

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION No. 1505395 IN THE NAME OF GLOBAL BRAND GROUP LLC

AND IN THE MATTER OF APPLICATION FOR REVOCATION No. 84362 THERETO BY PUNTER OF ENGLAND LIMITED

AND IN THE MATTER OF TRADE MARK APPLICATION No. 2618398 BY PUNTER OF ENGLAND LIMITED

AND IN THE MATTER OF OPPOSITION No. 103718 THERETO BY GLOBAL BRAND GROUP LLC

AND IN THE MATTER OF TRADE MARK APPLICATION No. 2632284 BY GLOBAL BRAND GROUP LLC

AND IN THE MATTER OF OPPOSITION No. 104351 THERETO BY PUNTER OF ENGLAND LIMITED

AND IN THE MATTER OF TRADE MARK APPLICATION No. 2643211 BY PUNTER OF ENGLAND LIMITED

AND IN THE MATTER OF OPPOSITION No. 400169 THERETO BY GLOBAL BRAND GROUP LLC

DECISION

Introduction

1. This is an appeal by Punter of England Limited against a decision on costs. It arises in the context of a decision of Mr. George Salthouse, acting for the Registrar, dated 18 October 2013 (O-415-13), in which he:
 - (1) Allowed the Application for Revocation No. 84362 by Punter of England Limited (*'PEL'*) in respect of Trade Mark Application Number 1505395 in the name of Global Brand Group LLC (*'GBG'*);
 - (2) Rejected Opposition No. 103718 by GBG to Trade Mark Application No. 2618398 in the name of PEL;
 - (3) Allowed Opposition No. 104351 by PEL to Trade Mark Application No. 2632284 in the name of GBG;

0-171-15

- (4) Rejected Opposition No. 400169 by GBG to Trade Mark Application No. 2643211 in the name of PEL; and
 - (5) Declined to make any order as to costs.
2. In these circumstances there is no appeal in relation to the substantive decision of the Hearing Officer the correctness of which is to be presumed.

Procedural Background

3. The background to the various disputes between the parties and which were ultimately consolidated are set out in paragraphs 1 to 17 of the Decision of the Hearing Officer. There is no suggestion that that summary is inaccurate and I will not repeat it here.
4. In summary, the relevant procedural background to this appeal is as follows.
5. By letter dated 13 September 2012 sent in the Application for Revocation No. 84362 proceedings PEL made the following request:

TM RULES 2008, Section 68

I request under Rule 68 an Order for Security as to Costs from [GBG] because it is registered in a country not signatory to the Brussels Convention and I attach a copy of the latest financial information relating to [GBG] which I have purchased from the Delaware Company Registry website which indicates that the Opponent has not filed any Annual Reports, it owes the Registry \$1,611.50 and its status is 'Cancelled-Voided' meaning that its name is available for re-registration therefore even if [GBG's] mark is revoked then I am unlikely to be able to enforce a Costs Order against [GBG] without security.

6. Enclosed with the letter was a print out from the Delaware Company Registry Website for '**GLOBAL BRANDS GROUP LLC**' (emphasis added).
7. By letter dated 18 September 2012 J A Kemp on behalf of GBG responded as follows:

We refer to [PEL's] letter of 13 September 2012.

We note that both the Registry and the Applicant for revocation are incorrectly using the registered proprietor's name in correspondence. The registered proprietor is Global Brand Group, LLC not Global Brands Group LLC. Thus the latest financial information which [PEL] provides to the Registry is wholly erroneous. As [PEL's] request is made on a wholly

erroneous basis, they may wish to reconsider their position as regards to the request for an order for security of costs.

8. The UK IPO responded by letter dated 20 September 2012 in the following terms:

Security for costs

It has been noted that you have requested security for costs. I am directed by the Registrar to say that you should try to come to an agreement with the other side regarding security for costs. If an agreement cannot be reached the matter should then be referred to the Registrar.

In the event that the parties cannot reach an agreement the Registrar will give your request further consideration and in the event the request is refused you will have the opportunity to provide further written submissions.

