

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

Trade Mark Application No. T1102788J
11 February 2016

IN THE MATTER OF A TRADE MARK REGISTRATION BY

TRANSASIA FINE PAPERS PVT LTD

AND

APPLICATION FOR DECLARATION OF INVALIDITY BY

ARJO WIGGINS FINE PAPERS LIMITED

Hearing Officer: Ms Diyanah Binte Baharudin
Assistant Registrar of Trade Marks

Mr Just Wang (Bird & Bird ATMD LLP) for the Registered Proprietors
Ms Gloria Goh and Mr Marc Wei (Allen & Gledhill LLP) for the Applicants

Cur Adv Vult

GROUND OF DECISION

1 The present case is an application for declaration of invalidity by Arjo Wiggins Fine Papers Limited (the “**Applicants**”) for the following trade mark registered by Transasia Fine Papers Pvt Ltd (the “**Registered Proprietors**”):

Trade Mark No	Representation of Mark	Class	Specification	Application Date
T1102788J		16	Bulk Paper; Coated Paper for Packaging; Coated Paper for Printing; Cut Sheet paper for use in office; Fine paper; Paper Boards; Paper for letterhead paper; Paper for graphical use; Paper for official documents; Paper for printing purposes; Paper for	07/03/2011

			use in printing; Paper for use with computer printers; Paper for vouchers; Paper for writing; Paper in loose sheets (not sensitized); Paper in sheet form (not sensitized); Paper in roll form (not sensitized); Paper pads; Paper postcards; Paper pouches (envelopes) for packaging purposes; Paper pouches (envelopes) for wrapping purposes; Paper sheets (stationery); Paper stationery; Paper tags.	
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(the “Registered Mark”)

Grounds of Invalidation

2 The Applicants rely on Section 23(1) read with Section 7(6) of the Trade Marks Act (Cap 332, 2005 Rev Ed) (the “Act”).

Applicants' Evidence

3 The Applicants' evidence comprises of Mr Jonathan Mitchell’s Statutory Declaration dated 17 December 2014 (“1st Mitchell”) and his Statutory Declaration in Reply dated 21 September 2015 (“2nd Mitchell”). Mr Jonathan Mitchell is the Director of the Applicants in this matter.

Registered Proprietors' Evidence

4 The Registered Proprietors’ evidence comprises Mr Rajesh Kejriwal’s Statutory Declaration dated 4 June 2015 (“1st Rajesh”). Mr Rajesh is the Director of the Registered Proprietors in this matter.

5 Neither of the deponents was called to the stand as witnesses for cross-examination, despite the case being based on the sole ground of bad faith under Section 23(1) read with Section 7(6) of the Act.

Applicable Law and Burden of Proof

6 It is trite law that the legal burden of proof needed to substantiate an action for invalidation of the registration of a trade mark lies on the Applicants: *Valentino Globe BV v Pacific Rim Industries Inc* [2010] 2 SLR 1203 (“Valentino”) at [21], citing *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814 (“Wing Joo Loong”) at [33].

Background

7 The Applicants are a leading manufacturer of creative and technical paper for use in a variety of industries and for different purposes, including coated paper for traditional and digital printing as well as creative paper for corporate communication and promotion, luxury packaging, fine arts, bookbinding and papers dedicated to speciality applications. The Registered Proprietors became the sole distributors for the Applicants’ paper products in all

of the Republic of India under a distribution agreement that was entered into on or around 17 July 2000 (the “**Distribution Agreement**”). The Distribution Agreement is not dated, but a letter dated 17 July 2000 from the Applicants to the Registered Proprietors enclosing a signed copy of the said Distribution Agreement is found in the evidence of both parties (1st Rajesh at p 22-31; 1st Mitchell at p 315-324).

8 Clauses 2 and 4 of the Distribution Agreement state that:

Expansion of Sales by Distributors	2. DURING the continuance of this Agreement the Distributors will conform to and comply with the instructions from time to time given to them by the Company and will well and faithfully serve the Company and endeavour to extend the sale of the Products within the Territory and will not do or cause to be done anything that may in any way hinder or prevent the sale of the said Products or interfere with the development of the Company’s business within the Territory.
Competition by Distributors	4. DURING the continuance of this Agreement the Distributors shall not offer for sale within the Territory either on their own account or on behalf of any other manufacturer or supplier any Products similar to any of the Products or which compete or interfere with the sale of the Products provided that the Distributors shall be entitled to sell the Products (if any) set out in Section 4 of the Schedule.

9 In April 2002, the Applicants introduced the “Curious Collection” brand (which included the “Skin Curious Collection”) to their distributors at a conference (1st Mitchell at p 80-81). The Registered Proprietors were in attendance at this conference, alongside several other companies (1st Mitchell at p 81). At this conference, a presentation was given by one Chris Brown to the attendees, and his presentation slides had the wording “be curious / be remarkable” in the top right hand corner of each slide. The Applicants supplied the Registered Proprietors with “Curious Collection” papers for sale in India from 2002 onwards (1st Mitchell at [22]).

10 Sometime in 2003, the Registered Proprietors came up with the idea of creating a bespoke marketing campaign that targeted the creative designing industry as it had growth potential. In 2004, the Registered Proprietors engaged a design communications company called Monkey Wrench Communications Private Limited (“**Monkey Wrench**”) and gave them the following instructions: (a) to invent a word that revolves around creativity and curiosity (b) wherein the invented word must trigger a question such as a “why” or “how” and that (c) further the word must be Indian but with a global connection. Based on these instructions, Monkey Wrench came up with the word “KYOORIUS”, which is a combination of “KYOON” (meaning “why” in Hindi) and the English word “curious” (see 1st Rajesh at p 34).

