

O-307-08

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION NO. 1501909 IN THE NAME OF
COBRETTI ENGINEERING AND AN APPLICATION FOR RECTIFICATION**

AND

**IN THE MATTER OF OPPOSITION TO THE RECTIFICATION THEREOF
BY KENNETH COOK**

Trade Marks Act 1994

IN THE MATTER OF registration No 1501909 in the name Cobretti Engineering and an application for rectification

And

IN THE MATTER OF opposition to the rectification thereof by Kenneth Cook

BACKGROUND

1. On 18 May 1992, Cobretti Engineering, a partnership, applied to register the trade mark VIPER in respect of "Sports cars; all included in Class 12. The application achieved registration on 12 November 2004.

2. These proceedings concern an application made by Cobretti Engineering and Robert Dennis Busbridge requesting that the register be rectified so as to record Robert Dennis Busbridge, trading as Cobretti Engineering as the proprietor. An application for Rectification of the register is made under Section 64 of the Act, which states:

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) An application for rectification may be made either to the registrar or to the court, except that

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(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.

3. First of all I am satisfied that as one of the named proprietors in the partnership shown on the register, and having an undisputed connection with Cobretti Engineering, the applicant

has a sufficient interest in the matter. I am not aware of any proceedings concerning this registration pending before the Court. I can therefore go on to consider whether there is an error or omission in the register such that rectification is necessary and justified.

4. As can be seen from Section 64, rectification concerns an alleged error or omission in the register. In this case the matter at issue is not an error; the register stands correct. The application is a request to change the proprietor's details from Cobretti Engineering, a partnership, to Robert Denis Busbridge, trading as Cobretti Engineering. The application is accompanied by a Form TM21 requesting a change of the proprietor of record to Robert Dennis Busbridge and Martin Alan Busbridge trading in partnership as Cobretti Engineering which is stated to be "the correct description applicable to when the application was filed in May 1992". The application itself is made on the following grounds:

"My brother Martin left the business and has taken no active part in the activities of Cobretti Engineering since the end of June 1992 and everyone with whom we deal including the tax authorities and others has regarded Cobretti Engineering as owned entirely by myself since that time. I have located a document signed by myself and my brother dated 29 June 1992, a copy of which is attached, which states "it was decided that the partnership between the two parties would be terminated". Following that my brother took no part in the activities of Cobretti Engineering and the business was carried on by me alone.

I also attach copies of two letters from Taylor Willcocks to me dated 28 January 1993 and 17 February 1993, addressed to R D Busbridge Esq, Cobretti Engineering, which confirms that the partnership has been formally dissolved, and asking for an indemnity from me, effectively that I would hold him harmless against any adverse financial consequences of carrying on with the business.

I continued all liabilities of Cobretti Engineering from when my brother left. In 1992 copyright litigation was started against Cobretti Engineering by Mr Kenneth Cook. My brother Martin did not want to become involved in that and basically walked out of the firm. There were difficulties between us anyway. I defended Cobretti Engineering against all the litigation without Martin's help or involvement; it ended with a Consent Order in 1999.

I am still continuing to trade as Cobretti Engineering and I have a website and advertise in Kit Car magazine, other magazines and local newspapers.

I have in the past made applications for the recordal of an assignment of the trade mark but in the circumstances have withdrawn all these applications. This is confirmed in my letter to The Registry of 19 September 2006.

I have not been able to make contact with my brother for some years, despite attempts to do so. After leaving the business in 1992, Martin travelled to the Philippines, New Zealand and Australia. I tried to contact him with regard to this trade mark more recently when he was living in Spain. He moved to Spain I believe in approximately 1996 or 1997, and he was in contact with my parents from time to time. I saw Martin again in June 2003 at our father's funeral in Fuengirola, Spain, where my parents resided. Martin was then living in a town called Benalmadena, near Fuengirola. Once again we fell out, over my mother's welfare, and I have not seen or heard of him since.

