

The Rolls Building,  
7 Rolls Buildings,  
Fetter Lane,  
London EC4A 1NL.  
Monday, 12th November 2018

In the matter of an Appeal to the Appointed Person from a  
Decision of Mr Raoul Colombo, dated 8th August 2018.

Before:

**THE APPOINTED PERSON**  
**(Mr Geoffrey Hobbs QC)**

-----

**IN THE MATTER OF:**

The Trade Marks Act 1994  
-and-

**IN THE MATTER OF:**

Trade Mark Registration No. 3 187 820  
for the device mark **COW & PIG** in Class 43  
in the name of GAVIN BOYER  
-and-

**IN THE MATTER OF:**

Invalidity Application No.502 028  
in the name of ELAINE STOCKBRIDGE

-----

(Transcript of the Shorthand Notes of:  
Marten Walsh Cherer Limited,  
1st Floor, Quality House, 6-9 Quality Court,  
Chancery Lane, London WC2A 1HP.  
Telephone: 020 7067 2900.  
email: *info@martenwalshcherer.com*)

-----

**MR. MICHAEL EDENBOROUGH QC** (instructed by Hiddleston Trade Marks)  
appeared for the Appellant.

**MR. AARON WOOD** (of Wood IP Limited) appeared for the Respondent.

**DECISION**

**(As approved by the Appointed Person)**

THE APPOINTED PERSON: On 5th April 2018, Elaine Stockbridge applied to the Registrar of Trade Marks for a declaration of invalidity in relation to registered trade mark no. 3187820 standing in the name of Gavin Boyer. This was a figurative mark featuring the words COW & PIG BRITISH KITCHEN, which had been registered on 23rd December 2016 with effect from 27th September 2016 for use in relation to "restaurants, restaurant services incorporating licensed bar facilities; restaurant services; restaurants" in Class 43.

Mr Boyer was at that time and remains the proprietor of an application filed under no. 3300752 on 30th March 2018 to register the words COW & PIG as a trade mark for use in relation to "restaurant and bar services" in Class 43. His application continues to be opposed by Miss Stockbridge.

For her part, Miss Stockbridge was and remains the proprietor of trade mark no. 3260749 and trade mark no. 3281200. Trade mark no. 3260749 is a figurative mark featuring the words COW & PIG BROMLEY, registered on 22nd December 2017 with effect from 2nd October 2017 for use in relation to a vast array of goods and services in Classes 16, 25, 30, 35, 38 and 43.

The registration continues to be the subject of an application for a declaration of invalidity filed by Mr Boyer.

Trade mark no. 3281200 is a figurative mark featuring the words COW & PIG, registered on 7th September 2017 with effect from 8th January 2018 for use in relation to a vast array of goods and services in Classes 16, 35 and 38. I understand that this registration is now the subject of an application for a declaration of invalidity filed by Mr Boyer.

Beyond that, Miss Stockbridge is the proprietor of six trade mark applications variously filed on dates in September, October and December 2017. All six applications continue to be opposed by Mr Boyer. Five of them are for figurative marks which between them cover the words COW & PIG BRITISH KITCHEN, COW & PIG WELLING, COW & PIG and COW & PIG ORPINGTON, for use in relation to a vast array of goods and services in Classes 16, 27, 29, 30, 35, 38 and 43.

On 19th April 2018 the Registry issued seven official letters, one relating to the further conduct of the invalidity application brought by Miss Stockbridge in respect of Mr Boyer's registered trade mark no. 3187820, and the others relating to the further conduct of the opposition proceedings brought by Mr Boyer against the six applications for registration filed by Miss Stockbridge.

The official letter of 19th April 2018 sent to Mr Boyer in relation to the invalidity application in respect of his registered trade mark enclosed a copy of the Form TM26(I)

Application for Invalidity. It continued as follows (emphasis as per the original):

**"Consolidation**

"Upon receipt of the Form TM8 in respect of this cancellation action the Registrar will direct under Rule 62(1)(g) of the Trade Mark Rules 2008 that this case be consolidated with related fast track opposition case numbers **OP600000794, OP600000795, OP600000796, OP600000799, OP600000800, OP600000806** and related Invalidity No. **CA000501986**.

"In view of this the Registry intends to exercise discretion under Rule 62(1)(j) of The Trade Marks (Fast Track Opposition)(Amendment) Rules 2013 and to treat the fast track oppositions as conventional oppositions with the usual evidence rounds. A separate timetable will be issued upon receipt of the above TM8.

"Rule 4(7)(b) of The Trade Marks (Fast Track Opposition) (Amendment) Rules 2013 states.

