

TRADE MARKS ACT 1994


**IN THE MATTER OF TRADE MARK REGISTRATION NO. 2389890 IN THE
NAME OF COMMERCIAL POWER SOLUTIONS LIMITED**

**AND IN THE MATTER OF AN APPLICATION BY TURBOCHIP (UK)
LIMITED TO INTERVENE IN AN APPLICATION FOR RECTIFICATION
THEREOF (NO. 82640) MADE BY SPECIALIST AUTOSPORT SERVICES
LIMITED**

**APPEAL TO AN APPOINTED PERSON FROM THE DECISION OF MS JUDI
PIKE DATED 16 JUNE 2008**

DECISION

Introduction

1. By a decision dated 16 June 2008 (“the **Decision**”), the Registrar’s Hearing Officer, Ms Judi Pike, refused an application by Turbochip (UK) Limited (“**Turbochip UK**”) under rule 35(1) of the Trade Marks Rules 2000 to intervene in ongoing rectification proceedings under section 64(1) of the Trade Marks Act (“the **Act**”) relating to the proprietorship of registered trade mark no. 2389890,  (“the **Mark**”).
2. Rule 35(1) states as follows:
 35. – (1) Any person, other than the registered proprietor, claiming to have an interest in proceedings on an application under rule 31, rule 32, rule 33 or rule 34 may file an application to the registrar on Form TM27 for leave to intervene, stating the nature of his interest and the registrar may, after hearing the parties concerned if so required, refuse such leave or grant leave upon terms and conditions (including any undertaking as to costs) as she thinks fit.
3. Of the four other rules mentioned in this provision, it is rule 34 that deals with applications for rectification under section 64(1) of the Act.
4. The Hearing Officer concluded that Turbochip UK did not have a stake in the proceedings sufficient to warrant the grant of leave to intervene. Turbochip UK now appeals against the Decision.

The application for rectification

5. In order to understand the basis for the Decision and Turbochip UK's objections to it, it is necessary to give some details of the rectification proceedings, as well as to introduce the parties involved.
6. The basic facts of the rectification application are that Commercial Power Solutions Ltd ("CPS") applied to register the Mark on 20 April 2005 and that the registration process was completed and the Mark formally granted in the name of CPS on 9 June 2006. On 25 September 2006, Specialist Autosport Services Limited ("SAS") made an application on Form TM26(R) for rectification of the register under section 64(1) of the Act by correcting the name of the registered proprietor from CPS to SAS.
7. Section 64(1) states:

64. – (1) Any person having a sufficient interest may apply for 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.
8. Section 64(3) goes on to say that, except where the registrar directs otherwise, the effect of rectification is that the error or omission in question shall be deemed never to have been made.
9. According to SAS's statement of reasons, when CPS applied for the Mark, it was the exclusive licensee of the "Turbochip brand" in the United Kingdom, pursuant to a licence (not recorded in writing) from a Danish company called Turbochip A/S, which knew about and approved the application. SAS alleges that Turbochip A/S terminated CPS's right to use the Turbochip name on 24 April 2006 and appointed SAS as exclusive UK licensee for Turbochip A/S on the same date. On that basis, SAS's case is that registering the Mark in CPS's name was clearly an error and that SAS's name should be substituted.
10. SAS's application for rectification was supported by two witness statements dated 21 September 2006: one made by Mr Nicholas Heyes, a director of SAS and (at that point, though no longer) one of the two directors and shareholders of CPS; and the other by Mr Finn Borg, who claims to be the proprietor of Turbochip A/S. These statements put flesh on the bones of SAS's case summarised in paragraph 9 above. In particular, Mr Heyes explains that, since early 2006, he had been in dispute with his co-director and shareholder, Mr Christopher John, over the management of CPS and that CPS had ceased trading with effect from early May 2006. In the meantime, Mr Heyes' other company, SAS, had been appointed UK licensee for the Turbochip brand on 24 April 2006 and had been developing the Turbochip business. Mr Borg

confirms that CPS's appointment as "authorised Dealer for Turbochip in the United Kingdom was terminated on 24 April 2006", with SAS being appointed in its place.