I have attempted to contact Martin since 2004 and have travelled to Spain on numerous occasions to see my mother, during which time I have been to his last known address in Benalmadena but he is no longer there. I have had some information that the possible reason for Martin leaving is due to some difficulties with certain UK authorities; I do not know of the details. I believe that he will have moved on and no longer be in Europe, and that he may now be using a different name to his legal name. This makes it very difficult for me to try and trace him.

It seems to me therefore that the inclusion of his name on the Trade Mark Register is an error which needs correction, particularly as he left long before the mark was registered. The entry of his name on the Register has long since ceased to have any proper effect.

In summary, Martin Busbridge has not had any involvement with Cobretti Engineering or myself since he left in June 1992 to date,"

5. These submissions were accompanied by various extracts from magazines, correspondence, etc. Although these have not been provided as formal evidence, with the exception of one handwritten note, Mr Cook addresses their evidential value but does not question their validity. In the circumstances of this case I consider it appropriate to accept the facts shown at face value, and where appropriate, take them into account in my decision.
6. The application for rectification is opposed by Mr Kenneth Cook. Much of Mr Cook's Statement of Case consists of allegations that go to the substance of these proceedings, but also to the truthfulness of the claims made by Mr Busbridge. I have summarised below what I take to be relevant to the determination of this case. There has also been a raft of submissions from both sides raising or reiterating points and providing further matter to support or refute the claims made. Where there is evidence that either supports or cast doubt upon the veracity of any claims made I will naturally take this into account. Mr Cook also comments on the outcome of earlier proceedings before the office. I do not propose to re-visit those proceedings; that was a matter for appeal. With this in mind, I take the grounds on

which the opposition is made to be as follows:

Since his bankruptcy in 1993 Robert Busbridge has not traded under the trading name of "COBRETTI ENGINEERING" nor could he by law because of his status as a bankrupt.

Robert Busbridge's claim to be treated as the sole owner of the business Cobretti Engineering is irrelevant and does not confer any legality. After the bankruptcy, the business known as Cobretti Engineering ceased so Robert Busbridge has not, and could not legally have owned the business himself as the partnership was never legally wound down, or assigned or otherwise bought from his partner. After the bankruptcy the ownership, including the application to register the Mark, would have been owned by creditors or the Official Receiver.

The document claimed to establish Robert Busbridge's rights to the business is merely a photocopied piece of paper that could have been made at any date between 1992 and present. It is not a legal document in any sense and therefore cannot be relied on. In any case it does not assign or sell the half of the business or assets to Robert Busbridge.

The letters from Robert Busbridge's solicitors merely discuss the partnership breaking up, and the responsibility for debts.

The copyright litigation ended in 1987 on advice from my solicitors, specifically, that the ten year period of protection was up and to continue would be a waste of time. I know of no Consent Order in 1999, but this has no bearing on this matter.

Documents 2 to 8, consist of copies of Robert Busbridge's adverts since 1993 to present date, plus other documents. His latest advert in June 2007, contrary to his claims, does not show a trading name of Cobretti Engineering, nor does his website.

The recordal of the assignments were found to be incorrect and were subsequently withdrawn. The Patent Office should apply the decision of that hearing.

That Martin Busbridge had never legally assigned any assets from his share of the business, over to his brother cannot be said to be an 'oversight, particularly as it can be seen Robert Busbridge was under legal advice and could have been advised to 'legally' obtain all assets of the whole business.

Robert Busbridge should never have been allowed to carry on with the original 1992 application to register the Mark Viper, due to his bankruptcy. It is law that a

bankrupt cannot own an asset; the application was an asset.

The application was under the name of a business, no longer in existence and should have been discontinued.

The assets of the partnership should not have been to be handed over to another person, simply because the other partner cannot be located, potentially against the wishes of that partner.

The trade mark cannot be renewed owing to the non existence of the partnership since 1992 and so the trade mark registration expired on May 1999."

I therefore state that this application should be discontinued on the grounds that it is not lawful and the original decision of the Registrar's Hearing Officer should be enacted. The appeal made to the appointed person was discontinued due to Robert Busbridge withdrawing his opposition, and no pronouncements or decisions were made by the appointed person, one way or the other.

