

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATIONS Nos. 2463435, 2463438 and 2463439
IN THE NAME OF CHEVRON RACING TEAM LIMITED**

**AND IN THE MATTER OF
CONSOLIDATED OPPOSITIONS THERETO UNDER Nos. 95811, 95812 and 95816
BY CHEVRON CARS LIMITED**

**AND IN THE MATTER OF
AN APPEAL TO THE APPOINTED PERSON
BY THE APPLICANT
AGAINST THE DECISION OF MR. ALLAN JAMES
DATED 25 NOVEMBER 2009**

DECISION

Introduction

1. On 7 August 2007, Chevron Racing Team Limited (“the Applicant”) applied to register the designations CHEVRON B8, CHEVRON B16 and CHEVRON B19 under numbers 2463435, 2463438 and 2462439 respectively for use as trade marks in relation to:

“Vehicles; apparatus for locomotion by land, air or water, road and racing vehicles; parts and fittings for all the aforesaid goods; all in Class 12, but not including brake linings or fans for motor vehicles.”
2. Following advertisement, the Applications were opposed by Chevron Cars Limited (“the Opponent”) on 21 December 2007. The grounds of opposition were:
 - (a) *Under section 5(4)(a) of the Trade Marks Act 1994* that use of the designations in the UK was liable to be prevented by the law of passing off protecting the Opponent’s earlier unregistered rights in CHEVRON, CHEVRON B8, CHEVRON B16 and CHEVRON B19.
 - (b) *Under section 5(4)(b) of the Act* because the designations would infringe the Opponent’s copyright in its CHEVRON logo.
3. The Registrar consolidated the oppositions. Both sides filed evidence and extensive written submissions but opted not to be heard.
4. Mr. James issued a written decision on the papers covering all three oppositions under reference number BL O/364/09 on 25 November 2009. In short, he refused the oppositions under section 5(4)(b) but accepted those under section 5(4)(a) of the Act.

Subject to appeal, he rejected the Applications and made a costs award of £2800 in the Opponent's favour.

5. On 22 December 2009, the Applicant filed Notice of appeal to the Appointed Person under section 76 of the Act against the Hearing Officer's rejection of the Applications under section 5(4)(a). The Opponent filed a Respondent's Notice on 19 February 2010 in which it: (i) sought to uphold the oppositions; and (ii) agreed with the Hearing Officer's findings bar one, namely that the sale to Mr. Andreason's Chevron Cars Limited in 1984 did not include any goodwill in the CHEVRON trade marks. Neither side challenged the Hearing Officer's decision under section 5(4)(b) and I therefore say no more about it.

The Hearing Officer's decision – undisputed facts

6. The Hearing Officer conducted a detailed review of the evidence. His account of the undisputed facts was as follows:

“13. It is common ground that the original business was started by Derek Bennett, who was a talented racing car engineer and that, from around 1965-1978, his business produced a large number of racing cars (over 500) under the name CHEVRON. Mr Bennett died in a hang gliding accident in 1978. After his death the business declined.

14. It is also common ground that the original business was conducted through a company called Derek Bennett Engineering Limited, and it does not appear to be disputed that the company was called Chevron Racing Cars Limited by the time it went into liquidation in 1980. It will be evident from the above description of the parties' cases that what happened to the goodwill of the original business after that is hotly disputed.

15. In 1989, Mr Andreason wrote to Vin Malkie Racing (a firm associated with the applicant) complaining that it was manufacturing new Chevron sports cars. In that letter, Mr Andreason claimed that he had purchased the assets of the original business in 1983, including “the sole right to use the name ‘Chevron’”. The complaint was triggered by a brochure produced and circulated by Vin Malkie Racing, which announced an intention to manufacture a “Vin Malkie Chevron B16 replica”. Vin Malkie Racing's solicitors responded by asking for documentary evidence of Mr Andreason's claim to the title of the original business. The skirmishing continued, but no action was taken until 1991.

16. In around August 1991, Mr and Mrs Malkie changed the name of a company they owned to Derek Bennett Engineering Limited (the first name of the original business) and subsequently, in September 1991, advertised a ‘Bennett B16’ sports car in Autosport magazine. This triggered a claim in the High Court in December 1991 by Chevron Road Cars Limited (a company associated with Mr Andreason's Chevron Cars Limited, the opponent's immediate predecessor in business) against the newly named Derek Bennett Engineering Limited and Mr and Mrs Malkie, alleging infringement of copyright and passing off. Following requests for further and better particulars of the claim, it was struck out in January 1994 as frivolous and

vexatious. The claimant did not resist the striking out of the claim. It stated at the time that its decision not to contest the striking out application had been taken on commercial grounds. Chevron Road Cars Limited was subsequently struck off the register and dissolved in April 1994.