*.....(g) consolidate proceedings provided that where a fast track opposition is consolidated with other non-fast track proceedings, it shall no longer be treated as a fast track opposition;*

"If either party disagrees with the preliminary view above they should request a hearing within 14 days from the date of this letter, that is on, or before **3 May 2018**.

"If you wish to continue with your registration, you **must** in

accordance with rule 41(6) of the Trade Mark Rules 2008 complete form TM8 and counterstatement (please see Glossary), and return it within **two months** from the date of this letter.

**"The TM8 and counterstatement must be received on or before 19 June 2018.**

**"In accordance with rule 41(6) if the TM8 and counter-statement are not filed within this period, (a period which cannot be extended), the registration of the mark shall, unless the registrar otherwise directs, be declared invalid in whole or in part.**

**"Before you decide whether to defend your registration, you may wish to refer to the guidance notes on invalidity proceedings and the scale of costs which are available from the IPO website at**

**<https://www.gov.uk/government/publications/trade-marks-invalidation/trade-marks-invalidation>.**

**"A Glossary of terms is also available from the IPO website at**

**<https://www.gov.uk/government/publications//trade-marks-tribunal-glossary-of-terms>."**

I pause at this point to observe that the Registry was proposing that the specified proceedings be consolidated

"Upon receipt of the Form TM8 in respect of this cancellation action". Page 2 of the official letter clearly, accurately

and emphatically spelled out what the consequences would be under rule 41(6) of the Trade Marks Rules 2008 if the required Form TM8 and counterstatement were not filed by Mr Boyer within the non-extendable period of two months expiring on 19th June 2018.

Mr Boyer responded in a letter to the Registry dated 1st May 2018, in which he stated:

"You have suggested combining cases raised by both parties under Rule 62(1)(j) of The Trade Marks (Fast Track Opposition) (Amendment) Rules 2013 and treating them as a single, conventional opposition. As requested, please accept this letter as our formal disagreement of this preliminary view and further, a request for a hearing. Please advise what the next steps are and any further information required by the Intellectual Property Office to advance this."

The Registry replied on 17th May 2018, stating:

"In your letter you have given no clear indication of why you disagree with the preliminary view to consolidate all the cases listed in the Registry's letter dated 19 April 2018. Before the matter is taken any further therefore, you are invited to put in writing your full reasons as to why you disagree with the Registry's proposed course of action. Once this has been received, further consideration of the matter will

then be given. Your comments should be received within fourteen days of the date of this letter, that is, on or before **31 May 2018.**"

Mr Boyer responded in a letter of 31st May 2018 which stated:

"You invited me to provide my reasoning behind the request not to group the cases relating to this opposition. Whilst I appreciate that the tribunal has the power to group the cases under the Trade Mark Rule 62(1)(g) and the expediency this offers over all, I would appeal to the tribunal that each of the cases be dealt with on its own merit. Each new trademark application filed by Ms Stockbridge was a systematic variation on the previous, opposed applications and I appeal to the discretion of the Tribunal under Rule 62(1)(h) to keep them separate and deal with them sequentially unless a point emerges where the case resolutions follow the same pattern.

"I understand that this is at the discretion of the Tribunal and that this decision is being taken without sight of the substance and evidence relating to each case. Following the Tribunal's decision we will proceed as directed."

It was submitted before me that these letters of 1st May, 17th May and 31st May served to show that the official letter of 19th April 2018 directed Mr Boyer down the wrong

path by prioritising the question of consolidation over the need to file a Form TM8 and counterstatement in response to the invalidity application. I do not agree. I think it is clear from the correspondence I have referred to that at the end of May the Registry was waiting for the required Form TM8 and counterstatement to be filed within the non-extendable period of two months expiring on 19th June in relation to the invalidity application, and Mr Boyer was waiting for the Registry to appoint a hearing at which to consider his objection to the Registry's proposal for the invalidity application to be consolidated "upon receipt of the Form TM8 in respect of this cancellation application" with his oppositions to Miss Stockbridge's applications for registration.

Mr Boyer failed to comply with the deadline for filing the requested Form TM8 and counterstatement. The Registry failed to appoint a hearing to consider his objection to consolidation. It is not clear from the papers before me why no hearing was appointed.

On 5th July 2018 the Registry wrote to Mr Boyer in the following terms:

"The official letter dated 19th April 2018 informed you that if you wished to continue with your registration you should file Form TM8 and counterstatement on or before 19 June 2018.



