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TRADE MARKS ACT 1994

IN THE MATTER OF:

OPPOSITIONS 404548 TO 404551, 404934 AND 404935

IN THE NAME OF FUELDEFEND GLOBAL LIMITED

TO TRADE MARK APPLICATIONS 2098940, 3097280 AND 3097283 TO 3097286

IN THE NAME OF BUTE TECHNOLOGY LIMITED

DECISION

1. On 7th November 2016, Mr Oliver Morris acting on behalf of the Registrar of Trade Marks issued a decision under reference BL O/520/16 upholding four oppositions brought by FuelDefend Global Limited (“FDG”) against four trade mark applications standing in the name of Bute Technology Limited (“BTL”). He ordered BTL to pay £3,000 to FDG in respect of its costs of the Registry proceedings.
2. BTL had 28 days beginning ‘*immediately after*’ the date of the decision within which to appeal to an Appointed Person in accordance with the provisions of rule 71(2) of the Trade Marks Rules 2008. Any request for an extension of the 28-day period needed to be made to the Registrar in the first instance under rule 77 of the 2008 Rules.
3. BTL took no steps either to file an appeal against the Hearing Officer’s decision or pay the sum of £3,000. which had been awarded by way of costs. The Registry wrote to it in the following terms on 9th January 2017:

It has been brought to my attention by the opponent’s agent in the above proceedings, Herstel, that the Order for Costs made against you on behalf of the Registrar on 7 November 2016 (£3,000.00) has not yet been paid.

Whilst the Registrar has no formal powers to enforce a cost order, you may wish to note our current practice whereby, if we are satisfied that costs have not been paid, we can publish details of those in default of Cost Orders on the IPO website.

<http://www.gov.uk/government/publications/trade-mark-disputes-unpaid-costs-orders/unpaid-costs-orders-case-details>

The aim of this approach is to encourage people to meet their obligations without imposing further costs on the other side, and also to provide public domain evidence that may be used in other proceedings where parties may be contemplating seeking security for costs.

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Since we have received notification that the costs in this case have not been paid you are invited to submit comments within one month from the date of this letter, that is on or before **6 February 2017**. If no response is received within this period the Registrar may move to publish details of this default in the public domain via the UK IPO website.

4. Mr MacSween responded to this by email on behalf of BTL on 6th February 2017 stating:

It is noted that the Hearing Officer upheld FDG oppositions for four marks and awarded costs of £3,000. This decision is contested on the following grounds:

- (i) The Hearing Officer determined the key evidence from FDG (Exhibit RDF 6.4) was a mind map submitted by Mr. Fowler. The Opposition Decision (section 52) stated it was highly improbable that Mr. Fowler fabricated the mind map to support these proceedings and the Opposition. On the contrary this is what happened as a deliberate action by FDG and Mr. Fowler to disrupt the legitimate business activities of the Applicant. It has taken time to collect evidence of this but the Applicant will have this in the next 4 weeks. This will explain that Mr. Fowler fabricated his evidence and that there were no grounds for the Oppositions by the Opponent.
- (ii) It is of concern that the Opponent has used the Trademark system in this way and given these circumstances we would propose that no public notice of the default is made at this stage.
- (iii) The Applicant wishes to continue with these Applicants (sic) and once evidence is provided will ask the IPO to overturn its decision and strike out the Oppositions. Furthermore the Applicant will look for costs from the Opponent and will ask the IPO and relevant authorities to take action against FDG and Mr. Fowler.

Given this ongoing activity we believe there are strong grounds that the costs award should be withheld, which the Applicant continues to do.

5. The Registry replied by letter dated 1st March 2017 informing Mr MacSween that:

The registry's decision, dated 7 November 2016, allowed the parties a period to appeal the decision which expired on 5 December 2016. The registry did not receive an appeal within this period and the decision has been implemented, this means the case is closed.

However, if you did wish to file an appeal it would be necessary for you to file a retrospective extension of time request on a Form TM9R. The registry would require reasons for the extension of time together with an explanation as why the request is made so late. It should be noted that

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requests for an extension of time are not automatically allowed even if the parties provide a reason.

