

**In The Matter Of Application No. 3613/94
By Atlas Vending Pte Ltd
To Register A Trade Mark In Class 32**

And

**In The Matter Of Opposition Thereto
By PepsiCo Inc.**

*Before Assistant Registrar Chua Ser Ching
16 May 2001*

Trade mark - Application for registration - Opposition - Whether marks are confusingly similar - Common element in marks -- Proprietorship of the word "DEW" - Importance of device in mark - Products which may be brought by children

The Applicant applied for the registration of a mark which consists of the words "MORNING DEW", and a device of a leaf with dew drops in respect of a variety of beverages in Class 32.

The Opponent is the registered proprietor of two "MOUNTAIN DEW" marks in Class 32, one in the form of a plain wordmark and the other stylised.

The Opponent based its opposition on Section 10, 11, 12, 15 & 23(1) of the Trade Marks Act (Cap. 332, 1992 Revised Edition). It argued, inter alia, that:

- the Applicant's mark is not distinctive in the light of the Opponent's marks;
- children, potential purchasers of the goods concerned, will not be able to distinguish the Applicant's mark from the Opponent's; and
- the Opponent's goods are known in Singapore as "DEW".

Held, dismissing the opposition:

- The words "morning" and "mountain" are not phonetically or visually similar.
- Marks must be looked at in their entirety and the Applicant's distinctive device of a leaf with dew drops further distinguishes the Applicant's mark from the Opponent's.
- Children may be sharper than adults when it comes to goods of interest to them.
- There is no evidence that the Opponent's goods are known in Singapore as "DEW". The newspaper reports tendered in evidence are American in origin and have to be read in context.
- The principle that, where two marks contain a common element which is also contained in a number of other marks, purchasers will pay more attention to the other features of the marks, is only applicable where there is extensive evidence of use of the marks in the same market.
- Since the Applicant's mark does not resemble the Opponent's marks, the Opponent's Sections 12, 15 & 23(1) grounds fail.
- The Opponent's reliance on Sections 10 & 11 are misconceived since these two sections are not meant for determining whether a mark is distinctive in the light of another mark. Sections 15 & 23 are provided for that purpose.

Provisions of legislation discussed:

- Trade Marks Act (Cap. 332, 1992 Revised Edition), sections 10, 11, 12, 15 and 23.

Cases referred to:

- Pianotist Co's Application (1906) RPC 774
- Bailey (1935) 52 RPC 136
- Aristoc Ltd v Rysta Ltd (1943) 60 RPC 87
- Otsuka Pharmaceutical Case (1995) AIPR 86
- Fialho Case (1937) 54 RPC 193

- Rose Cardin Case (1995) RPC 246
- Clark v Sharp (1898) 15 RPC 141
- Smith Hayden (1946) RPC 97
- In re Broadhead (1950) 67 RPC 209
- Harrods Case (1935) 52 RPC 65
- Bali Case (1969) RPC 472

Representation:

- Mr Patrick Yap (M/s K L Tan & Associates) for the Applicant
- Mr P Sivakumar (M/s Ella Cheong & G Mirandah) for the Opponent