have been identified, the second part of the inquiry is, do they alter the distinctive character of the mark as registered?

44 The distinctive character of a trade mark (what makes it in some degree striking and memorable) is not likely to be analysed by the average consumer,

but is nevertheless capable of analysis. The same is true of any striking and memorable line of poetry:

“Bare ruin’d choirs, where late the sweet birds sang”

is effective whether or not the reader is familiar with the Empson’s commentary pointing out its rich associations (including early music, vault-like trees in winter, and dissolution of the monasteries).

45 Because distinctive character is seldom analysed by the average consumer but is capable of analysis, I do not think that the issue of “whose eyes? – registrar or ordinary consumer?” is a direct conflict. It is for the registrar, through the hearing officer’s specialised experience and judgment, to analyse the “visual, aural and conceptual” qualities of a mark and make a “global appreciation” of its likely impact on the average consumer, who:

“normally perceives a mark as a whole and does not proceed to analyse its various details.”

The quotations are from para. [26] of the judgment of the Court of Justice in Case C-342/97 *Lloyd Schuhfabrik Meyer GmbH v. Klijsen Handel BV* [1999] E.C.R. I-3819; the passage is dealing with the likelihood of confusion rather than use of a variant mark) but both sides accepted its relevance.”

25. The Hearing Officer’s conclusions under section 46(2) were as follows:

“16) I consider it appropriate to first consider whether the nature of the use shown upon the pictures of the clocks is use in a form which does not alter the distinctive character of the trade mark in the form in which it was registered. This is the only use that is shown outside of the invoices. On the invoices either CONSTELLATION or CONST appears. The words OMEGA CONSTELLATION do not appear. The invoices all bear:



at their top. I do not consider that the invoices show any use of the trade mark in the form that it is registered

17) Ms Arenal argued that the use upon the clocks was use of the trade mark as well as the trade mark:



In considering her argument it is useful to consider some of the words of Lord Walker again [here the Hearing Officer re-quotes paragraph 45 of the *BUD and BUDWEISER BUDBRÄU* case].

I can envisage the average consumer as seeing one trade mark containing all three elements or two separate trade marks:



and CONSTELLATION or three separate trade marks. Owing to the distance between the top elements and the bottom element [the Hearing Officer had previously noted that the pictures of the clocks showed  in the top portion of the clock and the word “Constellation” in joined-up writing in the bottom part of the clock], I cannot readily envisage that the use will be seen as use of O as one trade mark and OMEGA Constellation as a different trade mark; which is what Ms Arenal’s proposition entails. Such an interpretation strikes me as very forced and unnatural. The relevant issue is to judge the particular nature of use shown. I am of the view that the use shown upon the pictures of the clocks ... will be perceived as use of all three elements as separate trade marks or the trade mark:



and the trade mark Constellation in joined-up handwriting as one composite trade mark or the use of:



as one trade mark and Constellation in joined-up handwriting as another trade mark. I consider that the presence of O, in the context of the use, does make a great deal of difference and means that the use shown is use in a form which does alter the distinctive character of the mark in the form in which it was registered. On this basis I do not think it necessary to consider whether the nature of the use of CONSTELLATION, in joined-up handwriting and in title case and at some distance from the rest of the trade mark also affects the matter. I notice, although it certainly has not been an influence upon my decision, that Mr Moody in paragraph 14 of his witness statement, on the two occasions that he refers to the trade mark, refers to it as O OMEGA CONSTELLATION. This may be a simple repeated error, although I assume care was taken in drafting a witness statement, or may reflect how Mr Moody sees the trade mark. The only time the trade mark, as registered, is shown in use is in the catalogues and promotional material describing watches. In the numerous catalogues showing watches, it does not appear on any illustration of a watch. **I consider that [the] use shown is use in a form which does alter the distinctive character of the mark in the form in which it was registered and so is not use for the purposes of section 46(1) and (2) of the Act.”**

26. Swiss agree that the Hearing Officer correctly instructed himself according to the *BUD and BUDWEISER BUDBRÄU* case, which is the leading authority on section 46(2) of the TMA. Indeed Swiss brought that case to the attention of the Hearing Officer at the

hearing below. However, Swiss argue that the Hearing Officer was wrong to conclude that the use shown of OMEGA CONSTELLATION failed to satisfy section 46(2). Swiss say that such a conclusion is contrary to the findings of the Registrar and the Court of Appeal in *BUD and BUDWEISER BUDBRÄU*. They attach to the statement of grounds a copy of the Court of Appeal's decision together with a page showing the neck label, which was held to constitute a variant mark under section 46(2) of BUDWEISER BUDBRÄU stylised. Swiss say that the differences in *BUD and BUDWEISER BUDBRÄU* between the mark as registered and the variant mark were far more substantial than the differences concerning the trade mark OMEGA CONSTELLATION.

