Richemont International SA v Goldlion Enterprise (Singapore) Pte Ltd
[2005] SGHC 208

Case Number : OM 26/2005

Decision Date : 31 October 2005

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Max Ng and Daryl Ong Toon Howe (Max Ng and Co) for the appellant; Aloysius Leng and Laurel Loi (AbrahamLow LLC) for the respondent

Parties : Richemont International SA — Goldlion Enterprise (Singapore) Pte Ltd

Trade Marks and Trade Names – Registration – Opposition to registration of trade mark – Whether trade mark for which registration being sought similar to opponent's earlier registered mark – Whether likelihood of confusion on the part of the public – Whether application for registration of trade mark made in bad faith – Sections 8(2)(b), 8(3) Trade Marks Act (Cap 332, 2005 Rev Ed)

31 October 2005 *Judgment reserved.*

Andrew Ang J:

1 This is an appeal against the decision of the Principal Assistant Registrar ("the PAR") of the Singapore Registry of Trade Marks dismissing the appellant's opposition to the respondent's Singapore Trade Mark Application No T00/20034I ("the Respondent's Application").

2 The Respondent's Application was to register "Jean Mercier" ("the Respondent's Mark") in a series of three marks in Class 14 under the Trade Marks Act (Cap 332, 2005 Rev Ed) ("the Act") for:

> Watches; clocks; tie clips; tie pins; buckles of precious metals; keychains; cufflinks; jewellery and costume jewellery; all included in Class 14.

3 The Respondent's Application was advertised in the Trade Marks Journal No 5 of 2002 dated 1 February 2002. The appellant's predecessors-in-title, Baume & Mercier SA, filed a Notice of Opposition ("the Opposition") to the Respondent's Application on 31 May 2002. Baume & Mercier SA subsequently assigned the trade mark applications, registrations, goodwill and/or any other rights in, *inter alia*, the trade mark "Baume & Mercier" ("the Appellant's Mark") and other associated trade marks to the appellant.

4 The appellant has 16 trade mark registrations for "Baume & Mercier" and other variations in Singapore and four of these registrations are found in Class 14:

> (a) Trade Mark Registration No T89/02404I "Baume & Mercier" (word) in Class 14 for "jewellery, articles not included in other classes made of precious metal or coated therewith, precious stones, clocks and watches".
>
> (b) Trade Mark Registration No T01/00944H "Baume & Mercier Linea" (word) in Class 14 for "Mechanical hand-winding and self winding watches; electric and electronic watches, watch movements, cases, faces and bands; watch-making materials, diving watches, chronometers; chronographers; wall clocks, small clocks, electric, electronic or hand-winding alarm clocks; jewellery and fashion jewellery; jewellery watches".

(c) Trade Mark Registration No T84/02492Z "Baume & Mercier & device" in Class 14 for "watches and parts and fittings therefor" (which has expired).

(d) Trade Mark Registration No T78/776551 "Baume & Mercier & device" in Class 14 for "watches and parts and fittings therefor".

5 Before the PAR on 7 July 2005, the Opposition failed on all the grounds raised by the appellant.

6 The grounds of appeal on which the appellant is proceeding are set out in the Notice of Motion dated 4 August 2005 as amended pursuant to leave granted on 22 September 2005. I shall deal with each of them in turn.

Section 8(2)(*b*) of the Act

7 Section 8(2)(*b*) provides as follows:

A trade mark shall not be registered if because —

(a) …

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public.

The following, therefore, require to be satisfied if registration is to be denied:

(a) the trade mark in question must be similar to the earlier trade mark;

(b) the trade mark in question is to be registered for goods identical with or similar to those for which the earlier trade mark is protected; and

(c) there exists a likelihood of confusion on the part of the public because of the above.

Similarity of marks

8 The authorities have it that when comparing trade marks one must consider their visual, aural and conceptual similarity: *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [2000] FSR 77 at 84. Or, as Parker J put it, "You must judge of them, both by their look and by their sound." (*In the Matter of an Application by the Pianotist Company Ld for the Registration of a Trade Mark* (1906) 23 RPC 774 at 777).

9 The appellant submitted that the Respondent's Mark was similar to its earlier mark "Baume & Mercier" in all three respects and that the PAR erred in law and in fact in holding that they were dissimilar. The submissions of the appellant were as follows:

(a) Both the Appellant's Mark and the Respondent's Mark consist of a French-sounding name made up of two words, and the second word is "Mercier" in each case.