"As no TM8 and counterstatement have been filed within the time period set, Rule 41(6) applies. Rule 41(6) states that:

'...otherwise the registrar may treat the proprietor as not opposing the application and registration of the mark shall, unless the registrar otherwise directs, be declared invalid'.

"The registry is minded to treat the proprietor as not opposing the application for invalidation and declare the registration as invalid as no defence has been filed within the prescribed period.

"If you disagree with the preliminary view you **must** provide full written reasons and request a hearing on, or before, **19 July 2018**. This **must** be accompanied by a Witness Statement setting out the reasons as to why the TM8 and counterstatement are being filed outside of the prescribed period.

"If no response is received the registry will proceed to issue a decision on the issue of failure to comply with the Rules governing the filing of a defence."

Registry records confirm that the letter was received by Mr Boyer by e-mail at the e-mail address he was using for correspondence with the Registry, at 18:33 on 5th July 2018.

I pause at this point to observe, firstly, that the period of 14 days specified in the official letter was clearly provided for the purpose of enabling Mr Boyer to make representations as to why he should be granted relief against the sanction of invalidity that would otherwise apply under rule 41(6) and, secondly, that it was open to Mr Boyer, if he wished, to apply for an extension of the 14-day period under rule 78 of the Trade Marks Rules 2008.

The deadline of 19th July 2018 came and went without any request for an extension of time in which to respond and without any response from Mr Boyer.

On 8th August 2018 Mr Raoul Colombo, acting on behalf of the Registrar of Trade Marks, issued a decision under rule 41(6) of the 2008 Rules in the following terms:

**"DECISION**

"The following trade mark has been registered under number 3187820 since 23 December 2016:

"COW & PIG BRITISH KITCHEN (stylised word mark)

The mark, which stands in the name of Gavin Boyer, was Registered in respect of the following services:

**"Class 43:**

"Restaurant services incorporating licensed bar facilities; Restaurant services; Restaurants.

"By an application filed on 5 April 2018, Elaine

Stockbridge applied for a declaration of invalidity of this registration under the provisions of Section 47(2) of the Trade Marks Act 1994.

"A copy of this application was sent to the registered proprietor's recorded address for service on 19 April 2018. The date for submitting a notice of defence and counterstatement was set for 19 June 2018.

"The registered proprietor did not file a counterstatement within the two months specified by Rule 41(6) of the Trade Mark Rules 2008, and neither party requested a hearing or gave written submissions in respect of the official letter dated 5 July 2018. Such circumstances are covered by Rules 41(6) which states:

'...otherwise the registrar may treat him as not opposing the application.'

"Under the provisions of the rule, the Registrar can exercise discretion. In this case, no reasons have been given why I should exercise this discretion in favour of the registered proprietor and I therefore decline to do so.

"As the registered proprietor has not responded to the allegations made, I am prepared to infer from this that they are admitted.

Therefore, in accordance with Section 47(6) of the Act, the registration is declared invalid and I direct that it be removed from the register and deemed never to have been made."

Mr Boyer appealed to an Appointed Person under section 76 of the Trade Marks Act 1994 on 4th September 2018 requesting a reversal of the decision issued on 8th August 2018. With professional advice and assistance, his grounds of appeal have been distilled into the propositions summarised in paragraphs 2, 15 and 16 of the skeleton argument filed on his behalf on 7th November 2018 as follows:

"2. It is submitted that the Contested Decision was vitiated by a material procedural error and an erroneous exercise of discretion that make the Contested Decision unsafe. Hence, this appellate tribunal should annul the Contested Decision, order a contribution towards costs in favour of the Appellant, and (if it is so minded) give directions for the future conduct of this matter.

"15. In summary, the Hearing Officer made a material procedural error in failing to appoint a hearing. That, at least in part, led to the missed filing of the Form TM8 and CS. Given that the Hearing Officer failed to

take, at least, that material fact into account when exercising his discretion under r.41(6), his Contested Decision is unsafe, and so ought to be annulled.

"16. It is submitted that directions should be given as to the future conduct of this matter. Further, the Appellant should receive a contribution towards his costs."

In a Witness Statement dated 1st November 2018, which has been filed in support of Mr Boyer's appeal, he refers at paragraphs 31 to 37 to the official letters he received by email on 19th April and the subsequent course of events:

"31. I was reviewing this letter and still trying to decide how to proceed when on 19th April 2018, I received by email seven letters from the Intellectual Property Office (IPO) informing me that the Respondent had filed Counterstatements in support of my oppositions to the Trade Mark Applications.