A similar letter has been sent to JA Kemp & Co.

9. By another letter dated 20 September 2012 in Opposition No. 103718 it was directed that Opposition No 103718 be consolidated with Application for Revocation No. 84362. With reference to an application by PEL for security for costs a response was given in substantially identical terms to that set out above.
10. On 21 September 2012 the UK IPO responded to the letter dated 18 September 2012 and confirmed that the proprietor of the Trade Mark Registration No. 1505935 was correctly shown on the register as Global Brand Group, LLC and apologised for the typing error that had previously occurred in some of the previous letters sent by the UK IPO.
11. By letter dated 22 November 2012 PEL, amongst other issues returned to the issue of security for costs. In that letter it was made clear that the parties had not been able to reach any agreement on the issue of security for costs. That that was the position was confirmed in the letter from J A Kemp dated 23 November 2012.
12. As a result of a number of issues arising in relation to the conduct of the proceedings, including the issue of security for costs, a case management conference was fixed for 19 December 2012 which was to take place by telephone conference link. At the case management conference Mr Prabhjit Gill, the director of PEL, represented PEL and Mr Fish of J A Kemp appeared on behalf of GBG. Mr George Salthouse represented the Registrar.
13. By letter dated 19 December 2012 it was stated that Mr Salthouse had made the following decision in relation to the application for security for costs: “*A security for costs order is not justified in the circumstances of the case*”.

14. By letter dated 3 January 2013, Mr Prabhjit Gill on behalf of PEL stated as follows:

Thank you for your letter dated 19.12.2012 setting out the decisions of Mr Salthouse. I may wish to apply to appeal some of the Hearing Officer's decisions therefore please find accompanying this fax a form TM5 and form FS2.

In particular please would the Hearing Officer specify from where did he obtain this evidence/knowledge that [GBG] turned-over millions of pounds in business in the United Kingdom? This is likely to be an important point as it clearly influenced the decision of the Hearing Officer in relation to the question for Security for Costs.

15. By letter dated 10 January 2013, Laura Stephens on behalf of the Hearing Officer responded:

I refer to your letter dated 3 January requesting to appeal some of the Hearing Officer's decision by way of filing form TM5. The Hearing Officer has reviewed your request and had decided that the request will not be granted.

The Hearing Officer's decision is not open to being appealed at this point. The parties can raise this as a preliminary point at the hearing or in their submissions. The Hearing Officer will then deal with it in his written decision thereby giving the parties the ability to appeal the reasons within the totality of the outcome. . . .

A refund will be arranged for fee [sic] of the Form TM5 shortly.

16. On 28 January 2013 Mr Gill on behalf of PEL made a formal complaint and sought the recusal of the Hearing Officer from Revocation No. 84362 and Opposition No. 103718. That complaint was responded to and fully dealt with by a letter dated 1 February 2013 from Allan James, Head of the Trade Mark Tribunal.
17. In the Form TM8 Notice of defence and counterstatement in Opposition No. 400169 dated 29 June 2013 PEL made a further request for security for costs as follows:

A request is made for a Security for Costs Order in this case not least because the Opponent (Global Brand Group LLC) has never filed an annual report with the Delaware Corporate Registry as of 09/01/2013, the Delaware Registry report is attached at (marked as ANNEXE 1), the lack of filing annual reports is a justification for a Security for Costs Order reference to Phillips v Eversheds [2002] EWCA Civ 486 at paragraph [6].

18. By letter dated 3 September 2013 the UK IPO wrote to the parties and indicated that all the disputes in the UK IPO between the parties be consolidated; and that the main hearing would take place on 17 September 2013. In relation to security for costs the position adopted was as follows:

It is noted that you made a request for security for costs in the form TM8 in respect of opposition 400169. As a decision has already been made in respect of the earlier group of consolidated proceedings, that decision also applies to the opposition now added to the consolidated group. No further decision on security for costs is considered necessary.

19. Both the parties filed evidence in the proceedings that were consolidated.
20. At the main hearing before the Hearing Officer Mr Alan Bryson, instructed by J A Kemp & Co., appeared on behalf of GBG. PEL was not represented, but provided detailed 'written submissions in lieu of attendance'.

