



## TRADE MARKS ACT 1955

### DECISION OF A DELEGATE OF THE REGISTRAR OF TRADE MARKS WITH REASONS

Re: Opposition by THE BOEING COMPANY to registration of trade mark application number 563351 in the name of D.M.H. IMPORTS (AUST.) PTY. LTD. for the mark BOEING in Class 18

#### **Background**

Application number 563351 was lodged, on 9 September 1991, in the name of D.M.H. IMPORTS (AUST.) PTY. LTD. (the applicant). The application was for registration of the word mark BOEING for the statement of goods,

"Rucksacks, backpacks, bags for campers, bags for climbers, beach bags, haversacks, travelling bags; leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks; umbrellas, parasols and walking sticks; whips, harness and saddlery; and all other goods in this class" in Class 18.

The mark was advertised as accepted in the *Official Journal* of 3 December 1992.

Notice of opposition to the mark's registration was lodged on 1 June 1993 by THE BOEING COMPANY (the opponent). The opposition was based on multiple factors but the main grounds, as stated in the notice and as pursued at the hearing in the matter, may be summarised as relating to: s.28, that the mark's use by the applicant would be likely to deceive or cause confusion, would be contrary to law and would not be entitled to protection in a court of justice; and to s.40, that the applicant was not the proprietor of the trade mark and therefore not entitled to apply for registration.

## **The evidence**

The service and lodgment of the opponent's and applicant's respective evidence in support, answer and reply in the matter was completed by 5 September 1994. The evidence comprised:

### *Evidence in support*

- \* Statutory declaration by Lynn H. Hess dated 15 July 1993 (first Hess declaration) and attachments 1 to 6.

### *Evidence in answer*

- \* Statutory declaration by Donald Peter Monk dated 9 November 1993 and Annexures DPM 1 to 5
- \* Statutory declaration by David Jacobson dated 11 November 1993
- \* Statutory declaration by Eva Maria Smith dated 15 November 1993
- \* Statutory declaration by Donald Peter Monk dated 16 November 1993
- \* Statutory declaration by Robert Mervyn Luck dated 18 November 1993
- \* Statutory declaration by Roger Hamill dated 20 November 1993
- \* Statutory declaration by Hendrik Marinus Keur dated 30 November 1993
- \* Statutory declaration by Gordon Leslie Starke dated 6 December 1993
- \* Statutory declaration by William Cook dated 22 December 1993
- \* Statutory declaration by John Scott Pavletich dated 5 January 1994
- \* Statutory declaration by Hilton Michael Olovitz dated 13 January 1994
- \* Statutory declaration by Reuben Henry Bates Brownsword dated 9 February 1994

### *Evidence in reply:*

- \* Statutory declaration by Lynn H. Hess dated 19 April 1994 (second Hess declaration)
- \* Statutory declaration by Phillip Carter dated 17 May 1994
- \* Statutory declaration by Noeline Shields dated 20 July 1994
- \* Statutory declaration by Patricia Wahrenberger dated 28 June 1994
- \* Statutory declaration by Ian Gibson dated 5 September 1994

In his first declaration forming the evidence in support, Mr Hess, a trade mark attorney employed by the opponent, described the history and composition of his company, and its worldwide reputation for the mark BOEING in relation to the manufacture and sale of many kinds of aircraft and associated goods. He described the opponent's Australian association

with products and services bearing the mark, and how the mark had become widely used in this country in respect of the opponent's aircraft. He declared that the opponent had developed promotional programmes for Qantas and other Boeing customers which included the distribution of collateral products bearing the BOEING mark. He described how the opponent had spent millions of dollars advertising and promoting its mark in newspapers, television commercials, exhibitions and trade shows. He said that the opponent owned many international trade mark registrations of the word BOEING in numerous classes and attached tribunal decisions of two overseas cases where the opponent had taken legal action against infringers with respect to clothing and confectionery, respectively.

The applicant's Managing Director, Mr Monk, in his declaration lodged as part of the evidence in answer, described his company's history and business, and how it adopted the present mark because of the allusion it had to travel. He described how travel goods, mainly travel packs, were sold under the mark, together with other marks such as AIRBUS, TRIDENT, SKYSTAR and others. Annexed to his declaration were leaflets and catalogues, showing the applicant's goods, documents relating to shipment of its goods to Australia and to the financial aspects of sales and advertising, and swing tickets bearing the mark. He said that he was not aware of prior use of the BOEING mark in respect of travel goods before his company adopted it.

