**BL O/0559/25**

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NUMBER 3,887,112 IN THE NAME OF PRO HEALTH SOLUTIONS LTD

AND IN THE MATTER OF AN OPPOSITION UNDER NO 441,243 IN THE NAME OF PROHEALTH INC

AND IN THE MATTER OF TRADE MARK REGISTRATIONS NUMBERS 3,887,235 and 3,660,929 IN THE NAME OF PRO HEALTH SOLUTIONS LTD

AND IN THE MATTER OF CANCELLATION NUMBERS 506,387 and 506,263 IN THE NAME OF PROHEALTH INC

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF JUNE RALPH (O/299/25) DATED 28 MARCH 2025

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DECISION

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## Introduction

1. This is an appeal from the decision of June Ralph, for the Registrar, dated 28 March 2025 (O/299/25).

2. Proheath Inc opposed the application of Pro Health Solutions to register a trade mark (No 3,887,112) under section 5(4)(a) of the Trade Marks Act 1994. It also applied to invalidate Pro Health Solutions' registered trade mark (No. 3,660,929) under section 5(4)(a), and its other trade mark (No 3,887,235) under sections 5(2)(b), 5(3) and 5(4)(a). The opposition and the first application for invalidation were both successful under section 5(4)(a), and the second invalidation application was successful under both section 5(2)(b) and 5(4)(a), but not section 5(3). Pro Health Solutions appeals all the decisions but only in relation to section 5(4)(a).

3. Pro Health Solutions applied to register the word marks PROHEALTH and Prohealth (a series of two) (No 3,887,112) in Class 5 on 9 March 2023. It also has a registered trade mark for the word mark Pro Health Solutions (No 3,887,235) in Class 5, which also has a date of filing of 9 March 2023. Finally, it has a registered trade mark (No 3,660,929) in Class 5, with a date of filing of 25 June 2021, for the following figurative mark:

4. The Respondent claims that since 2018 it has used the sign ProHealth and also the following sign on food supplements of various kinds:

5. In relation to the application to declare the word mark Pro Health Solutions invalid, the Respondent also relied on two earlier international registrations for the marks ProHealth and ProHealth Longevity both covering goods in Class 5. However, as the Hearing Officer's finding under section 5(2)(b) is not challenged, I do not need to consider these marks further.

**Grounds of appeal and skeleton arguments**

6. Before turning to the substance of the appeal, an issue arose in relation to the skeleton argument and grounds of appeal filed for the Appellant by Dr Soufian and also the skeleton argument file for the Respondent by Mr Caddy.

7. Dr Soufian, who is acting as a litigant-in-person, filed his grounds of appeal on 25 April 2025. These were in narrative form and were a combination of a witness statement and challenge to the Hearing Officer's decision. At the end of the grounds was a list of cases each with a case name, a citation, the court, a "quote", a URL, and a comment. The cases were all real, but three of the purported "quotes" were not found in the decisions cited. On 5 June 2025, Dr Soufian filed a skeleton argument. This included two cases with complex (but incorrect) references, and four cases with the correct reference. The cases were all followed by a summary of a few words to a few lines setting out what the case decided. In three of the cases, the summary misrepresented the case substantially.

8. At the start of the hearing, I asked Dr Soufian if he had drafted the documents and he said he had drafted it with the assistance of Chat GPT. I pointed out the numerous errors in the citations and problems with the skeleton and he politely apologised and did so unreservedly. Before moving on, it is worth noting that most of the skeleton produced by Chat GPT was made up of arguments purportedly relating to the evidence in the case. However, the factual issues highlighted were largely not relevant to the issues before me and the proposed arguments were not very helpful. In other words, even aside from the fabricated citations, the output of Chat GPT was in fact unhelpful to him.

9. In the case of Mr Caddy, who is a trade mark attorney, his skeleton argument dated 6 June 2025 included three cases which existed and were correctly cited. But it was unclear to me the cases cited stand for the propositions claimed by Mr Caddy.

10. During the Hearing, I asked Mr Caddy to identify the part of the judgments which supported the propositions made. He said, "I cannot actually remember that now, to be honest with you". I gave him time to read the judgments so as to find the relevant paragraphs. He could not do so. He then said he got the references from a "previous edition of Kerly's Law on Trade Marks". I could not find any support for the propositions (or anything similar) in Kerly during the hearing. He then said he could not remember where he got them from, saying maybe it was Wadlow [on the Law of Passing Off] but said he went on to say that did not make much sense. After the hearing, I checked Wadlow and could not find anything matching the propositions.

