

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION NO 3,065,775 IN THE NAME OF  
ION IP LTD

AND IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF INVALIDITY  
BY JAMES DONOHUE

AND IN THE MATTER OF INTERNATIONAL REGISTRATION NO 1,352,920  
DESIGNATING THE UNITED KINGDOM IN THE NAME OF JAMES DONOHUE

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF MARK BRYANT  
DATED 21 NOVEMBER 2018 (O/746/18)

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DECISION

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**Introduction**

1. This is an appeal from the decision of Mark Bryant, for the Registrar, dated 21 November 2018. In that decision he dismissed James Donohue's application for a declaration of invalidity in relation to a registered trade mark owned by Ion IP Ltd. Once the mark was found to be valid it followed that Ion IP's opposition to Mr Donohue's application for protection of an international registration had to be successful.
2. The trade mark in suit (No 3,065,775) owned by Ion IP covers two word marks in a series DRYSHOD and DRY SHOD. The mark was registered in Class 25 for "Clothing; footwear; headgear". The mark was applied for on 25 July 2014 and completed the registration procedures on 23 January 2015.
3. Mr Donohue applied for protection of an international trade mark in the United Kingdom for DRYSHOD in Class 25 for "Footwear". The United Kingdom designation was dated 14 May 2017. Ion IP opposed the designation under section 5(1) and 5(2)(b) of the Trade Marks Act 1994 (as applied by article 3 of the Trade Marks (International Registration) Order 2008 (SI 2008/2206 as amended)).
4. On 28 July 2017, Mr Donohue applied to declare Ion IP's trade mark invalid on the grounds it (the series) was registered in bad faith contrary to section 3(6) of the Trade Marks Act 1994.
5. It was accepted below, and on appeal, that if Ion IP's trade mark was valid then the opposition should be successful; and, on appeal only, that if Ion IP's trade mark was invalid that the opposition should be dismissed. In either case, therefore, the outcome of the opposition is entirely dependent upon the success of the declaration for invalidity.

## Standard of appeal

6. In *Actavis Group PTC EHF v ICOS Corporation* [2019] UKSC 15, the Supreme Court considered the role of appellate courts once more and set out some general principles at paragraphs 78 to 81:

78. Finally, before addressing directly the question whether the Court of Appeal was entitled to reverse Birss J's finding of non-obviousness, I remind myself of the limits of an appellate court's power to overturn the evaluation of a trial judge in this field. Where inferences from findings of primary fact involve an evaluation of numerous factors, the appropriateness of an intervention by an appellate court will depend on variables including the nature of the evaluation, the standing and experience of the fact-finding judge or tribunal, and the extent to which the judge or tribunal had to assess oral evidence: *South Cone Inc v Bessant, In re Reef Trade Mark* [2002] EWCA Civ 763; [2003] RPC 5, paras 25-28 per Robert Walker LJ.

79. An experienced patent judge faced with a challenge to a patent on the ground of obviousness, and who has heard oral evidence including cross-examination, carries out an evaluation of all the relevant factors, none of which alone is decisive but each of which must be weighed in the balance in reaching a conclusion. In *Biogen Inc v Medeva plc* [1997] RPC 1, 45, Lord Hoffmann emphasised the need for appellate caution in reversing the judge's evaluation of the facts where the application of a legal standard involved no question of principle but was simply a matter of degree. He held that it would be wrong to interfere with the judge's assessment if no question of principle were involved.

80. What is a question of principle in this context? An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. What is the nature of such an evaluative error? In this case we are not concerned with any challenge to the trial judge's conclusions of primary fact but with the correctness of the judge's evaluation of the facts which he has found, in which he weighs a number of different factors against each other. This evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible: *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR 577, paras 14-17 per Clarke LJ, a statement which the House of Lords approved in *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46 per Lord Mance.

81. Thus, in the absence of a legal error by the trial judge, which might be asking the wrong question, failing to take account of relevant matters, or taking into account irrelevant matters, the Court of Appeal would be justified in differing from a trial judge's assessment of obviousness if the appellate court were to reach the view that the judge's conclusion was outside the bounds within which reasonable disagreement is possible. It must be satisfied that the trial judge was wrong: see, by way of analogy, *In re B (A Child) (Care Proceedings Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911, paras 90-93 per Lord Neuberger, para 203 per Lady Hale.