The Hearing Officer's Decision

21. The Hearing Officer's decision and reasoning in relation to costs was as follows:

COSTS

81) PEL has been successful in all four actions and is entitled to a contribution towards its costs. However, in TPN 4/2007 unreasonable behaviour is cited as a reason to increase or withhold costs. In paragraphs 38 – 44 I have dealt with the serious and unfounded allegations made by Mr Gill against GBG's witnesses and legal representatives. Given the behaviour of Mr Gill in this case I decline to make any award of costs.

22. The paragraphs referred to in the Decision by the Hearing Officer stated as follows (the footnotes are not reproduced for the purposes of this Decision):

38) Prior to dealing with the actual decision there are a number of preliminary points which require comment. At the earlier Case Management Conference Mr Gill sought an order for security of costs. Tribunal work manual Chapter 7 paragraph 5.7 reads:

"In proceedings before the Tribunal it is usually requested where a party does not carry on business in the United Kingdom or does not appear to have any, or sufficient, assets in the United Kingdom to cover any award of costs made against them, or has not paid

0-171-15

previous costs ordered by the Tribunal, OHIM or a Court. Where security is agreed between the parties, appropriate sums of money are deposited or undertakings agreed by third parties such as trade mark agents, solicitors or banks. If there is no agreement that security should be paid, the Tribunal can be asked to intervene and determine the matter.

Requests by UK parties for security for costs from a party which is a national or resident in another member state party to the Brussels or Lugano Conventions may not be granted, unless very cogent evidence of substantial difficulty is provided.

In the case of *Sun Microsystems Inc v Viglen* the Appointed Person held, following *Nasser v United Bank of Kuwait*, that security for costs applications needed to be determined on their own merits; simply because a party was resident abroad outside a Brussels or Lugano Convention country would not automatically result in security being ordered. Whether to order security is an act of discretion.

A failure to pay previous costs awards will usually be accepted as good evidence of a difficulty in recovering costs.”

39) The United States of America is a Brussels Convention member and as GBG is resident in that country security of costs are only required where cogent evidence is provided that GBG is unable to meet any costs awarded against it. In the instant case no such evidence was provided. It was also clear that the company has a licensing agreement regarding three marks not connected to this case with a very large well known high street company. In such circumstances an award of security of costs was not warranted. At the time of the CMC on 19 December 2012 PEL was relying upon a document which related to a different company, and the fact that it was registered in Delaware which was described as the haunt of many illegitimate businesses such as drugs traffickers, embezzlers and money launderers. I was informed that it was very easy to set up a company in Delaware, requiring only about one hour and a few dollars. Given the same situation occurs in many other countries, including the UK, I did not view this last point as particularly valid. No evidence was provided which showed that GBG was anything other than a legitimate business.

40) PEL provided submissions dated 7 November 2012, 23 January 2013, 28 February 2013 and 28 March 2013. Ordinarily I would simply refer to these my decision as and

when required. However, some of the submissions are extreme and are not corroborated by the evidence. The unsubstantiated allegations of false statements / perjury are repeated in every set of submissions. Mr Gill seems particularly exercised that Mr Rumsey was not a director of HS, something I have already dealt with earlier in this decision. He also returns to his claim that Mr Rumsey could not comment on the activities of HS after he left. Given that he left in November 2008 and the company went into liquidation in early January 2009 I believe that he was able to reasonably state that the company would continue selling the stock that it had. Mr Rumsey made it very clear in his statement the exact duration of his employment and was not seeking to mislead in any way. For Mr Gill to make the type of allegations he has is intemperate at best. He also comments on the issue of confidentiality, as at the time of writing one of his submissions he had been provided only with a redacted version of Mr Johnston's witness statement dated 17 October 2012. He refers to "secret trails" and claims it is an abuse of process. Both contentions are clearly ludicrous. He also claims:

"9. Mr Rumsey would not have produced false testimony had Mr Johnston not sought to induce him, Mr Rumsey is the witness sought out and arranged by Mr Johnston with reference to paragraph [3] of Mr Rumsey's first witness statement."

