

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK REGISTRATION No. 2348052
IN THE NAME OF FOX INTERNATIONAL GROUP LIMITED**

**AND IN THE MATTER OF APPLICATION FOR REVOCATION No. 83639
BY SENSAS**

**AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON
BY THE APPLICANT FOR REVOCATION
AGAINST A DECISION OF MRS ANN CORBETT
DATED 1 JUNE 2011**

DECISION

Background

1. This is an appeal from a decision of Mrs Ann Corbett (BL O/180/11), acting for the Registrar, dated 1 June 2011, in which she refused wholly or partially to revoke UK Registration number 2348052 standing in the name of Fox International Group Limited ("Fox").
2. UK Registration number 2348052 is for the trade mark CHALLENGER in respect of: angling apparatus; angling accessories in Class 28. It was entered in the Register on 23 April 2004 with a filing date of 6 November 2003.
3. On 13 January 2010, Sensas applied to revoke the registration on grounds of non-use under section 46(1)(a) and 46(1)(b) of the Trade Marks Act 1994. Sensas requested revocation from 24 April 2009 under section 46(1)(a) or from 7 September 2009 under section 46(1)(b) in either case in respect of all the goods within the registration.
4. Fox took issue with the grounds of revocation in a Notice of defence and counterstatement dated 4 February 2010. Both sides filed evidence and the application came to be heard before Mrs Corbett on 22 March 2011.
5. At the hearing, it was conceded by Sensas and agreed by Fox that the evidence showed genuine use during the relevant periods by Fox of the CHALLENGER trade mark in relation to angling rods and landing nets.
6. The dispute between the parties accordingly centred on whether such genuine use justified retention of the original specification: angling apparatus; angling accessories as contended for by Fox or should be narrowed down to angling rods and landing nets as argued for by Sensas.

7. After reviewing the law and the evidence particularly the trade evidence exhibited to the witness statement of Mitchell Smith, dated 2 August 2010, filed in support of the application, the Hearing Officer decided the matter in favour of Fox and ordered Sensas to pay Fox a contribution of £1500 in costs.

8. Her conclusions on the issue of partial revocation were:

“26. Whilst I accept the mark has been used on a limited range of goods, taking the evidence as a whole, I am not persuaded that it supports Sensas’ submissions that *angling rods* and *landing nets* are each sub-categories of goods such that the specification of goods as registered should be subject to a limitation. *Angling rods* and *landing nets* are both articles of angling apparatus. I consider the registration should remain on the register for the specification of *angling apparatus*; *angling accessories* as this represents a fair description of the use made of the mark.”

The appeal and standard of review

9. On 28 June 2011, Sensas filed Notice of appeal to the Appointed Person under section 76 of the Act. At the appeal hearing Sensas was represented by Mr. Simon Malynicz of Counsel and Fox by Mr. David Crouch of Bromhead Johnson¹ (the same representatives who had appeared below).

10. There was an acceptance from both sides of the *REEF* standard of review (*REEF Trade Mark* [2003] RPC 101, Robert Walker LJ at para. 28). Sensas relied on the following passage from the judgment of Floyd J. in *Galileo Technology LLC v. European Union* [2011] EWHC 35 (Ch) at paragraph 14:

“I conclude that, unless I am satisfied that the Hearing Officer made an error of principle, I should be reluctant to interfere. I should interfere if I consider that his decision is clearly wrong, for example if I consider that he has drawn inferences which cannot properly be drawn, or has otherwise reached an unreasonable conclusion. I should not interfere if his decision is one which he was properly entitled to reach on the material before him.”

11. Sensas contended that the Hearing Officer made errors of principle as well as findings that were clearly wrong and/or unreasonable.