The Jacobson, Smith, Luck, Hamill, Keur, Starke, Cook, Pavletich, Olovitz and Brownsword declarations were all made by people employed, for varying lengths of time, in the trade of selling travel packs who declared that they knew of the applicant's use of the mark with respect to the goods in question but had no knowledge of the use of the mark on those goods by the opponent.

The second Hess declaration formed part of the opponent's evidence in reply. Mr Hess provided information on the name AIRBUS, one of the applicant's marks used on travel packs, which he said, along with BOEING, was the name of a major manufacturer of

commercial aircraft. The balance of the evidence in reply comprised the Carter, Shields, Wahrenberger and Gibson declarations which were made by people involved in the business of selling travel bags, inter alia, for varying lengths of time. They declared that they would conclude a connection between the BOEING mark and the opponent if they saw it used on travel bags.

On 6 October 1994, the opponent applied for a hearing under the provisions of reg.49 and the matter was set down before me, as the Registrar's delegate, in Melbourne on 7 February 1995. The opponent was represented at the hearing by Ms Anne Makrigiorgos of Griffith Hack & Co. Appearing on behalf of the applicant was Mr Robert Kelson of Callinan Lawrie.

### **Submissions**

Ms Makrigiorgos said that the opponent would be relying upon paras. 28(a), (b) and (d) and s.40 of the *Trade Marks Act* in the present proceedings and that each of the related issues would be addressed in turn. She submitted that, given the opponent's extensive reputation in the mark BOEING, use of the mark by the applicant on any of the goods specified in the statement of goods in the application would be likely to lead to deception and confusion. She said that the first Hess declaration showed the opponent's wide use and reputation of its famous mark on goods in classes 9 and 12. She went through this declaration, detailing the mark's use on aircraft, the widespread publicity given the mark by the opponent's use, and details of the opponent's advertisements in the print and television media, showing the mark, primarily to advertise its aircraft but also in conjunction with travel items such as travel bags and umbrellas. She said that the opponent had developed promotional programmes incorporating travel items, using gift catalogues to show what was available and to show where such goods could be obtained. These advertising schemes were so extensive that the Australian public might accordingly think that any use of the mark on travel items in class 18 was sanctioned by the opponent - *Radio Corporation Pty Ltd v*

*Disney* (1937) 57 CLR 448 and *Ferguson & Co's T/M* (1903) VLR 331. She said that the purpose of s.28 was to protect the public, particularly in cases involving extremely well known marks, citing the case of *Lever Bros Ltd v Abrams* (1909) 8 CLR 609 for support. She said that a mark's reputation could extend outside its use on particular goods and the public might be deceived into thinking that use on other goods had been sanctioned by the original owner. This was particularly so given the use of the mark by both the applicant and the opponent was on goods intended for the same class of customers - travellers - who might well use the BOEING travel goods of the applicant on the BOEING aircraft of the opponent.

She said that the well known tests with respect to para. 28(a) were outlined in *Smith Hayden & Co Ltd's Appn* (1946) 63 RPC 97 at 101. Following those criteria and, given the opponent's considerable reputation in the mark BOEING, I had to now decide the likelihood of the potential deception and confusion amongst a substantial number of persons stemming from the applicant using its mark on the goods listed in the application. The marks belonging to both parties were exactly the same and the declarations from those in the trade, forming part of the opponent's evidence, added weight to its argument. That these experienced traders would infer a connection between the opponent and the present mark was evidence of more than a reasonable possibility of deception and confusion occurring. She said that the travelling public, to whom the present goods were aimed, would also make the same inference. Thus the opponent had established a prima facie case under para. 28(a) which should be answered by the applicant. She said that the applicant had a commercial association with its own declarants, whilst the opponent had no such affiliation with its declarants, giving the latter group's assertions more weight. In any case, it was the Registrar who had to judge the likelihood of deception and confusion as per *Electrix Ltd's App'n* (1959) RPC 283 and *Payton & Co Ltd v Snelling, Lampard & Co* (1900) 17 RPC 628.