11 In November 2005, there was an email exchange between Mr Gary Bowles (the then-Market Manager, South East Asia, for the Applicants) (“**Mr Bowles**”) and Mr Rajesh

Kejriwal (the Director of the Registered Proprietors and the deponent of the Registered Proprietors' Statutory Declaration in the current proceedings) ("Mr Rajesh"). The parties were in dispute over the interpretation of an e-mail from Mr Rajesh to Mr Bowles dated 25 November 2005 (the "Email"). Essentially, the Applicants' view was that this Email contained various assurances that the Registered Proprietors would not use "KYOORIUS" for anything other than a design service centre (called "Kyoorius Exchange") and not as a brand for competing creative paper products. The Registered Proprietors' view was that Mr Rajesh was merely addressing Mr Bowles' concern about competition from other paper suppliers as a result of Kyoorius Exchange and not the similarity of "KYOORIUS" to the "Curious Collection" mark.

12 Despite the issues raised in this Email, the parties resumed business relations thereafter. Between 2006 and 2008, the Applicants' sample invoices show that they sold reams of paper, including paper from both the "Curious Collection" and "Conqueror" brands, to the Registered Proprietors through another company, Reemar Paper Ltd (1st Mitchell, pp 333 – 525). The "Curious Collection" and other "Curious"-prefixed signs indicating the various types of paper products in this range regularly appeared alongside the sign "KYOORIUS EXCHANGE: Where Creatives Meet" on a number of sample paper swatches compiled by the Registered Proprietors, as seen in 1st Rajesh at pp 96-97, 104-107, 112-113, 120-121, 126-127, 130-131, 134.

13 In 2006, the Registered Proprietors sent slide presentation material relating to "Kyoorius Exchange" to the Applicants' Mr Bowles (1st Rajesh at [30]). The slide presentation is titled, "KYOORIUS Exchange: The Creative Hub", and lists Kyoorius Exchange's business goals as a creative industry "supplier", "partner" and "connector". As regards being a "supplier", they would supply paper, books and magazines and art supplies. These supplies currently included "Arjo Wiggins Brands" but would be expanded to include a "wide range encompassing all customer brackets: Gmund, Favini, Fabriano, James Cropper, Burgo/Condat, etc": see 1st Rajesh, at pp 262-264.

14 Further to this presentation, the Registered Proprietors embarked on an elaborate strategy to reach out to the creative designing industry by way of, *inter alia*, seminars and conferences under various KYOORIUS-prefixed marks. One of the main events was a conference called "KYOORIUS DESIGNYATRA". The evidence contains advertising material and photographs showing that it was organized for 4 consecutive years from 2006 to 2009 (1st Rajesh, Exhibit 3, pp 36-94). The brochure for the 2006 event described it as "the first design event in India" which would serve as "a platform to bring together Indian and international design communities, design-led businesses and organizations through a broad range of activities including design conferences, trade exhibitions, curated exhibitions, workshops and parties" (sic) (1st Rajesh at p 36). "KYOORIUS EXCHANGE" and the stylised phrase "KYOORIUS EXCHANGE: Where Creatives Meet" appear prominently on all advertising and promotional materials for the KYOORIUS DESIGNYATRA events.

15 The parties' contractual relationship as supplier and distributor ended on 28 October 2010, when the Applicants, through Antalis Asia Pacific Pte Ltd, gave the Registered Proprietor 3 months' written notice of their intention to terminate the Distribution Agreement (1st Rajesh at 223; 1st Mitchell at 326). Their business relationship had lasted for slightly over 10 years. During the course of this relationship, the Registered Proprietors had distributed about 13 different brands and sub-brands of the Applicants' paper products in India, including the brands "Skin Curious Collection" and "Curious Collection" (see 1st Rajesh at p 2-3, 1st

Mitchell at 11-12). The other brands were: Conqueror, Rives, Countryside, Yearling, Stratakolour, Popset, Keaykolour, Courier, Sensation, Village and Opale (1st Rajesh at [5]; 1st Mitchell at [20]).

16 About 5 months later, the Registered Proprietors applied to register the Application Mark on 7 March 2011. On the same date, they also applied for the same mark in Class 41 for the specification “Arranging and conducting of conferences; arranging of conferences; conducting of business conferences; conducting of educational conferences; consultation services relating to publication; publication of books; publication of educational materials; publication of journals; publication of magazines; publication of manuals; publication of multimedia material online; publication of posters; weblog (blog) services (online publication of journals or diaries).” These applications were both granted. The Applicants brought the present proceedings for invalidation, but only for the Application Mark registered in Class 16.

Ground of Invalidation under Section 7(6)

17 Section 23(1) of the Act reads:

23.—(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 7.

18 Section 7(6) of the Act provides that:

7.—(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.

Decision on Section 7(6)

19 As mentioned above at [5], neither of the parties’ deponents was cross-examined and I am therefore left to decide the issue of bad faith based on the documents filed in 1st Mitchell, 2nd Mitchell and 1st Rajesh, in particular, an e-mail from Mr Rajesh to Mr Bowles, which both parties spent considerable time on during the oral submissions of this hearing (see below at [22]-[41]). I would therefore be careful to draw any adverse inferences against either party unless this is very clear on the face of the documents before me.