7. While this was a patent case, the principles enunciated are of general application and would apply to appeals before the Appointed Person (and were adopted by Emma Himsworth QC, sitting as an Appointed Person, in *DG FASHION* (O/174/19)).
8. Additionally, the appellate courts have long been mindful of overturning a decision of a first instance judge where the issue is the credibility of a witness. In *Cook v Thomas and Another* [2010] EWCA Civ 227 at paragraph 48, Lloyd LJ stated that:

...an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen witnesses give evidence in a case in which credibility is in issue.

9. In *Langsam v Beachcroft LLP* [2012] EWCA Civ 1230, Arden LJ at paragraph 72 similarly held:

...It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility...

10. Lord Reed, speaking for the Supreme Court, in *McGraddie v. McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at paragraph 3 emphasised again how the trial judge is "in a privileged position to assess the credibility of witnesses' evidence".

11. In *Curran v Collins* [2015] EWCA Civ 404, Arden LJ once more stated at paragraph 30 how challenging the credibility of a witness is a "particularly difficult task".

12. A further important point was made in *Lewis v Narayanasamy* [2017] EWCA Civ 229 at paragraph 69:

Ground 2 is also misconceived. It is that the judge was wrong to prefer Mr Lewis's evidence to Mr Narayanasamy's in relation to their intended arrangement because, in considering Mr Lewis's credibility, he did not take account of Mr Lewis's unsatisfactory evidence about the MACC investigation. This ground is founded on the elementary error that because a witness's evidence about one aspect of the case is unsatisfactory, his evidence should be so regarded as regards all other aspects. The judge did not make that error. Having, at [91], criticised Mr Lewis' evidence about the MACC investigation, he went on to say that:

'... This unreliability may well have arisen from a sensitivity, pride and embarrassment on his part that he had been subject to such an investigation and that he had lost his job with Sivananthan; in my judgment, it does not, of itself, mean that his other evidence cannot be relied upon.'

The second part of that sentence reflected a correct approach. The judge then said that he believed Mr Lewis was trying to be truthful in his evidence on the main issues, but that he still proposed to be cautious about accepting that evidence on important points in the absence of supporting evidence. That too was a sound approach. The judge's findings as to the unreliable nature of Mr Lewis's evidence in relation to the MACC investigation did not require him to reject his evidence on other matters.

13. In simple terms, in *Lewis* the Court was making it clear that just because a witness's credibility was undermined in respect of one issue it does not follow that all his or her evidence is to be rejected in its entirety.

14. I will apply these principles.

### **The appeal**

15. Unusually, this case involved the Hearing Officer hearing live evidence. James Donohue, the Appellant, and David Foster, a director of the Opponent, were both cross-examined under oath. The Hearing Officer concluded that Mr Donohue was an honest and credible witness who attempted to recall the facts as well as he could (Decision, paragraph 12) and Mr Foster was an honest witness who was able to recall accurately the facts upon which he was questioned and prepared to concede inaccuracies and

provide explanations for them (Decision, paragraph 17). The Appellant mounts three challenges to the Hearing Officer's evidential findings.

*Background*

16. The mark DRYSHOD had originally been used on footwear by Apsley Rubber and its successors; this use began in 1885 (according to the original design artwork exhibited). More recently, an CTM existed for DRY-SHOD which lapsed on 13 November 2013. None of the parties to the appeal had any rights in this original incarnation of the mark and so it is material only to the extent it was a brand known to both Mr Foster and Mr Donohue.
17. Mr Donohue and Mr Foster had been in a business relationship selling neoprene MUCK boots (Mr Foster had been Mr Donohue's UK distributor). Mr Donohue sold the MUCK business in 2002 but remained involved as a consultant for another two years. In the period between 2004 and 2014 both sides accepted there had been some contact between the two men. However, the nature of the relationship in July 2014 was in dispute between the parties.
18. On 3 January 2014, Mr Donohue applied at the United States Patent and Trademark Office (USPTO) to register the trade mark DRYSHOD (the USPTO registered the mark on 17 April 2015 (No 4,717,624)). Mr Donohue was required by the USPTO to prove his intent to commercialise the name, which led him to want samples of products affixed with the trade mark DRYSHOD. He decided to contact Mr Foster for assistance in obtaining these samples.
19. On 22 July 2014, Mr Donohue (using the last known email he had for Mr Foster) emailed him on 22 July 2014 to check whether it was still the right email. There was then a series of emails exchanged over the following days. On 25 July 2014, between email exchanges, Mr Foster applied to register the mark DRYSHOD (and DRY SHOD) in the United Kingdom. The correspondence continued until later in the year but then ceased.
20. On a factory visit in China in 2017, Mr Foster and Mr Donohue met once more at which point Mr Donohue talked about his plans to enter the United Kingdom market using the mark DRYSHOD.

