

O-105-13

IN THE MATTER OF APPLICATION NO 2597728
IN THE NAME OF MELLO DRINKS LTD

AND

OPPOSITION THERETO UNDER NO 102873
BY ANTON RIEMERSCHMID WEINBRENNEREI UND LIKORFABRIK GMBH & CO

O-105-13

1. On 15 January 2013, I issued my decision in these proceedings (O-019-13). In that decision, I found the opposition to have failed. In relation to costs, I stated:

“61. Mello has succeeded and is entitled to a contribution towards the cost of the time it has spent on these proceedings. The Registrar usually operates on a published scale of costs, however, since Mello has not been professionally represented during the proceedings, an award made from the published scale might be larger than its actual expenditure.

62. In BL O/160/08 *South Beck*, Mr Richard Arnold Q.C., sitting as the appointed person, stated:

“32. Secondly, counsel for the opponent submitted that, if CPR r. 48.6 was applicable, the hearing officer had misapplied it. In support of this submission he pointed out that CPR r. 48.6(4) provides:

The amount of costs to be allowed to the litigant in person for any item of work claimed shall be-

(a) where the litigant can prove financial loss, the amount that he can prove he has lost for time reasonably spent on doing the work;

(b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in the practice direction.

The Part 48 Practice Direction provides at paragraph 52.4 that the amount which may be allowed to a litigant in person under rule 46.8(4) is £9.25 per hour. Counsel submitted that the hearing officer appeared to have awarded the applicant two-thirds of the scale figure which he would have awarded a represented party, and that this could not be justified since the opponent had not proved any financial loss and was very unlikely to have spent over 160 hours on the matter.....

36. In my judgment the approach which should be adopted when the Registrar is asked to make an award of costs in favour of a litigant in person is as follows. The hearing officer should direct the litigant in person pursuant to r. 57 of the 2000 Rules to file a brief schedule or statement setting out (i) any disbursements which the litigant claimed he has incurred, (ii) any other financial losses claimed by the litigant and (iii) a statement of the time spent by the litigant in dealing with the proceedings. The hearing officer should then make an assessment of the costs to be awarded applying by analogy the principles applicable under r. 48.6, but with a fairly broad brush. The objective should be to ensure that litigants in person are neither disadvantaged nor overcompensated by comparison with professionally represented litigants.”

O-105-13

63. Under the current practice direction, the amount allowed to a litigant in person is £18 per hour.

64. In line with the above, Mello should produce an estimate of its costs, including the number of hours spent on these proceedings, broken down by category of activity, i.e. reviewing the notice of opposition, completing its counterstatement, reviewing ARWL's evidence and preparing evidence. **This estimate should be filed within 21 days of the date of this decision and should be copied at the same time to ARWL who will have 14 days from receipt of it to provide written submissions.** I will then review those papers and issue a supplementary decision covering the costs of these proceedings."

2. Mello subsequently filed an estimate of costs in a schedule which is attached at Annex A to this decision. In its covering letter, dated 2 February 2013 and received here on 5 February, it confirmed that it had sent a copy to the representative of the opponent. Nothing has been received from the opponent.

3. The schedule filed by Mello sets out, in some detail, the actions taken by it and indicates that it spent some 127.45 hours in total defending its application, considering my decision and preparing an estimate of costs. It also claims time and travel expenses.

4. Given that Mello would have had to understand the basis of the opponent's case against it, as well as how to go about defending its application, I consider it is reasonable for Mello to have spent some time carrying out some research to familiarise itself with the relevant opposition procedures and the legal issues involved. I do not, however, consider it was reasonable or necessary for it to spend time reading the whole of the Trade Marks Act and associated rules or the whole of the Trade Marks registry's Tribunal Work Manual (and even less so doing so on more than one occasion as set out in the schedule).

5. Similarly, I do not consider it was reasonable for Mello to have taken some 28 hours in total to prepare and file a defence, a defence which consisted of just three pages attached to the Form TM8. Neither do I consider it reasonable to have spent a further 28 hours reviewing the evidence filed by the opponent or 10 hours preparing its own evidence. Mello's evidence consisted of a single witness statement totalling two pages. The content of it was overwhelmingly submission rather than evidence of fact. The opponent's evidence was more extensive and consisted of two witness statements. One of those was a two-page document containing very limited information and which would have taken very little time to read and digest. The second was also a two-page document containing limited factual information and which was accompanied by two exhibits. The first of those exhibits consisted of ten invoices. The second exhibit consisted of a decision of the Regional Court of Liechtenstein with a translation into English where the dispute involved a different trade mark to the one under consideration in these proceedings.

6. Mello represented itself in these proceedings. The schedule of costs includes details of expenses relating to travel for its Managing Director. No explanation is given of why such travel was undertaken or who it was that the MD might have been meeting with, however, the fact remains that discussion between officers of a

O-105-13

company can take place without having to involve cross country travel. I do not consider these expenses to have been justified.

7. I am prepared to accept that the following time was reasonably spent by Mello:

Investigating the basis of the opponent's objection:	8 hours
Familiarising itself with how to file a defence and preparing and filing that defence:	8 hours
Reviewing the opponent's evidence:	6 hours
Preparing and filing evidence:	2 hours
Reviewing the decision:	4 hours
Preparing an estimate of costs:	4 hours

8. That amounts to a total of 32 hours. At the rate allowed to a self-represented litigant (as set out above) that equates to £576 which I consider Mello is entitled to as a contribution to the costs it will have incurred in dealing with these proceedings.