7. Mr Robert Busbridge had previously sought to become the proprietor of record through two assignments. On 12 April 2002 the Registrar recorded an assignment from Cobretti Engineering to Autotrak Limited. On 10 May 2002 a further assignment from Autotrak Limited to Robert Dennis Busbridge was recorded. Mr Kenneth Cook challenged the legality of these assignments as part of his grounds of opposition to the registration of the application. In his decision, the Registrar's hearing officer, Mr Reynolds took the view that the recordal of these assignments were errors of procedure in or before the Office and the matter should be remitted to the appropriate Section in the Registry for the application to be returned to the name of the original applicant Cobretti Engineering. Mr Reynolds did not deal with Mr Cook's other objections to aspects of the assignments, instead stating that if matters progress to that point those objections would need to be made the subject of a (post registration) application for rectification.

8. The application proceeded to registration, whereby the assignments referred to in Mr Reynolds' decision became the subject of an application for rectification by Mr Cook. In his summary at the end of his detailed decision, Mr David Landau, the Registrar's Hearing Officer found the following:

1. The trade mark could have been assigned by the partners after the dissolution of the partnership.
2. The trade mark should be in the name of Robert Dennis Busbridge and Martin Alan Busbridge trading as Cobretti Engineering.

3. The trade mark cannot be renewed owing to the non-existence of the partnership since 29 June 1992 and so the trade mark registration expired on 18 May 1999 (seven years after the date of application). (It will be necessary for the renewal fee to be refunded.)

9. The decision of Mr Landau was appealed to the Appointed Person, and heard by Mr Geoffrey Hobbs QC. Although no formal finding was made by Mr Hobbs QC, the discussions during the course of the hearing indicated that he considered that if the assignment from Cobretti Engineering to Autotrak, and from that company to Martin Robert Busbridge were withdrawn, the renewal of the registration could be allowed to stand. Mr Robert Busbridge wrote to the Registrar on 19 September 2006, and again on 18 February 2007 withdrawing the requests for the recordal of the two assignments referred to above.

10. It would appear that at the time of the hearing before the Appointed Person, the understanding was that after withdrawing the assignments the registration would revert to being in the name of Cobretti Engineering, a partnership. During the course of the hearing the Appointed Person stated that it had long been held that in law the name of a partnership is no more than a collective name representing the individual members of the partnership. Consequently, as "Robert Dennis Busbridge" and "Martin Alan Busbridge" had both been partners in Cobretti Engineering at the time of filing the application, it had, in law, always been in their names.

11. Even if this were not the case, there are two events that create the same effect. The first is that when the application had been filed, because it had been made in the name of a partnership, it had been accompanied by a Form TM4 giving the names of the members of the partnership, namely, Robert Dennis Busbridge and Martin Alan Busbridge. The second event relates to a Form TM20 filed on 28 September 1992 requesting that the application be changed so as to be in the name of Robert Dennis Busbridge and Martin Alan Busbridge, trading as Cobretti Engineering. This request had been actioned by the Registry on 12 October 1992. It would seem that this form only changed things to the eye; in the mind of the law nothing changed. I must therefore commence on the basis that unless there is a something that has changed the position, the registration exists in the names of Robert Dennis Busbridge and Martin Alan Busbridge.

12. The next matter I should address is the renewal of the registration, for if that should not have happened there will be no registration to rectify. I will return to the discussions that ensued at the hearing before the Appointed Person, for they give a useful insight into the position as viewed by the relevant law. After questioning the Registrar's Hearing Officer, the Appointed Person told Mr Robert Busbridge that although the registration had, in fact, been renewed, because of the question over the proprietorship this was under sufferance rather

than unconditionally. However, once the issue of the assignments had been cleared, this would mean that the renewal had been made by one of the proprietors and could be considered to have been properly made. As the assignments have been withdrawn the renewal can be taken to have been made by a person entitled to make the application for renewal and the renewal is therefore able to stand, albeit subject to the issues raised by Mr Cook which he asserts should have prevented the progress of the application to registration in the first place.