The combined test for bad faith

20 The legal test for determining the presence of bad faith is fairly settled and is summarized in *Valentino* at [29], citing *Wing Joo Loong* at [105]-[106]. In turn, *Wing Joo Loong* cites the English cases of *Harrison v Teton Valley Trading Co Ltd* [2004] 1 WLR 2577 and *Ajit Weekly Trade Mark* [2006] RPC 25. The test is a “combined” test which contains both a *subjective element* (*viz*, what the particular applicant knows) and an *objective element* (*viz*, what ordinary persons adopting proper standards would think). The subjective element of the test means that the tribunal must ascertain what the Registered Proprietors knew about the transaction or other matters in question. It must then be decided whether in the light of that knowledge, the Registered Proprietors’ conduct is dishonest judged by ordinary standards of honest people, the Registered Proprietors’ own standards of honesty being irrelevant to the objective element. The objective standard is “acceptable commercial behaviour observed by reasonable and experienced persons in the particular commercial area being examined.” Bad faith should also be determined as at the date of the application

(*Festina Lotus SA v Romanson Co Ltd* [2010]4 SLR 552 (“*Festina*”) at [100]) – in this case, as of 7 March 2011.

21 As stated in *Valentino* at [30] citing *Nautical Concept Pte Ltd v Jeffery Mark Richard and another* [2007] 1 SLR(R) 1071 (“*Nautical Concept*”) at [15] that was in turn citing the English decision in *Royal Enfield Trade Marks* [2002] RPC 508:

Furthermore, it is pertinent to note that an allegation of bad faith is a serious claim to make and it must be sufficiently supported by the evidence (see *Nautical Concept Pte Ltd v Jeffery Mark Richard* [2007] 1 SLR(R) 1071 at [15] which we reproduced below):

An allegation that a trade mark has been applied for in bad faith is a serious one. In *Royal Enfield Trade Marks* [2002] RPC 508, it was held (at [31]) that:

A plea of fraud should not be lightly 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) [of the UK Trade Marks Act 1994]. *It should not be made unless it can be fully and properly pleaded and this will rarely be possible by a process of inference.* [Emphasis added; emphasis in original omitted]

Was there a “gentleman’s agreement” in the Email?

22 In the absence of an express written agreement, the Applicants submit that the Email (mentioned above at [11] and reproduced below at [23]) contained assurances from the Registered Proprietors that they would only use “KYOORIUS” as a brand name for a design service centre, organising events, seminars, conferences, and publishing. They further submit that the Registered Proprietors assured the Applicants that “KYOORIUS” would not be used as a brand for creative paper products. Other assurances were also made regarding the Registered Proprietors’ intent to only stock paper that complemented the Applicants’ collection, and that they would remain loyal to them.

23 The entire Email is reproduced below (without any editorial amendments on my part) to aid in understanding the parties’ arguments and the subsequent analysis of the same:

“Dear Gary

Apologies for the late revert and Thank you. I will discuss this with Subodh the next time I am in Delhi, unless he contacts me first. I think it is very unlikely that he will contact me since we have met many a times and we are unaware of each other and it did not justify him sending a mail to Conqueror. I have met him with Nick Mason regarding re-distribution in India and post the meeting, both Nick and I decided that he is too price oriented and commodity inclined to be our distributor but we could make him a dealer (Which he declined).

What Subodh has done is what any “Swash buckling” mercenary paper merchant would do. Due to the opening of [KE] there could be some overlapping on our side and interpretation and perception of people can be taken in any direction. Nevertheless, I would like to clarify on the situation in India since this has also come up for a conference call twice in the recent past. I deem it necessary to reassure my partners “AWFP” of our strong commitment towards the development of the AWFP range in India.

[1] We have a very transparent approach in all our dealings..... During your visit in India in April, I had mentioned to you and also given you a presentation of my being a partner in a project styled “Kyoorius Exchange”. Kyoorius Exchange (KE) is a venture in which I am a stakeholder and its business module is along the lines of a “Design Service Centre” which is beyond just paper. TAFP is a paper merchandising business primarily Conqueror Led though we are adding coated to enhance our basket. As a “design service center”, KE’s main activities are more diverse and would range from being a “resource center” (the new buzz word for library), ‘image bank”, “Apple Mac center”, or what we can even call as an equivalent of a “design cafe” (another favorite buzz word to add to internet cafe, print café, and etc). Distribution of paper would just be an extension of the services, in the same way as the selling of design books, pens, stationery, art materials, CD ROMs, Mac peripherals and etc. However stocking paper in its full range availability is one of the key ingredients to KE. Paper distribution is not its core area though it has to have a complete range since it has a more designer end-user orientation. I do want to emphasise that there is a distinct difference between TAFP and KE. Please also note that KE would have been formed, with or without me by the other stakeholders.

[2] KE will look at ranges of paper which compliment AWFP collection or is not available with AWFP. My being in the picture ensures that KE stocks only relevant paper and does not in any way jeopardise my current and future sales of AWFP. Book Binding, Ivory Board, Large colour range, Coated, Handmade, etc are some of the ranges that we are looking at other than some exclusive papers.

[3] This was a strategy which curtails the advent of Favini or other mills in India to AWFP benefit since our very large focus is on AWFP brands. Its something which I cannot explain but Conqueror is in our blood, others are just business exigencies. We can manage which paper is sold most of the time and that is AWFP. Keeping the “competition” in check by also distributing their products through a allied source is a good strategy, imagine the feedback that we can get.