6. In a Form TM9(R) subsequently filed on 19th May 2017, Mr MacSween requested an extension of time until 6th June 2017 within which to file an appeal on behalf of BTL against the Hearing Officer's decision dated 7th November 2016. The Registry indicated on 25th May 2017 that its preliminary view was that the requested extension of time should be refused. Mr MacSween requested a hearing at which to make representations in support of the request.
7. The hearing took place on 3rd July 2017 before Ms June Ralph acting on behalf of the Registrar. She rejected the request for the reasons she gave in a decision issued under reference BL O/357/17 on 27th July 2017 and she ordered BTL to pay £200. to FDG in respect of its costs of the failed application.
8. The period of 28 days prescribed by rule 71(2) for filing an appeal against Ms Ralph's decision ran from and including 28th July 2017. On 30th August 2017, the Registry received a Form TM55P Notice and Grounds of Appeal under section 76 of the Trade Marks Act 1994. This was signed by Mr MacSween on behalf of BTL and dated 25th August 2017.
9. There then followed correspondence between the parties and the Registry as to whether the Form TM55P received on 30th August 2017 could be regarded as duly filed. For reasons which puzzle me, but which have not been raised before me for review on this appeal, the Registry adopted the position that it should be admitted into the proceedings.
10. BTL's appeal must and can only be against Ms Ralph's decision dated 27th July 2017 to refuse the requested extension of time for appealing against the decision issued by Mr Morris on 7th November 2016. It is not and cannot be an appeal against the decision which Mr Morris issued on the substance and merits of the oppositions brought by FDG.
11. Ms Ralph dealt with the application before her on the basis set out in paragraphs (8) to (14) of her decision dated 27th July 2017:

- (8) The reasons for requesting an extension of time as stated in the TM9R were that:

“...It has taken a considerable length of time for the Application to gather evidence in order to prove that the Opponents provided False Statements. This has in part been delayed by defamation proceedings that Messrs MacSween and Meechan have ongoing against FuelDefend Global Ltd and Mr Fowler. A request for a retrospective extension of time is hereby requested. Whilst it is appreciated the appeal is well beyond usual timescales we believe that the exceptional circumstances vindicate this request. Also this will negate the need for a new action to be brought by the applicants in relation to the Marks, Costs and damages against FuelDefend Global Ltd and Mr Fowler”

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- (9) In considering the extension of time request I must bear in mind two questions. Firstly the reasons why the extension was requested and secondly the reasons for its late filing. In the hearing Mr MacSween submitted that he had not made an appeal by the due date of 5th December 2016 as he had been advised by his then legal representatives that there were no grounds on which to appeal. Following this and during subsequent other legal proceedings for defamation, Mr MacSween now believes evidence presented to the hearing officer in the opposition cases may have been false. Mr MacSween also said that confirmation of this new information had not become available until at least May 2017, hence the delay in requesting the extension of time. Mr MacSween subsequently included this new information with his skeleton argument.
- (10) I explained to both parties that I could not be drawn in to reviewing evidence that either pertained to the original opposition decision or any defamation proceedings. Furthermore if I were to grant the extension and any subsequent appeal was lodged then it would fall to the Appeal body to decide on whether new evidence could be presented.
- (11) I asked if Mr MacSween had taken any other action to address the trade mark matters during this period outside of his attention to the defamation proceedings. Mr MacSween said the defamation proceedings and the gathering of evidence regarding the false statements had taken more time than initially anticipated but that he now felt it was a point of law to ensure that the truth was spoken.
- (12) Mr McKenzie responded with some points about the new evidence supplied with Mr MacSween's skeleton argument. Specifically in relation to the extension of time request, Mr McKenzie's view was that nothing material had changed in the case and that it was very late in the day to start reopening proceedings.
- (13) In terms of the factors outlined above, it is clear that the Trade Marks Act 1994 and the Trade Marks Rules 2008 were followed and the applicant was given the requisite 28 day period ending on 5th December 2016 to appeal when the opposition decision was issued on 7th November.
- (14) I must have regard to the fairness of this matter to both parties and to re-open a case that has been considered 'closed' for seven months is a serious issue. I note that there have been other ongoing legal proceedings between the parties during this time. However I am unconvinced by the reasons provided by the applicant as to why this extension of time should be