11. A Notice of defence and counterstatement on Form TM8 was filed in the name of CPS on 8 December 2006, supported by a statement signed by Mr John. Without attempting a full summary of the statement, I highlight the following points that are made: the Mark is a valuable asset of CPS; CPS has never been an exclusive licensee for Turbochip A/S; Mr John "purchased ... the use of the [Turbochip] name in October 2002" and granted CPS the right to use it, subject to the proviso that it would revert back to Mr John or be sold as part of a business package to any interested party, if Mr John and Mr Heyes were to dissolve their business relationship; and, finally, the application for rectification is one of a number of steps taken by Mr Heyes to get hold of the assets of CPS unlawfully, and is an abuse of the process.

12. On 30 January 2007, Mr Heyes filed a further witness statement, responding to the counterstatement and *inter alia* disputing Mr John's authority to represent CPS. Mr John then filed a witness statement dated 7 July 2007, giving further details of the dispute between him and Mr Heyes and concluding that:

30. [CPS] is and should remain the proprietor of [the Mark] until such time as CPS is closed down, placed into liquidation or valued and sold to a suitable purchaser for a fair and equitable sum agreed between all interested parties.

He adds (at paragraph 36) that, since the directors of CPS are in deadlock, the most appropriate forum to deal with the current situation is either a Court of law or a mediation process covering all the assets of CPS.

13. The final link in the lengthy chain of evidence came in the form of a third witness statement of Mr Heyes, dated 11 September 2007. The following extract gives an indication of how SAS proposes to put its case for rectification:

10. ... as from the beginning of May 2006, CPS's application no longer had Turbochip A/S' consent, CPS no longer had the right to use the Turbochip name in the United Kingdom, and those rights had been licensed on an exclusive basis to SAS. Therefore the subsequent registration of the TURBOCHIP trade mark in CPS' name on 29 June 2006 was in error, as the trade mark registered in CPS' name could no longer guarantee the identity of the origin of the product in question. ...

14. At this point, the evidence in the rectification application was complete and the case would have proceeded to a decision either on paper or following a hearing if requested by either party. However, the application to intervene was made shortly thereafter, with the effect that the rectification application was put on hold.

The application for leave to intervene

15. On 12 October 2007 the Registry received a Form TM16 filed by Mr John purportedly on behalf of CPS, applying to record a change of ownership of the Mark from CPS to Turbochip UK as of 1 October 2007. The form was countersigned by a Mr John Gray as director of Turbochip UK.
16. The Registry notified the parties that no action would be taken in relation to the proposed recordal because of the ongoing rectification proceedings.
17. Following that notification, Mr Gray, acting for Turbochip UK, filed a Form TM27 on 9 November 2007, launching the present application to intervene. The application was supported by a witness statement dated 31 October 2007 from Mr Thomas Gray (John Gray's brother), in which he claims that it was he and a Mr Thorben Jensen who originally came up with the name "Turbochip" when doing business with Mr Borg, and that the two of them chose the logo form of the name, as portrayed in the Mark. Thomas Gray claims to have traded using the Turbochip logo in both the UK and Eire since before 2000, first through a company called Turbochip Ltd and then, with his brother, John Gray, through Turbochip UK. He also claims that Mr Borg adopted the name and logo for use alongside his company name of Padborg Elektro APS and that the Turbochip logo has not been registered in Denmark.
18. Thomas Gray then states:
 18. My brother John met with Mr Chris John and as a result of evidence provided substantiating our rights over the Turbochip logo Mr John immediately agreed to assign the Turbochip UK Trade Mark to my company as the rightful owner. The necessary paperwork was completed and Form TM16 was submitted with the necessary fee on 1st October 2007.
19. So the essence of Turbochip UK's application for leave to intervene was at the outset that one of its founders 'invented' the Mark and that, in recognition of this fact, Mr John had agreed that CPS should assign the Mark to Turbochip UK and had completed the Form TM16 (and possibly other unidentified paperwork) to give effect to this agreement.
20. By a letter dated 19 November 2007, Mr John supported the application, stating that it was quite clear to him that the Mark should not have been registered by CPS without the consent of Mr Tom Gray or his company.
21. The Registry notified the parties on 14 December 2007 of its preliminary view that Turbochip UK should be permitted to intervene, in response to which SAS requested a hearing to argue the case against the intervention. That hearing took place before Ms Judi Pike in Newport on 10 April 2008. Mr Gray appeared for Turbochip UK; Mr John appeared purportedly as representative for CPS (though his right to