11. A few hours after the hearing, Mr Caddy sent an email to the Secretariat, he said in the email that he had not been expecting to "make out my own side's case more so than had been done in the skeleton". He then went on to try and show support for the propositions in the three cases cited in the skeleton. In my view, nothing in the email improved Mr Caddy's position and the quotation above clearly makes it worse.

**Use of generative artificial 'intelligence'**

12. In *Ayinde, R (On the Application Of) v London Borough of Haringey* [2025] EWHC 1383 (Admin), the Divisional Court considered the problems arising from advocates using generative artificial 'intelligence' (such as Chat GPT) in preparing documents to be used in court at [6]-[9] (footnotes omitted):

> 6. In the context of legal research, the risks of using artificial intelligence are now well known. Freely available generative artificial intelligence tools, trained on a large language model such as ChatGPT are not capable of conducting reliable legal research. Such tools can produce apparently coherent and plausible responses to prompts, but those coherent and plausible responses may turn out to be entirely incorrect. The responses may make confident assertions that are simply untrue. They may cite sources that do not exist. They may purport to quote passages from a genuine source that do not appear in that source.
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> 7. Those who use artificial intelligence to conduct legal research notwithstanding these risks have a professional duty therefore to check the accuracy of such research by reference to authoritative sources, before using it in the course of their professional work (to advise clients or before a court, for example). Authoritative sources include the Government's database of legislation, the National Archives database of court judgments, the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales and the databases of reputable legal publishers.
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> 8. This duty rests on lawyers who use artificial intelligence to conduct research themselves or rely on the work of others who have done so. This is no different from the responsibility of a lawyer who relies on the work of a trainee solicitor or a pupil barrister for example, or on information obtained from an internet search.
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> 9. We would go further however. There are serious implications for the administration of justice and public confidence in the justice system if artificial intelligence is misused…

13. The Divisional Court went on to set out how a court should respond to fabricated material at [23] and [24]:

> 23. The court has a range of powers to ensure that lawyers comply with their duties to the court. Where those duties are not complied with, the court's powers include public admonition of the lawyer, the imposition of a costs order, the imposition of a wasted costs order, striking out a case, referral to a regulator, the initiation of contempt proceedings, and referral to the police.

> 24. The court's response will depend on the particular facts of the case. Relevant factors are likely to include: (a) the importance of setting and enforcing proper standards; (b) the circumstances in which false material came to be put before the court; (c) whether an immediate, full and truthful explanation is given to the court and to other parties to the case; (d) the steps taken to mitigate the damage, if any; (e) the time and expense incurred by other parties to the case, and the resources used by the court in addressing the matter; (f) the impact on the underlying litigation and (g) the overriding objective of dealing with cases justly and at proportionate cost.

14. Dr Soufian is a litigant-in-person, but an unrepresented person is still under a duty not to mislead the court: *Vernon v Bosley* (No 2) [1999] QB 18. Further, as Lord Sumption explained in *Barton v Wright Hassell LLP* [2018] UKSC 12, [2018] 1 WLR 1119 at [18]:

> In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties ... The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.

15. Indeed, in *Olsen v Finansiel Stabilitet A/S* [2025] EWHC 42 (KB) at [109], Kerr J considered whether litigants-in-person who had provided fabricated authorities to the court should be held liable for contempt. Accordingly, it is clear that litigants-in-person (however inexperienced) have a duty not to mislead the registrar or the Appointed Person by providing fabricated authorities.

16. This is the case even though litigants-in-person are given much greater latitude in conducting their case than those who are professionally represented. A litigant-in-person should not, therefore, be punished for raising irrelevant arguments which are honestly made or putting forward arguments based on genuine misunderstandings of the law. But there is a difference between honest mistakes and misunderstandings and relying on laws which have been fabricated.

17. As identified in *Ayinde* (including in the Appendix setting out domestic and overseas examples of attempts to rely on fake citations), fabrication of citations can involve making up a case entirely, making up quotes and attributing them to a real case, and also making up a legal proposition and attributing it to a real case even though the case is not relevant to the legal proposition being made (for instance, it deals with a completely different issue or area of law). It is not, however, fabrication to make an honest mistake as to what a court held in a particular case or to be genuinely mistaken as to the effect of a court's judgment. In any event, it does not matter whether fabrication was arrived at with or without the aid of generative artificial intelligence. I therefore need to consider what if any sanction is appropriate.