12. Fox on the other hand directed me generally to the Court of Appeal decision in *BUD and BUDWEISER BUDBRÄU Trade Marks* [2003] RPC 25 and as to what might constitute an error of principle, the statement of Lindsay J. in *esure Insurance Limited v. Direct Line Insurance Plc* [2008] RPC 6 at paragraph 12:

“... an error of principle such as to justify or require departure from the decision below ... includes the taking into account of that which should not have been, the omission from the account of that which should have been within it and the case (explicable only as one in which there must have been

¹ Mr. Hugo Cuddigan of Counsel had been instructed by Bromhead Johnson to appear on behalf of Fox but was taken ill on the day of the appeal hearing. As well as the oral submissions of Mr. Crouch, I had the benefit of Mr. Cuddigan’s skeleton argument.

error of principle) where it is plain that no tribunal properly instructing itself could, in the circumstances, have reasonably arrived at the conclusion that it reached.”

13. Fox said that it was not enough for Sensas to complain about the result of the multi-factorial assessment carried out by the Hearing Officer under the guise of “not giving enough weight” to evidence preferred by Sensas.

Grounds of appeal

14. The primary ground of appeal was the law. Mr. Malynicz argued that whichever approach was followed – that of the English tribunals or the General Court of the Court of Justice of the EU – the result arrived at was the same; the specification should have been reduced to angling rods and landing nets. Failing that, I ought to consider making a preliminary reference to the CJEU under Article 267 TFEU although Sensas’s primary position was that such a reference was unnecessary because on any basis the words “apparatus” and “accessories” were too wide.
15. The secondary or ancillary grounds of appeal were that the Hearing Officer improperly failed to take account of the trade witnesses and/or the catalogue evidence.

Part revocation

16. I considered the law on part revocation in *Penn Fishing Tackle Manufacturing Co. v. Fox International Group (EXTREME)*, BL O/217/10. I said:

“13. The current law on part cancellation for non-use was succinctly summarised by Mr. Geoffrey Hobbs QC sitting as a deputy judge of the High Court in *Daimler AG v. Sany Group Co Ltd* [2009] EWHC 1003 (Ch), paragraph 9:

“The required degree of precision [with which the goods/services of the registration in suit may need to be redefined] has not yet been authoritatively defined by the European Court of Justice (it was touched upon obliquely in Case C418/02 *Praktiker Bau-und Heimwerkermärkte* [2005] ECR I-5873 at paragraphs 49 to 52). In three decisions of the Court of First Instance (Case T-256/04 *Mundipharma AG v. OHIM* [2007] ECR II-449; Case T-483/04 *Armour Pharmaceutical Co v. OHIM* [2006] ECR II-4109; Case T-126/03 *Reckitt Benckiser (España) SL v. OHIM* [2005] ECR II-2861) it has been indicated that the outcome should be a specification expressed in wording which covers no independent sub-category or sub-categories of goods other than the one(s) within which the relevant trade mark can be taken to have been used. In the most recent of these decisions (Case T-256/04 *Mundipharma AG* at paragraphs 27 to 36) it was emphasised that the chosen wording should reflect the purpose and intended use of the relevant goods. I have previously expressed the view that the aim should be to arrive at a fair specification by identifying and defining not the particular examples of goods for which there has been genuine use, but the particular categories of goods they

should realistically be taken to exemplify (*WISI Trade Mark* [2006] RPC 13, p. 580 at paragraphs 11 to 18; *DATASPHERE Trade Mark* [2006] RPC 23, p. 590 at paragraphs 19 to 25). That appears to me to be consistent with the case law in England (analysed by Mr. Richard Arnold QC sitting as the Appointed Person in *NIRVANA Trade Mark* (BL O/262/06) at paragraphs 36 to 59) and also with the case law of the Court of First Instance. However it is possible, that the case law in England may not fully accord with the case law of the Court of First Instance, as noted in the decision of Mr. Richard Arnold QC sitting as the Appointed Person in *EXTREME Trade Mark (Pan World Brands Ltd v. Tripp Ltd* [2008] RPC 2, p. 21 at paragraphs 51 to 56; see also Bently and Sherman *Intellectual Property Law* 3rd Edn (2009) pp 906, 907) ...”