represent CPS is disputed by SAS); and SAS was represented by its trade mark attorney, Mr Bob Elliott, then of Baines Wilson, attending by telephone.

22. The Hearing Officer notified the parties of her decision to refuse leave to intervene by a letter dated 14 April 2008, which she followed up with the Decision of 16 June 2008, expanding on her reasons, pursuant to a request by Turbochip UK.

The Decision

23. After setting out some of the background, which is included within the discussion above, the Hearing Officer summarised the submissions made on behalf of the parties at the hearing and in the skeleton argument submitted for SAS, which I further summarise here:

- (1) For Turbochip UK, Mr John Gray reiterated the explanation of how his brother and Mr Jensen had invented the name TURBOCHIP and the logo depicted in the Mark, and how Mr John had agreed to assign the Mark once he was aware of this history.
- (2) For SAS, Mr Elliott argued that Turbochip UK's version of events could not be correct since Mr Borg's company had been using the Turbochip marks before Messrs Gray and Jensen claim to have invented them. He submitted that Mr John appeared to have persuaded the Grays to assist him in his dispute with SAS in return for an assignment of the Mark. The purported assignment was invalid, given that Mr Heyes had not agreed to it and that Messrs John and Heyes were in financial deadlock over the fate of CPS. If the Grays' claims were genuine, there were more appropriate remedies to pursue, such as invalidation on the grounds of bad faith. Further, the effect of the intervention, if allowed, would be to delay the rectification proceedings significantly, which was particularly inappropriate given the late timing of the application.
- (3) Mr John supported the application to intervene. The Hearing Officer states (at paragraph 9 of the Decision) that he did so "for CPS", but Mr John's position was of course contrary to that of his co-director and shareholder, Mr Heyes. It seems to me that Mr John's role at the hearing could more properly be described as that of a witness for Turbochip UK, though he was not cross-examined on his evidence. Among other things, he gave an explanation of the relationships between Mr Borg, Mr Jensen and Mr Thomas Gray: Mr Borg is Mr Jensen's brother-in-law and Mr Jensen is Mr Gray's brother-in-law; and he sought to explain why he was entitled to assign the Mark, by reference to Mr Heyes' alleged behaviour in relation to CPS.

24. The Hearing Officer then set out the text of rule 35 (which I have already reproduced above) and stated that it was clear that rule 35(1) gave the Registrar a general

discretion to permit intervention in revocation, invalidation and rectification proceedings in the Registry.

25. The operative part of the Decision was as follows:

12. The hearing before me was to determine whether or not Turbochip should be granted leave to intervene in the rectification proceedings. A request to intervene can be made at any stage; in this case, the evidence rounds were complete. As such, I had the benefit of seeing all the evidence filed by SAS and CPS, together with the later correspondence involving Messrs Gray. In preparing for the hearing, it was clear to me that there has been a serious falling-out between Mr Heyes and Mr John, which took place after the application for the trade mark was filed. Matters which were already complex were further complicated by the Grays'/Turbochip's recent involvement. At the hearing, I emphasised to the parties that my role was to determine whether an intervention should be allowed and whilst I appreciated that to some extent this matter was bound up with the substantive issue of the rectification, that I could not base my decision upon who was entitled to the registration since that would be to determine the substantive outcome of the rectification. I therefore endeavoured to keep the issue before me separate, although I permitted Mr John and Mr Gray, both unrepresented, to lay the background facts of the dispute before me.