## Sanctions

18. The sanctions before the Appointed Person and the registrar will be slightly different from those set out by the Divisional Court in *Ayinde* (see paragraph 13 above). This is because the power to impose sanctions is much more limited.

*Referral to the police*

19. The Divisional Court suggested in *Ayinde* that in the most egregious cases of fabricating material it may be appropriate to report a party to the police to be investigated for perverting the course of justice. There are numerous other offences that could, in some instances, be committed by relying on fabricated material, such as fraud by false representation contrary to section 2 of the Fraud Act 2006. As the Divisional Court said, the need to refer a case to the police involving fabricated citations will be extremely rare.

*Contempt*

20. In many of the cases involving fabricated citations, the court has considered whether it should punish the advocate or litigant for contempt. Neither the registrar nor the Appointed Person has the power to deal with contempt summarily (see Trade Marks Rules 2008, r 65 and 73(4)). Further, it is probably the case that the Law Officers cannot bring contempt proceedings under CPR Pt 81 in relation to any improper actions before the registrar as it is an administrative tribunal (see the recent summary of the law in this respect by the Divisional Court in *R (Bailey) v Justice Secretary* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564, [27]-[39]). And, furthermore, misconduct before the Appointed Person is unlikely to be within the law of contempt notwithstanding the concurrent jurisdiction the Appointed Person has with the High Court. A parallel could be drawn between the Appointed Person and the Competition Appeals Tribunal in this respect. The Court of Appeal has held that the breach of the CAT's orders is not a contempt: *Office of Communications v Floe Telecom Ltd* [2006] EWCA Civ 768, [53]. In any event, I do not think any of the conduct here comes close to contempt even if I did have the power.

*Wasted costs*

21. Neither the Appointed Person nor the registrar has a power to make a wasted costs order. The power to award costs is not one of the inherent powers of a court or tribunal, rather it is a power that comes from statute (or statutory instrument): *C7 v Secretary of State for the Home Department* [2023] EWCA Civ 26, [72] to [74]. The Trade Marks Rules 2008, r 67 gives the registrar and (by reason of s 73(4)) the Appointed Person power to "award any party such costs…and direct how and by what parties they are to be paid". Accordingly, as Emma Himsworth QC, sitting as the Appointed Person, confirmed in *Global Brand Group v Punter England* (O/171/15), [56], there is no power to order costs against a *representative* of a party, rather the power is limited to ordering a party to pay costs

*Strike out*

22. The registrar has an inherent jurisdiction to strike out or stay all or part of a case: *Rhone Poulenc SA's Patent* [1989] RPC 570 at 573. This is part of the registrar's inherent

power to regulate the registrar's own procedures: *Pharmedica Gmbh's TM App* [2000] RPC 536 at 541. It is clearly appropriate to strike out parts of any pleading, skeleton argument, witness statement, or exhibit which is fabricated. However, the nature of proceedings before the registry and before the Appointed Person means that it is usually not cost effective for a party to apply for a strike out in advance of the final hearing. And at that hearing, where a Hearing Officer or Appointed Person is aware material is fabricated, it will be disregarded in any event whether or not it is formally struck out.

*Costs*

23. The usual rule before the registrar is to award costs on a scale; the current scale was published as an Annex A to Tribunal Practice Notice 1/2023. Before the Appointed Person, the costs awarded are not on a scale but represent a contribution to the actual costs incurred. As TPN 1/2023 makes clear (and has long been practice), where a party acts unreasonably it is open to the registrar to award so called "off-scale" costs.

24. It is difficult to see a situation where the conduct of a party who has tried to rely on fabricated citations could be seen as anything but unreasonable. In my opinion, therefore, the starting point in instances where a party puts fabricated material before the tribunal is that off-scale costs should be awarded. Only where there is strong mitigation in favour of that party should a different approach be adopted, and even then, it is likely that awards should be made at the top of the scale even if not off-scale: see *Lions Gate Entertainment v Telegraph Media Group* [2019] FSR 16, [31]-[41].