[4] If you look at all the successful paper merchants (Surya Palace, Star Paper, Dougett, even Anthalis to some extent), they have all been successful because of the range they carry – they compliment each other and overall you have a position of strength. While exclusivity has a distinct advantage, it also enables you to lose some orders due to many unavoidable reasons. This way you keep the customers within your reach, thus helping keep other competition at bay.

[5] We take a larger market share and since we have all the ranges (including coated which I am adding), most designers and printers refer to buy from us. Our rapport with them also turns into a nice bond and with KE, we have the perfect

combination to keep them with us. This strength also helps in diminishing other small distributors because the low sales or price makes in unviable for them.

[6] If you look at this minutely, you will realize that it is better to have these brands with us where we can manipulate and keep the FAST MOVING lines of AAFP safe, rather than have this with another merchant who will compete with us on just price alone and will also stock similar fast moving lines. We take a bigger hit.

We will cross our target this year of 150 Mt (Inspite of all stock lots and cut in A&P) and we have targeted 200Mt next year in our marketing plan. But I am confident that I will give you a business of at least 250Mt next year which is my target to my marketing team.

Having said all this, the basic contention is that you will need to reassure yourself and trust Transasia to deliver its best to AAFP and 100% loyalty. Its a promise which I am willing to go on record and make. I have invested a lifetime (if you look at my lifetime with fine papers over the last seven years) and also invested huge monies in ensuring that Conqueror is a brand in India apart from generating business. I am not going to jeopardise what I have invested over the last few years in other distribution business unless it made a perfect fit.

I was a little disturbed over your apprehension (Though I can see where you are coming from) but if you look at the background both Transasia and AAFP have had a good partnership and would continue to do so. Will and yourself have been very supportive over the last one year, within the parameters that you have, and I am extremely thankful. Please trust me on this one too. Please do advise me on some strategy that we can develop to utilise KE to our better advantage. I would be obliged if you can treat this very confidentially between you, Will and myself only. Thanks in advance.” (sic)

24 At the hearing, the Applicants highlighted various lines of the Email to show that Mr Rajesh knew that Mr Bowles had “apprehensions” about what “Kyoorius Exchange” (“**KE**”) would be used for, since it had come up twice during conference calls in the past. They point to the following lines in the Email that indicated such (with emphasis on words in bold):

- a) “Due to the opening of [KE] there could be some overlapping on our side and interpretation and perception of people can be taken in any direction. Nevertheless, I would like to clarify on the situation in India **since this has also come up for a conference call twice in the recent past**”; and
- b) “**I was a little disturbed over your apprehension** (Though I can see where you are coming from) but if you look at the background both Transasia and AAFP have had a good partnership and would continue to do so.”

25 In their view, the language used in the Email indicated that KE would be focused on distribution of paper rather than as a brand of paper. They point to the following lines in the Email that indicate such (with emphasis on words in bold):

- a) “As a “**design service center**”, KE’s main activities are more diverse and would range from being a “resource center” (the new buzz word for library), ‘image bank’, “Apple Mac center”, or what we can even call as an equivalent of a “design cafe” (another favorite buzz word to add to internet cafe, print café,

and etc). **Distribution of paper would just be an extension of the services**, in the same way as the selling of design books, pens, stationery, art materials, CD ROMs, Mac peripherals and etc. However stocking paper in its full range availability is one of the key ingredients to KE. **Paper distribution is not its core area** though it has to have a complete range since it has a more designer end-user orientation”; and

- b) **“KE will look at ranges of paper which compliment AAFP collection or is not available with AAFP”**.

26 The Applicants referred to Mr Rajesh’s statement of his “100% loyalty” to them and that KE would only stock paper to complement the Applicants’ paper collection or papers which are not available from the Applicants. He went on to assure Mr Bowles that his being in the picture would ensure that KE would not jeopardize the Applicants’ paper sales. Finally, the Applicants took issue with Mr Rajesh’s representation that he was only one of the stakeholders of KE and it would have gone ahead with or without his participation, but that in reality, he was the mind behind the conceptualization of KE.

27 The Registered Proprietors, on the other hand, were of the view that Mr Rajesh was transparent that the distribution of paper would always be an extension of KE, citing the following lines in the Email (with emphasis on words in bold):

- a) “Kyoorius Exchange (KE) is a venture in which I am a stakeholder and its business module is along the lines of a “Design Service Centre” **which is beyond just paper**”; and
- b) **“Distribution of paper would just be an extension of the services**, in the same way as the selling of design books, pens, stationery, art materials, CD ROMs, Mac peripherals and etc. However stocking paper in its full range availability is one of the key ingredients to KE. **Paper distribution is not its core area though it has to have a complete range since it has a more designer end-user orientation**”.