14. In *EXTREME Trade Mark*, Mr. Arnold said:

“52. I considered the principles applicable under section 46(5) at some length in *NIRVANA Trade Mark* (O/262/06) at [36]-[59]. Since then the CFI has given judgment in Case T-256/04 *Mundipharma AG v Office for Harmonisation in the Internal Market* (unreported, 13 February 2007). In that case the opponent’s mark was registered in respect “pharmaceutical and sanitary preparations; plasters”. The applicant did not dispute that the mark had been used in relation to “multi-dose dry powder inhalers containing corticoids, available only on prescription” and the Board of Appeal found that the opponent had only proved use of the mark in relation to those goods. On appeal to the CFI the opponent contended inter alia that use should be taken to have been proven in relation to “therapeutic preparations for respiratory illness”. The CFI upheld this contention.

53. In its judgment, having recapitulated paragraphs [45] and [46] of its judgment in Case T-126/03 *Reckitt Benckiser (España) SL v Office for Harmonisation of the Internal Market (ALADIN)* [2005] ECR II-2861 and recorded that it was not disputed that the mark had been used in relation to “multi-dose dry powder inhalers containing corticoids, available only on prescription”, the CFI went on:

“26. Next, it should be borne in mind that the earlier mark was registered for ‘pharmaceutical and sanitary preparations; plasters’. That category of goods is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently. Consequently, the fact the earlier mark must be regarded as having been used for ‘multi-dose dry powder inhalers containing corticoids, available only on prescription’ confers protection only on the subcategory within which those goods fall.

27. In the contested decision, the Board of Appeal held that the earlier mark was to be taken into consideration only in so far as it covered goods the genuine use of which was not contested. It

thus defined a sub-category corresponding to those goods, namely ‘multi-dose dry powder inhalers containing corticoids, available only on prescription’.

28. That definition is incompatible with Article 43(2) of Regulation No 40/94, as interpreted in the light of *ALADIN*, and applicable to earlier national marks pursuant to Article 43(3) of that regulation.

29. The Court notes in this respect that, since consumers are searching primarily for a product or service which can meet their specific needs, the purpose or intended use of the product or service in question is vital in directing their choices. Consequently, since consumers do employ the criterion of the purpose or intended use before making any purchase, it is of fundamental importance in the definition of a sub-category of goods or services.

30. The purpose and intended use of a therapeutic preparation are expressed in its therapeutic indication. However, the definition employed by the Board of Appeal is not based on that criterion as it does not state that the goods in question are intended for the treatment of health problems and does not specify the nature of those problems.

31. Moreover, the criteria chosen by the Board of Appeal, namely the dosage form, the active ingredient and the obligation to obtain a doctor’s prescription, are, as a rule, inappropriate for defining a sub-category of goods as contemplated in *ALADIN*, as the application of those criteria does not fulfil the abovementioned criteria of purpose and intended use of the goods. In fact, a given medical condition can often be treated using a number of types of medication with different dosage forms and containing different active ingredients, some of which are available over-the-counter whilst others are available only on prescription.

32. It follows that, in failing to take into account the purpose and intended use of the goods in question, the Board of Appeal made an arbitrary choice of sub-category of goods.

33. For the reasons set out in paragraphs 29 and 30 above, the sub-category of goods covering those the genuine use of which has not been contested must be determined on the basis of the criterion of therapeutic indication.

34. The sub-category proposed by the intervener, namely ‘glucocorticoids’, cannot be accepted. That definition is based on the criterion of the active ingredient. As discussed in paragraph 31 above, such a criterion is not generally

appropriate by itself for defining subcategories of therapeutic preparations.

35. By contrast, the definition proposed by the applicant and OHIM, namely ‘therapeutic preparations for respiratory illnesses’, is appropriate in two ways: first, it is based on the therapeutic indication of the goods in question and, second, it allows for the definition of a sufficiently specific sub-category, as contemplated in *ALADIN*.

36. In the light of the foregoing, the Court finds that the earlier mark must be deemed to have been registered, for the purposes of the present case, for ‘therapeutic preparations for respiratory illnesses’.”

54. Although at first blush this suggests an approach which is somewhat different to that laid down by the English authorities considered in *NIRVANA*, I consider that the difference is smaller than might appear. The essence of the domestic approach is to consider how the average consumer would fairly describe the goods in relation to which the trade mark has been used. Likewise, paragraph [29] of *Mundipharma* indicates that the matter is to be approached from the consumer’s perspective.

