

**IN THE HEARINGS AND MEDIATION GROUP OF
THE INTELLECTUAL PROPERTY OFFICE OF SINGAPORE
REPUBLIC OF SINGAPORE**

Trade Mark No. T0312726Z
29 June 2012

IN THE MATTER OF A TRADE MARK REGISTRATION BY

POWER ROOT (M) SDN. BHD.

AND

APPLICATION FOR REVOCATION THEREOF BY

THE SUNRIDER CORPORATION DBA SUNRIDER INTERNATIONAL

Hearing Officer: Ms See Tho Sok Yee
Principal Assistant Registrar of Trade Marks

GROUND OF DECISION

1 The Registered Proprietors ("Proprietors"), Power Root (M) Sdn. Bhd., are the owners of Trade Mark No. T0312726Z ("the Trade Mark") in Class 32. The Trade Mark was registered with effect from 20 August 2003 in respect of "Mineral water; fruit juices, fruit juice beverages (non-alcoholic); fruit extracts; isotonic beverages; milk of almonds (beverages); non alcoholic beverages and non alcoholic fruit extracts; soya bean based carbonated and non carbonated (non-alcoholic) beverages and drinks; syrups for beverages; vegetable juices (beverages); all included in Class 32."

2 The Applicants for Revocation ("Applicants") are The Sunrider Corporation dba Sunrider International. They filed an application to revoke the Trade Mark on 16 November 2010.

3 The Proprietors filed their Counter-Statement on 16 March 2011. This was followed by the Applicants' evidence on 6 October 2011. The Proprietors did not file any evidence. As such, the Registrar confirmed in writing on 24 April 2011 that the Proprietors are deemed to admit to the facts alleged by the Applicants, applying Rule 59(2)(d) of the Trade Marks Rules (Cap 332, 2008 Rev Ed) read with Rule 33(3).

4 The Applicants filed written submissions in support of their application to revoke the Trade Mark. Both parties did not attend the revocation hearing fixed for 29 June 2012.

Ground of Revocation

5 The Applicants rely on Sections 22(1)(a) and 22(1)(b) of the Trade Marks Act (Cap 332, 2005 Rev Ed) (“the Act”) in their grounds of revocation filed on 16 November 2010.

6 In their submissions on 13 June 2012, however, the Applicants acknowledge that the evidence by the Proprietors in the Counter-Statement shows that the Trade Mark was used between 2003 and 2004. The Applicants concluded their submissions by submitting that the Trade Mark should be revoked under Section 22(1)(b) of the Act. It therefore appears that the Applicants are not proceeding on Section 22(1)(a) of the Act in this revocation.

7 The sole of ground of revocation is therefore Section 22(1)(b).

Applicants' Evidence

8 The Applicants' evidence comprises a Statutory Declaration made by Mrs Oi-Lin Chen, President of the Applicants, on 28 September 2011 in Los Angeles, the United States of America.

Applicable Law and Burden of Proof

9 The applicable law is the Trade Marks Act (Cap 332, 2005 Rev Ed). Under Section 105 of the Act, if a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.

10 The undisputed burden of proof in the present case accordingly falls on the Proprietors.

MAIN DECISION

Ground of Revocation under Section 22(1)(b)

11 Section 22(1)(b) of the Act reads:

Revocation of registration

22.

—(1) The registration of a trade mark may be revoked on any of the following grounds:

...

(b) that such use has been suspended for an uninterrupted period of 5 years, and there are no proper reasons for non-use;

Proprietors' Position

12 The Proprietors claimed in the Counter-Statement that there was an import ban imposed by the Agri-Food and Veterinary Authority of Singapore through their circular of 22 September 2004, stating that "the drink products sold under the Registered Trade Mark contained non-permitted substances". The Proprietors have not been able to import their drink products bearing the Trade Mark into Singapore and are appealing against the ban to date.

Applicants' Submissions

13 In their submissions, the Applicants refer to the Proprietors' evidence filed in the Counter-Statement. They acknowledge that there is evidence of use of the Trade Mark between 2003 and 2004. On the other hand, the evidence dated in 2009 and 2010 do not show the Trade Mark in use.