28 They argued that reading the Email as a whole, it would be clear that Mr Rajesh was not seeking to clarify the Registered Proprietors’ position on the use of “KYOORIUS” as a trade mark. Instead, they were only trying to address concerns that the Registered Proprietors would be using KE to distribute other brands of paper products. To this end, they highlighted Clause 4 of the Distribution Agreement (extracted above at [8]), and the following lines in the Email:

- a) “This was a strategy which curtails the advent of Favini or other mills in India to AAFP benefit since our very large focus is on AAFP brands. Its something which I cannot explain but Conqueror is in our blood, others are just business exigencies. We can manage which paper is sold most of the time and that is AAFP. **Keeping the “competition” in check by also distributing their products through a allied source is a good strategy, imagine the feedback that we can get**”;
- b) “We take a larger market share and since we have all the ranges (including coated which I am adding), most designers and printers refer to buy from us. Our rapport with them also turns (sic) into a nice bond and with KE, we have the perfect combination to keep them with us. This strength also helps in diminishing other small distributors because the low sales or price makes in unviable for them”;

- c) “If you look at this minutely, you will realize that it is better to have these brands with us where we can manipulate and keep the FAST MOVING lines of AWF safe, **rather than have this with another merchant who will compete with us on just price alone and will also stock similar fast moving lines.** We take a bigger hit”; and
- d) “I am not going to jeopardise (sic) what I have invested over the last few years in **other distribution** business unless it made a perfect fit.”

29 They also referred to the slide presentation material discussed above at [13], where one of the slides refers to the business goals of KE, one of which was to be a supplier in addition to being a distributor for paper for the creative industry. As regards “the situation in India” (see the second introductory paragraph in the Email), the Registered Proprietors countered that it did not refer to any agreement that KE or “KYOORIUS” would never be used as a trade mark for paper products. Instead, this referred to the concerns that the Registered Proprietors were distributing other brands of paper products through KE despite a clause in the Distribution Agreement which forbade them to supply other brands of paper products “similar to any of the [Applicants’] [p]roducts or which compete or interfere with the [Applicants’] [p]roducts” (extracted above at [8]).

30 In relation to the statements made by Mr Rajesh as to his loyalty and that he would only stock paper to complement the Applicants’ paper collection, the Registered Proprietors responded that this was not a commitment made in perpetuity. The statements were made at a time when the parties were still in a contractual relationship, but terminated upon the termination of the Distribution Agreement. Further, as regards the issue of whether Mr Rajesh was one of the key stakeholders in KE, the Registered Proprietors submitted that this has little bearing on the issue of bad faith, and that in any event, it was the truth, given that there were other parties involved in setting up KE as well.

My findings on the Email

31 I find the Registered Proprietors’ submissions as regards the content of the Email more persuasive than that of the Applicants. The Email must be read in light of the surrounding circumstances. At the time it was written, the Distribution Agreement was still in force and this agreement placed restrictions on the Registered Proprietors’ marketing efforts in India. According to Clause 2, the Registered Proprietors were contractually bound not to “hinder or prevent the sale of the [Applicants’] [p]roducts or interfere with the development of the [Applicants’] business within [India].” Clause 4, labelled “Competition by Distributors”, contractually obliged the Registered Proprietors not to offer for sale products that were “similar to any of the [Applicants’] [p]roducts or which compete or interfere with the sale of [the same].” Section 4 of the Schedule that was referred to in the Distribution Agreement was simply marked “N/A”, indicating that there were no other products that the Registered Proprietors were allowed to deal with.

32 Despite these clauses, KE had been formed either by the Applicants and/or other stakeholders. In the Email, Mr Rajesh referred to this meeting and explained that KE would be a “design service centre” that would be “diverse” and that “distribution of paper would just be an extension of the services” but that “however, stocking paper in its full range availability is one of the key ingredients of KE.” He explained that the distribution of paper would not be a core area although KE needed “a complete range since it has a more designer end-user orientation.” Further down the Email, he sought to justify KE’s existence, saying that it was

“a strategy which curtail[ed] the advent of Favini or other mills in India to [the Applicants’] benefit.” Later in the paragraph, he mentioned that this would “keep the competition in check by distributing their products through an allied source” and that this would be a useful channel to obtain feedback. Paragraphs of the Email labelled [4], [5] and [6] go on to describe how successful paper merchants had retained their success “because of the range they carry”. He described the disadvantages of having exclusivity, because orders may be lost through unavoidable reasons, and that having a range of products would keep customers within reach. There would also be a “bond” between customer and distributor through KE. Lastly, he described how it would be better to aggregate the various brands rather than having “another merchant who will compete with us on just price alone and will also stock similar fast moving lines.” He then reiterated that sales targets had been surpassed and finally concluded the Email by promising “trust” and “100% loyalty”, and that he was “disturbed over [the Applicants’] apprehension”, though he could see where they were coming from.

33 In light of the Distribution Agreement in force between the parties at the time, it would not be surprising that KE, as a platform that aggregated different types of paper including paper from “other mills in India” and/or other “merchants” would raise the very concerns that the Applicants had sought to address in the Distribution Agreement: it might hinder sales and/or interfere with the development of their business if customers were not supportive of KE (Clause 2). The Applicants themselves observed in 2nd Mitchell at [13] that “distribution of paper brands would have been in direct competition with the Applicant[s] which would have been a direct breach of Clause 2”. Further to or alternatively, the gathering together of different paper mills in India for sale on the same platform (KE) might trigger or exacerbate competition between them and the Applicants, since they were essentially selling similar items (Clause 4).