9. I order Anton Riemerschmid Weinbrennerei und Likorfabrik GmbH & Co to pay Mello Drinks Ltd the sum of £576. This sum is to be paid within 7 days of the expiry of the appeal period or within 7 days of the final determination of this case if any appeal against my decision is unsuccessful.

10. The periods for appeal against both the substantive decision and this supplementary decision on costs, run concurrently from the date of issue of this decision.

Dated this 6th day of March 2013

**Ann Corbett
For the Registrar
The Comptroller-General**

Annex A

Dates of Correspondence and Periods of Activity	Summary of Required Action	Total Time Spent in Hours
22/12/2011	Reading and analysis of first communication received from Opponent notifying Mello Drinks of opposition; including research into Opponent and their trademark.	1
25/01/2012	Received first letter from Intellectual Property (IP) Office. Included opponents papers - TM7 notice of opposition (7 pages), statement of grounds of opposition from ARWL (5 pages) and a request for us to file a TM8 and counterstatement. Online research to gain clear understanding of grounds of opposition.	3
Jan/Feb 2012	Reading of "Opposing a Trademark FAQ's" (15 pages) as an introduction to proceedings. First reading of Trade Marks Act 1994 (88 pages) to become familiarised with the law and be able to discuss with MD. Urgent meeting with Managing Director of Mello Drinks Ltd, his travel time from Peterborough to Manchester (3 hours each way - see below petrol costs) plus meeting time to discuss opposition in detail, legal implications and next steps (3 hours).	9
Feb-12	First reading of Trade Marks Tribunal Work Manual (101 pages)	11
Feb-12	Extensive online research into trademark law, second reading of Trade Marks Act 1994 (88 Pages), reading how to file TM8.	8
Feb-12	Preparing, drafting and writing up response to TM7, including statement of grounds of defence (3 pages)	4
Feb-12	First draft sent to Managing Director of Mello Drinks Ltd to view and approve - edits and comments made as seen fit by MD.	3
05/03/2012	Incorporation of edits and comments from MD - final version written up of statement of grounds of defence and TM8 edited and sent to opponent.	2
29/05/2012	Received witness statement of Linda Bray (LB) and evidence, including a request for extension of time to file further evidence (TM9) total of 25 pages. Reading and analysis of information, further research into ARWL company and brand (including research to see presence and familiarity of trademark in UK market), understanding of TM9 and reasons behind extension of time request.	7
13/06/2012	Received letter from registry refusing request of extension of time. Evidence was not processed because it was received late - reference to Paragraph 10 of Tribunal Practice 2/2011 which was researched and read into to understand our position and expected next steps.	2

27/06/2012	Received letter from LB disagreeing with above decision, LB included extracts from section 76 & 77 of Trade Mark Rules 2008 - reading of Trade Mark Rules 2008 (36 pages) to gain understanding of legal procedure.	4
10/07/2012	IP office sent a letter allowing the extension of time request.	0.25
26/07/2012	Received further evidence and witness statement of Frank Barwinski (FB) - 49 pages of which 11 pages were a complex European Court Judgement from a previous court case. Time spent on first reading.	11
02/08/2012	Received letter from IP office requesting response to FB evidence and witness statement. IP office letter mentioned necessity to follow correct legal proceedings format e.g. page numbering guidance and format to be either witness statement, statutory declaration or affidavit. Required reading of IP office website documents and research into aforementioned formats to understand expectation of response.	4
Aug-12	Second reading of the evidence received on 26/07/2012. Required extensive reading of complex legal jargon, research on case law referenced by opponent, analysing previous European Court Judgement to understand full reason behind previous decision and extract supporting information for our application, re-reading of trade mark legal documents from previous months and finding grounds to support our defence.	13
Aug-12	Meeting with Managing Director of Mello Drinks Ltd, travel time from Peterborough to Manchester (3 hours each way - see below petrol costs) plus meeting time to discuss the information gathered, explain the opposition's witness statement and position and decide on next steps and actions.	11
Aug-12	Preparation and first draft of response to FB witness statement and evidence using knowledge from research above to draft my own witness statement defending our trademark.	5
Sep-12	First draft sent to Managing Director of Mello Drinks Ltd to view and approve - edits made as appropriate.	3
07/09/2012	Final version of Mello witness statement in response to FB witness statement edited and sent.	2
21/09/2012	Received letter acknowledging of receipt of my witness statement.	0.1
03/10/2012	LB confirms that Opponent will not file further evidence.	0.1
25/10/2012	Reading letter from IP office confirming next steps and legal proceedings - researched into next steps and what we could expect to happen next, what the implications would be of all possible outcomes in order to financially prepare.	2

22/11/2012	LB files Summary of Argument - very complex and detailed legal jargon, statute, reference to case law - all of which required research to understand. LB also referred back to previous correspondence from the last 11 months, which required extensive cross referencing of documents.	4
15/01/2013	Received 18 page ruling decision from Ms Ann Corbett, time taken to read, analyse and understand the outcome and implications for Mello Drinks Ltd. Prepared summary for MD.	3
29/01/2013	Summary of ruling decision sent to Managing Director to read and discuss.	1
31/01/2013	Preparing estimate of costs, looking back at last 13 months of letters, research, notes, e-mails and meetings.	5
	Total Hours	127.45
	Estimated Cost of Time Spent (at £18 per hour)	£2,294
	Petrol Cost - 620 miles at 45p/mile	£279
	Total Estimated Cost	£2,573