And:

"21. A request for costs is made and requested to be off the standard scale because of the opponent proprietor's conduct in submitting perjured testimony, or at least that no reduction is made in a costs award because this company is a litigant-in-person."

41) These are very serious allegations which do not appear to be supported by any evidence.

42) On 17 September 2013 Mr Gill provided further submissions. In it he makes the following allegation:

"1. Paragraph [2] of Mr Keith Johnston's second witness statement and paragraph [2] of Mr Steven Todd Rumsey's second witness statement are almost completely identical this is an indicative behaviour that Global Brand Group LLC's alleged evidence is manufactured and therefore inherently unreliable.

2. Since the witness statements of the above witnesses were drawn up by J A Kemp under the auspices of its

Mr Fish this collusion by a “professional” practitioner who is; a solicitor, barrister and trademark attorney, this manufacturing of witness testimony as assisted by its professional representative is contrary to CPR Part 1.1 and CPR Part 1.3 and is wrong and is also wasteful of the Tribunal’s resources.”

43) Given that the paragraphs referred to relate to both men reserving their right to bring libel proceedings against Mr Gill it is hardly surprising that the wording would be identical as I would presume that both men would have sought legal advice on the wording of such a warning from their legal advisor, Mr Fish. This is not the first attack upon the integrity of Mr Fish individually and J A Kemp as a business. The allegations are completely without foundation. Given that the paragraphs referred to relate to both men reserving their right to bring libel proceedings against Mr Gill it is hardly surprising that the wording would be identical as I would presume that both men would have sought legal advice on the wording of such a warning from their legal advisor, Mr Fish. This is not the first attack upon the integrity of Mr Fish individually and J A Kemp as a business. The allegations are completely without foundation. [sic] and result either from Mr Gill’s complete lack of understanding of the business world or a wilful misreading of every action taken and word spoken to attempt to twist them to meet some grand conspiracy theory in which everyone, myself and the IPO included, are colluding against him. I am unsure why such a grand alliance would occur or how most of the “players” said to be involved would benefit. Had GBG been manufacturing evidence then they were remarkably inept as they would surely have been capable of ensuring that they had a better paper trail than that filed.

44) Further, given his comments on wasting the Tribunal’s resources it is ironic that his latest submissions cover 35 pages and is merely a detailed rehash of what Mr Gill has said many, many times in his previous witness statements and submissions. I therefore do not intend to say anything further about his submissions as I do not find them useful to my decision.

The Grounds of Appeal

23. PEL appealed to the Appointed Person under Section 76 of the Trade Marks Act 1994. The Grounds of Appeal contend, in substance, that the Hearing Officer made an error of principle in not awarding PEL its costs of the consolidated proceedings contrary to the usual practice that costs follow the event.
24. Although neither conventionally structured nor phrased in a way that is entirely easy to follow in substance PEL’s contentions are that the Hearing Officer’s approach to

the exercise of his discretion on the question of costs was in a manner which is open to objection on the basis that it involved or betrayed bias or unfairness on his part.

25. The suggested bias or unfairness on the part of the Hearing Officer was said to be:
- (1) That the Hearing Officer had incorrectly stated that the USA is a Brussels Convention member when considering PEL's application for security for costs;
 - (2) That the Hearing Officer had misunderstood or misread evidence in the proceedings by conflating various issues "*into a claim that [PEL] was alleging a 'grand conspiracy theory'*" in paragraph 43 of his Decision;
 - (3) That the Hearing Officer had been unfair and irrational in dealing with the allegation of "*Contempt of Court issue*";
 - (4) That the Hearing Officer had not considered certain arguments on the substance of the consolidated opposition proceedings before him; and
 - (5) That the confidentiality orders made in the course of the proceedings were excessive.
26. No Respondent's Notice was filed.
27. The parties requested that the appeal be determined on the papers.
28. PEL provided me with an extensive written argument dated 6 June 2014 in support of its appeal together with a bundle of the cases referred to. That argument raised further and other issues that were relied upon in support of the appeal and as to the appropriate relief that were not included in the Form TM 55P contrary to Rule 71(1) of the Trade Mark Rules 2008.
29. J A Kemp & Co on behalf of GBG sent a short letter also dated 6 June 2014 containing some succinct observations in relation to the appeal.