13. It was submitted at the hearing and it was also clear from the evidence that Mr Heyes and Mr John are in deadlock over the fate of CPS. Both are co-directors and the only shareholders in the company: they each own and control 50% of the company and its assets. Mr Heyes has since formed SAS, whilst Mr John is acting for CPS (I note that the rectification application was filed on 25 September 2006 and that Mr John filed a Form TM33 at the registry on 3 October 2006 to be recorded as the address for service for the registration). A 50% share or control means that its owner cannot assign, dispose of or alter any of the company's assets without the other's consent (see the decision of the registrar in BL O/121/06 *ATOTA*, upheld on appeal to the Appointed Person). Mr Heyes has not consented to the assignment to Turbochip and I therefore cannot see that the assignment has any validity (it is also not supported by any documentation).

14. Since I have decided that both the Form TM16 and the purported assignment were filed/made without validity, the trade mark registration is still in the ownership of CPS, as if no such agreement had ever been made. Turbochip cannot be the beneficial owner of the trade mark registration; that is, this is not a situation where the trade mark is still owned by CPS, but there is a valid agreement that it can pass to the ownership of Turbochip. If Turbochip is not the beneficial owner, it does not presently have a stake in the proceedings sufficient to warrant my granting leave to intervene. I appreciate that this might seem strange to the Grays. There are also potentially more people than the Grays who may be interested in the 'invention' of this trade mark and consequently who owns the registration; for example, Mr Jensen and/or Mr Borg. Permission to intervene is commonly granted in situations where a party which began proceedings assigns the mark to a third party, which then has the right to file evidence, plays a full part in any hearing and which is liable for costs. There is no beneficial owner here and if I were to determine whether or not the Grays were sufficiently interested to intervene, I would have to do so on the basis of hearsay evidence of conversations in public houses. That is not something which I am prepared to do, and it would also mean crossing over into the substantive issues of the case. I took the view that what I had to decide was relatively straightforward: was Turbochip an assignee with a

beneficial ownership? If it was, then intervention could be contemplated. If not (as I decided), there could be no proper basis for intervention.

15. This is not an application for invalidation on the basis of bad faith, or passing off rights: it is an application for rectification of the register which has been through the evidence rounds and is now ready for a decision on the substantive rectification issue. Adding another party at this late stage in the proceedings would mean the probability of further evidence and all that goes with it in terms of procedural timescales. If intervention had been appropriate, the lateness of the request would not have deterred me from granting leave. Even so, whether SAS or CPS may in the end have succeeded, intervention may still not have given the Grays the end result they sought. However, I did not need to consider the end result of any intervention since I decided that there was no basis for it; the assignment had no validity and therefore Turbochip was not the beneficial owner of the trade mark and could have no interest in it for the purposes of operating rule 35(1). I made no costs award.

Dissolution of CPS

26. One further matter to mention before turning to the grounds of appeal is that CPS was dissolved on 3 December 2008, after the Decision was issued and the appeal filed, but before the appeal hearing. Pursuant to section 654 of the Companies Act 1985, all assets that were owned by the company at that date, including trade marks, will have passed to the Crown as *bona vacantia* (i.e. ownerless goods). The Treasury Solicitor is the Crown's nominee for dealing with such assets.

27. Following an enquiry made by SAS's professional representative, Mr Elliott (now a partner at Crutes LLP), the Treasury Solicitor stated the following in a letter dated 5 December 2008:

In view of the evidence of Mr Borg, the proprietor of Turbochip A/S Padborg, to the effect that the above company's appointment as authorised dealer for Turbochip in the UK was terminated, I do not believe that the trade mark was incontrovertibly an asset which vested in the Crown on the company's dissolution. In any case I do not wish to pursue a claim to that effect. Accordingly, I do not propose to become involved in the rectification proceedings.