*Referral to regulator and admonishment*

25. As the Divisional Court made clear, where false citations are put before the court by a lawyer (whether by using artificial intelligence or otherwise), it is likely to breach one or more of a lawyer's regulatory duties. These were set out by the Divisional Court for barristers (*Ayinde*, [17]-[21]) and solicitors (*Ayinde*, [22]), but similar duties exist for trade mark attorneys. Rule 1 of the Core Regulatory Framework adopted by IPReg in July 2023, sets out the overarching principles and requires that attorneys must: (2) act in a way that upholds public confidence in the regulated profession, (4) be honest, (5) act with integrity; and (8) maintain proper standards of work. Rule 3.1 makes it clear an attorney is accountable for an attorney's own work and that of those the attorney supervises. One or more of these duties will clearly be breached by a trade mark attorney who puts fabricated citations before the registrar or Appointed Person.

26. It is clearly open to the registrar to publicly admonish a professional representative (or a litigant-in-person) either in the hearing itself or in the decision handed down. However, the Divisional Court made it clear that in cases where fake material is placed before the tribunal this should be an exceptional course of action (*Ayinde*, [31]).

**Intellectual Property Office practice**

27. It is important that all litigants before the registrar (whether *ex parte* or *inter partes*) and during any appeal to the Appointed Person are made aware of the risks of using artificial intelligence. Many litigants-in-person will know little about trade mark law and think that anything generative artificial intelligence creates will be better than they can

produce themselves. So a very clear warning needs to be given to make even the most nervous litigant aware of the risks they are taking.

28. I would therefore suggest that the registrar considers adopting a practice of including a very clear warning in any correspondence requesting submissions, skeletons or other documents from the parties. The warning should set out explicitly the risks of using artificial intelligence for legal research, drafting skeleton arguments or written submissions as well as setting out the potential consequences that may arise if a person puts fabricated citations before the registrar or Appointed Person. It is clear from *Ayinde* that this warning is needed even if the parties are professionally represented.

**Dr Soufian**

29. As I have already mentioned, Dr Soufian was very open about his use of Chat GPT, he explained his lack of experience, and he apologised immediately and unreservedly. These are all strong factors in his favour. In the usual course of events, I would suggest that his case is one that can be dealt with by costs still within the scale (but I do not in fact make such an order for reasons that will become apparent). In the future, if a notice warning of the risks of using artificial intelligence is included in registry correspondence, lack of experience is much less likely to be such strong mitigation.

**Mr Caddy**

30. I cannot say how Mr Caddy came up with the propositions of law he put forward for the three cases. I emphasise once more that a fabricated citation is not just an entirely made up case, but also includes citing a case for a proposition where there is absolutely no basis in the case for that proposition to be made. As I have already mentioned, even after his clarification I struggle to see how the cases he cites support his propositions more than in the most general and abstract sense.

31. Three things about Mr Caddy's conduct concern me greatly. First, he did not know when asked in the hearing where he obtained the propositions of law he included in a skeleton argument, even though the document was dated less than a week before the hearing. Secondly, he appears to think that he is not expected to be ready to expand on points made in his own skeleton argument at the hearing. Thirdly, he appears to think it is acceptable to use out-of-date textbooks. It is necessary for all lawyers to have access to relevant and up-to-date textbooks and relevant case reports whether online or printed and whether within their own firm or using one of the law libraries available to them, which for those who are London-based (like Mr Caddy) include the Intellectual Property Reading Room at the British Library.

32. In the end, I have decided I will not refer Mr Caddy to IPREG on this occasion. I accept that it is possible that he found these references and simply read them (misunderstood them) in a way I cannot follow or understand. However, even if this is the case he needs to seriously reflect on how he conducts his practice in the future, including how he undertakes legal research, how he drafts skeleton arguments, and he must ensure that when he appears before a tribunal he is properly prepared to do so. Advocates should always be prepared to explain to a court or tribunal what they have included in skeleton or other written arguments.

33. I will now turn to the substantive appeal.

**Standard of appeal**

34. The standard of appeal is by way of review. Neither surprise at a Hearing Officer's conclusion nor a belief that the Hearing Officer has reached the wrong decision will 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's findings were rationally insupportable. The principles to be applied were summarised by Joanna Smith J in *Axogen Corporation v Aviv Scientific Ltd* [2022] EWHC 95 (Ch), [24] and in relation to findings of fact this should now be read in light of the summary of Arnold LJ in *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262, [110] and in terms of evaluative decisions the Supreme Court's guidance in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, [49] where it stated that:

> …on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

35. When considering this appeal, and applying these principles, it is important to remember the high bar set.

**Background and ground of appeal**

36. Dr Soufian explained in the hearing how his business had developed since 2020 and how important the trade mark is to his business. However, his sole challenge to the Hearing Officer's decision can be put quite simply. He submits that the finding by the Hearing Officer that the Respondent's sales and other activity in the United Kingdom before 15 October 2020 were sufficient to create protectable goodwill was rationally insupportable.