She said that travel agencies often offered bags to customers marked with the name of a particular airline and it was not unusual for the opponent to do the same. Such airline bags

were goods of the same description as the present set of goods. Ms Makrigiorgos pointed here to the videotape included in the opponent's evidence which, she said, featured an advertisement for BOEING aircraft with a passenger putting such a bag into an overhead locker.

With respect to any blameworthy action on behalf of the applicant in the present matter, Ms Makrigiorgos said that the applicant's given reason for its adoption of its mark amounted to passing off and was therefore contrary to law, possibly contravening s.52 and para. 53(d) of the *Trade Practices Act*. She said that the applicant had adopted the mark in an effort to gain some of the opponent's reputation and goodwill and this had been admitted to by Mr Monk in his declaration when he said that the present mark, and also the mark AIRBUS, had been adopted to denote travel. This, she said, was an admission of passing off and such purloining of the opponent's mark meant that the present mark was intended to deceive - *Australian Woollen Mills Ltd F.S. Walton & Co Ltd* (1937) 58 CLR 641. The mere indication of origin on the swing tags attached to the goods was not nearly enough to overcome such allegations. The foregoing meant that the mark was disentitled to protection in a court of justice and therefore both paragraphs (b) and (d) of s.28 had been offended.

In relation to the objection under s.40, Ms Makrigiorgos said that any claim of proprietorship of the mark by the applicant was not valid. A claim of local authorship of a mark was only valid if no other person had used a mark in this country. Here the opponent had already established rights in the mark in Australia and was the local author - *Shell Company (Australia) Limited v Rohm and Haas Co* (1949) 78 CLR 601. She further referred to *Seven Up Co v O.T. Ltd* (1947) 75 CLR 203 and to the reasons given by Mr Monk for the applicant's adoption of the mark which, she said, was tantamount to fraud. She referred to several dictionaries where that word was generally defined as the obtaining of a material advantage by unfair or wrongful means, for example by means of a false representation. Here, the applicant was attempting to ride on the applicant's reputation and goodwill without the payment of any royalties.

Ms Makrigiorgos concluded her presentation by submitting that costs should be awarded in the matter to the opponent.

In reply, Mr Kelson said that, with respect to the s.28 objection, it was the reputation of the opponent in Australia for the goods in question as at the date of the application's lodgment - 9 September 1991 - which should be considered. He said that the "collateral products" said to be distributed by the opponent did not amount to use of the marks on the present goods. He referred here to *Ferodo Ltd's App'n* (1948) 62 RPC 111 for support. Any use of the mark on those goods in the United States, as it appeared to be in the catalogue submitted in the evidence in support, did not equate to use of the mark on them in Australia. There was mention in the first Hess declaration of goods in that catalogue being available "world wide, including Australia, since mid-September 1991" but this was an imprecise date, pre-dated by the present application and the goods could only be ordered from an overseas source. He said that this was not use of the mark on those goods in Australia - *Rothmans Ltd v W.D. & H.O. Wills Australia Ltd* (1955) 92 CLR 131. Such a circumstance applied equally to the objections under ss.28 and 40.

Mr Kelson said that there was no evidence of any reputation in the goods enjoyed by the opponent and therefore para. 28(a) did not apply. He said that all of the opponent's evidence pointed to a considerable reputation in aircraft, together with their parts and associated goods. Any appearance of travel bags in advertisements for the opponent's goods was incidental and they were simply props at travellers' feet. The current objection could just as easily be made about cutlery, slippers, magazines or any of the multitude of items used in conjunction with the transport of passengers in aircraft. The opponent was not known in this country as a bag manufacturer, despite any overseas activities or registrations. Any proceedings in overseas jurisdictions concerned different circumstances and parties and were therefore not relevant to the present case.

He said that the Monk declaration clearly set out the circumstances of the adoption of the mark by the applicant. Exhibits to that declaration showed how the bags in question were first ordered from the manufacturer in June and July 1988, and were received from 1 September 1988 onwards. He said that the use of the mark stemmed from the time that the goods were ordered and he referred for support here to the *Yanx* case - *Amalgamated Tobacco Corporation Limited* (1951) 82 CLR 199 . The applicant's evidence showed use of the mark in trade, along with several other marks, shortly after the goods' arrival in the country. The goods' origin was clearly displayed on swing tags attached to them and there was no question at all of an attempt at passing off.