(b) The word "Mercier" is a prominent part of both the Appellant's Mark and the Respondent's Mark. In particular, the word "Mercier" has two syllables as compared to the one

syllable of "Baume" (pronounced somewhat like "Bom", with a long "o" vowel sound) and "Jean" (pronounced somewhat like "John", with a long "o" vowel sound), respectively.

(c) Furthermore, the word "Mercier" is phonetically more prominent than the words "Baume" and "Jean", as the consonants in the latter are all relatively "soft" whereas the consonant "C" in the "Mercier" is a relatively "harsh" consonant and would stand out when the word marks are pronounced in full.

(d) Members of the public in Singapore would recognise the word "Mercier" as a surname and the word "Jean" as a first name when used in the context of the Respondent's Mark "Jean Mercier". As such, more emphasis would be placed on the word "Mercier" than on the first name "Jean" (or "John") in the context of the Respondent's Mark "Jean Mercier". Similarly, members of the public in Singapore would recognise the word "Mercier" as a surname when used in the context of the Appellant's Mark "Baume & Mercier".

(e) As for the other words "Baume" and "Jean" in the Appellant's Mark and the Respondent's Mark, apart from the same long "o" vowel sound in both "Baume" and "Jean", the initial consonants "J" in "Jean" and "B" in "Baume" are very short and could easily be slurred over while the terminal sound "N" in "Jean" could easily be mistaken for the terminal sound "M" in "Baume". The words "Baume" and "Jean" are therefore similar phonetically.

(f) The Appellant's Mark and the Respondent's Mark are also similar conceptually as they share the same "idea" of being French-sounding names, with all the connotations that may bring, such as style, elegance, exclusivity, *etc*.

10 The respondent, on the other hand, argued as follows:

(a) The visual impact of both marks is different. "Baume and Mercier" is seen as two names joined by an ampersand or two separate words unlike "Jean Mercier" which is one proper name, namely, a surname preceded by a forename "Jean".

(b) The enunciation of the two marks is different "Baume and Mercier" and "Jean Mercier".

(c) The appellant never uses the word "Baume" in the Appellant's Mark without the ampersand sign ("&") and the word "Mercier". The word "Geneve" and Greek letter "phi" (Φ) always appear together on the face of the watches. The use of the word "Mercier" alone has no significance based on the manner in which the Appellant uses its marks and the word has never been used independently of "Baume", the ampersand sign ("&") and Greek letter "phi" (Φ).

(d) Looking at each mark as a whole, there is no conceptual similarity between the Appellant's Mark and the Respondent's Mark.

(e) There is no special prominence accorded to the word "Mercier" in either the Appellant's Mark or the Respondent's Mark to leave an impression that the distinct portion of the mark is "Mercier" or to lead to an imperfect recollection that the marks are "Mercier" marks.

(f) There is no registration where the word "Mercier" is the sole feature in the mark.

(g) The Greek letter "phi" (Φ) device in the Appellant's Mark is highly distinctive in nature and unlikely to be confused with the respondent's series of three "Jean Mercier" marks which are merely word marks without any device.

To this last point, I should perhaps add that the Greek letter "phi" is always underscored when it appears together with the Appellant's Mark.

11 It is clear that the common element in both marks is the word "Mercier". In *In the Matter of Broadhead's Application for Registration of a Trade Mark* (1950) 67 RPC 209 at 215 where a dispute arose as to fair use of marks "Alka-vescent" and "Alka-Seltzer," Evershed MR stated:

> [W]here you get a common denominator, you must, in looking at the competing formulae, pay much more regard to the parts of the formulae that are not common — although it does not flow from that … that you must treat the words as though the common part was not there at all.