34 The Registered Proprietors’ justifications for the existence of KE make sense when viewed in this light. Essentially, as distributors, they were trying to embark upon a new marketing strategy to boost sales of creative papers but had run into contractual issues that were designed to ensure exclusivity of the Applicants’ distribution channel in India. At no time was there any mention of the Applicants’ “Curious Collection”, despite that it had been introduced in April 2002, three years prior to the Email. The Registered Proprietors simply appeared to be defending their new marketing strategy, rather than defending against the choice of the “KYOORIUS” name in light of the Applicants’ “Curious Collection” range of paper. There was also no clear statement by the Registered Proprietors assuring the Applicants that they would use “KYOORIUS” solely as a design service centre and not as a trade mark for paper products. In the Email, they merely describe KE’s business as a “design service centre” that “would range from being a “resource center” (the new buzz word for library), “image bank”, “Apple Mac center”, or what we can even call as the equivalent of “design café” and that “distribution of paper would be an extension of their services” whilst “stocking paper in its full range availability (sic) [was] one of the key ingredients to KE.” This is simply descriptive and indicates that KE would be a comprehensive one-stop site targeted at the end-user that should stock a full range of paper and have other print and design services targeted at the end-user, with distribution of paper as an extension of such services.

35 As for Mr Rajesh’s involvement in KE, I note that he had instructed Monkey Wrench to design the name “KYOORIUS” and that the trade mark applications for “KYOORIUS” in Singapore were made in the Registered Proprietors’ name. However there is also evidence that one Mr Kay Khoo and one Mr Sajan Raj Kurup were also involved as co-founders of KE

(1st Rajesh, pp 233-234). In any event, nothing much turns on this point and a finding on this point does not assist either party.

36 The parties also made submissions as to a deck of slides that the Registered Proprietors had sent to the Applicants dated March 2006 (referred to at [13] and [29] above). The Registered Proprietors contend that they had been transparent about the possibility of being a paper supplier rather than only a distributor. This is supported by reference to the slide which is titled “Where do we want to be”, which goes on to state a sub-heading “SUPPLIER”, with three further sub-headings that read “Paper”, “Books & Magazines” and “Art Supplies.” In 2nd Mitchell, the Applicants state that “it is not clear from the slide presentation as to what the [Registered Proprietors] meant by “SUPPLIER” (i.e. whether they meant to distribute or supply paper products). They refer back to the Email where it is submitted that the Registered Proprietors intended to supply design services and not distribution of paper. I do not think a finding on this point either way would make a difference to my decision above at [31]-[34]. In any event, on the face of it, the word “SUPPLIER” would be taken to have its natural meaning, i.e. that the Registered Proprietors would want to be a supplier of paper products.

37 The present situation is far removed from other cases where there was an express agreement or where there was a “gentleman’s agreement”. In *Subair Systems, LLC v Subair Systems Asia Lintied* [2010] SGIPOS 9 (“*Subair*”) there was an express written agreement between the parties that the registered proprietors should not “challenge or assist others in challenging the Technology or the registration thereof or attempt to register any Technology, including any trademarks, servicemarks, marks or trade names confusingly similar to the SubAir Marks” (*Subair* at [44]). The action was also left undefended by the registered proprietor. IPOS found that it was clear on the face of the agreement that the registered proprietors did not have the right to register the trade mark in question and conversely the agreement showed that they recognized the applicant’s rights in the said trade mark (and the technology involved). Accordingly, the trade mark was declared invalid.

38 In *SP Muthiah & Sons Pte Ltd v Sockalingam Kalidhas Trading as Jayaco* [2010] SGIPOS 5 (“*SP Muthiah*”), the hearing officer found that there was a “gentleman’s agreement” that there would be an exclusive distributorship arrangement between the supplier (Sockalingam Kalidhas) in India and the distributor (SP Muthiah) in Singapore, as a result of the parties’ friendship and business relationship over 20 years, which was affirmed during cross-examination of both parties (see *SP Muthiah* at [14], [37]-[42]). In violation of this agreement, the supplier had supplied goods to other distributors (who were competitors), and in doing so, selectively asserted trade mark ownership over the goods sold to these parties, but not the original distributor. The distributor successfully opposed the supplier’s trade mark application on the basis of bad faith.

39 Indeed, bad faith may not be found where there is uncertainty as to the scope of an agreement between the parties as to whether a mark is permitted to be registered. In *The Polo/Lauren Company, L.P. v United States Polo Association* [2015] SGIPOS 10 (“*Polo*”), the opponents’ arguments on the ground of bad faith was that the applicant was prohibited from registering their application mark as it was prohibited by a settlement agreement entered into between them pursuant to litigation in the United States (“U.S.”). Although the existence of this settlement agreement was not disputed, neither party adduced it in evidence citing confidentiality reasons. Instead, a judgment of the U.S. court in 2013 was relied upon by the opponents. The IP Adjudicator found that the said judgment appeared to have raised more

questions than it answered about the scope of the settlement agreement (at [42]-[44]). She went on to hold at [45]-[46] that:

45 The [o]pponents' entire case of bad faith is based on inferences. The law in this regard is very clear. An allegation of bad faith is a serious claim to make, and it must be distinctly proved and this will rarely be possible by a process of inference: see [17(d)] above. I pause to add that there is no absolute prohibition against drawing inferences. The thrust of this legal principle is that the tribunal must be cautious about making findings of bad faith based on inferences. This point was made by Tay Yong Kwang J in *Festina* at [114]:

The concept of bad faith is extremely wide in the sense that the courts can infer instances of bad faith and decide according to the justice of individual cases. Naturally, the court should also be cautious in not over-extending this concept lest it becomes a weapon of terror against competitors of trade mark proprietors.

46 Tay J in *Festina* also said at [98] that a party alleging bad faith must meet "a high threshold".

40 This part of the IP Adjudicator's finding was not discussed on appeal by the High Court in *Polo/Lauren Co LP v USPA* [2016] SGHC 32.