27. I am unable to accept this criticism of the Hearing Officer's decision. The nature of an appeal from a decision of the Registrar is review not rehearing. The issue before the Court of Appeal in *BUD and BUDWEISER BUDBRÄU* was whether the judge had been entitled to interfere with the hearing officer's decision. The Court of Appeal decided that he had not. The hearing officer had not applied the wrong test under section 46(2):

"Moreover, I am unable to hold that Mr. Salthouse was not entitled to take the view that he did. It is true that another hearing officer might, as indeed did the judge, have taken a different view. But it cannot be said that Mr. Salthouse's view was one to which no reasonable officer could have come." (Sir Martin Nourse at paragraph 12)

Likewise, in the present case, the Hearing Officer applied the correct test. Swiss argue practical difficulties of placing the mark on a clock face so as not to interfere with its function of being able to tell the time clearly - digits or numbers must not be obscured. They also say it is natural for a long mark such as OMEGA CONSTELLATION to be abbreviated on invoices. Both these points were brought to the attention of the Hearing Officer below. In my judgement, the Hearing Officer was entitled to take the view he did. The additional evidence sheds no further light on this issue and the first ground of appeal fails. Swiss have failed to show in relation to clocks use of OMEGA CONSTELLATION in a form that does not alter the distinctive character of the trade mark in the form in which it is registered for the purposes of section 46(1) and (2) of the TMA.

28. In view of that finding, it is unnecessary for me to consider Swiss's second ground of appeal namely, that Hearing Officer erred in alternatively concluding that the use shown by Swiss in respect of clocks was internal and promotional and did not constitute genuine use as required by section 46 of the TMA.
29. There is, however, in my view justification in Swiss's third ground of appeal that the Hearing Officer did not consider whether horological instruments; parts and fittings therefor was a fair description of the use shown and/or conceded of OMEGA CONSTELLATION.
30. Mr. Geoffrey Hobbs Q.C., sitting as the Appointed Person, in *WISI Trade Mark*, BL O/251/05, usefully reviewed the authorities on partial revocation for non-use under the TMA and Council Regulation (EC) No. 40/94 on the Community trade mark. The aim of the exercise is to arrive at a fair specification of goods and/or services having regard to the use made of the mark and the way in which the relevant public would perceive the use (*Decon Laboratories Ltd v. Fred Baker Scientific Ltd* [2001] RPC 293, *Thomson Holidays Ltd v. Norwegian Cruise Line Ltd* [2003] RPC 586 (CA), *West (t/a Eastenders) v. Fuller Smith & Turner Plc* [2003] FSR 44 (CA)). Whilst specifications must be certain (*Case C-363/99, Koninklijke KPN Nederland NV v. Benelux Merkenbureau (POSTKANTOOR)* [2004] ETMR 57(ECJ)), pernickety descriptions of goods and services are best avoided (*ANIMAL Trade Mark* [2004] FSR 383, *Case T-126/03, Reckitt Benckiser (España) SL v. OHIM*, 14 July 2005, CFI).

31. *The Oxford English Reference Dictionary* provides the following definition of horology (adj. horological): “the art of measuring time or making clocks, watches, etc.; the study of this”. *Webster’s New Collegiate Dictionary* defines horological as: “of or relating to a horologe or horology”. According to that dictionary, horologe means: “a timekeeping device” and “horology”: “1: the science of measuring time 2: the art of constructing instruments for indicating time”. *Webster’s* defines horologist as: “1: a person skilled in the practice or theory of horology 2: a maker of clocks or watches”.
32. The Hearing Officer observes in his decision (at paragraph 21) that: “At the hearing [US] accepted the use of the trade mark for various types of wristwatches”. The evidence of use submitted by Swiss showed use of the mark OMEGA CONSTELLATION in relation to watches, jewellery watches and chronometers. Ms. Arenal referred me to *ANIMAL Trade Mark*, supra., where Jacob J. accepted that horological instruments were a fair description of the use shown in that case for watches and chronographs. Mr. Crouch responded that in *ANIMAL* the specification of horological instruments was agreed between the parties. Nevertheless, taking into account the relevant authorities, I believe that “horological instruments; parts and fittings therefor” is a fair description of the use made/conceded in the present case.

Conclusion

33. The specification of UK Trade Mark Registration No. 723200 in Class 14 is restricted with effect from 3 October 1965 to “horological instruments; parts and fittings therefor”.
34. Both parties have enjoyed a measure of success on appeal. In the circumstances I believe the fair course is to order that each party should bear their own costs of the application for revocation and the appeal. As for the application to introduce fresh evidence on appeal, the additional evidence was submitted shortly before the hearing. US are entitled to a contribution towards their costs of having to respond to the application on short notice. Accordingly, I order that Swiss pay to US the sum of £750.00 within seven days of being notified of my decision in this appeal.

Professor Ruth Annand, 17 October 2005

Ms. Sofia Arenal, Mewburn Ellis LLP appeared on behalf of Omega SA (Omega AG) (Omega Ltd).

Mr. David Crouch, Bromhead Johnson appeared on behalf of Omega Engineering Inc.