12 In the recently decided case of *The Polo/Lauren Co, LP v Shop In Department Store Pte Ltd* [2005] SGHC 175 ("*The Polo/Lauren Co*"), Lai Kew Chai J stated at [26]:

> In cases where there is a common denominator, it is important to look at the differences between the mark and the sign in order to decide whether the challenged sign has been able to distinguish itself sufficiently and substantially: *The European Limited v The Economist Newspapers Limited* [1996] FSR 431 at 436; see also *Kerly's Law of Trade Marks and Trade Names* (Sweet & Maxwell, 13th Ed, 2001) at paras 16-63 to 16-67. In *Samsonite Corp v Montres Rolex SA* [1995] AIPR 244 ("*Samsonite Corp*") at 270, it was held that just because the registered mark was wholly included in the challenged sign, it did not mean that it would necessarily cause confusion between the two. In *Polo Textile Industries Pty Ltd v Domestic Textile Corporation Pty Ltd* (1993) 26 IPR 246 ("*Polo Textiles*") at 250, Burchett J emphasised that decisions, which held that the taking of a word mark and adding to it an additional word constituted infringement, should not be applied mechanically such that no added word could ever save such a taking from infringement. In other words, sometimes, looking at the challenged sign as a whole, the distinctiveness of the registered word mark is dissolved by the addition of the word. Accordingly, the similarity between the mark and the sign is significantly diminished and may be insufficient to cause a likelihood of confusion.

13 In the instant case, apart from the common word "Mercier", the visual differences are clear, as detailed in the respondent's submissions. The appellant's counsel pointed out that there have been advertisements where the name "Baume & Mercier" appeared without the underscored Greek letter "phi". However, I believe no evidence was adduced to show that, as used on the appellant's goods, the underscored Greek letter "phi" had been omitted. Besides, in my view, the common denominator "Mercier" is not even the distinctive feature in the Appellant's Mark such that the addition of the word "Jean" would be ineffective to obscure the similarity. As pointed out by Lai J at [27] of *The Polo/Lauren Co* ([12] *supra*), this is an important issue because the more distinctive a mark, the greater the protection it is to be accorded: *Premier Brands UK Ltd v Typhoon Europe Ltd* [2000] FSR 767.

14 The appellant's contention that aurally the two marks were similar was properly dismissed. Firstly, the Appellant's Mark is a combination of two surnames linked by an ampersand whereas the Respondent's Mark is just one name comprising a first name "Jean" and the surname "Mercier". Secondly, I do not agree with the appellants that "Baume" and "Jean" sound the same. This is all the more so since there is a tendency on the part of not a few members of the public to mispronounce unfamiliar foreign names. So far as conceptual similarity is concerned, I agree with the PAR that the appellant's construction is not well founded. In my view, it is too far-fetched.

15 I therefore arrive at the conclusion that the PAR's finding that the two marks are not similar cannot be faulted. Strictly speaking, having arrived at this conclusion, it will not be necessary, for purposes of s 8(2) of the Act, to go on to consider:

(a) whether or not the goods are identical or similar; and

(b) whether there is a likelihood of confusion on the part of the public.

Nevertheless, for the sake of completeness in this appeal, I shall go on to consider the second requirement in s 8(2), *viz*, whether or not the goods are identical or similar.

Identical or similar goods

16 In deciding this question, the PAR referred to *Kerly's Law of Trade Marks and Trade Names* (Sweet & Maxwell, 13th Ed, 2001) ("*Kerly's*") at p 241 for the following factors which may be taken into consideration:

(1) the uses of the respective goods or services;

(2) the users of the respective goods or services;

(3) the physical nature of the goods or acts of service;

(4) the trade channels through which the goods or services reach the market;

(5) in the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(6) the extent to which the respective goods and services are in competition with each other: that inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

17 The PAR noted that both the appellant's and the respondent's goods were in Class 14 and that the comparison of the specification of the goods in the appellant's registrations and the Respondent's Application indicated that the goods were identical. However, she went on to say, at [2005] SGIPOS 10 at [36], that:

> The decision whether goods are identical or similar however, entails more than a mere comparison of the specifications of goods. A global assessment of the facts will have to be considered and I am thereby guided by the principles set out by *Kerly's* above.

She finally arrived at the finding (at [37]) that, notwithstanding identical items listed in the specifications, it was difficult to conclude "from a global consideration that the [appellant's] and the [respondent's] goods were identical". She held that at best it could only be said that the goods were similar.