13. Mr Cook argues that Mr Robert Busbridge should never have been allowed to carry on with the application to register Viper. This is argued on two counts. Firstly because of his bankruptcy, it being law that a bankrupt cannot own an asset and the application is an asset, and secondly, that as the application was under the name of a business no longer in existence it should have been discontinued.

14. It is certainly true that as a bankrupt Mr Robert Busbridge would have lost control of his assets. In such circumstances any registration or licence (which I would take to include the trade mark application) held in connection with his work or trade might be affected by the bankruptcy order, but this depends upon the circumstances under which the license or asset was granted. There is nothing in the trade marks legislation that even suggests that in the event of an applicant becoming a bankrupt, an application for registration just stops in its tracks. The application and any attached value will belong to the trustee appointed to manage the affairs, who may dispose of it to realise value or lessen it as a liability. In other words, the trustee can carry on with the application, or withdraw it. In his written submissions Mr Robert Busbridge confirms that the trustee in his bankruptcy was fully informed of his legal position and had no interest, inter alia, in the trade mark application. Whilst there is no formal evidence, a number of letters provided with the written submissions clearly show the Examiner from the Insolvency Service was fully aware of the application and could legitimately have claimed a beneficial interest in the asset even after Mr Robert Busbridge had been discharged from bankruptcy. The Examiner confirmed that they had no interest in the application and never sought to realise it as an asset. Even without these letters it would be reasonable to infer that the Examiner knew about this application; there is an onus for a bankrupt to declare such matters. The application was not withdrawn or otherwise disposed of and carried on through the examination and registration process. If I have any concern in this area it is that the Examiner has not formally disclaimed the application as property falling within the scope of the bankruptcy.

15. When a self-employed person is declared bankrupt their business is normally closed down and any business assets claimed by the trustee, unless they are exempt. That said, there is nothing to prevent a bankrupt from being self-employed and starting to trade again, albeit subject to certain restrictions. One such restriction is a prohibition on them carrying on business (directly or indirectly) in a different name from that in which they were made bankrupt without revealing the name in which they were made bankrupt. From this it is

reasonable to infer that, subject to any action that the trustee may take, Mr Robert Busbridge could continue to trade under the name Cobretti Engineering and presumably use the name VIPER. Mr Busbridge was discharged as a bankrupt in 1996.

16. Mr Robert Busbridge has provided evidence to support his claim that, notwithstanding the partnership problems and the bankruptcy, he has continued to trade as Cobretti Engineering and used the name VIPER. Mr Cook disputes that this is the case, drawing attention to the lack of use of the name Cobretti in Mr Robert Busbridge's advertisement and website. The papers filed with his written submissions show that Mr Robert Busbridge, Cobretti and VIPER had a continued connection in trade. However, whilst this is not formal evidence, Mr Cook does comment on the material and does not challenge its authenticity. In any event, this information relating to Mr Robert Busbridge's use of Cobretti and VIPER is only useful in establishing a continued connection with the partnership. There is no requirement that an application for registration actually be in use, so whether there is evidence one way or the other will not have any bearing on the issue here.

17. The core issue raised by Mr Cook is that the assets of the partnership should not be handed over to Mr Robert Busbridge, potentially against the wishes of Mr Martin Busbridge, simply because the latter cannot be located. Mr Robert Busbridge has provided a document signed by him and his brother dated 29 June 1992. This states "it was decided that the partnership between the two parties would be terminated". Mr Cook states that this document, which is claimed to establish Robert Busbridge's rights to the business is merely a photocopied piece of paper that could have been made at any date between 1992 and present. He asserts that it is not a legal document in any sense, cannot be relied on, and in any event does not assign or sell Mr Martin Busbridge's share of the business or assets to his brother. Unlike the information from sources such as advertisements, features and formal correspondence from legal representatives, this note does suffer from the flaws identified by Mr Cook, and would be unsafe as evidence of fact.