Mr Kelson said that the opponent had not demonstrated use on Class 18 goods at any time and had produced no evidence that anyone would be misled or deceived by the applicant's use on those goods. In the case of *Southern Cross Refrigerating Co v Toowoomba Foundry Pty Ltd* (1954) 91 CLR 592, the opponent's reputation had been built up over a long period of time for a wide range of goods. In the present instance, the only Australian use and reputation by the opponent, as at the relevant date, had been on aircraft and, to a far lesser degree, on sunglasses. Any persons looking at the swing ticket attached to the applicant's goods would not be caused to wonder as to their origin. The declarants for the opponent, despite saying that they would associate use of the mark BOEING on travel bags with that entity, did not indicate whether they knew of any use at all of the mark on those goods by *any* party. In contrast, the declarants for the applicant sold the applicant's goods and therefore knew of its use of the mark on travel packs. Certainly, none of them knew of any use at all by the opponent on anything but aircraft. The opponent's reputation was limited to a narrow area of technology which, especially as at the date of this application, did not flow over to the present goods.

With respect to any alleged wrongdoing on behalf of the applicant, Mr Kelson said that it was not within the purview of the Registrar to rule on passing off and, in any case, none had been committed. He said that it was not unlawful to adopt a mark for use on goods in

Australia providing the overseas proprietor had not used it on those goods here first - *Aston v Harlee Manufacturing Co* (1960) 103 CLR 391.

Mr Kelson said that the opposing parties claims with respect to use of the mark BOEING could only be asserted for their respective goods - the class 18 travel items on behalf of the applicant included in its statement of goods, and the aircraft in class 12 and sunglasses in class 9 included in the registrations of the opponent. In *Hermes Sweeteners Ltd v Hermes* 17 IPR 382, mere assertions of use were not given serious weight. There, an opposition based upon use of a similar mark on class 3 goods did not succeed against classes 5 and 30, and it was held that the goods were not of the same description. Mr Kelson said that the present instance was similar as there was no nexus between the opponent's and applicant's goods which were, in fact, totally different.

Mr Kelson said that Spender J had summarised the law on proprietorship in a judgment, re *Thai Gypsum Products Pty Ltd v Waring and Gillow Pty Ltd and Anor.* 29 IPR 99. His Honour had reviewed the classic decisions on the subject and held, in that decision, that there had been first use by the applicant of the mark in question in a brochure in relation to the goods and that it was therefore the proprietor of the mark in Australia. Here, the present applicant adopted the present mark for the goods in the specification, first used it in this country and applied for registration of it, all without committing fraud. It could therefore legitimately claim to be the proprietor of it in Australia for those goods since 8 September 1988. There had been no evidence submitted which showed that the opponent had used the mark on those particular goods at the time of the present application or subsequently.

He concluded his submissions by asking for costs on behalf of the applicant.

## **Discussion**

*Section 28 - Deception and confusion*

The provisions of this section of the Act read as follows:

A mark -

- (a) the use of which would be likely to deceive or cause confusion;
  - (b) the use of which would be contrary to law;
  - (c) which comprises or contains scandalous matter; or
  - (d) which would otherwise be not entitled to protection in a court of justice,
- shall not be registered as a trade mark.

The test to be applied under paragraph (a) of these provisions, on which the opponent partly relies, has been well established by cases such as *Southern Cross*, supra, where it was said:

Registration should be refused if it appears that there is a real risk that the result of the user of the mark will be that a number of persons will be caused to wonder whether it might not be the case the two products come from the same source.

That risk must extend to a substantial number of people: *Kendall Co v Muslyn Paint and Chemicals* (1963) 109 CLR 300.

Following the High Court decision in *New South Wales Dairy Corporation v Murray Goulburn Co-operative Company Ltd* 18 IPR 385, the *Moo* case, the Registrar now follows the practice as laid out in the decision of Hearing Officer Homann in *Titan Manufacturing Co v John Terrence Coyne* 22 IPR 613 - that is, that all paras of s.28 should be read together. This means that, should I find that the marks are likely to deceive or cause confusion, then it will also be necessary to find that the mark would not be entitled to protection in a court of law.