41 Given that an allegation of bad faith is a serious claim to make, and it must be distinctly proved and this will rarely be possible by a process of inference, I would be slow to conclude that any assurances were made by the Registered Proprietors unless it is clear from a plain reading of the Email. In the present case, the Email contains assurances from the Registered Proprietors that KE's existence would not threaten the Applicants' business, but not assurances that "KYOORIUS" would *only* be used as a brand for a design service centre, organising events, seminars, conferences, and publishing or that it would *never* be used as a brand for creative paper products.

Right to Register

42 The Applicants also submit that the Registered Proprietors had a duty to inquire with them as to whether they can register the "KYOORIUS" trade mark for paper products, in light of the Applicants' apprehensions over the use of the name "KYOORIUS" and their involvement with KE.

43 As stated in *Weir Warman* at [89], such a duty only arose if the registrant feigned ignorance of facts that would have negated its right to register, and not where he/she relies on an independent right to register:

The duty to inquire in *Maycolson* only arose in relation to a registrant feigning ignorance of facts that would have negated its right to register. In contrast, where one does not deny awareness of material facts surrounding the registration of a trade mark, and relies instead on an independent right to register, as in the present case, there should not be any basis for creating a broad and general "duty to disclose" on the registrant. Such a duty, besides being difficult to define, would create uncertainty as to the relevant circumstances that must be disclosed

on registration. Thus, so long as the facts and circumstances required by the trade mark registration form are disclosed fully and accurately, and where one has the right to register the trade mark, it goes too far, in my opinion, to require the registrant to additionally disclose any other circumstances that may be relevant.

44 In *Weir Warman*, the High Court held there was no bad faith where the defendant did not disclose the express written agreement that evidenced the plaintiff's concurrent right to register the mark in question. The High Court also stated that there should be no broad and general duty to disclose on the registrant, as it would create uncertainty as to which relevant circumstances must be disclosed on registration.

45 In the present case, the Registered Proprietors had appointed a communication design studio, Monkey Wrench, to create the name "KYOORIUS" sometime in or around 2004 (see 1st Rajesh, Exhibit 2 (containing the Statutory Declaration of Pawas Shah). They then used this name as a prefix for various initiatives and activities centred on "an elaborate marketing strategy to reach out to the creative designing industry" (1st Rajesh, at [9]). These were:

- a) "KYOORIUS EXCHANGE" – Slideshow presentation in March 2006 to Mr Bowles (1st Rajesh, at [30], Exhibit 12);
- b) "KYOORIUS DESIGNYATRA" – A design exhibition and showcase, over several years from 2006 to 2009 (4 years) (1st Rajesh, Exhibit 3, pp 36-94); and
- c) "KYOORIUS VERDICT", described as a design and print award to recognize and reward professionals and printers (1st Rajesh, Exhibit 3, p 56). It appears that this award ceremony is part of the "KYOORIUS DESIGNYATRA" exhibition series.

46 Reference was also made to "KYOORIUS DESIGN SHOWCASE BOOK" and "KYOORIUS FYIDAY" in 1st Rajesh, although I am unable to find supporting evidence for the same, save for a blurry photograph of the latter in 1st Rajesh on p 94. In any event, the Applicants do not refute the fact that these events took place. In conjunction with these events, the Registered Proprietors had used these "KYOORIUS"-prefixed signs on various advertising and promotional materials such as event booklets, event tickets and registration forms (see 1st Rajesh, Exhibit 3, pp 36-94).

47 The Registered Proprietors say that the Applicants had financially supported KE, relying on the following evidence in 1st Rajesh:

- a) Document titled "A&P Approval Sheet" describing the Applicants as one of the sponsors of "Kyoorius Design Yatra 2010" (at p 136-7);
- b) E-mail correspondence between Mr Bowles, Mr Rajesh and one Ms Sreeja confirming the various items that the Applicants were prepared to support, and the value of such sponsorship, based on the Registered Proprietors' sales and marketing plans in 2008 (at p 138-155);
- c) E-mail correspondence regarding "balance A&P for 2007," which appears to show Mr Bowles, Mr Rajesh and Ms Sreeja seeking clarification from each other regarding some remaining amount of sponsorship that the Applicants had to remit to the Registered Proprietors via Reemar Paper Ltd (see p 156-168).

48 The Applicants do not object to these facts but sought to qualify that their sponsorship was only in light of their understanding that KE would be used solely as a design service

centre, rather than a brand name for paper products (see 2nd Mitchell at [16]-[19]). However, besides the Email, there appears to be nothing much to support this point.

49 The evidence suggests that the Registered Proprietors had played a part in the derivation of the word “KYOORIUS” in 2004 and used “KYOORIUS”-prefixed signs for 4 years between 2006 and 2009. On 29 July 2010 the Applicants wrote to the Registered Proprietors to give written notice of their intended termination of the Distribution Agreement (on the letterhead of one Antalis Asia Pacific Pte Ltd), stating that the termination would be effective on and from 28 October 2010. The letter further thanked the Registered Proprietors for the working relationship over the past 10 years. This letter is not disputed by the Applicants. Following this decision, the Registered Proprietors laid out what they saw as their business options in 1st Rajesh at [15], as follows:

By reason of the [termination of the Distribution Agreement], the [Registered Proprietors], after having successfully established itself as a premium distributor of paper products to, *inter alia*, the creative designing industry, was suddenly faced with the real possibility of being unable to meet the demand for paper products created due to the marketing and advertising efforts put by the [Registered Proprietors]. The [Registered Proprietors were] thereafter left with only two viable options:

- (a) Engage another suitable paper mill to provide the supply of paper under the manufacturer’s brand; or
- (b) Engage a paper mill as an OEM to supply paper with the precise specifications as set out by the [Registered Proprietors] and which the [Registered Proprietors] would sell under its own trade mark.