17. Earlier, in August 1990, Mr Andreason's Chevron Cars Limited (claimed to be the opponent's predecessor in business) applied to register a logo version of the CHEVRON mark. After two oppositions were resolved (neither connected in any way with these proceedings) the mark was eventually registered in 1997. However, due to a misunderstanding about the renewal process it was not renewed and was removed from the register in 1998.

18. In his statement dated December 2008, Mr Malkie accepts that Mr Andreason's Chevron Cars Limited "carried on business using the [Chevron] name and Chevron mark for a number of years" and that "Whilst Mr Andreason's companies, and [Mr Andreason's Chevron Cars Limited], were in existence they certainly shared part of the market for repair and replacement parts for original Chevron Cars with us but in the last 15 years or so their involvement became less and less in Britain and Europe after Mr Andreason appeared to relocate himself and his activities to United States of America". The extent of the use of the mark 'Chevron' in the UK by Mr Andreason's Chevron Cars Limited in recent years (particularly after 2003 when the manufacturing business was re-located to Florida) is therefore disputed.

19. The opponent appears to accept that from sometime around the year 2000 (when the applicant registered the Chevron trade mark in its own name), it started to use Chevron in a trade mark sense. It disputes that there was any such use by the applicant prior to that. The opponent also accepts that it knew that the applicant had registered the Chevron trade mark and was using that mark before it purchased the goodwill in Mr Andreason's Chevron Cars Limited in 2007."

Disputed facts relating to the Opponent

7. Unsurprisingly, it is the Hearing Officer's conclusions on the disputed facts that are controversial. Those were divided into two sets. First, as to the Opponent:

"46. My conclusions on this evidence are as follows:

- i) Chevron Cars Limited carried on a trade in the UK under the name Chevron Cars supplying spare parts for Chevron race cars from 1984 until at least 2004.
- ii) That for a period beginning sometime after 1984, and ending in 1992, it also produced a number of new race cars which it offered for sale under the mark Chevron. The number of vehicles concerned is unlikely to be as high as the figure of 170 stated in Mr Andreason's evidence because this figure includes go-karts, which are irrelevant for present purposes for the reason described at paragraph 50 below. Nevertheless, judging from the number of different model designations

used for race cars, the number produced is likely to have been dozens, and could have been as many as 100.

iii) Around 1991, Chevron Cars Limited, initially through a related company probably formed for this purpose – Chevron Road Cars Limited – attempted to launch a road going version of the Chevron B16. This and further attempts to launch road going versions of the B8 and B16 in collaboration with third parties appear to have failed. At least, there is no evidence that any were sold to anyone in the UK.

iv) From at least as early as 1985, it is clear that part of Chevron Cars Limited's market was in the USA. This appears to have been a developing trend so that, by 2003, the USA accounted for such a proportion of Chevron Cars Limited's customers that the manufacturing side of the business was moved to the USA.

v) Although there is no documentary evidence that Chevron Cars Limited sold a single Chevron part or car to anyone in the UK, and the business appears at all material times to have had a distinctly international flavour, on the balance of probability at least some of the new cars produced up until 1992 must have been sold to UK customers. Similarly, on the balance of probabilities the parts side of the business must have had UK customers during the 1980s and 1990s.

vi) Given that:

- a) the market for the Chevron parts business was limited to those who owned the 660 cars in existence,
- b) Chevron Cars Limited was not the only supplier of parts to that market,
- c) that the business was moved to the USA in 2003 to be nearer to the bulk of its customers,

it seems unlikely that Chevron Cars Limited had more than a small number of UK customers for Chevron parts in the period leading up to the move of the business to Florida in 2003.

vii) The company advertised an address in the UK for UK and European enquiries for parts around the time of the move of the manufacturing business to Florida in 2003, and one of the two Directors remained in the UK.

viii) It is likely that the business in the USA was conducted through Chevron–Tiga Cars Inc.

ix) Chevron Cars Limited had ceased trading altogether by 2006.

