

**O-398-17**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK REGISTRATION 3181310  
IN THE NAME OF CRAIG PORTER STEWART  
IN RESPECT OF THE TRADE MARK:**



**IN CLASS 25**

**AND**

**AN APPLICATION TO RECTIFY THE REGISTER (UNDER NO. 84779) BY  
DRYWORLD INDUSTRIES INC.**

## THE BACKGROUND AND PLEADINGS

1) Registration 3181310 is in respect of the mark "DRYWORLD" (and device) and is in respect of various goods in Class 25. It currently stands in the name of Craig Porter Stewart. An application for rectification was made by Dryworld Industries Inc. ("the applicant") on 7 March 2017 and relates to a dispute over ownership.

2) The applicant requests that the register be rectified to record itself as the proprietor. Its application was signed by Brian McKenzie, co-CEO of the applicant. He claims that, whilst an employee of the applicant, Mr Stewart was instructed by him to prepare an application for the mark on behalf of the applicant, but that he inadvertently typed his own name as the owner. Consequently, he claims the recording of Mr Stewart as proprietor "was purely a clerical error".

3) By email dated 15 March 2017, the applicant sent a witness statement by Mr McKenzie. He repeats the claims made in the application for rectification, but provides no corroboratory evidence to support these statements.

4) By letter dated 5 April 2017, the application was sent to Mr Stewart inviting him to file a counterstatement. Further, he was also invited to provide a witness statement and any evidence in support of his case i.e. that he is the rightful owner. An example witness statement was provided in order to assist him.

5) Mr Stewart replied by email of 4 May 2017, claiming:

- (i) He was not an employee of the applicant, counterclaiming that he "was associated with DRYWORLD ... but was not formally under any contract of employment, nor was offered";
- (ii) At no point was he ever instructed or asked to make an application, countering that he made the application completely of his own volition;

(iii) It was not a clerical error that the application was filed in his name and that he made the application knowingly in his own name.

6) Mr Stewart requested that this email be taken as his witness statement. It was accepted as setting out his counterclaims, but by letter of 11 May 2017, he was informed that it was not acceptable as a witness statement. He was referred back to the official letter of 5 April 2017 and it was explained to him what the minimum requirements are for a witness statement to be accepted. Once again, an example witness statement was sent to him. Further, the sequential nature of evidence rounds before the Registry was explained and it was emphasised that this was his opportunity to present his evidence. Mr Stewart was provided with a further 14 days to provide this. Nothing was received.

7) On 12 June 2017, the Registry informed the parties that the evidence rounds were closed and requested the parties to indicate whether they wished to be heard or if they were content for a decision to be reached from the papers.

8) By a letter dated 7 July 2017, Mr Stewart replied, indicating surprise that the official letter of 12 June recorded that he had filed no evidence and asked that his email of 4 May 2017 be taken into account and, if so, he was content for a decision to be made from the papers. By official letter of 21 July 2017, Mr Stewart was reminded that he was invited to provide a witness statement in the official letters of 5 April and 11 May, that his response to the first was not sufficient and that there was no response to the second. He was informed that, consequently, he had had "many opportunity's [sic] to file a witness statement and evidence/submissions in the correct format, however [he had] not done so". On the same date, the parties were informed that the case would be passed to a hearing officer, who will make a decision from the papers.

## DECISION

9) Rectification claims of this manner are governed by Section 64 of the Act. This reads:

“64. - (1) Any person having a sufficient interest may apply for the rectification of an error or omission in the register:

Provided that an application for rectification may not be made in respect of a matter affecting the validity of the registration of a trade mark.

(2) [...]

(3) Except where the registrar or the court directs otherwise, the effect of rectification of the register is that the error or omission in question shall be deemed never to have been made.

(4) [...].

(5) [...].”

10) The purpose of Section 64 is to permit corrections of errors or omissions on the register. The applicant claims that as a result of a clerical error, it was not recorded as the proprietor. Consequently, it has sufficient interest within the meaning of section 64(1).

11) In these proceedings, both sides' cases suffer from serious flaws. The applicant has made unsupported assertions that, whilst formalised by way of a witness statement, were not corroborated in any way. Mr Stewart denied the applicant's version of events, but this was not provided in evidential format, nor was his version of events corroborated in any way. This is an unsatisfactory position, with neither side

corroborating their version of events. For example, it may have been possible for the applicant to support its statement that Mr Stewart was an employee by submitting documentary evidence of this. Similarly, it may have been possible to provide documentary evidence of its instructions to Mr Stewart regarding the making of the application, or details of who made the payment of the application fee. None of this has been provided.

12) This leaves me in the uncomfortable position that neither side appears to have supported its case to the extent that I would be content that any decision I reach is based upon the actual position. Nevertheless, I must still reach a decision based upon the scant information before me. I must take due account of the applicant's witness statement where, under a statement of truth, it is stated that Mr Stewart, as an employee of the applicant, was instructed to file the trade mark application in the name of the applicant. Whilst this evidence is not corroborated, despite a number of opportunities given to Mr Stewart by the Registry, he has failed to provide any evidence to the contrary, with his counter assertions not being formalised in a witness statement and accompanied by a statement of truth. Consequently, the challenge to the applicant's evidence is no more than unsupported assertion. To make it clear, I am taking Mr Stewart's assertions into account, but accord them little weight as they are not provided under cover of a witness statement and statement of truth.

13) In light of the above, I find that the applicant's case has not been adequately or successfully challenged by Mr Stewart and that it is therefore successful in its request for the register to be corrected to record it as the proprietor because, as a result of a clerical error, the application for the trade mark was filed in the wrong name.

## **COSTS**

14) The applicant has been successful and is entitled to a contribution towards its costs. However, its costs have been minimal. It produced a brief statement of case that was then reproduced in the form of a witness statement. Mr Stewart's input in these

proceedings was also minimal and, therefore, reviewing his inputs would have required little time. Further, the applicant has not had legal representation in these proceedings and has, therefore, not accrued any legal costs. Taking all of this into account, I award costs to the applicant in the amount of £90.

15) I order Craig Porter Stewart to pay Dryworld Industries Inc. the sum of £90 which, in the absence of an appeal, should be paid within 14 days of the expiry of the appeal period or, if an appeal is filed, within 14 days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 23rd day of August 2017**

**Mark Bryant**

**For the Registrar**

**The Comptroller-General**