18 Before me, the appellant contended that the PAR "erred in law by going on further to make a global assessment of the facts" after having found initially that the goods were identical from a comparison of the specifications. In my view, this contention is valid. As footnoted in the same passage in *Kerly's*, the abovementioned factors were derived from the judgment of Jacob J in *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281 at 294 ("*British Sugar*"). Reference to the judgment shows that the factors had been suggested by Jacob J to determine "whether there is or is not similarity" between goods and services which are not identical or identically described. It follows

that once it has been determined that the goods are identical from a comparison of the specifications, there is no need to consider the said factors.

19 In any event, I note that the respondent has conceded that "the identical items listed in the specifications" when viewed from a global context are, at best, "similar goods". Whether the goods are identical or similar, the second test is satisfied. I therefore proceed to the last question, *viz*, whether there is a likelihood of confusion on the part of the public.

Likelihood of confusion

20 The sort of confusion required to satisfy s 8(2) of the Act is confusion as to origin. As is stated in *Kerly*'s at para 8-59 where the treatise deals with s 5(2) of the UK Trade Marks Act 1994 (c 26) which is identical to s 8(2) of the Act (except for certain words of extension at the end of s 5(2)):

> It is not enough that on seeing the mark the subject of the application, the earlier mark is "called to mind" if there is no possibility of the customer being under any misapprehension as to the origin of the goods or services.

Thus, the mere association which the public might make between two trade marks because of their similar semantic content is not *in itself* a sufficient basis for concluding that there is a likelihood of confusion in the absence of any possibility of a misapprehension as to the origin of the goods and services: *Wagamama Ltd v City Centre Restaurants Plc* [1995] 32 IPR 613; *Sabel BV v Puma AG, Rudolf Dassler Sport* [1998] RPC 716 ("*Sabel*").

21 As worded, s 8(2) requires that the likelihood of confusion must arise from the identity or similarity between the trade marks as well as from the identity or similarity between the goods or services (the "identity or similarity requirement"). If the likelihood of confusion is caused by other factors, it will not suffice: *Kerly*'s at para 8-20. And see *The Polo/Lauren Co* ([12] *supra*) at [15], where Lai Kew Chai J considered the statutory requirements for infringement under s 27(2)(*b*) of the Act, the elements of which are similar to those of s 8(2) of the Act.

22 It may therefore be said that the identity or similarity requirement in respect of both the marks as well as the goods or services are "threshold" requirements which have to be met before one may proceed to consider whether or not there is a likelihood of confusion on the part of the public.

23 In *British Sugar* ([18] *supra*), the question arose (with reference to s 10(2) of the UK Trade Marks Act 1994) whether the inquiry as to similarity in the goods had to be separately considered or could be merged into a larger and composite question as to whether there was a likelihood of confusion. Jacob J ruled out the possibility of such merger. He stated (at 294):

> The questions arising under section 10(2)(a) are:
>
> (1) Is the mark used in the course of trade?
>
> (2) Are the goods for which it is used similar to those covered by the registration?
>
> (3) Is there a likelihood of confusion because of that similarity?
>
> The first of these questions causes no difficulty here. The problems arise under the second and third questions. British Sugar seek to elide the questions of confusion and similarity. Their

skeleton argument contends that there is "use in relation to a product so similar to a dessert sauce that there exists a likelihood of confusion because the product may or will be used for identical purposes." I do not think it is legitimate to elide the question in this way. The sub-section does not merely ask "will there be confusion?": it asks "is there similarity of goods?", if so, "is there a likelihood of confusion?" The point is important. For if one elides the two questions then a "strong" mark would get protection for a greater range of goods than a "weak" mark. For instance "Kodak" for socks and bicycles might well cause confusion, yet these goods are plainly dissimilar from films or cameras. I think the question of similarity of goods is wholly independent of the particular mark the subject of registration or the defendant's sign.

24 Likewise in the present case, treating the identity or similarity required with respect to the marks as a threshold requirement, once it was found that the marks were dissimilar, the PAR was able to say, without more, that no likelihood of confusion arose even though she had found that the goods were similar. In reaching that conclusion, she did not misdirect herself on any principle. Seeing as I have earlier held that her finding that the marks were not similar could not be faulted, her final conclusion that the opposition under s 8(2) failed must be upheld.