Standard of review

30. The appeal is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that he has reached the wrong decision suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was clearly wrong. See Reef Trade Mark [2003] RPC 5, and BUD Trade Mark [2003] RPC 25.

31. In addition as stated by the Court of Appeal in Fage UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5; [2014] E.T.M.R. 26 at paragraph [115] by Lord Justice Lewison:

115 It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] Fam. 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135.

Decision

32. As noted above there is no appeal in relation to the substantive decision of the Hearing Officer the correctness of which is to be presumed. Moving forward on that basis I turn to consider the appeal against the Hearing Officer's decision on costs. This in substance raises the question whether the Hearing Officer exercised his discretion under Section 68(1) of the Trade Marks Act 1994 and Rule 67 of the Trade Marks Rules 2008 in a manner which is open to objection on the basis that it involved or betrayed unfairness or bias on his part.
33. Section 68(1) of the Trade Marks Act 1994 establishes that:

Provision may be made by rules empowering the registrar, in any proceedings before him under this Act –

- (a) to award any party such costs as he may consider reasonable, and
- (b) to direct how and by what parties they are to be paid.

Rule 67 of the Trade Mark Rules 2008 accordingly provides that:

The registrar may, in any proceedings under the Act or these Rules, by order award to any party such costs as the registrar

0-171-15

may consider reasonable, and direct how and what parties they are to be paid.

34. Further guidance is given in TPN 4/2007 which confirms that the well established principle that the conduct of the parties may be taken into account when considering an award of costs.
35. The power to award costs (or to withhold costs) is very broad. It was described by Geoffrey Hobbs QC in LEUKIC Trade Mark (O-048-10) at paragraph 23 as follows (emphasis added):

23. The power to award costs under Rule 67 remains broad and flexible to a degree which leaves relatively little room for an appellant to establish that the exercise of it was wrong in the circumstances in which it came to be exercised. As Sir Peter Gibson observed in Martin v. Randall [2007] EWCA Civ 1155 at paragraph 16:

“An appellate court’s ability to interfere with a trial judge’s exercise of discretion is constrained. It is only where the trial judge has exceeded the generous ambit within which reasonable disagreement is possible that the appellate court is entitled to interfere. An often adopted statement of the circumstances in which an appeal against an exercise of discretion will be allowed is that of Stuart-Smith LJ in *Roache v. News Group Newspapers Ltd* [1998] EMLR 161 at p 172:

‘Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.’”

Moving forward on that basis it would be necessary for the Opponent to establish that the Hearing Officer’s decision on costs was untenable.

36. In the present proceedings it was made explicitly clear by the Hearing Officer in paragraph 81 of his Decision that that he was declining to make any award of costs on the basis of the behaviour of Mr Gill. In my view it was entirely open to the Hearing Officer to take into account the behaviour of Mr Gill in the conduct of the proceedings when it came to considering the question of costs.

37. I turn now to the suggested unfairness or bias relied upon in this appeal to suggest the Hearing Officer should not have exercised the discretion in the way that he did.

That the Hearing Officer had incorrectly stated that the USA is a Brussels Convention member when considering PEL's application for security for costs