55. To the extent that there is a difference between them, I remain of the view expressed in *NIRVANA* that I am bound by the English authorities interpreting section 46(5) of the 1994 Act and Article 13 of the Directive and not by the CFI’s interpretation of Article 46(2) of the CTM Regulation since, as already noted above, there are differences between the two legislative contexts. Nevertheless I consider that English tribunals should endeavour to follow the latter so far as it is open to them to do so. *Mundipharma* suggests that, within the spectrum of domestic case law, the slightly more generous approach of Jacob J in *ANIMAL Trade Mark* [2003] EWHC 1589 (Ch), [2004] FSR 19 is to be preferred to the slightly less generous approach of Pumfrey J in *DaimlerChrysler AG v Alavi* [2001] RPC 42.

56. Applying these principles to the present case, counsel for the proprietor submitted that a holdall was an item of luggage and would be so described by the average consumer having regard to its purpose and intended use and that it was not appropriate to attempt to sub-divide “luggage” into narrower sub-categories. With some hesitation, I have come to the conclusion that I accept these submissions”.

15. In *NIRVANA*, Mr. Arnold identified that the main difference between the approaches of the English courts and the General Court was that the former based a fair description of the use that had taken place on the perception of the average consumer whereas the latter provided no clear yardstick for determining when a sub-category of products cannot be further divided. To my mind, a danger with the category/sub-category approach is that invites sub-

division according to the product(s) concerned. A tribunal may be seduced into equating a fair description with actual use shown.”

17. Since then Mr. Geoffrey Hobbs QC sitting as the Appointed Person in *Gima (UK) Limited v. Euro Gida Sanayi Ve Ticaret Limited*, BL O/345/10 has said (p. 10 – 11):

“It is fair to say that the existing case law leaves some room for argument as to how tightly worded the resulting specification of goods or services should be (see paragraphs 16 13 to 19 of the decision of Professor Annand sitting as the Appointed Person in *Fox International Group Ltd v Penn Fishing Tackle Manufacturing Co.* BL O-217-10, 30th June 2010).

However, that does not appear to me to alter the basic nature of the required approach. As to that, I adhere to the view that I have expressed in a number of previous decisions. In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

Argument – the law

18. There was no suggestion that the Hearing Officer got the law wrong. Indeed Mr. Malynicz used the Hearing Officer’s decision (at paras. 9 – 13) to guide me through the various principles he wished to highlight.

19. The Hearing Officer cited first, the Court of Appeal decision in *Thomson Holidays Ltd v. Norwegian Cruise Lines Ltd* [2003] RPC 32. Mr. Malynicz drew my attention especially to the following guidance in Aldous L.J.’s judgment:

“31. ... In my view that task [to arrive at a fair specification of goods having regard to the use made] should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. ... Thus the court should inform itself of the nature of the trade and then decide how the notional consumer would describe such use.”

20. Mr. Malynicz said what was key was to identify the relevant purchaser of the goods. That was clear also from the judgment of Jacob J. in *ANIMAL Trade Mark* [2004] FSR 19, which was the second authority cited by the Hearing Officer:

“20. ... A lot depends on the nature of the goods – are they specialist or of a more general, everyday nature? Has there been use for just one specific item or for a range of goods? Are the goods on the High Street? And so on ...”

21. Sensas sought to persuade me that these were specialist goods which would be bought by specialist purchasers. The aim it seemed to me was to link into Sensas’s secondary or ancillary complaint that the Hearing Officer had ignored the evidence of Sensas’s trade witnesses.

22. Whilst not disagreeing with the general proposition, I would make three observations at this point. First, Mr. Malynicz accepted that the goods would be purchased by beginners through to angling enthusiasts (and relatives or others on their behalf).

23. Second, as Jacob J. remarked in *ANIMAL*, the notional purchaser must be taken to know the purpose of the exercise:

“20. ... So one must assume that the average consumer is told that the mark will get absolute protection (“the umbra”) for use of the identical mark for any goods coming within his description and protection depending on confusability for a similar mark on similar goods (“the penumbra”)”².