granted after such a long period of time. There is undoubtedly a great deal of discontent about the outcome of the opposition cases, possibly because Mr MacSween states that he had relevant material available that could have been put before the hearing officer in the opposition cases but that he was advised against doing so by his then legal representatives. This discontent has probably been made more acute by the defamation proceedings. There has been sporadic email communication from the applicant during the last seven months outlining concerns about the decision and mentioning issues regarding false statements emanating from the defamation proceedings. I note that, having received an email from Mr MacSween on 6 February 2017 in which he stated that he wished to contest the opposition decision, the Tribunal informed him, in a letter dated 01 March 2017, that the case was closed but that if he wished to request a retrospective request for an extension of time to appeal, he would need to file a Form TM9R and explain why the request had been made “so late”. Despite this clear explanation from the Tribunal as to what needed to be done and that any such request would already be considered as being “so late”, no response was received from Mr MacSween until more than two and a half months later on 19 May 2017 when the Form TM9R was eventually filed. In all of the circumstances, bearing in mind the length of time that has passed since the appeal period expired and that ultimately I have not been shown any material that demonstrates the applicant has been actively working on filing its grounds of appeal, I do not find there are sufficient reasons or the requisite special circumstances in this matter which allow me to grant the extension of time request.

12. In its Notice and Grounds of Appeal as expanded upon in the Skeleton Argument and oral submissions put forward on its behalf, BTL contends that it should be given an extension of time for appealing against the decision issued by Mr Morris in order to raise a case on appeal from that decision to the effect that it should be set aside for having been obtained by fraud.
13. It is said that Ms Ralph erred by not taking into account ‘*the argument that a judgment can be set aside or reopened if it was allegedly obtained by fraud*’: paragraph 11 of BTL’s Skeleton Argument. The thrust of the complaint is that she should not have adhered to the position stated in paragraph (10) of her decision, but should additionally have assessed whether the evidence brought forward by BTL in support of its request for an extension of time was sufficient to justify a belated appeal on the ground that the decision issued on 7th November 2016 was fraudulently obtained.
14. An allegation to the effect that a judgment was obtained by fraud cannot properly be raised without evidence of sufficient probative value to support it. I recognise that such evidence may become available on a timescale that bears no resemblance to the period of 28 days prescribed by the 2008 Rules for filing a Form TM55P Notice and Grounds of Appeal. I agree that the need to secure such evidence and the need for an extension

of time for the purpose of enabling it to be put forward on appeal are intertwined. It follows, in my view, that the length of time for appeal ought, in principle, to remain extendable in tandem with the length of time properly required for the necessary evidence of fraud to be obtained.

15. The question is whether BTL's application in the present case was made in circumstances which did indeed warrant the extension of time without which it would be unable to mount an appeal based (as it contended) on evidence of sufficient probative value to support its allegation of fraud. The probative value of the evidence on which it relied was a material consideration in that connection. It was fully considered in the context of BTL's appeal to this Tribunal against the Hearing Officer's decision not to review it.
16. There were no applications for disclosure of documents and no requests for cross-examination of any witnesses in the Registry proceedings leading up to delivery of the decision issued on 7th November 2016. The Hearing Officer was required to determine as best he could on the basis of the written evidence before him whether BTL's applications for registration were objectionable under section 3(6) of the Trade Marks Act 1994 for having been filed in bad faith.
17. He directed himself correctly as to the law in paragraphs (5) to (7) of his decision. He carefully examined the written evidence before him in paragraphs (8) to (46) of his decision. He set out his 'Analysis and findings' in fully reasoned terms in paragraphs (47) to (56) of his decision.
18. In paragraph (47) he made it clear that he regarded it as inconceivable that both parties could have coined the marks in issue independently of one another, with the result that there were two main scenarios which he had to consider: [1] that the marks were all coined by FDG in 2013 and/or 2014 and that upon leaving FDG, Mr Terry Winter (and/or his colleagues Mr Jamie MacSween / Mr Richard Meechan) had knowledge of those marks and decided to apply for them as part of their new business venture; or [2] that they were coined by Messrs MacSween, Winter and Meechan in the early part of 2015 when setting up their new business venture.
19. With reference to a 'mind map' (Exhibit RDF 6.4) which he had reproduced at paragraph (17) of his decision, he said in paragraph (51): "*One of the most crucial parts of the evidence is the mind map showing most of the subject marks. ... Against FDG's position is that Messrs Winter, MacSween and Meechan have all given direct evidence that they did not see the document nor knew of any plans to use the names, and that they conceived the names. [Counsel] highlighted that the witnesses had not been put on the stand to have their evidence tested by way of cross-examination. Whilst this is noted, it is clear that the evidence has been disputed and challenged from the outset, so the absence of cross-examination does not prevent me from disbelieving their evidence. ...*"
20. He went on to say in paragraph (52): "*Against the applicant's position is that Mr Fowler has given direct evidence that the document was produced in 2014 (see his reply evidence) and there is hearsay evidence from Mr Reyner who refers to the FDG meetings in July 2014 when the CV Protect re-launch was discussed and other (albeit unspecified) brand names were discussed.*" In the same paragraph, he rejected the view

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that the 'mind map' was fabricated for the purposes of the proceedings in an attempt to support the opposition.