38. The Hearing Officer refused the application for security for costs at the Case Management Conference on 19 December 2012. No written reasons were given by the Hearing Officer at that stage but PEL were informed, in a letter dated 1 February 2013, that written reasons could be requested at once but that the Hearing Officer had indicated that he would incorporate his reasons for the refusal of the application in his substantive Decision. That is what ultimately happened.
39. In relation to the refusal to grant security for costs it is alleged that there was an appearance of bias in the proceedings in the UK IPO on the basis that the Hearing Officer stated in paragraph 39 of his Decision that "*The United States of America is a Brussels Convention member*". PEL are entirely correct that the United States is not a Brussels Convention member. The statement by the Hearing Officer to the contrary is clearly incorrect. That error led to the Hearing Officer adopting the incorrect standard when considering PEL's application for security for costs.
40. However, the fact that a company is resident in the USA is not in and of itself a reason for making an order for security for costs. No material was put before the Hearing Officer in support of the application in December 2012. Such information as had been put before the Hearing Officer, as noted above, related to a different company and not GBG. In such circumstances, it does not appear to me that the error made by the Hearing Officer was one that could be regarded as material. That is all the more case given: (1) in the event the Hearing Officer made no order for costs; and (2) as Mr Gill acknowledged in his written arguments dated 6 June 2014 submitted on behalf of PEL at paragraph 39 that "*it is now too late for any such Security to be of any practical values even if granted since the revocation proceedings are closed.*"
41. PEL, with some justification, has raised this as an issue. However the fact that the Hearing Officer has made an error in his reasoning for refusing security for costs does not in my view demonstrate bias.

That the Hearing Officer had misunderstood or misread evidence in the proceedings by conflating various issues "into a claim that [PEL] was alleging a 'grand conspiracy theory'" in paragraph 43 of his Decision and

That the Hearing Officer had been unfair and irrational in dealing with the allegation of “Contempt of Court issue”

42. These points are best considered together. Both arise in the context that PEL allege that the Hearing Officer was unfair in the way that he dealt with the evidence and conduct of GBG and its representatives in the light of the evidence and written submissions made on behalf of PEL.
43. At this juncture it is necessary once again to remind myself that the subject of the appeal is the question of costs and not the substantive part of the proceedings in which the Hearing Officer found that PEL were entirely successful.
44. The “Contempt of Court issue” relates to wide ranging allegations made against the witnesses on the part of BGB for perjury and as against J A Kemp for acting in an unprofessional manner. These are very serious allegations.
45. The Hearing Officer considered these allegations both in his detailed review of the evidence in paragraphs 18 to 36 of his Decision and his reasoning in paragraphs 40 to 43 of his Decision. In this connection I should make clear that paragraph 43 cannot and should not be read in isolation as it is the conclusion that the Hearing Officer has reached in the light of all the materials before him. In summary the Hearing Officer found that the allegations made were entirely without foundation.
46. In my view, the way in which the Hearing Officer approached and dealt with these issues was appropriate and his findings as to the conduct of Mr Gill were ones that the Hearing Officer was entitled to make. Bearing in mind the seriousness of the allegations, in particular in relation to the integrity of the professional representatives of GBG, it was necessary for the Hearing Officer to deal with them fully in his Decision.
47. Given the seriousness of the allegations I have carefully reviewed all the papers in the proceedings in more detail than would otherwise be the case on appeal. I have seen nothing in the approach taken by the Hearing Officer in either paragraph 43 of his Decision or in his approach to the “Contempt of Court issue” to suggest that the Hearing Officer was unfair or biased. Indeed it is my opinion that the views he expressed in his Decision were ones that he was fully entitled to take.
48. Having come to the view that he did as to the conduct of the proceedings on behalf of PEL, it is my view, that these were matters which the Hearing Officer was fully entitled to take into account when considering how to exercise his discretion in relation to costs.

The Failure to consider an argument on approbation/reprobation

49. I can deal with this ground of appeal very shortly. PEL's appeal is concerned only with costs. It would appear from the TM 55P that this ground was contingent upon an appeal by GBG against the substantive decision. There is no such appeal. It is therefore not necessary for me to say anything further about this.

The Confidentiality Order Issues

50. With regard to the Confidentiality Orders I can again deal with this issue quite briefly. There appear to be two orders on file made on behalf of the Registrar at the request of GBG in order to preserve the confidentiality of certain parts of the evidence filed on the basis that it contained "*commercially sensitive information*": the first dated 15 April 2013 and the second dated 24 July 2014. On the face of both orders it is stated that PEL had not raised any objection to the making of such orders. It therefore does not seem to me to be open to PEL to seek to rely upon such orders in support of its appeal, even assuming such orders can be said to be relevant at all to the Hearing Officer's decision on costs.