2 5 Before I leave the subject of likelihood of confusion, I should address one other submission made by counsel for the appellant. Counsel suggested that the use of the words "there exists a likelihood of confusion" in ss 8(2) and 8(3) of the Act requires a lower degree of likelihood than the words "likely to … cause confusion" in s 15 of the Trade Marks Act (Cap 332, 1992 Rev Ed) ("the earlier Act"). On that basis, he submitted that Singapore decisions based on the earlier Act had to be treated with circumspection. In particular, reference was made to *Kellogg Co v Pacific Food Products Sdn Bhd* [1999] 2 SLR 651 where the Court of Appeal held that the likelihood of confusion and description was to be determined with reference to the reactions of ordinary sensible members of the public. In the court below ([1998] 3 SLR 28), Christopher Lau JC had, in similar vein, quoted from Yong Pung How CJ's judgment in *Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuff Pte Ltd* [1991] SLR 133 at 141–142, [24] as follows:

> The test to be applied has been stated in *Newsweek Inc v British Broadcasting Corporation* [1979] RPC 441 at p 447 which is whether ordinary sensible members of the public would be confused. It is not sufficient that the only confusion would be to a very small unobservant section of society or as Foster J put it recently, if the only person who would be misled would be a moron in a hurry.

In my view, the test audience ought to be the same for ss 8(2) and 8(3) of the (current) Act as for s 15 of the earlier Act. There is no reason why the likelihood of confusion should not be assessed by reference to ordinary sensible members of the public rather than to any particularly observant or obtuse section thereof. As to the degree of confusion, neither statutory form of words dictates the degree required. The word "likely" in s 15 of the earlier Act, unqualified by any preceding word or phrase such as "very", "most", or "in any way", imports a likelihood no different from that required under s 8(2) or s 8(3) of the Act. It seems to me the test in each case should be whether there is a real prospect that ordinary sensible members of the public may be confused. (This was the approach adopted by Hoffmann J (as he then was) in *Re Harris Simons Construction Ltd* [1989] BCLC 202 where he had to construe the meaning of the word "likely" in the context of s 8(1)(b) of the UK Insolvency Act 1986 (c 45) which required that an administration order be made only if the court was satisfied that one of the purposes set out in s 8(3) of the same Act was "likely" to be achieved.)

Section 8(3) of the Act

26 Section 8(3) provides as follows:

Where an application for registration of a trade mark is made before 1st July 2004, if the trade mark —

(*a*) is identical with or similar to an earlier trade mark; and

(*b*) is to be registered for goods or services which are not similar to those for which the earlier trade mark is protected,

the later trade mark shall not be registered if —

(i) the earlier trade mark is well known in Singapore;

(ii) use of the later trade mark in relation to the goods or services for which the later trade mark is sought to be registered would indicate a connection between those goods or services and the proprietor of the earlier trade mark;

(iii) there exists a likelihood of confusion on the part of the public because of such use; and

(iv) the interests of the proprietor of the earlier trade mark are likely to be damaged by such use.

Apart from grounds similar to those in relation to s 8(2) with respect to the similarity of the marks and the likelihood of confusion, the appeal with regard to this section is that the PAR erred in law in declining to go on to consider whether the other requirements of s 8(3) were satisfied after she determined that the goods were similar.

27 The appellant pointed out that the PAR had failed to consider that, apart from Class 14, the Appellant's Mark was also registered in other classes and as such would not be similar to those specified in the Respondent's Application. Whilst it is true that the goods were not similar, the marks were not similar either. Since it was an essential requirement that the marks had to be identical or similar, the PAR did not err in declining to consider the other requirements in s 8(3). Since, even in relation to similar goods, the PAR had found that there was no likelihood of confusion, given that the marks were dissimilar, what more, in relation to goods which were not similar?

Grounds of opposition under ss 7(5) and 8(7)(*a*) of the Act

28 Section 7(5) of the Act provides that a trade mark "shall not be registered if or to the extent that its use is prohibited in Singapore by any written law or rule of law". Section 8(7)(*a*) proscribes registration in these terms:

A trade mark shall not be registered if, or to the extent that, its use in Singapore is liable to be prevented —

(*a*) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, …

29 The appellant included this ground in its opposition to the Respondent's Application contending that the respondent's goods bearing the Respondent's Mark might pass off as the goods of the appellant. The PAR ruled against the appellant. On appeal, the appellant contended that the PAR "erred in law by holding that the requirement for deception or confusion arising out of the goodwill and

reputation in the appellant's earlier marks [was] the first element of passing off, in addition to the elements of 'goodwill/reputation' and 'misrepresentation'". In my view, that was an unwarranted conclusion from the PAR's Grounds of Decision.