Thus what the consumer would ask for when purchasing may not be decisive.

24. Third, I accept Mr. Crouch’s point that a specification need not be phrased in lay language, in the exact terms a notional purchaser might use. Mr. Crouch relied in support on the following statement by Aldous L.J. in *Thomson Holidays*:

“30. How would the average consumer describe the services provided by Thomson under the FREESTYLE mark? I believe they would use the term “package holidays”. That is a fair description of the use made. I therefore would add to both specifications *words to the effect* that the services were all for package holidays. ...” (Emphasis supplied).

25. Next, Mr. Malynicz took me to my decision in *Penn Fishing Tackle* and the review of the law I conducted in that case (see para. 16 above). To his mind, the *Daimler v. Sany* test³ – *identifying and defining not the particular examples of goods for which there has been genuine use, but the particular categories of goods they should realistically be taken to exemplify* – whilst attractive, did not inform how to differentiate examples and categories. However, that is the (often difficult) question for the tribunal to determine in the particular circumstances of each case.

26. Turning to the case law of the General Court, Sensas submitted that Case T-126/03, *ALADIN* advocated the most restrictive approach in that if a sub-category of goods was identifiable the specification must be reduced to reflect that sub-category of use. Fox on the other hand argued that this was a misinterpretation of the decision relying on what the General Court said at paragraph 46:

“46. Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods

² In Jacob J’s example of use only for three-holed razor blades from Venezuela, “razor blades” or “razors” would be the fair description the notional consumer would pick.

³ Confirmed and re-stated in *Gima*.

concerned by the registration. Consequently, the concept of ‘part of the goods or services’ cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.”

27. Finally, I was taken to Case T-256, *RESPICUR* where the General Court in the context of pharmaceuticals said that the purpose or intended use of a product was relevant in defining a sub-category of goods:

“29. The Court notes in this respect that, since consumers are searching primarily for a product or service which can meet their specific needs, the purpose or intended use of the product or service in question is vital in directing their choices. Consequently, since consumers do employ the criterion of the purpose or intended use before making any purchase, it is of fundamental importance in the definition of a sub-category of goods or services.”

28. Mr. Malynicz alleged that the Hearing Officer failed to take purpose and *RESPICUR* into account. Mr. Crouch remarked that “angling” was fishing with a hook and what was needed was a rod and line. The purpose of all this was to catch fish and the Hearing Officer had this in mind.
29. The Hearing Officer was referred by both parties to my decision in *Penn Fishing Tackle*. That contained a discussion of the relevant paragraphs of *RESPICUR* (see para. 16 above).

Policy points

30. Before leaving the law, Sensas made three policy arguments. First, Sensas contended that because the standard infringement action now covered similar goods, the tribunal should adopt an ungenerous (but not pernickety) approach to partial revocation on grounds of non-use⁴.
31. Second, Recital 9 to Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks states:
- “(9) In order to reduce the total number of trade marks registered and protected in the Community and, consequently, the number of conflicts which arise between them, it is essential to require that registered trade marks must actually be used or, if not used, be subject to revocation.”
32. Third, in Case C-307/10, *CIPA v. Registrar of Trade Marks (IP TRANSLATOR)*, 29 November 2011, Advocate General Bot affirmed the need for a specification of goods to be clear and precise (69) *inter alia* to make it possible to apply the grounds for revocation (para. 60).

⁴ Mr. Malynicz argued that that contrasted to the position under the 1938 Act where the exclusive right extended only to goods within the registration but defences to non-use included bona fide use in relation to goods of the same description.

33. On the other hand, the AG cautioned against over-specificity as this would unduly limit trade mark protection (para. 70). He contemplated that general terms including those of Nice Class Headings might satisfy the need for clarity and precision (paras. 74 and 77). The test was whether the nature of the goods could objectively be identified (paras. 75 and 80).
34. Fox repeated that “angling” meant fishing with a rod and line⁵. Further “apparatus” was a well understood term even though not commonly used to designate angling products. Indeed the Hearing Officer provided a definition of “apparatus” from Collins Dictionary, 3rd Edition as: “a collection of instruments, machines, tools, parts or other equipment used for a particular purpose”. In Fox’s submission “angling apparatus” was sufficiently clear, precise and contained and represented a fair description of the goods in respect of which their CHALLENGER mark was genuinely used.