*No intention to market in the United Kingdom*

21. The Appellant's first ground of challenge relates to whether in July 2014 Mr Foster knew Mr Donohue had any intention of marketing any product under the trade mark DRYSHOD in the United Kingdom. The Hearing Officer's conclusions on this point were set out in paragraph 47 and 48 of his Decision:

Reliance upon a claim that Party B intended to market his mark in the UK is not the key issue in assessing whether Party A's registration was made in bad faith. In order to assess this, it is necessary for a finding that Mr Foster/Party A knew of such an intention. There is nothing in the evidence that demonstrates that this was so. There is no evidence that Mr Donohue had a history of extending his activities to the UK. If there had been, that may have alerted Mr Foster/Party B to the possibility that he may have intentions to do the same with his DRYSHOD

brand. Taking these two points into account, together with territorial nature of trade marks and the fact that Mr Foster was aware of the DRYSHOD mark becoming available in the UK after 2013, there is nothing in this factual matrix, including that fact that Party B had made an approach to Mr Foster to assist him in obtaining his US registration, that leads me to conclude that Party A was acting in bad faith when applying for its registration.

In reaching such a conclusion, I have kept in mind the guidance of the CJEU in *Malaysia Dairy Industries Pte Ltd v Ankenævnet for Patenter og Varemærker*, Case C-320/12, where it held that merely knowing that a trade mark was in use by another in another jurisdiction did not amount to bad faith under Article 4(4)(g) of the Directive (equivalent to section 3(6) of the Act).

22. Mr Zweck, on behalf of the Appellant, put forward two reasons why this conclusion was flawed. The first relates to internet sales. It was not in dispute that the Appellant had indicated in 2014 that he intended to focus on sales over the internet. Mr Zweck suggested sales over the internet suggest international distribution, which would include the United Kingdom.
23. The factual conclusion Mr Zweck suggested should be drawn would have been entirely contrary to the approach adopted by the Court of Justice in C-324/09 *L'Oreal v eBay* [2011] ECR I-6011 at paragraphs 64 and 65:

64 It must, however, be made clear that the mere fact that a website is accessible from the territory covered by the trade mark is not a sufficient basis for concluding that the offers for sale displayed there are targeted at consumers in that territory (see, by analogy, Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* [2010] ECR I-0000, paragraph 69). Indeed, if the fact that an online marketplace is accessible from that territory were sufficient for the advertisements displayed there to be within the scope of Directive 89/104 and Regulation No 40/94, websites and advertisements which, although obviously targeted solely at consumers in third States, are nevertheless technically accessible from EU territory would wrongly be subject to EU law.

65. It therefore falls to the national courts to assess on a case-by-case basis whether there are any relevant factors on the basis of which it may be concluded that an offer for sale, displayed on an online marketplace accessible from the territory covered by the trade mark, is targeted at consumers in that territory. When the offer for sale is accompanied by details of the geographic areas to which the seller is willing to dispatch the product, that type of detail is of particular importance in the said assessment.

24. In other words, the fact that a trader in the United States is going to sell goods over the internet would not (and should not) lead anyone to assume that this would *necessarily* include an intention to sell goods in the United Kingdom. Accordingly, the fact that Mr Foster knew the Appellant was intending to make sales online does not assist in whether he should have known there was an intention to sell in the United Kingdom.
25. Mr Zweck also suggested that because the Respondent (together with the associated companies) was a UK distributor of boots and had previously been a UK distributor for the Appellant, the July 2014 email exchange should have put Mr Foster on notice that the Appellant intended to sell his goods in the United Kingdom. The highpoint of the exchange supporting the Appellant is part of an email dealing with the production of samples sent by Mr Foster and dated 24 July 2014. It ends with the following passage:

The leather factory we work with for Grubs is a large scale manufacture [sic] of price point workwear mainly for sears and Walmart, so not overly suitable of this kind of product. If you are looking for quality product we need to look at better factories, they will want to know about projected volume etc. I'm willing to take it forward but need a bit more information on the product and volumes to move it forward.