Other issues

51. Mr Gill, on behalf of PEL, raises a number of issues in his written materials dated 6 June 2014. Many of the points raised were not ones that went to the issues raised on this appeal that were contained by the Form TM 55P. To the extent, if at all, that new and different grounds were raised they are out of time under the rules and I do not intend to deal with them further.
52. That would normally be the end of the matter, however, because many of the issues raised in the written materials arise in the context of the serious allegations of impropriety both as against GBG's witnesses and as against GBG's professional representatives it is necessary for me to make some observations.
53. Firstly, these allegations are in substance a repetition of the points that were repeatedly made on behalf of PEL throughout the present proceedings and which are recorded in the Hearing Officer's Decision. Having carefully considered all the papers on file it is my firm view that such allegations are without foundation.
54. Secondly, Mr Gill on behalf of PEL requested an order for security for costs against J A Kemp. The issue relating to wasted costs was raised for the first time in the appeal in the written submissions dated 6 June 2014 filed on behalf of PEL. That issue is a claim that as matter of last resort I should consider making a wasted costs order against J A Kemp. As is apparent from at least paragraphs 28, 31 to 34, 42 and 43 of the Hearing Officer's Decision this is not the first time that submissions have been made based on the professional conduct of J A Kemp.

55. I wish to make it quite clear that firstly in my view there was no proper basis put forward on behalf of PEL, even assuming such an order was possible, as to why such an order would be appropriate. From everything that I have read, I am satisfied that J A Kemp have behaved in an appropriate manner throughout these proceedings.
56. Secondly, Rule 67 of the Trade Mark Rules 2008 enables the Registrar to make orders for costs against and in favour of the parties to the proceedings before him under the Act and the Rules. Legal or other representatives do not become parties simply by acting on behalf of their principals in proceedings in which they have been engaged to act. It follows that the representatives themselves are not parties as against whom orders for costs can be made under Section 68 and Rule 67: Rule 67 is equally applicable to those appointed under the Act to determine appeals: see Rule 73(4) of the Trade Mark Rules 2008. In those circumstances there is no power for either the Registrar or a person appointed under the Act to determine appeals to make a wasted costs order.

Conclusion

57. Having carefully considered the papers before me it is my view that the Hearing Officer was: (1) fully entitled to take the conduct of Mr Gill, on the part of the PEL in considering how to exercise his discretion in relation to the issue of the costs of the proceedings; and (2) fully entitled on the basis of the materials before him to make the findings he did in relation to the conduct of the proceedings by Mr Gill on behalf of PEL.
58. In the circumstances, for the reasons set out above, it appears to me that the Hearing Officer was fully entitled to make the order for costs that he did in the decision under the appeal. I am certainly not prepared to exercise the relevant discretion differently on that matter on appeal. The appeal against the decision to make no order as to costs will therefore be dismissed.
59. At the request of the parties this appeal has been decided on the papers. The question of the costs of the appeal remains to be determined. The following directions are given with a view to the determination of that issue:
- (1) GBG is directed to send me any written representations in support of any claim for costs in respect of the appeal by 6.00 pm on Tuesday 14 April 2015;
 - (2) PEL is directed to send me any written representations it wishes to make in response to those of GBG under paragraph (1) above, by 6.00 pm on Tuesday 21 April 2015;

0-171-15

(3) GBG are directed to send any written representations they wish to make in reply to those of PEL under paragraph (2) above by 6.00 pm on Tuesday 28 April 2015; and

(4) Any written representations sent to me under paragraphs (1) to (3) above must at the same time be copied to the opposite party and to the Treasury Solicitor's Department.

If neither side informs me in writing by 6.00 pm on Tuesday 5 May 2015 that they wish to be heard in relation to the claim for costs that remains to be determined I shall proceed to issue a supplementary decision dealing with that claim, taking account of the written representations I have received.

Emma Himsworth Q.C.

Appointed Person

31 March 2015