Trade witnesses’ evidence

35. Moving to the secondary or ancillary grounds of appeal, Sensas argued that the Hearing Officer paid no regard to the evidence of the trade witnesses/trade catalogues.
36. Sensas took issue with the following comments in the Hearing Officer’s decision:
 - “19. The witness statements filed by each of these gentlemen are largely identical, both in form and content, to that of Mr Angel, including, in some instances, mistakes in spelling.
 20. In *Re Christiansen’s TM* [1885] 3 RPC 54 at 60 Lord Esher MR stated:
 - “Now, to my mind, when you have evidence given upon affidavit, and you find a dozen people, or twenty people, all swearing to exactly the same stereotyped affidavit, if I am called upon to act upon their evidence, it immediately makes me suspect that the affidavits are then not their own views of things and that they have adopted the view of somebody who has drawn the whole lot of the affidavits, and they adopt that view as a whole and say ‘I think that affidavit right’ and they put their names at the bottom.”
 21. I do not consider, however, that anything turns on this evidence which is, in essence, somewhat vague evidence of opinion.”
37. Sensas argued that these comments indicated that the Hearing Officer placed no weight on the evidence of the trade witnesses. Whilst acknowledging the similarities in wording and shared misspellings, Sensas said that her criticisms of their evidence were unnecessarily harsh. Since Fox made no attempt to cross examine the witnesses the contents of their statements should be believed.
38. In my judgment such complaints were unjustified. In total, Sensas filed nine witness statements from members of the fishing/angling trade in support of the application.

⁵ Sensas confirmed this definition *inter alia* from the Oxford English Dictionary.

39. The Hearing Officer made a careful review of the first two of these, from Mitchell Smith, UK Carp Fishing Manager for Sensas SA, France, and Stuart James Angel, Manager, Davies Angling, Staines, both dated 2 August 2010:

“15. Sensas has filed evidence from Mitchell Smith who is its UK Carp Fishing Manager, a position he has held for five years having been employed in the fishing industry for over 25 years and with experience as an angler for 32 years.

16. Mr Smith states that the term “angling apparatus” is not generally used because it covers an extremely broad range of goods. Somewhat contradictorily, he himself uses the term when he states that pages taken from the Fox website exhibited at MS2 show that company to provide a broad range of fishing and angling apparatus. He goes on to state that angling and fishing shops use the term “angling accessories” to refer to “minor itms (sic) of fishing and angling equipment that are not central to fishing including itms (sic) such as swiverls (sic), baiting tools, lead shot, bait boxes, feeders, bait riddles, line markers and catapults” though he gives no details to explain how he reaches this conclusion. He states his belief that rods and landing nets will not be referred to as angling apparatus and accessories by the average consumer and that they are likely to be sold in separate parts of a store.

17. Stuart James Angel is the Manager of Davies Angling, a fishing and angling equipment shop located in Staines. He states he has held this position for some 21 years and has been a fishing and angling enthusiast for more than 30 years. Mr Angel states that anglers and fishing enthusiasts:

“generally do not use the term “angling apparatus” because of the breadth of this term which would cover an extremely broad range of goods, including fishing rods, reels, seat boxes and lines, all of which could be used directly in relation to angling and fishing.”

He goes on to say that he:

“believe[s] that angling and fishing shops use the term “Angling accessories” but this refers to less important items of fishing and angling equipment which are not vital to fishing including items such as swivels, baiting tools, lead shot, bait boxes, feeders, bait riddles, line markers and catapults etc.”.

He says that:

“Fishing rods and landing nets are clearly central to the activity of fishing and most anglers will own or have access to these items, I believe therefore that fishing rods and landing nets form their own clearly identical (sic?) group of items. Angling and fishing customers purchase fishing rods and landing nets by reference to these names. In addition, I believe that customers will refer to these items by the terms “fishing rods and landing nets” when purchasing such items in fishing and angling outlets.”

