

O-080-05

IN THE MATTER OF REGISTERED TRADE MARK NO. 2149359 IN THE
NAME OF APPLIED TECHNOLOGIES MANUFACTURING LIMITED

AND IN THE MATTER OF APPLICATION FOR REVOCATION THEREOF NO.
81505 BY APPLE PROJECTS LIMITED

DECISION

1. On 10 November 2003 Apple Projects Ltd (“the applicant”) applied to revoke Registered Trade Mark No. 2149359 (“the mark”) standing in the name of Applied Technologies Manufacturing Ltd (now known as LookC Ltd, “the registered proprietor”) for non-use pursuant to section 46(1)(a) and (b) of the Trade Marks Act 1994. The registered proprietor did not file a counterstatement or evidence of use within the three month period specified by rule 31(2). In a written decision dated 12 March 1994 Mr Attfield on behalf of the Registrar directed that the mark be revoked with effect from 10 November 2003. Subsequently the registered proprietor appealed on the grounds that it had not received the application and had in fact used the mark.
2. In an Interim Decision dated 11 November 2004 I made the following order:
 - “(1) Unless within 28 days of the date of this decision the registered proprietor files a witness statement verified by a statement of truth which confirms the accuracy of the account given by Mr Golightly at the hearing as summarised in paragraph 14 above and sets out the evidence of use or reasons for non-use upon which the registered proprietor wishes to rely to defend the application for revocation, the hearing officer’s decision will be set aside but the discretion under rule 31(3) will be exercised against the registered proprietor with the result that the appeal will be dismissed without a further hearing.
 - (2) If the registered proprietor does file such evidence, the applicant shall inform the Registrar within 28 days of the evidence being sent to it

whether it consents to the appeal being allowed or not. If the applicant does consent, the appeal will be allowed without a further hearing.

- (3) If the applicant consents to the appeal being allowed, the evidence of use or reasons for non-use filed by the registered proprietor will be admitted under rule 31(8) on terms that (a) the applicant shall have three months (to run from the end of the 28 day period mentioned in (2) above)) in which to file any evidence in answer and (b) the registered proprietor shall have three months (to run from the date on which a copy of the applicant's evidence is sent to it) to file evidence strictly in reply if so advised.
- (4) If the applicant does not consent to the appeal being allowed, the appeal will be listed for a further hearing before me."

3. In addition I reserved the costs of the appeal.
4. Subsequently the registered proprietor duly filed a witness statement in accordance with paragraph (1) of the order and the applicant consented to the appeal being allowed.
5. The registered proprietor has sought an order for its costs of the appeal to be paid not by the applicant but by the Registrar. The basis for this application is that in the Interim Decision I held that the hearing officer's decision was irregularly made since the hearing officer had exercised the discretion under rule 31(3) adversely to the registered proprietor without giving the registered proprietor an opportunity to be heard as required by rule 54.
6. In my judgment this is not a sufficient basis for an order for costs to be made against the Registrar, at least in the circumstances of the present case. The decision under appeal resulted from the registered proprietor's failure to meet the time limit under rule 31(2). In the Interim Decision I expressed the view that the most likely explanation for this was that Mr Golightly of the registered proprietor had inadvertently failed to notice or respond to a card from the Royal Mail advising it of a failed attempt to deliver the application by recorded delivery (e.g. because it got mixed up with some junk mail which Mr Golightly threw away). In these circumstances I consider that it would not be

right to require the Registrar to pay the registered proprietor's costs of the appeal.

7. Accordingly I make no order as to costs.

21 March 2005

RICHARD ARNOLD QC

A.A. Thornton & Co made written submissions on behalf of the registered proprietor.