18. As part of his written submissions, Mr Robert Busbridge provided two letters from Taylor Willcocks, Solicitors, that refer to the granting of an indemnity by Mr Robert Busbridge to Mr Martin Busbridge following the dissolution of the partnership. Mr Cook refers to these letters, and whilst he disputes their evidential value, unlike the handwritten note he does not challenge their validity. It therefore seems appropriate that their contents should be taken into account.

19. It is at this point that I will return to the words of Mr Hobbs QC sitting as the Appointed Person in the appeal hearing. Mr Hobbs QC questioned Mr Robert Busbridge about the possibility of his contacting his brother Martin and obtaining an agreement from him to the transfer of his share of the business. Whilst that would have been tidier, it has not happened. Mr Hobbs QC helpfully went on to set out the perspective of the law in relation to

partnerships and the means by which ownership may pass from one partner to another, Mr Hobbs said the following:

“If it is a handover, there may be a handover for money or there may be a handover for other valuable promises like and indemnity that the outgoing partner will no longer be bothered in any way with the debts of the ongoing business, past, present or future, which is a very valuable consideration.”

20. The earlier letter proposes an indemnity being granted from all debts from the date of dissolution. The later letter changes this to Mr Robert Busbridge granting an indemnity to Martin from whenever the debts may have occurred with the exception of half of a bank overdraft secured on Martin’s house. There is nothing beyond these letters to show that agreement on the indemnity had been concluded. However, the change in the offer shows a clear intent by Mr Martin Busbridge to leave the partnership and put his liabilities in order. He was clearly prepared to relinquish his interest on the basis of a suitable indemnity being granted, and having left the partnership and gone abroad, it would be reasonable to infer that the matter was concluded. To my mind this falls within the “handover” circumstances set out by Mr Hobbs, and it is reasonable to take the partnership as having been passed into the ownership of Mr Robert Busbridge.

21. In summary, the withdrawal of the assignments brought the name of record of the registration back to Cobretti Engineering, which, from the words of the Appointed Person is in effect the same as naming the partners, in other words, Robert Dennis Busbridge and Martin Alan Busbridge trading in partnership as Cobretti Engineering. In any event, a Form TM4 had been filed making it explicit that this was the position. That being the case and absent any other reason, Mr Robert Busbridge was entitled to file for renewal of the registration. The letters filed with Mr Robert Busbridge’s written submissions show that in 1992 his brother and business partner, Mr Martin Busbridge sought an indemnity against his liabilities to the partnership. On the basis of the guidance provided by the Appointed Person this is one of the circumstances that can effect a handover of the business. Although there is no evidence that agreement on the indemnity was ever concluded, it is clear that Mr Martin Busbridge was prepared to relinquish his share of the partnership on this basis, and having had no further involvement, indeed having left the country, it is reasonable to infer that the indemnity was granted. This puts the ownership of Cobretti into the name of Mr Richard Busbridge which, appears to be no more than a reflection of the de facto position. Although limited, the features and advertisements provided show that Mr Robert Busbridge has carried on the business on his own, and with his name alone being connected with it.

22. So having determined that the application can be claimed by Mr Robert Busbridge as Cobretti Engineering, there is the question of whether the application should not have proceeded because of his financial status. There is nothing in the trade mark legislation that

has the effect of cancelling an application in the circumstances of the applicant being declared bankrupt, so that fact, of itself, did not prevent the application from becoming registered or take the ownership from the partnership; that required some action by the trustee/Examiner. The letters provided with the written submissions show that the trustee knew about the application, but did nothing that would sever its connection with the applicants, so although it was an asset it remains with the partnership. The conclusion that I reach is that the application for rectification should succeed and the opposition by Mr Cook is rejected. Accordingly, I order that the register be rectified so as to show Robert Dennis Busbridge, trading as Cobretti Engineering as the proprietor.

23. The opposition having failed the applicant is entitled to a contribution towards his costs. I therefore order that the opponent pay the applicant the sum of £650 towards his costs. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 12th day of November 2008

**Mike Foley
for the Registrar
the Comptroller-General**