30 The PAR had cited *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341, as having established the elements of passing off. The elements, described by *Kerly*'s ([16] *supra*) at para 14-03 as the "classical trinity", are reputation, misrepresentation and damage to goodwill. The PAR also quoted Geoffrey Hobbs QC in *WILD CHILD Trade Mark* [1998] RPC 455 at 460 for his statement of the three elements for passing off as follows:

> (1) that the plaintiff's goods and services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
>
> (2) that there is misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant are goods or services of the plaintiff; and
>
> (3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.

31 In [55] of the Grounds of Decision, the PAR specifically stated as follows:

> Based on the guiding principles in the ***Reckitt & Colman*** and ***Wild Child*** cases, *the first element to be proven is that the [appellant has] acquired goodwill and reputation in Singapore for [its] mark* in respect of the goods of [its] registrations. [emphasis added]

That being so, it would be wholly inconsistent for the PAR to have said that proof of deception or confusion was the first element of passing off. Her actual words in [57] of the Grounds of Decision were:

> The [appellant is] not able to prove that there is deception or confusion arising out of goodwill and reputation in [its] mark, which is the first element of passing off.

Admittedly, the statement could have been better expressed. Nevertheless, reading [55] and [57] together, it seems clear that the "first element" referred to goodwill and reputation and not to deception or confusion. Accordingly, this ground of appeal fails.

Bad faith

32 Another ground of opposition raised by the appellant before the PAR was that the Respondent's Application was made in bad faith contrary to s 7(6) of the Act which provides:

> A trade mark shall not be registered if or to the extent that the application is made in bad faith.

Section 8(6) of the Act elaborates on bad faith by providing that:

> In deciding whether any such application was made in bad faith, it shall be relevant to consider whether the applicant had, at the time the application was made, knowledge of, or reason to know of, the earlier trade mark.

The PAR held that the Respondent's Application had not been made in bad faith. The appellant appealed contending that, in so holding, the PAR erred in law and in fact. The basis on which the PAR

had disallowed this ground was that "[a]n allegation that a mark has not been made in good faith must be substantiated by evidence concretely showing there was bad faith on the part of the [respondent]" (at [62]); she was unable to conclude from the evidence or the submissions that there was bad faith.

33 In support of her holding, the PAR had referred to the Court of Appeal's decision in *McDonald's Corp v Future Enterprises Pte Ltd* [2005] 1 SLR 177 which followed *"Royal Enfield" Trade Marks* [2002] RPC 24 where it was held (at [31]) that:

> An allegation that a trade mark has been applied for in bad faith is a serious allegation. … A plea of fraud should not lightly be made … and if made should be distinctly alleged and distinctly proved. It is not permissible to leave fraud to be inferred from the facts (see *Davy v Garrett* (1878) 7 Ch.D. 473 at 489). In my judgment precisely the same considerations apply to an allegation of … bad faith made under section 3(6). *It should not be made unless it can be fully and properly pleaded and should not be upheld unless it is distinctly proved and this will rarely be possible by a process of inference*. [emphasis added]

I am unable to disagree with the PAR either on her approach or on the finding that bad faith had not been proved. Accordingly, this ground of appeal also fails.

Grounds of opposition under sections 7(1)(*a*) and 7(1)(*b*)

34 The final grounds of appeal were:

> (a) that the PAR erred in fact and/or law in holding that the Respondent's Mark was capable of distinguishing the goods dealt with in the course of the respondent's trade from the goods dealt with by any other person for the purposes of s 7(1)(*a*) read with s 2(1) of the Act; and
>
> (b) that the PAR erred in fact and/or law in holding that the Respondent's Mark did not lack distinctiveness nor was devoid of distinctive character for the purposes of s 7(1)(*b*) of the Act.

The PAR had found in favour of the respondent in regard to both grounds of opposition, seeing no reason to overturn the examiner's decision on the registrability of the "Jean Mercier" mark. Likewise, I can see no reason to disturb her finding. I should add that I find these final grounds of appeal to be devoid of merit and reminiscent of the metaphorical "clutching at straws".

35 I therefore dismiss the appeal with costs to be taxed unless agreed.

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