26. The implication of the phrasing and the words “we need” suggests collaboration Mr Zweck says. Against this implication is the statement in Mr Donohue’s email of the previous day “If I were going to do anything with this name/concept, I would do it on my own and probably focus on online business”. The passage set out above was part of Mr Foster’s substantive response to the email suggesting “doing it on my own” and focusing on “online business” (which by nature does not require distributors other than postal services or similar) and so it is difficult to see how one could conclude Mr Foster *must* have been thinking a distribution collaboration was being proposed.
27. Therefore, nothing put forward by the Appellant undermines the Hearing Officer’s conclusions set out in paragraph 47 of his Decision that there was no clear intention to use the mark in the United Kingdom. I therefore dismiss the appeal in this respect.

*Failure to disclosure use and later registration*

28. The second issue related to what Mr Zweck called “a long-standing relationship” between the two men; his point being that this relationship meant that had Mr Foster been using the mark in 2014 he would have disclosed that use to Mr Donohue and so, Mr Zweck contends, there could not have been any use prior to 2014. Accordingly, Mr Foster’s application to register on 25 July 2014 was as a result of Mr Donohue’s business idea or as Mr Zweck put it “an opportunity to extract value from Mr Donohue’s business”.
29. Similarly, Mr Zweck says Mr Foster should have disclosed his registration of the DRYSHOD trade mark to Mr Donohue when they met in China in 2017. However, Mr Zweck says, Mr Foster kept quiet in 2017 to make further money from Mr Donohue based on the latter’s plans to enter the United Kingdom market.
30. The Hearing Officer’s conclusions on this issue are in paragraphs 49 to 51 of his Decision:

49) Much is made of the close relationship between Mr Foster and Party B [that is Mr Donohue], however, I find that there is little to be gleaned from this. Even if I was to accept the highpoint of Party B’s case, namely that he and Mr Foster were good friends and close business associates and that, as a result of this, Party B could have expected that either Mr Foster would leave the mark alone, or at least confide in Party B as to what his plans were. In such circumstances, Party B may rightly feel disappointed in Mr Foster, but that does not displace the fact that, in the absence of any knowledge that Party B had plans to extend into the UK, Party A was free to apply for the mark.

50) Party B identifies what he perceives as Mr Foster’s continued deception, when meeting in China in July 2017. Mr Foster has explained his reason for not disclosing to Party B that he had been trading under the DRYSHOD mark for some four years in the UK as being that Party B’s own disclosure of broader plans to use their mutual distributor contacts and to expand his DRYSHOD range to include rubber boots made him realise that he was suddenly a competitor. It strikes me that Mr Foster’s reasons are at least as plausible as Party B’s, but I can see that

from the perspective of Party B, why this would appear to him as a continued deception. I find that the circumstances surrounding Party B's and Mr Foster's face to face meeting in China is equally consistent to both sides' perceptions and that these circumstances do not enhance Party B's claim of bad faith.

51) Taking all of this into account, I conclude that, whilst it is understandable that Party B may feel aggrieved, I do not interpret the factual matrix as indicating that Party A applied for the DRYSHOD mark in the UK in bad faith. Clearly, Mr Foster's view of his relationship is somewhat different to that portrayed by Party B, such that he felt he did not need to disclose his activities in the UK or his act of filing for the mark in the UK to Party B. Nevertheless, he must have realised the potential for doing this to upset Party B. However, the underlying right of Mr Foster/Party A to apply for the mark is not displaced by this.

31. Mr Zweck submits that the Hearing Officer did not deal with what he called "the central implausibility" said to flow from a long-standing business relationship. Because of such a relationship he submitted Mr Foster's explanation is at odds with "a normal human reaction" to the disclosures made by Mr Donohue in 2014 and 2017. He suggests that saying nothing was "inherently unlikely" if the Respondent was using the mark, and so he claims the only plausible conclusion is the Respondent was *not* using the mark before July 2014.
32. It appears to me that Mr Zweck's submission amounts to little more than saying that the Hearing Officer was wrong because he did not make the inferences from the evidence the Appellant wanted him to. The issue here was Mr Foster's state of mind (as the directing mind of the Respondent). However, this aspect of the Appellant's case has largely rested on the absence of something being said rather than any positive statements. The Hearing Officer heard evidence from both sides as to why nothing was said in 2014 and 2017 and reached his own view about the nature of the relationship between the two men. He weighed up those two versions and concluded that Mr Foster's reasons were at least as plausible as those of the Appellant.
33. The case turns entirely on whether Mr Foster's account can be believed or not. After being cross-examined by Mr Zweck, the Hearing Officer concluded his account could be believed (and, importantly, Mr Donohue was not being disbelieved as he could give no direct evidence on Mr Foster's state of mind). On appeal, I have only a transcript of this evidence and for the reasons re-stated again and again by the appellate courts, and summarised at paragraphs 8 to 13 above, the findings of fact by the first instance judge (particularly, after live cross-examination) should not be disturbed unless they are wrong. In this context wrong means that I do not merely disagree with his reasons, but they were "outside the bounds within which reasonable disagreement is possible".
34. On this basis the Hearing Officer's conclusions are clearly not wrong and cannot be disturbed. He was fully entitled to take the view he did about Mr Foster's state of mind. Indeed, there is something else not raised by the Hearing Officer or the parties which might support a proper reason for silence in 2014, albeit one not explored with Mr Foster. The Court of Justice stated in *C-529/07 Chocoladefabriken Lindt* [2009] ECR I-4893 at paragraphs 51 and 52:

51 Furthermore, in order to determine whether the applicant is acting in bad faith, consideration may be given to the extent of the reputation enjoyed by a sign at the time when the application for its registration as a Community trade mark is filed.

52 The extent of that reputation might justify the applicant's interest in ensuring a wider legal protection for his sign.

35. These paragraphs are somewhat opaque but what I take the Court to have meant is that a person with existing unregistered rights can register those rights to strengthen any claim against a new market entrant. Therefore, as I said in the Hearing, assuming Mr Foster was trading under the mark DRYSHOD before July 2014, a legal professional might have advised him to say nothing to a foreign competitor about his existing trade under the mark until he had filed a trade mark application to buttress his unregistered rights. A failure to disclose in such a case might therefore be for sound and legitimate business reasons.
36. I am not sure the meeting between the two men in 2017 takes matters much further. The necessary bad faith must exist at the date of filing of the trade mark application, albeit subsequent conduct can be used as evidence that such bad faith existed on the filing date (*Lindt*, paragraphs 41 and 44). While the Hearing Officer did consider the meeting in 2017, I am doubtful much can be taken from Mr Foster's failure to say something about his trade almost three years later. The evidence of the meeting is simply irrelevant to his intention in 2014.
37. By 2017, Mr Foster could not conceal he had registered the mark in the United Kingdom: a simple search of the register would have disclosed it. Mr Foster suggests he did not say anything to Mr Donohue because he suddenly realised they were now competitors. Mr Zweck says this silence in 2017 "beggars belief". The silence, he says, was because Mr Foster thought he could get further value out of Mr Donohue by not speaking.
38. It is true that Mr Foster's silence may have given him more information about his competitor's plans than he would have received if he had spoken up. Even if this was improper (and I am not saying whether or not it was) it has nothing to do with his state of mind in July 2014.
39. In the circumstances, the Hearing Officer's findings that the failure to disclose use of the mark in 2014 and 2017 did not demonstrate bad faith are entirely proper. The Appellant's complaints in this respect are therefore dismissed.

#### *Fabrication*

40. In the hearing below, Mr Zweck had alleged that Mr Foster fabricated or misrepresented the evidence of earlier use of the DRYSHOD mark to provide the Respondent with a plausible explanation as to why the application was filed in 2014.
41. Before turning to the allegation itself, it is important to remember that the United Kingdom does not require prior use of the mark before filing; all that is required is a bona fide intention to use the mark (see Trade Marks Act 1994, s 32(3)). There is no



level of existing use which must be proved (in contrast to later in the mark's life where it might face an application to revoke a mark for non-use). Any previous use is only relevant to support Mr Foster's claim that the Respondent was using the mark and had a basis for wanting to protect it (as the Hearing Officer put squarely to Mr Zweck: Transcript, page 47). Accordingly, the Respondent failing to establish prior use would not have been fatal to its case.