In assessing the reputation of the opponent's mark in Australia, the relevant date is the date of lodgment of the opposed application - *Southern Cross*, supra. I accept from the opponent's evidence, and from my own knowledge that, at the relevant date, the opponent had a very well established reputation in this country for its mark - although only for its famous aircraft. The opponent does not appear to have had any established reputation for travel goods as at the date of the present mark's application. Indeed, given the declarations

lodged as part of its own evidence, none of the declarants appear to have any knowledge of sales of such items at all by either the opponent or the applicant. There has been no convincing evidence put forward by the opponent to show any instances of deception caused by the use of applicant's mark. The declarations from those in the trade, submitted as part of the opponent's evidence in reply, do indicate that those persons would conclude a connection between the opponent and the present mark, but the applicant has also produced declarations from others in the same field who are equally as adamant that they would not make such a connection. I find nothing sinister in the fact that they sell the applicant's goods. However, all of those declarants have said that they had no direct financial connection with the applicant. From my reading of the declarations from both parties, I think that, if anything, the declarants for the applicant tend to be from more "mainstream" camping and travel goods outlets, whereas those for the opponent are generally from the "boutique" end of the market. Therefore, I cannot accept the opponent's assertion that a "substantial number of persons" would be confused or deceived as to the origin of the two marks in question. The two sets of goods - aircraft and sunglasses on one hand, and Class 18 travel items on the other - are most certainly not goods of the same description. I agree here with Mr Kelson that there is as much nexus between other items used in conjunction with travel and the aircraft manufactured by the opponent as there is between those planes and the bags sold by the opponent. I do not agree that a traveller in a BOEING aircraft would be deceived into believing that the same entity who built it would have made, or sanctioned, the manufacture of the pack he had just surrendered at the check-in desk.

The catalog(sic) submitted as an attachment to the first Hess declaration does have items such as, "Athletic Bag", "Flight Bag" "Golf Umbrella" and "Fanny Pack" amongst the goods for sale but the intended audience of the brochure appears to be North American as only U.S. telephone numbers and addresses are given where potential customers should place an order. The catalogue is dated "Copyright © 1991", which could mean it was produced any time in that year and there is no information regarding its possible Australian distribution. In

any case, Mr Hess claims that the collateral products were available to employees and customers since "mid-September 1991" and the present application was lodged on 9 September 1991. Whichever way the availability of the material is inferred, there would not appear to have been sufficient time for the opponent to build up a reputation in the appropriate goods, prior to the date of lodgment, sufficient to satisfy para. 28(a).

The use of the word BOEING in a television commercial allegedly shown in Australia in the 1970s does nothing, in my opinion, to further the opponent's cause in this leg of the opposition. I have viewed it several times and, although some bags do appear to be carried by some passengers, I cannot agree that they play a featured or memorable part. I do not think that they would be taken by viewers as meaning that they should identify the bags with the aircraft manufacturer, or that they were offered for sale.

I have considered the reports relating to overseas tribunal decisions lodged as part of the opponent's evidence but I cannot agree that they constitute any sort of precedent value in the present case. In the Chilean case, the tribunal decision appears to be based on the incorrect consideration of a previously registered mark, BOING, not owned by the present opponent, whilst the Japanese case was apparently concerned with the opposition to registration of a mark in the form of a confectionery item shaped like the opponent's aircraft. In any event, such decisions are of interest value only because the relevant legislation and judicial systems of the countries concerned may not be the same as Australia's and the individual circumstances involved could well have differed from the present situation.

For the foregoing reasons, I find that use of the applicant's mark will not lead to deception or confusion. I am therefore satisfied that the requirements of paragraph 28(a) have not been made out.

Given the above, I need not proceed further in relation to the s.28 objection. However, for the record, I note that there is nothing before me to show that there has been any

blameworthy conduct on the part of the applicant nor any other circumstance which would disentitle the mark to protection in a court of justice. I cannot agree with Ms Makrigiorgos that I can decide if blameworthy conduct lies with the applicant adopting the mark. The Registrar is not competent to determine matters of passing off and the opponent, should it wish to pursue that matter, should do so in the proper forum. I do note, however, that the applicant appears to generally use the mark as a subsidiary to the house mark D.M.H. TRENDSETTER and attaches a swing ticket clearly denoting the goods' origin. I find, therefore, the requirements of paragraph 28(d) have also not been made out. The opponent's case in terms of s.28 must therefore fail.