He concludes by stating his belief that:

“fishing rods and landing nets are ordinarily sold in specific sections of angling and fishing shops where the customer can easily view and locate these items”.

40. She was correct in observing that that the remaining seven witness statements (Barnet, Johns, Manning, Connolly, Haywood, Newport and Read) were largely identical in form and content to that of Mr. Angel. She was also correct in noting the apparent contradiction in Mr. Smith’s evidence when he said that “angling apparatus” was not used in trade but described Fox as providing “angling apparatus”.
41. Further as I have already mentioned, the issue was not what the purchaser would ask for when purchasing a rod or net. Of course, he would ask for the item by name. Instead, for a fair specification on partial revocation, the purchaser must be taken know that the object of the exercise is to devise an appropriate scope of protection (see para. 23).
42. The Hearing Officer did not fail to take account of the trade evidence but preferred to be guided by copy catalogues and product guides exhibited to Mr. Mitchell’s witness statement at MS3 that indicated how different suppliers categorised the goods in suit.
43. I accept Fox’s position that this was a question of weight for the Hearing Officer, which was moreover unaffected by the lack of cross-examination. As Mr. Geoffrey Hobbs QC sitting as the Appointed Person in *CLUB SAIL Trade Marks* [2010] RPC 32 recently remarked:

“38. ... it is not obligatory to regard the written evidence of any particular witness as sufficient, in the absence of cross-examination, to establish the fact or matter (s)he was seeking to establish” (and see generally paras. 37 – 41).
44. The statement of grounds of appeal suggested that Sensas additionally took issue with the Hearing Officer’s treatment of the catalogue evidence. However, at the hearing Mr. Malynicz accepted as accurate the Hearing Officer’s summary of the catalogues and product guides and took no issue with it.

Conclusions on the merits

45. I am not persuaded that the Hearing Officer fell into error in deciding that Fox was entitled to retain a specification of “angling apparatus” in Class 28 in view of the genuine use of CHALLENGER for angling rods and landing nets that Fox had shown. She discussed the relevant law, undertook a careful analysis of the available evidence and applied the law accordingly. In my judgment she was entitled to find that “angling apparatus” constituted a fair specification in the circumstances.
46. I do not consider that the same can be said of the Hearing Officer’s finding in relation to “angling accessories”. The Hearing Officer seems to have arrived at that finding purely on the basis that one supplier – Preston Innovations – categorised landing nets as accessories in the copy catalogue evidence at MS3. It was accepted by the parties that no other use for “angling accessories” had been shown.

47. Mr. Malynicz made much of the advertisement for sale of bivvies in the copy catalogue evidence at MS3. I agree with Mr. Crouch that Fox's Class 28 registration even as it stands is not for bivvies (*Reliance Water Controls Ltd v. Altecnic Ltd* [2002] RPC 34) since bivvies or tents for use in angling fall within Class 22.
48. Nevertheless, Class 28 would cover items such as bait, floats and swivels mentioned as accessories in the trade evidence. It seems to me that the Preston Innovations example of landing nets as accessories did not justify the Hearing Officer allowing Fox to retain the term "angling accessories" in addition to "angling apparatus" when no other use for the former had been shown. I believe the Hearing Officer fell into error in this respect and I will disallow Fox "angling accessories".
49. However, in view of any uncertainty in the categorisation of landing nets, my decision is that the specification should be restricted to read as follows: "angling apparatus, angling rods, landing nets" with effect from 24 April 2009. I have not considered it necessary to make a reference to the CJEU in order to decide the case.

Costs

50. The result is that Sensas had a measure of success below and both parties were successful on appeal. I will order that Sensas pay Fox the reduced sum of £1,175 towards Fox's costs of the application and that both parties bear their own costs of this appeal.

Professor Ruth Annand, 22 February 2012

Mr. Simon Malynicz of Counsel instructed by Elkington & Fife LLP appeared on behalf of the Applicant for Revocation/Appellant

Mr. David Crouch of Bromhead Johnson appeared on behalf of the Registered Proprietor/Respondent