"32. I also received the letter by email from the IPO dated 19th April 2018 informing me that the Respondent had filed a cancellation action No. CA000502028 against my Trade Mark Registration No. 3259841 ("the Trade Mark Registration"). The truth is that I noted this and saw that the IPO had decided to consolidate the various proceedings. Since this letter was in virtually the same

format as the other letters that I had received, I simply skim-read this letter and did not read it in detail. However, I did note that the Examiner had requested a response if I objected to the consolidation by 3rd May 2018. I was concerned that these cases should not be consolidated. I therefore sent a letter to the Examiner on 1st May 2018 objecting to the consolidation and requesting a hearing. I subsequently received a response from the Examiner on 17th May 2018, in which he asked me to set out the reasons for my objection and requesting a reply by 31st May 2018.

"33. I duly responded as requested by the Examiner on 31st May 2018 setting out my reasons objecting to the consolidation and finished my letter by stating:

'I understand that this is at the discretion of the Tribunal and that his decision is being taken without sight of the substance and evidence relating to each case. Following the Tribunal's decision we will proceed as directed.'

"34. By this, I meant that I would await the further direction in connection with the proceeding from the IPO, which I never received. I can also confirm that when I said 'without sight of the substance and evidence' **I of course meant by this that I was planning to file evidence and to set my case out.**

"35. As I have mentioned, I only skim-read the IPO's letter of 19th April 2018. However, I did assume that any deadlines in connection with the case would be re-set once I received the response from the IPO, to my final letter of 31st May 2018 or at least would receive further guidance. I am now shown the attached Exhibit GDB 12 consisting of copies of my correspondence with the IPO.

"36. At this stage, I was simply swamped by material from the IPO in relation to the various cases. I also had been using the hard copies of the letters from IPO as the main prompt for me to take action. I did receive the IPO's subsequent letter by email of 8th July 2018. At that point, I was suffering from severe stress which had built up in part due to the pressure of handling these multiple trade mark cases. However, I can confirm that I simply overlooked this letter because of the pressure that I was under but I would have responded if I had received a hard copy of the same. I can confirm that I received all the hard copies of the letters from the IPO in connection with the various oppositions in cancellation action except their letters of 19th April and 8th July 2018. In this cases, despite extensive investigation, I cannot locate copies of these letters. However, I can confirm that during this period from April to July 2018, my wife and I did experience the loss or

mis-delivery of a number of parcels to our home address.  
"37. I can also confirm that at no stage did I intend to surrender the registration and not fight a cancellation action. Instead, it is, I believe, clear from my correspondence with the IPO that I fully intended to fight these matters."

The references in paragraph 36 to "8th July 2018" should be understood as references to "5th July 2018".

I begin by noting the guidance provided by Lord Sumption JSC at paragraph 18 of the Judgment of the Supreme Court in *Barton v Wright Hassall LLP* [2018] UKSC 12 as to the standard for compliance with rules and orders being the same for represented and unrepresented parties. At paragraph 18, his Lordship said:

"Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting



hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); *Nata Lee Ltd v Abid* [2015] 2 P & CR 3. At best, it may affect the issue 'at the margin', as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR rule 6.15(2) simply as a matter of basic fairness. The rules provide a framework within

which to balance the interests of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

The rules and practice directions applicable to proceedings in the Trade Marks Registry are not inaccessible or obscure. I think it is reasonable, as Lord Sumption observed, to expect a litigant in person in Mr Boyer's position in the present case to familiarise himself with the rules applicable to the steps which he was either about to take or required to take in relation to the application for invalidity of his registered trade mark no. 3187820.

Moreover, the information and warnings provided to him in the official letters of 19th April 2018 and 5th July 2018 left no room for doubt as to what was required of him if he wished to avoid what would otherwise be the consequence of

failing to take the steps necessary to defend the registration of his trade mark. All he had to do in order to understand the procedure was to read those letters.

By the time he received the official letter of 5th July 2018 the only viable way of defending his registered trade mark was for Mr Boyer to seek a direction from the Registrar permitting him to contest the application for invalidity, despite the expiry of the two-month deadline for filing the required Form TM8 and counterstatement.

The witness statements which Mr Boyer has put forward for consideration on this appeal are, as I understand it, intended to establish that the Registrar would and should have permitted him to oppose the application for invalidity if he had done the very thing he did not do, which was to request such a direction by 19th July 2018 or within such further period as the Registrar might have allowed for that purpose.