*Section 40 - Proprietorship*

The provisions of s.40, so far as is relevant here, are that:

A person who claims to be the proprietor of a trade mark may make application to the Registrar for registration of that trade mark in Part A or Part B of the Register

On that subject, McGarvie J said in *Settef S.p.A. v Riv-Oland Marble Co (Vic) Pty Ltd* 10 IPR 402 at 413:

The basic common law principle is that the first person who uses a trade mark of an appropriate type within a country becomes the proprietor of the mark there: *Re Registered Trade Mark "Yanx"*; *Ex parte Amalgamated Tobacco Corp Ltd* (1951) 82 CLR 199 at 203; *Thunderbird Products Corp v Thunderbird Marine Products Pty Ltd* (1974) 131 CLR 592 at 603; *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* 59 ALJR 77 at 83.

...

In considering who, within s.40(1) of the Act, was at the time of Settef's application for registration the proprietor of the trade mark, one considers who at common law was the proprietor in Australia: *The Shell Co of Australia Ltd v Rohm & Haas* (1949) 78 CLR 601 at 625 and 627.

In other words, the first user of the mark in Australia (for relevant goods and prior to the date of application) becomes the proprietor at common law. That proprietorship, however, is limited to "the same kind of thing", as per Holroyd J in *Hick's trade mark* (1897) 22 VLR 636. Any small amount of use will suffice, but the effect of the act relied on to constitute use must be the creation, in the minds of those concerned, of an impression that goods of a particular trader are being offered for sale in Australia. This has been affirmed in later cases such as the *Seven Up* case, *supra*, where Williams J. said at 211,

But the position is different if at that date the mark has become identified with the goods of the foreign trader in Australia because those goods have been brought into Australia by the foreign trader himself or by some importer or in some other manner.

I am not concerned, in deciding the issue of proprietorship, with the question of whether the opponent's and applicant's marks are so alike as to lead to the deception or confusion of

customers. That question is relevant in relation ss.33 and 28, but not to s.40 which only applies when the marks are identical or so similar as to be virtually the same mark - *The Kendall Co v Mulsyn Paint and Chemicals*, supra; and *Tavefar Pty Ltd v Life Savers (Australasia) Ltd* 12 IPR 159. In the present case, the marks used by both parties are one and the same and both parties are claiming to be the first user and therefore proprietor of the mark in this country for the goods included in the specification.

I think there are two matters which need to be decided in determining the question of proprietorship in this instance. Firstly, was the applicant for registration of the mark the first user of the mark in Australia or did the opponent first sell goods under the mark? Secondly, if the opponent is shown to have used the mark first, was that use on the "same" goods or not? Although the actual date of first Australian use of the mark BOEING on goods by the opponent is not stated, Mr Hess says that the mark has been routinely advertised for "the last quarter of a century" in this country. It is implicit in the opponent's evidence that the mark had been used here for some time before that. The applicant has used the mark BOEING on the goods in the specification, according to the declaration of Mr Monk, since 8 September 1988. It is obvious, then, that the mark itself was first used in Australia by the opponent. The question then to be answered is whether that use was on the appropriate goods thus allowing the opponent to succeed in its opposition to the present application under the ground of s.40 of the *Trade Marks Act*. I am of the opinion that it has not. The opponent's evidence shows that, for a considerable period, it has used the mark in this country on the aircraft that it manufactures and also on a variety of associated equipment. Mr Hess declared that the mark has also been used "over the years" on "collateral products" - which include some of the present goods - in promotional programmes for Qantas and other customers. However, nowhere in the opponent's evidence is there any support for the proposition that this use pre-dated the present application, or the applicant's claimed use since 8 September 1988 which is supported by invoices and other documents lodged in evidence. The only document which relates to the opponent's use on the appropriate goods is the gift catalogue, attached to the first Hess declaration, which is said to have been

available since mid-September 1991. I cannot agree that the use of the mark in the video and advertisements, also attached to that declaration, can be regarded as an offer to trade in the present goods. The appearance of any travel items in that context is use as props and is not, in my opinion, use of the mark in connection with the goods.

For the foregoing reasons, I find that the opponent is not successful on this ground of its opposition.

### **Conclusion**

I find that the opponent has failed on all of the grounds relied upon in the notice of opposition. I therefore dismiss the opposition and, subject to any appeal from this decision, the mark should proceed to registration.

I can see no reason why costs should not follow the result and I accordingly award costs in the matter to the applicant.

Ian Forno  
Hearing Officer

22 March 1995