28. This leaves a rather bizarre situation where the registered trade mark at the heart of the rectification and intervention proceedings is apparently in limbo: its registered proprietor no longer exists, and the Crown is not interested in taking it over. However, I do not read the Treasury Solicitor's letter as an unequivocal disclaimer of the Mark, and it seems to me likely that the Crown's final position will be affected by the outcome of the rectification action. If SAS were to succeed in its application, then it would no doubt argue that the error in the proprietor's identity should be corrected *ab initio*, or at least as from a date before the dissolution of CPS, in which case the Mark would never have been *bona vacantia*. On the other hand, if SAS were to lose, then the Mark would be confirmed as an asset of CPS which passed to the Crown on its dissolution. I would expect the Treasury Solicitor to take a fresh look at the position at that stage. I also note for completeness that it may still

be possible at that point for CPS to be restored to the Companies Register for the purpose of transferring the Mark, thus avoiding the *bona vacantia* rules.

Grounds of Appeal

29. The grounds of appeal given by Turbochip UK on the Form TM55 are as follows:

- (1) that the Hearing Officer was wrong to consider evidence from the rectification application, but should instead have considered the intervention application “on the basic facts alone”;
- (2) that Mr Heyes is a director of both CPS and SAS and it is perverse in law for him to act on behalf of both companies;
- (3) that Mr Heyes is not actively promoting the Turbochip brand in the United Kingdom any more as he now trades as Eco Power Solutions Ltd and is also a director of Turbochip Ltd which was first registered by the Gray family;
- (4) that “legal opinion” tells the appellant that, as a result of the Gray’s/Turbochip UK’s use and promotion of the Turbochip marks before CPS was even formed, there would be no difficulty in convincing a court that Turbochip UK is the rightful owner of the Mark.

30. Bearing in mind that Turbochip UK did not have professional representation, I explained to Mr Gray at the hearing that an appeal from the decision of a Registry Hearing Officer is not a re-hearing, but a review, and that I was not entitled to interfere with the Decision in the absence of a material error of principle (*REEF Trade Mark* [2002] EWCA Civ 763, [2003] RPC 5 at [28]).

31. I asked Mr Gray whether he wished to submit that the Hearing Officer was wrong in concluding that Mr John was not entitled to assign the Mark from CPS to Turbochip UK because of the lack of consent from Mr Heyes, at a time when the two were at loggerheads. Mr Gray stated that he could not give a straight answer to that question as he would need a legal opinion on it, but he went on to confirm that this was not one of his grounds of appeal. His focus at the hearing was instead on seeking to persuade me that Turbochip UK has a better right to the Mark than either CPS or SAS, and that the best way to proceed would be to allow the intervention in SAS’s application for rectification so that all interested parties and witnesses could be present and give evidence as to their respective claims.

(1) Wrong to consider evidence in rectification application

32. Mr Gray did not press the first ground of appeal at the hearing, concerning the Hearing Officer’s reliance on the evidence in the rectification application. This ground seems to contradict Mr Gray’s overall submission that Turbochip UK has the

best rights to the Mark, since that in itself requires an analysis of the parties' respective conflicting claims, which in turn involves consideration of the evidence.

33. In any event, as Mr Elliott submitted for SAS, the Decision was based primarily on the Hearing Officer's analysis of the purported assignment from CPS to Turbochip UK, which was not a matter dealt with in the evidence in the rectification application. Although she referred to the evidence of deadlock between Messrs John and Heyes, this state of affairs was also clear from the submissions of the parties at the hearing of the application to intervene. It was plainly central to the question of whether the Mark could be validly assigned by CPS at the behest of only Mr John, and the Hearing Officer was right to rely on it.
34. It was appropriate for the Hearing Officer to review the evidence in the rectification proceedings in order to inform herself of the issues and consider whether to grant leave to intervene. Her references to the evidence in the Decision were very limited, and she was careful to avoid reaching any conclusions in relation to facts that were disputed on the rectification evidence. I therefore reject the first ground of appeal as having no merit.