I must point out that the powers conferred upon the Appointed Person by r 73(4) of the 2008 Rules do not include the power to grant an extension under r 77 of any time or period prescribed by the rules or specified by the Registrar. That, together with the need to recognise that I am sitting not as the Registrar but on appeal from the Registrar, prevents me from treating the evidence filed for the first time on appeal as if it had been duly filed at first instance

in response to the official letter of 5th July 2018.

The question as it appears to me is, essentially, whether the decision delivered by the Registrar on 8th August 2018 in the absence of any response to the official letter of 5th July 2018 can and should be reversed for being unjust, having regard to the explanations that Mr Boyer has provided on appeal as to why he did nothing in response to the application for invalidity in accordance with the requirements of rule 41(6) and the notifications in the official letters.

I have considered with care the evidence given by Mr Boyer in the paragraphs I have quoted from his recent witness statement. I note that he confirms receipt by e-mail of the relevant letters. His position in relation to the official letter of 19th April 2018 is that he skim-read it. He says nothing about the Form TM26(I) Application for Invalidity which accompanied it. His evidence is that he assumed the period of two months expired on 19th June 2018 would be re-set once he received a response from the Registry to his letter of 31st May 2018, notwithstanding that it was expressly stated in bold type in the letter of 19th June 2018 that this was "a period which cannot be extended".

I can only say that I do not see how any such assumption could reasonably or realistically be made, either on the basis of what the letter actually said or on the basis

of anything that was said in subsequent correspondence between Mr Boyer and the Registry.

Moreover, I do not accept that the assumption which Mr Boyer says he made can be attributed to any act or omission on the part of the Registrar. It was, on any view of the matter, a unilateral assumption which could not alter the two-month time limit specified in rule 41(6) absent a successful application to the Registrar under rule 77(5): see *BOSCO Trade Mark* BL O/399/15, 21st August 2015 at paragraphs 3, 8 and 9.

Mr Boyer confirms that he received the official letter of 5th July 2018 by e-mail. He says he overlooked it. It is not possible to tell from that whether he overlooked it in the sense of omitting to do anything about it, despite being aware of it and knowing what it said, or overlooked it in the sense of not noticing that he had received it or noticing that he had received it but not noticing what it said. It seems clear to me that there was no failure to receive the official letters of 19th April and 5th July, only a failure to consider them with the relatively small degree of care required to keep up with the progress of the proceedings he was involved in.

While I can understand that Mr Boyer may have felt swamped by the material from the UKIPO, it is necessary to bear in mind that all bar one of the proceedings to which the

correspondence related were opposition proceedings which he had commenced, that the attack on the validity of his registered trade mark no. 31878 was plainly and obviously something he needed to consider, that he seems to have had no difficulty in keeping on top of the correspondence over the period from 19th April 2018 to 31st May 2018 during which he was communicating with the Registry on the subject of consolidation, that he acknowledges the pressure he says he was under was not so great as to have impeded him in dealing with the requirements of the official letters if they had all been received by post, and that the number of proceedings he was dealing with was by its nature a reason for devoting more, not less, time to the task of monitoring the progress of them.

There is no medical evidence to support the suggestion, if indeed it is suggested, that Mr Boyer was incapacitated by stress either from working or from attending to his business and legal affairs during the period April to July 2018. He says in his witness statement that he and his wife experienced the loss and misdelivery of a number of parcels to their home address during that period. He says nothing in his witness statement about e-mails sent to him building up in his inbox and remaining unopened and unanswered at any relevant time.

In my view, Mr Boyer has nothing and no one other than

himself to blame for his failure to comply with the requirements of the rules and the related letters from the Registry. I can see no flaw in the Hearing Officer's exercise of discretion on the basis of the information and material before him.

It was submitted that the Hearing Officer should have realised, simply upon reading the correspondence on file, that Mr Boyer had mistakenly assumed in the course of communicating with the Registry on the subject of consolidation, that the time for filing a Form TM8 and counterstatement would be re-set and should further have realised that he, Mr Boyer, was intent on defending the validity of the trade mark registration. I do not accept that the correspondence discloses the existence of any such mistaken assumption, nor do I accept that the Hearing Officer was required to try and work out what Mr Boyer's intentions were in relation to the application for invalidity in the absence of any statement from him in response to the letter of 5th July asking him to set out his position.

I am not persuaded by the evidence which has been put forward for consideration on appeal that there is any real or proper basis for regarding the Hearing Officer's decision as wrong or unjust. For these reasons, the appeal is dismissed.

-----

O/774/18

Appeal dismissed. Appellant ordered to pay £2,200. to the Respondent as a contribution towards its costs of the Appeal, to be paid within 21 days of 12<sup>th</sup> November 2018.