21. It appears from the papers before me that Mr Reyner, in his capacity as an employee of FDG, sent an email to 96 of FDG's customers, suppliers and contacts on 21st May 2015 indicating that a serious theft and fraud concerning Mr Meechan and Mr MacSween had been uncovered and was the subject of an ongoing police investigation from which actions would arise in due course.
22. Mr Meechan and Mr MacSween brought proceedings for defamation against Mr Geoff Reyner, Mr Russell Fowler and FDG in respect of the publication of that email. The proceedings were settled on the basis of a Statement in Open Court on 18th May 2017 in which Mr Fowler and FDG publicly retracted the allegations of theft and fraud made against Mr Meechan and Mr MacSween and offered "*their sincere and unqualified apologies to both Mr Meechan and Mr MacSween for the embarrassment and distress which the false allegations in the email caused to them, and for the serious harm to their business and personal reputations. A copy of this statement will also be sent to each recipient of the email complained of.*"
23. The papers before me do not show whether there has been any formal resolution of the defamation proceedings as between Mr Meechan and Mr MacSween on the one hand and Mr Reyner on the other. I understand from what I was told by Mr MacSween at the hearing of the present appeal (Transcript p.15, line 6 to p.16, line 5) that Mr Reyner offered as part of the settlement discussions to provide a witness statement in relation to the trade mark opposition proceedings which had culminated in the decision issued by Mr Morris on 7th November 2016. He later did so in the form of a Witness Statement dated 30th June 2017, which as I understand from what I was told by Mr MacSween (Transcript p.3, line 15 to p.4, line 13) was before Ms Ralph at the hearing of BTL's application for an extension of time for appeal.
24. In his Witness Statement of 30th June 2017, Mr Reyner confirms that he was employed by FDG as Global Sales & Marketing Director from 08/01/2009 to 25/11/2016. He also confirms that he is taking legal action against FDG in relation to employment issues and claims arising out of the defamation proceedings brought against him. He does not refer to his condemnatory email of 21st May 2015 or explain how or why he came to write and publish it in the terms that he did. He does not refer to the related fact that there were two police investigations, one in England and one in Scotland (as confirmed at the hearing before me: Transcript p.4, line 14 to p.5, line 5; p.11, line 22 to p.12, line 20). He does not explain how or why his Witness Statement came to be provided in connection with the settlement of the defamation proceedings. He does not say (and it would have been surprising if he had said) that he was unaware of the course and conduct of the trade mark opposition proceedings which were commenced and taken through to a conclusion during the period of his employment by FDG.
25. It is quite striking, given the purpose for which his Witness Statement was provided and also the vantage point from which he was able to speak as Global Sales & Marketing Director of FDG from 2009 to 2016, that Mr Reyner does not directly say that the evidence filed on behalf of FDG in the trade mark opposition proceedings was false or included fabricated documentation and, more specifically, does not directly say that the Hearing Officer was deceived into acting upon untruthful evidence given about

him in his capacity as Global Sales & Marketing Director in paragraphs (16), (17), (20), (21), (41) and (52) of the decision sought to be appealed