(2) Mr Heyes' directorship of both CPS and SAS

35. Mr Gray said nothing about the second ground of appeal at the hearing. It appears to have fallen away in view of the subsequent dissolution of CPS, which means that Mr Heyes is no longer a director of that company. In any event, this objection does not point to any error made by the Hearing Officer. She had to take the parties as she found them, and it was a matter of public record that Mr Heyes was a director of both CPS and SAS. He did not in fact "act on behalf of both companies" in the intervention application: while he did stand behind the submissions made on behalf of SAS, his position in relation to CPS was that the deadlock with Mr John meant that neither of them could properly represent the company without the other.

(3) Mr Heyes no longer actively promoting the Turbochip brand

36. In relation to the third ground of objection, Mr Gray stated at the hearing that SAS/ Mr Heyes were not actively advertising the Turbochip brand, and added that a third party had told him that Mr Borg had recently stopped supplying materials to SAS and had suggested that other dealers should contact him direct.
37. By introducing such matters, it was plain that Mr Gray saw them as part of his general claim that that Turbochip UK had a better right to the Mark than SAS (or CPS). This is effectively a variant on the fourth ground of appeal and is put forward as a further example of the evidence about the Turbochip brand which Mr Gray submits should be given to the Registry in the rectification proceedings. I deal with

those matters below, and for now state that I do not consider the third ground to have any merit as a basis for setting aside the Decision.

(4) Turbochip UK is the rightful owner of the Mark

38. As I have mentioned, Mr Gray did not pursue the claim of ownership on the basis of the purported assignment and the Form TM16 filed by Mr John. However, he left open the question of whether the Hearing Officer reached the correct conclusion on this point, so I shall deal with it briefly. In my view, she clearly did reach the correct conclusion. Mr John openly admitted that he had submitted the Form TM16 without the consent of Mr Heyes, the only other director and 50% shareholder of CPS. As such, the application to record the change of ownership could not be said to have been made by CPS, but was simply made by Mr John himself. Further, by section 24(3) of the Act, an assignment of a registered trade mark is not effective unless it is in writing signed by or on behalf of the assignor. No such signed agreement has been produced.
39. Turning to the overall submission of Mr Gray that Turbochip UK is the rightful owner of the Mark by virtue of its invention of the Turbochip brand and long-standing use and promotion of it, the question for me is whether the Hearing Officer fell into error when she restricted her analysis of the “interest” in the rectification proceedings to the assignment issue, rather than relying on the wider assertions of earlier or better rights.
40. To deal with this, I go back to the text of rule 35(1). (The rule has now been replaced by rule 45(1) of the Trade Marks Rules 2008, which is in identical terms.) This refers to an applicant for leave to intervene “claiming to have an interest in proceedings” under *inter alia* the rule relating to applications for rectification under section 64(1). The wording indicates that the “interest” concerned must be in the “proceedings” themselves. The rule is not a general invitation to anyone who claims to have an interest in the trade mark in issue to seek to participate in the proceedings.
41. The rectification proceedings concern the question of whether the alleged switch of exclusive licensing arrangements from CPS to SAS between the application and grant dates for the Mark means that CPS was wrongly recorded as registered proprietor and that SAS’s name and details may be substituted pursuant to the provisions of section 64(1). There are two possible outcomes: CPS remains as registered proprietor, or SAS is substituted. I say nothing about which outcome appears most likely, since the matter is yet to be considered at first instance.
42. Having rejected the potential interest in the proceedings as assignee and beneficial owner of the Mark, the only other interest for which Turbochip UK argues is its earlier and better rights as inventor and user of the Turbochip trade marks. As Mr

Elliott pointed out, this argument goes to the question of whether CPS was entitled to apply for the Mark in the first place, which is a quite different question from that of whether – having done so – it was a correctable error to record CPS rather than SAS as the registered proprietor.