47. It is argued on behalf of the applicant that there is a further break in the chain of title which means that Chevron Cars Limited was not the owner of the goodwill generated by that business prior to 1991. In short, the writ issued by Chevron Road Cars Limited in 1991 claimed that Chevron Cars Limited was a predecessor in title. In response to the request for further and better particulars of the claim, the plaintiff filed the rather ambiguous response that it had acquired “all such rights as are material in the present proceedings including the right to bring proceedings for passing off...”. It claimed to have acquired this right “by an agreement and evidenced by a resolution of Chevron Cars Limited in favour of [the plaintiff]”. A copy of the response is included at page 311 of exhibit VAM1 to Mr Malkie’s statement. However, the precise terms of the resolution in question are not included.

48. Mr Andreason’s evidence is that there was no sale of the business. Chevron Road Cars Limited was merely granted a licence.

49. Despite the statements made in 1992, I find that there was no transfer of the goodwill in the business to Chevron Road Cars Limited. It is clear that despite the resolution referred to above, Chevron Cars Limited simply carried on trading in 1992 in relation to parts for racing cars and restorations. It is difficult to believe that there was ever any intention to sell the goodwill in that business to a company called Chevron Road Cars Limited. It is much more likely that that company was established as the vehicle to develop the new business in road going versions of the racing cars, which was in prospect at that time. Given that there was no trade mark, the “licence” could have been no more than an agreement by Chevron Cars Limited to refrain from taking the action that it could otherwise have taken as the owner of the goodwill in the racing cars business – to sue for passing off. As the road car business does not appear to have gotten off the ground, any goodwill generated by that business is irrelevant. I therefore turn to the next relevant matter in the chain of title – the sale of the assets of Mr Andreason’s Chevron Cars Limited to the opponent in early 2007.

50. The Deed of Assignment between Mr Andreason’s Chevron Cars Limited and the opponent (then called Gridbase Limited) is dated 20 February 2007. A copy of it comprises exhibit CKS7 to Mr Smith’s second witness statement. The business assigned is defined as being “...manufacturing and selling classic cars and parts therefore (sic) branded as ‘Chevron’”. The sale included the goodwill in the business and the stock. The relevant stock included a small amount (20 plastic boxes) of parts for Chevron racing cars and body mouldings for 22 types of Chevron racing cars. Just two of these mouldings related to racing cars that Mr Andreason says that he designed. The other 20 relate to cars produced by the original business. The deed warrants that Chevron Racing Cars Limited [sic] had no employees, which is consistent with my finding that it was not trading at that time. The business sold to the opponent did not include the production of go-kart racers or any goodwill generated by that side of Chevron Cars Limited’s earlier business, presumably because there was none or it was of no interest to the purchaser.

51. Mr Andreason's evidence is that Chevron Cars Limited operated until 2006. Mr and Mrs Malkie's evidence does not appear to directly contradict that evidence. Mr Malkie appears to accept that his businesses shared the market for replacement parts for Chevron racing cars with Mr Andreason's Chevron Cars Limited, whilst that company existed. His evidence is that Chevron Cars Limited share of the British and European market for Chevron parts became smaller and smaller, particularly after the move of the business to Florida in 2003 (see paragraph 18 above). The evidence as a whole therefore points to Chevron Cars Limited retaining a UK business for some time after the move of the manufacturing side of the business to Florida in 2003, but that the company had ceased trading by early in 2006. Nevertheless, the nature of the racing car business and Chevron's reputation amongst racing enthusiasts in the UK probably meant that at the date of the assignment to the opponent in 2007, Mr Andreason's Chevron Cars Limited retained a residual goodwill in the UK in relation to the lengthy period during which it was associated with the Chevron mark. This is consistent with the preamble to the 2006 offer for sale which records that the Directors had been approached about a sale by race teams in the US and the UK.

52. It is arguable that the application made in June 2006 to have the UK company struck off the register amounted to a public declaration that the UK business would not be revived, and therefore amounted to an abandonment of the goodwill of the UK business. However, the public offer made the following month in the UK to sell the assets of the business sent a different message. Properly analysed, I believe that this amounted to an offer to sell the US business, and the goodwill associated with it (including the order book), along with the residual goodwill of the UK business. I find that the nature and timing of this offer was sufficient to counter the strong implication given by the slightly earlier request for striking off that the goodwill in the UK business had been abandoned. There is no reason why, in principle, the residual goodwill in a business cannot be assigned to another party. See, for example, *Ad-Lib Club Ltd v Granville* [1972] RPC 673 at page 677 and *Star Industrial Co. Ltd v Yap Kwee Kor* [1976] FSR 268 at page 270. Consequently, I find that the 2007 deed of assignment effectively transferred the residual goodwill in the earlier UK Chevron business of producing racing cars, and the more recently concluded UK business of providing spare parts for Chevron racing cars, to the opponent."