26. His Witness Statement contains a series of comments and observations expressed in somewhat oblique terms to the following effect: (1) “*Contrary to Mr Fowler’s Witness Statement I was not aware of a plan to rename FuelDefend Global Limited with a launch date of January 2015, or July 2015*” (paragraph 4); (2) “*In all the marketing meetings throughout 2013/2014, I do not remember any discussions of FuelDefend Global Limited being rebranded as CVProtect*” (paragraph 4); “*I do not recollect ever seeing RDF 06.4 spider diagram that references CVProtect and other opposed marks. It is my recollection that RDF 06.2 and RDF 06.3 were used in the July 3 meeting and not RDF 06.4 as claimed by Mr Fowler.*” (paragraph 5); “*I have no recollection of RDF08 purported to be supporting evidence from myself that CVProtect was discussed in July 2014, I believe that the attached diagram refers to 06.3 and not 06.4.*” (paragraph 6); “*I am suspicious of the authenticity (and would like to see evidence) of RDF08 and was never asked to produce a witness statement in relation to the Oppositions whilst I was an employee of Fuel Defend.*” (paragraph 7); “*The evidence in RDF08 is incorrect as I do not recall CVProtect being discussed in the meeting of 3 July ...*” (paragraph 7); “*... I was not aware that there was a plan to rebrand FuelDefend Global Ltd as CVProtect. If there had been I would have been able to have produced a great deal of evidence to support this from internal emails to work with external parties.*” (paragraph 7).
27. The principal matter considered in the course of argument at the hearing before me was the probative value of the evidence given in Mr Reyner’s Witness Statement relative to that previously given in the Witness Statements of Mr Winter, Mr MacSween and Mr Meechan which the Hearing Officer had rejected in the decision he issued on 7th November 2016. It is undoubtedly correct that the Hearing Officer’s task in determining the objection to registration under section 3(6) of the 1994 Act would have been considerably more difficult if the evidence provided in Mr Reyner’s Witness Statement had been before him. However, it does not follow that there is now *prima facie* evidence that his decision was obtained by fraud on the part of FDG.
28. What the latest Witness Statement does is bring to a total of four the number of ex-employees of FDG whose written evidence is expressed in terms that are designed to cast doubt on the reliability of the evidence and exhibits put forward by FDG’s Chairman and CEO, Mr Fowler.
29. I note that Mr Reyner does not address the contents or challenge the authenticity of Exhibit RDF 5 to Mr Fowler’s Witness Statement of 25th February 2016 (an email dated 13th May 2013 in which he himself identified ‘CV Protect’ as a name for consideration in connection with the new arrangement for naming and style promotion then under consideration). I note the subdued language of his comment with reference to Exhibit RDF 8 to that Witness Statement (which is, on the face of it, an email from him in which he himself summarises events at three meetings he attended in July 2014 “All very clear to my memory” including a 3 hour meeting on 3rd July 2014 at which “the issue of CV Protect was raised as a relaunch idea for FDG in 2015”): “*I am suspicious of the authenticity (and would like to see evidence) of RDF08 ...*”. I note the challenge to Mr Reyner’s veracity raised with reference to 3 emails specifically identified in paragraphs 1.4 to 1.7 of Herstel Ltd’s letter dated 8th September 2017 responding on

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behalf of FDG to BTL's Form TM55P Notice and Grounds of Appeal dated 25th August 2017. I note Mr MacSween's position on behalf of BTL at the hearing before me to the effect that he was completely incredulous at the idea that the version of events accepted by the Hearing Officer in his decision dated 7th November 2016 could be correct (Transcript p.7, line 19 to p.8, line 9) and was hoping that "*If my appeal can be allowed to be upheld, we can all get into the witness box and get to the truth in this matter and once and for all get justice on that*" (Transcript p.9, lines 20 to 22).

30. The evidence relied on by BTL, which needs to be considered in its totality in connection with its application for an extension of time for appeal, is not sufficient, in my view, to raise a *prima facie* case that the decision of 7th November 2016 was fraudulently obtained. Mr Reyner's Witness Statement adds more of the same to the (rejected) expressions of incredulity and assertions of unawareness in the Witness Statements of Mr Winter, Mr MacSween and Mr Meechan. As I have endeavoured to point out, it does so without clearly aiming and landing a punch in relation to the central allegation of fraud. I am not satisfied that BTL's case for an extension of time to mount an appeal based on the allegation of fraud it wishes to pursue is made out on the evidence before me on appeal. That leaves it with no effective basis for challenging the Hearing Officer's decision dated 27th July 2017 to refuse the request for an extension of time made in its Form TM9(R) filed on 19th May 2017.
31. As I announced at the conclusion of the hearing, the appeal is dismissed and (in the absence of any request or submissions on behalf of either party in relation to costs) it stands dismissed with no order for costs.

Geoffrey Hobbs QC

26th September 2018

The Appellant was represented by Mr Jamie MacSween

The Respondent was represented by Mr Russell Fowler

The Registrar took no part in the appeal.