43. While Turbochip UK would no doubt be keen to see its name and details substituted for those of CPS, it has not put forward any serious basis for a claim for rectification under section 64(1). Mr Gray openly conceded that it failed to apply for registered protection of the Turbochip trade marks, and there is no suggestion (akin to that made by SAS) that it stepped into the shoes of CPS after the application was made.
44. Accordingly, I agree with Mr Elliott's submission that Turbochip UK would have to rely on another provision of the Act in order to pursue its claims. I also agree that an intervention application is not the right way to pursue them. The claims do not amount to an interest in the rectification proceedings. I therefore reject the fourth ground of appeal.

Conclusion

45. I conclude that the Hearing Officer was right to find that Turbochip UK had not established a proper basis for intervening in the rectification proceedings.
46. Mr Gray's supplemental argument based on the convenience of allowing all parties with potential rights in the Turbochip brand and all witnesses to be involved in a Registry process does not help him in the absence of a relevant interest. Further, while the recent dissolution of CPS and the possible result that the Mark is *bona vacantia* might be a reason for Turbochip UK to air its claims sooner rather than later, it does not change the underlying basis for the rectification proceedings or the lack of any interest in those proceedings on the part of Turbochip UK.
47. The result is that I dismiss the appeal.
48. I have considerable doubt as to whether any application to the Registry would be capable of determining the underlying dispute between the various individual and corporate parties, which appears to be Mr Gray's aim. I would urge the parties to consider mediation or some other form of alternative dispute resolution as a more cost-effective and constructive method of determining a dispute of this nature than bringing further applications before the Registry or taking action in the courts.

Costs

49. The Hearing Officer made no costs award at first instance, and Mr Elliott did not challenge that aspect of the Decision. However, he did seek costs in relation to the appeal.

50. Pursuant to the scale fees set out in Tribunal Practice Notice 2/2000, Mr Elliott calculated that a respondent in SAS's position could claim up to a maximum potential total of £2,450, broken down as to £200 for considering the appeal notice, £750 for considering evidence and £1,500 for preparation and attendance at the hearing. The actual costs that had been incurred in relation to these matters came to £370 for considering the appeal notice and attached grounds (which Mr Elliott characterised as Mr Gray's evidence) and £1,295 for preparation, travelling, waiting and the hearing, at an hourly rate of £185. On top of that was a disbursement for a first class return rail fare from Newcastle to London of £378, giving a total of £2,043.
51. Mr Elliott pointed out that Turbochip UK had had ample warning of the likely level of costs, as a result of an estimate of £1,935.50 that was given in support of an application for security for costs in relation to the appeal made by SAS in November 2008. (The application was refused on the basis that SAS had failed to establish that Turbochip UK would be unable to meet any order for costs made on the appeal.)
52. I do not consider it appropriate to treat the statement of grounds endorsed on the Form TM55 as "evidence" under the scale fees. The grounds form part of the notice of appeal and were not particularly lengthy in this case. Further, while it may be perfectly acceptable for Mr Elliott to charge his client for travelling first class in order to make it easier to prepare for the hearing on the train, I do not think it is reasonable to pass the charge on to Turbochip UK in this case. My own on-line checks tell me that a flexible day return involving travel at peak times in standard class, booked a week or two in advance, costs around £265.
53. Having taken these matters into account, I believe that it is appropriate to order Turbochip UK to contribute to SAS's costs in the amount of £1,750, payable within 14 days of notification of this decision.



ANNA CARBONI

22nd April 2009

Mr John Gray appeared in person for the appellant (the applicant for leave to intervene). Mr Bob Elliott of Crutes LLP appeared on behalf of the applicant for rectification in the proceedings in which the appellant seeks leave to intervene.