42. Mr Zweck put his case before the Hearing Officer as to why he alleged the evidence was fabricated. The Hearing Officer considered these submissions and his findings were in paragraph 44:

...It is clear to me that this evidence is not as conclusive as it might have been in demonstrating use from 2013 in respect of the mark DRYSHOD, but I am not convinced by the submissions made by Mr Zweck, that they are fabricated. As I have commented earlier, Mr Foster appeared to be an honest witness when subject to cross examination and he has made verbal and written statements regarding the veracity of these exhibits. Merely because the documents are not as conclusive as they could have been does not render them false or misleading. I accept that not all of these exhibits support use of the DRYSHOD mark, but others such as the leaflet shown at paragraph 29 (5th bullet point), above, do show use in 2013 and early 2014 (i.e. before the relevant date in these proceedings). Further, the invoices at Exhibit DF8 identify the model of the subject goods as being DRYSHOD. Whilst most of these refer to the import of goods to Ion Associates Ltd, Mr Foster has explained that this is his trading business, whilst Party A is his company that holds the intellectual property. Whilst he failed to make this distinction clear in his witness statement, it does not lend any support to the contention that these documents fail to show that he was actively undertaking a trade in DRYSHOD boots from 2013.

43. Mr Zweck made similar criticisms of the document before me as those aired before the Hearing Officer. Put simply, his argument was that Mr Foster must be lying and as the Hearing Officer did not agree so the Hearing Officer must be wrong. This sort of argument is not something which should be considered on appeal. It relates purely to whether Mr Foster and his explanations as to certain matters were believed or not. As the Hearing Officer heard testimony from Mr Foster (and Mr Donohue) he is much better placed than I am to assess the matter.
44. At times Mr Zweck hinted that because some parts of Mr Foster's evidence were inaccurate other parts should not be accepted. This is plainly wrong in law. It was made clear in *Lewis v Narayanasamy* that a witness may downright lie about one thing, but be truthful about another. The court can take the plum and leave the duff as it were. If a court can accept testimony from a witness it has found to be lying, there is no reason the Hearing Officer could not accept testimony on one thing where he found an honest witness had been inaccurate about certain other things. The Hearing Officer's conclusions on fabrication are therefore entirely proper and not open to challenge.

*Failure to consider a point*

45. The Appellant's final point related to the boxes of boots in the photographs exhibited. The boxes had a label affixed with the name of a company called "Dryshod" (its name was partially redacted; and it was never made clear in the hearing before me what the label said in full). Mr Zweck submitted that even if the evidence of use was genuine it "seemed more likely" that it demonstrated use by this third party (the "Dryshod")

company) rather than by the Respondent with the Respondent being a mere agent of this third party. Mr Zweck complained that he made this argument below and it had not been considered by the Hearing Officer.

46. Put another way, Mr Zweck's submission was that even if the use had been genuine it was somebody else's use and so the Respondent's filing was therefore in bad faith in respect of that third person (the other "Dryshod" company). Mr Zweck concluded by highlighting that, as bad faith is an absolute ground, the opponent (or an applicant for invalidity) need not be the proprietor of the earlier right (cf. article 5 of the Trade Marks (Relative Grounds) Order 2007 (SI 2007/1976)). The final submission, so far as it relates to standing to oppose under section 3(6), must be right.
47. However, as the Hearing Officer noted, there was no evidence from any third party (including the other "Dryshod" company) regarding its pre-existing interest in the mark DRYSHOD. There was no evidence of the relationship (or more importantly the absence of any relationship) between the Respondent and such a third party or even that the third party really existed.
48. While it was not explored fully in the hearing, a label on packaging is hearsay evidence (in the criminal context see, *Patel v Controller of Customs* [1966] AC 356 and *R v Cook (Anthony Frederick)* (1980) 71 Cr App R 205). While hearsay is admissible before the Hearing Officer under the Civil Evidence Act 1995, it is still important for him to assess the weight of the evidence carefully (taking into account the factors in s 4 of the 1995 Act). In this case there was no witness evidence, written or otherwise, explaining anything about the "Dryshod" labels or indeed what they may or may not signify in terms of trade mark use and by whom.
49. Therefore, while the point was not considered separately in the Hearing Officer's written decision, it is clear that in the absence of some evidence supporting earlier rights existing in a third party (for instance, the "Dryshod" company) there was nothing for the Hearing Officer to consider other than the vague speculation put forward by the Appellant. Put simply, an unexplained label in an exhibited photograph cannot on its own found a case of bad faith simply because the label is not that of the trade mark proprietor (or applicant). Therefore, this final ground of appeal is also dismissed.

## **Conclusion**

50. The appeal is dismissed in its entirety and the Hearing Officer's decision is upheld. I order that the Appellant should pay a contribution of £1,000 towards the Respondent's costs of the appeal within 14 days of the date of the order.

PHILLIP JOHNSON  
9 May 2019

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Counsel for the Respondent: Jamie Muir Wood (instructed by Groom, Wiles & Wright)