Disputed facts relating to the Applicant

8. The Hearing Officer's second set of conclusions this time relating to the Applicant was:

"60. My conclusions on the disputed facts around the applicant's use of Chevron are that:

- i) Vin Malkie Racing/Chevron Racing Cars Limited/the applicant provided parts for Chevron racing cars from at least as early as 2003 and under the specific marks applied for from at least as early as 2004, most of which were sold to UK customers.

ii) Chevron Racing Cars also produced a small number of complete Chevron B8 and Chevron B16 racing cars prior to the dates of the applications (from at least as early as 2003 in the case of the B16), which carried those marks in order to distinguish their trade source. The majority of these cars were probably sold in the period 2006-2008 after changes to FIA rules lead to renewed demand for “new” replica racing cars.

iii) There is no direct evidence that any of these racing cars were sold to customers in the UK, but given the locations of the customers for parts, most probably were.

iv) The likelihood is that all the uses of the Chevron mark described in 1-4 above by firms related to the applicant, were with the consent of the applicant as the holder of the registered Chevron trade mark, and that the applicant is therefore entitled to the benefit of this use and a share of any goodwill generated by it.”

Section 5(4)(a) of the Act

9. Regarding section 5(4)(a) of the Act, the Hearing Officer instructed himself with reference to *Halsbury’s Laws of England*, 4th Edition and the decision of Mr. Geoffrey Hobbs QC sitting as the Appointed Person in *Croom’s Application* [2005] RPC 2 at paragraph 45:

“... When rival claims are raised with regard to the right to use a trade mark, the rights of the rival claimants fall to be resolved on the basis that within the area of conflict:

- (a) the senior user prevails over the junior user;
- (b) the junior user cannot deny the senior user’s rights;
- (c) the senior user can challenge the junior user unless and until it is inequitable for him to do so.”

It was suggested in the Notice of appeal that the latter reference was somehow inappropriate but this was not pursued at the appeal hearing.

Two relevant dates

10. The Hearing Officer further instructed himself that legally two dates were relevant: (i) when the Applicant’s use complained of commenced; and (ii) the date of the Applications (Joined Cases T-114/07 and 115/07 *Last Minute Network Limited v. OHIM* [2009] ECR II-1919). On the present facts he identified those as:

“66. ... The opponent’s representative invites me to infer (in paragraphs 26-29 of its written submissions) that the use complained about started in “about 2000” when the applicant also applied to register the Chevron mark. I have found no earlier use by the applicant of Chevron as a trade mark. Consequently, I will adopt the opponent’s position on this point. The relevant questions are therefore as follows:

- i) Was the opponent’s predecessor in business in a position to prohibit the applicant from using the marks applied for in the year 2000?

ii) Was the opponent also in a position to prohibit the applicant from using the marks at the date of the applications on 7 August 2007?”

The crux of the Opponent’s appeal as it was argued before me was that the Hearing Officer erred in his ascertainment of the first relevant date, which was in fact earlier.

The Hearing Officer’s findings

11. His findings around those two dates for the purposes of section 5(4)(a) were:

“67. Based on my earlier conclusions as to the facts, I find that the opponent is entitled to be considered to be the senior user of the Chevron mark. The most distinctive feature of the opposed marks is the word Chevron. Further, the parties are trading in the same goods. The answer to the first question set out in the preceding paragraph therefore depends heavily on whether the opponent’s predecessor in business had sufficient goodwill in the UK in 2000 in order to found a passing off action. If it did, damage would usually be inferred in these circumstances.

68. Although the UK business of the opponent’s predecessor in title was plainly in decline by 2000, I find that the opponent’s predecessor was likely to have had sufficient goodwill under the Chevron mark amongst UK customers for racing car parts and associated restoration services that it would have succeeded in a passing off action brought at that time. Consequently, I would answer the first question positively.

69. The answer to the second question posed in paragraph 66 turns on whether:

i) The opponent owned sufficient goodwill under the mark CHEVRON in the UK to bring a passing off action in August 2007 and, if so;

ii) Whether the applicant’s use of the opposed marks would cause the opponent damage and, if so;

iii) Whether it was no longer equitable for the opponent to oppose the applicant’s use.