14 The Applicants also refer to the Proprietors' website at www.powerroot.com and submit that there is no evidence of the Trade Mark in use.

15 Further, the Applicants commissioned a private investigation by HS Intellectual Property Services. An investigation on the use / non-use of the Trade Mark was undertaken from 7 April 2011 to 6 May 2011. The investigator "arrived at a 'true and fair' conclusion that drink products bearing the said mark are not available in Singapore and it is not being used in Singapore for a period of five or more years as of April 2011."

16 As for the ban by the Agri-Food and Veterinary Authority of Singapore, the Applicants submit that the Proprietors have not adduced evidence of the ban even though it is incumbent on the latter to give proper reasons for non-use. Neither have the Proprietors furnished evidence on the steps taken to overcome the ban.

17 The Applicants argue that it has been eight years since the ban. Since the Trade Mark has not been used for a continuous period of 5 years and there are no proper reasons for non-use, the Trade Mark should be revoked.

Decision on Section 22(1)(b)

18 As preliminarily noted in the foregoing, the burden of proof is on the Proprietors, under Section 105 of the Act, to show what use has been made of the Trade Mark. Additionally, the Proprietors are deemed to admit to the facts alleged by the Applicants under Rule 59(2)(d) of the Trade Marks Rules.

19 Based on the private investigation report and printouts from the Proprietor's website, the Applicants have established a *prima facie* case that there is no use of the Trade Mark in Singapore in respect of the goods claimed.

20 By the Proprietors' own reference to an import ban imposed by the Agri-Food and Veterinary Authority of Singapore in their Counter-Statement, it appears that the Proprietors do not dispute they have not used the Trade Mark since the alleged ban.

21 The Proprietors' defence, however, is that there are proper reasons for non-use. In particular, the import ban imposed by the Agri-Food and Veterinary Authority of Singapore prevented the import to Singapore of the goods on which the Trade Mark is used.

22 It is noted that the Proprietors' specification of goods in respect of which the Trade Mark is registered is relatively wide. The specification covers "Mineral water; fruit juices, fruit juice beverages (non-alcoholic); fruit extracts; isotonic beverages; milk of almonds (beverages); non alcoholic beverages and non alcoholic fruit extracts; soya bean based carbonated and non carbonated (non-alcoholic) beverages and drinks; syrups for beverages; vegetable juices (beverages); all included in Class 32." It is not reasonable to conclude on a balance of probabilities, especially given the lack of evidence on the contents of the import ban, that the ban by the Agri-Food and Veterinary Authority of Singapore would cover all the above kinds of goods.

23 Further, it is well within the Proprietors' ability to adduce evidence in respect of the import ban and of their efforts to appeal against the ban. However, they have not done so. Accordingly, they have not discharged their evidential burden to establish proper reasons for non-use.

24 The ground of opposition under Section 22(1)(b) therefore succeeds.

25 Section 22(7) of the Act provides that the effective date on which the rights of the Proprietors are deemed to have ceased is either the date of the application for revocation, in this case 16 November 2010, or, if the Registrar is satisfied that the grounds for revocation existed at an earlier date, that date.

26 The Applicants did not specify the uninterrupted period of 5 years relevant under Section 22(1)(b). In the absence of more concrete indications of any uninterrupted period of 5 years ending before 16 November 2010, I am inclined to apply Section 22(7)(a) of the Act and revoke the Trade Mark as from the filing date of the application for revocation.

Conclusion

27 Having considered all the pleadings and evidence filed and the submissions made in writing, I find that the revocation succeeds under Section 22(1)(b). The Trade Mark is revoked as from 16 November 2010. The Applicants are also entitled to costs to be taxed, if not agreed.

Dated this 30th day of July 2012

See Tho Sok Yee

Principal Assistant Registrar of Trade Marks
Hearings and Mediation Group
Intellectual Property Office of Singapore