37. The significance of the date comes from the uncontested finding that the Appellant started using the marks on 15 October 2020 and had goodwill developing from that date. Accordingly, the Respondent needs to establish that by 15 October 2020 it had already developed goodwill in its ProHealth signs and therefore it would have succeeded in a passing off claim against the Appellant on that date. It was not disputed before me that if the Respondent had goodwill in the mark then the opposition under section 5(4)(a), as well as the invalidation applications under that provision, must succeed.

**Was there sufficient goodwill?**

38. The Hearing Officer summarised the evidence of the Respondent's goodwill in at [37] and [38] (citations omitted):

> 37. The relevant market for assessing goodwill is the UK. Goodwill arises as a result of trading activities and accrues to the business that the public thinks is responsible for the goods. At the relevant date the opponent's evidence demonstrated that UK customers were able to purchase supplements from the US facing website from 2002 to 2018. The data supplied in Exhibit RB-

> 13 for UK customers shows 70 orders priced in US$ and totalling approximately $36.4K for those 16 years. However, the order numbers were in single digits in most years and moreover there were years in which no orders were made at all. The opponent accepts in its written submissions that its pre 2018 sales were "low". Evidence of UK sales dated from 2018 up to the relevant date is provided in pounds sterling and totals £117,846, showing an increase year on year. The opponent describes this period of sales as "modest" but submits it is sufficient to indicate the presence of UK customers and, therefore, establishes a protectable goodwill.24 I note further from the evidence there are screenshots that at the relevant date the opponent's goods could be purchased from a UK online retailer your healthbasket in addition to its own websites. Moreover, the opponent's NMN supplements were reviewed by UK bloggers, BiohackersLab, prior to the relevant date which indicates such supplements were available to UK customers for purchase at that time. I also take into account the relatively low cost of the goods such that a modest turnover may still indicate a larger volume of goods sold.
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> 38. Taking all the above factors into account and following the guidance given in the Smart Planet extract above regarding low levels of trade and turnover I find that the evidence provided is just sufficient to demonstrate that the opponent has a small but protectable goodwill in dietary supplement goods.

39. The Hearing Officer referred to the decision of Tom Mitcheson QC, sitting as the Appointed Person, in *Smart Planet Technology v Rajinda Sharm* (O/304/20) where Mr Mitcheson concluded that sales of paper cups totalling €3,230 to two customers did not create protectable goodwill ([37]).

40. There is a clutch of cases where sales, while small, have been sufficient to found goodwill. All the cases on whether goodwill is sufficient are highly fact dependent, but there are two cases which are instructive and show the rationality of the Hearing Officer's assessment in this case.

41. The first case is *Stannard v Reay* [1967] RPC 589 where a fish and chip van was found to have developed sufficient goodwill after three weeks trading on the Isle of White where there were sales of between £129 7s 6d and £138 16s 10d per week. If the lower figure were taken for each week, total sales over the three weeks in 2020 money would be about £7,400.

42. In *Lumos v Sweet Squared* [2012] EWPCC 22, the claimant was selling a skincare product. From the beginning of 2008 to September 2009 its sales were about £2,000 per quarter. This rose to £10,000 per quarter by September 2010 (approx. £13,100 in 2020 money). These sales represented a very small part of the market (approximately 0.25%) and the court was clear that low market share did not preclude the development of goodwill. While the decision was overturned on appeal ([2013] EWCA Civ 590), this conclusion was not.

43. Accordingly, as the Hearing Officer's decision was in line with these earlier decisions (where much lower sales figures were found to be adequate to create protected goodwill) she was clearly entitled to find the Respondent had developed sufficient goodwill by October 2020.

## Conclusion

44. I therefore dismiss the appeal.

45. In light of the Respondent's conduct, I make no award as to costs in relation to this appeal (notwithstanding the conduct of the Appellant), but the costs order made by the Hearing Officer still stands.

PHILLIP JOHNSON
20 June 2025

**Representation**

For the Appellant: Dr Mustapha Soufian (acting as a litigant-in-person)

For the Respondent: Mr Victor Caddy (of IAM The Victor LLP)