70. There is no evidence that the opponent itself generated any goodwill under the Chevron mark prior to the date of the applications. I have carefully considered whether the goodwill that the opponent purchased in 2007 was sufficient to found a passing off action in the UK. I regard it as highly relevant that Mr Andreason’s Chevron Cars Limited does not appear to have abandoned its UK business at the time of the move to Florida in 2003. In these circumstances, I find that even though the UK business had ceased by 2006, within the limited and specialised market under consideration, the residual goodwill situated in the UK that the opponent purchased in 2007 was sufficient to be protected under the law of passing off.

71. The applicant's use of the marks at issue would plainly have been damaging to the opponent's goodwill by diverting trade and therefore making it more difficult for the opponent to revive the UK business."

Acquiescence

12. The Hearing Officer dismissed the Applicant's claims to defences of common law and statutory acquiescence. His reasoning was:

"72. I therefore turn to the final question of whether it was equitable for the opponent to oppose the applicant's use in August 2007. The opponent appears to have been trading to some extent or another under the Chevron mark for around 7 years by that time. It seems tolerably clear that the applicant had sufficient business under the Chevron mark by 2003 to cause the opponent's predecessor in business to complain about the damage that it was doing to its business. There was, therefore, a period of at least 4 years in which the applicant and/or other businesses within the same group, were engaged in a commercially significant trade under the Chevron mark prior to August 2007.

73. The applicant says that it is now too late for the opponent to object to the continued use of Chevron marks. In this connection, the applicant invites me to attach weight to the opponent's predecessor's knowledge of its use of the Chevron mark supposedly dating back to the period 1989-94. This appears to form the cornerstone of its claim of delay acquiescence. However, I see no substance in this point. This is because, inter alia, the evidence shows that the mark at the centre of the earlier dispute was in fact a different mark - BENNETT B16. The outcome of the complaint into the use of that mark is self evidently irrelevant to these oppositions.

74. Further, there is no evidence that the applicant ever changed its position as a result of a) the delay in the opponent's predecessor in business taking action to prevent the applicant's use of Chevron, or b) the move of the manufacturing side of its business to the USA, or c) the subsequent application to have the UK company struck off the register. The applicant was already trading under the Chevron mark before b) and c) happened. The applicant's true motivation for trading under the Chevron mark is apparent from the extract from the applicant's web site in exhibit RA2 to Mr Malkie's statement. This indicates that the applicant became aware in 2000 that Mr Andreason's registration of Chevron Cars Limited had lapsed and it (wrongly) took this to mean that the mark was therefore in the public domain. Given these facts, I do not believe that it would have been unconscionable for the opponent to object to the applicant's use of the opposed marks in August 2007. Consequently, there is no estoppel through acquiescence.

75. I also reject the applicant's reliance on statutory acquiescence 75. I also reject the applicant's reliance on statutory acquiescence under s.48 of the Act, which was raised for the first time in its written submissions. I have two reasons for doing so. First and foremost, the point was not pleaded. Second, the evidence does not establish that the opponent's predecessor in business became aware of the applicant's use of Chevron as a trade mark until 2003, less than five prior to the date of the applications and therefore an insufficient

period to activate a potential defence under s.48. There may be a third problem with this point. The oppositions are directed at the marks applied for and not the applicant's existing registrations of Chevron marks. The opposed marks are obviously not yet registered. Consequently, if it is a requirement for the opponent's acquiescence to the applicant's use to be concurrent with the applicant's registration of the subject marks, then the point is a bad one for that reason too. I am aware that the Court of Appeal has recently asked the European Court of Justice ("ECJ") to make a preliminary ruling on exactly that point of law in the latest saga of the *Budweiser* litigation. However, as the defence is plainly unavailable here for other reasons, there is no need to wait for the ECJ's answer."

13. The reference to the BENNETT B16 trade mark also constituted a contentious aspect of the Applicant's appeal.

Standard of appeal

14. At the appeal hearing Mr. George Hamer of Counsel, instructed by sfn Solicitors appeared for the Applicant. The Opponent was represented by Mr. Andy Millmore of Harbottle & Lewis LLP.
15. It was accepted that the appeal was a review and that the applicable approach was that set out by Robert Walker L.J. in *REEF Trade Mark* [2003] RPC 101 at 109 – 110:

"In this case the hearing officer had to make what he himself referred to as a multi-factorial comparison, evaluating similarity of marks, similarity of goods and other factors in order to reach conclusions about likelihood of confusion and the outcome of a passing-off claim. It is not suggested that he was not experienced in this field, and there is nothing in the Civil Procedure Rules to diminish the degree of respect which has traditionally been shown to a hearing officer's specialised experience. ... On the other hand the hearing officer did not hear any oral evidence. In such circumstances an appellate court should in my view 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. The appellate court should not treat a judgment or written decision as containing an error of principle simply because of its belief that the judgment or the decision could have been better expressed ...".

Merits of the appeal

16. As I have said, the Applicant's main criticism was that the Hearing Officer got the date wrong for when the Applicant's use complained of commenced. That was not the year 2000 but at least in 1989 if not earlier.
17. In support of its appeal, the Applicant relied on: (i) copies of correspondence between the Opponent's predecessor in title and the Applicant (or more specifically a related trading entity) in the period 1989 to 1991; and (ii) proceedings commenced against the Applicant (or again more specifically related trading entities) in 1991.
18. The correspondence in question concerned the "Vin Malkie Chevron B16 Replica" car, which was claimed to infringe the Opponent's predecessor's copyright and constitute passing off.

19. The 1991 proceedings for copyright infringement and passing off were brought as a continuation of that past dispute and the formation (by essentially the Applicant) of a new company Derek Bennett Engineering Limited who “introduce[d] their superb new car – the Bennett B16 – a faithful reproduction of Derek’s (Bennett) famous sports car.”
20. Those events were also relied on (and were the subject of detailed submissions) by the Applicant below. The Hearing Officer made the general observation (with which I agree) that (paragraph 56):

“... Mr. Malkie [for all intents and purposes the Applicant] has not been very successful at distinguishing between his use of the mark Chevron for the purpose of identifying the trade source of his companies’ goods, and the use of the name Chevron merely to designate cars as replicas of the original Chevron racing cars.”
21. The Hearing Officer found that: (i) the conduct the subject of the 1989-91 correspondence was not use of the designation CHEVRON B16 as a trade mark; (ii) the Applicant’s use of BENETT B16 was irrelevant to these proceedings; (iii) there was no evidence that the Applicant used CHEVRON B16 as a trade mark once the 1991 proceedings were terminated in 1994. He decided upon 2000 as the date for commencement of the Applicant’s use complained of because that was the date put forward by the Opponent in its written submissions. It also coincided with when the Applicant obtained registration of the Chevron mark (otherwise not relevant to present proceedings) having become aware that the Opponent’s registration for Chevron had lapsed, which to the mind of the Applicant (mistakenly) meant that the mark was in the public domain. Nevertheless, the Applicant’s invoice evidence ran only from 2004 and for the purposes of acquiescence the Hearing Officer determined that there was no evidence to indicate that the Opponent became aware of the Applicant’s use of the trade marks in suit (or any of them) until 2003.
22. In my judgment, those were findings which the Hearing Officer was entitled to make. I have carefully considered the evidence (including the written submissions below). Despite Mr. Hamer’s eloquent argument, I was unable to find error on the Hearing Officer’s part. It seemed to me that in relation to the 1989-91 correspondence and 1991 proceedings the Applicant had a tendency to translate what was claimed into what happened, which did not necessarily follow.
23. That disposes of the main grounds of the appeal. The Applicant further claimed that the Hearing Officer erred in failing to find that the Applicant commenced use of the designations as early as 1978 when Mr. Malkie was still associated with the original Derek Bennett team. I saw no basis for overturning the Hearing Officer on that point. It is a further example of what the Hearing Officer identified as the need to distinguish between claims to have built (and here raced) a replica and claims to have sold such goods under the marks at issue (paragraph 54).
24. The Applicant raised two final arguments. First, that the Hearing Officer wrongly made a finding of goodwill in the absence of evidence of any actual sales in the UK by the Opponent. Second, that he wrongly omitted to find that there was a fatal break

in the chain of goodwill because the Opponent's predecessor assigned its rights before the commencement of the proceedings in 1991.

25. The Hearing Officer dealt in detail with those issues in his decision. As to the first, he held that taking the evidence in the round, the Opponent had established goodwill at the relevant dates. Regarding the second, he preferred the Opponent's evidence that a "licence" of rights had been given not an assignment. I was not taken to any error or misdirection of fact on the part of the Hearing Officer. Accordingly, I accept Mr. Millmore's submission that the Applicant was simply inviting me to substitute my own findings for those of the Hearing Officer and decide the case afresh.

Conclusion

26. In the event, the appeal fails (rendering it unnecessary for me to consider the Respondent's Notice). The Hearing Officer ordered the Applicant to pay the Opponent the sum of £2,800 towards its costs of the opposition. I will order the Applicant to pay the Opponent a further £800 towards the costs of this appeal such sums to be paid within 14 days of this decision.

Professor Ruth Annand, 4 October 2010