50 The Registered Proprietors further went on to explain the decision they made in 1st Rajesh at [16]:

In the circumstances, the [Registered Proprietors] decided to adopt the latter approach as it would have control over the quality and specification of the paper supplied. As regards branding, it was only logical for the [Registered Proprietors] to latch onto the [Registered Proprietors]’ own established and well known “KYOORIUS” trade mark for the sale and supply of its paper products. Simply put, the [Registered Proprietors] merely adopted its own trade mark “KYOORIUS” as a house brand for products and services that it provided. Having had its paper supply abruptly cut off by the Applicant[s], this decision made plain commercial sense for the [Registered Proprietors], and was a natural consequence of having invested heavily in its “KYOORIUS” trade mark.

51 Having engaged a third party to create the word “KYOORIUS” and having used “KYOORIUS”-prefixed signs for their events and exhibitions for 4 years (2006 to 2009 inclusive), it would not be surprising then that the Registered Proprietors saw themselves as having the right to register “KYOORIUS” as a trade mark.

Relevance of mark similarity

52 The Applicants do not rely on mark similarity as a ground for invalidating the Registered Mark, and the sole ground of invalidation in this case is bad faith under Section 23(1) read with Section 7(6) of the Act.

53 Both parties made submissions as to whether the Registered Mark (“KYOORIUS”) was similar to the Applicants’ “Curious”-prefixed marks. The Applicants had registered a number of marks such as “Curious Collection”, “Skin Curious Collection” and “Curious Matter” (see 1st Mitchell at pp 6-7). They also sold a range of creative paper with other such “Curious”-prefixed names, such as “Curious metallic”, “Curious translucents”, “Curious touch” (see App WS at [4]). Their range of creative paper with these “Curious”-prefixed names had been sold in Singapore since 2002, whilst the trade mark applications were filed in 2001 (“Curious Collection”) 2008 (“Skin Curious Collection”) and 2013 (“Curious Matter”) respectively.

54 The Applicants submit that the marks are conceptually similar and that such unexplained similarity would amount to bad faith, citing the case of *Polo Spirit Pte Ltd v Tous S L* [2009] SGIPOS 3 (“*Polo Spirit*”). They also submitted that given the previous contractual relationship the parties were in, the Registered Proprietors’ act of registering a similar mark that was being used by their former supplier showed bad faith, citing *Grand Tec Resources Pte Ltd v The Gates Corporation* [2006] SGIPOS 7 (“*Grand Tec*”). However, they submitted that the court is also entitled to make a finding of bad faith despite the fact that the marks in question are not so similar as to cause confusion, as stated in *Rothmans of Pall Mall Ltd v Maycolson International Ltd* [2006] 2 SLR(R) 551 (“*Rothmans*”) at [29]. In *Rothmans*, the High Court found that there were circumstances warranting a finding of bad faith despite the fact that the competing marks “Rothmans” and “Fairlight” were not similar. These circumstances were, *inter alia*, that the respondents’ online advertisements and product packaging drew emphasis to the similarities between the two brands and there was also an Europe-wide injunction against the use of the “Fairlight” mark and packaging at the time against the Hertlein brothers, the respondents’ licensor.

55 In similar vein, the High Court in *Nautical Concept Pte Ltd v Jeffrey Mark Richard and another* [2007] 1 SLR(R) 1071 (“*Nautical*”) found that there was bad faith despite the marks being slightly different. The respondents owned the mark “Jeffrey-West”. The appellants were their Singapore agents. The case concerned the appellants’ application for the mark “JWest”, although he had also registered and sold goods under the marks “Jeffrey-West” and “JW” without the respondents’ consent earlier on. The court found that the appellants did not furnish any legitimate reason for trying to hijack the respondents’ marks and had merely asserted that they thought the respondents were no longer in business, which was not plausible because their goods were still being sold in a Singapore department store. The respondents had also put forward rather elaborate reasons for choosing the “JWest” mark, which the court found unconvincing.

56 On the other hand, the Registered Proprietors argued that the unexplained similarity in *Polo Spirit* only amounted to bad faith because it involved two bear device marks that were strikingly similar. They also cited the case of *Team Lotus Ventures Ltd’s Application v Opposition of Group Lotus Ltd* [1999] ETMR 669 (“*Team Lotus*”) at [673], where the UK Trade Marks Registry held that one of the factors contributing to the hearing officer’s finding of bad faith was the “striking degree of similarity [between the opponents’ and the applicants’ marks] so much so that it would be incredible to conclude that the applicant produced its mark as the result of coincidence.” The Registered Proprietors cited the case of *Festina Lotus SA v Romanson Co Ltd* [2010] 4 SLR 552 (“*Festina*”), where the High Court held that the

applicants' explanation as to the derivation of the invented word "J.ESTINA" "appear[ed] extremely contrived" (*Festina* at [122]). In *Festina*, the court also considered the similarity of marks under Section 8(2)(b) of the Act and held that "FESTINA" was similar to "J.ESTINA". It was also noted that there were previous instances of litigation between the parties in South Korea and Europe. Against this backdrop, the court found that the application was made in bad faith.

57 From the authorities cited by both parties, there is no consistent statement of principle that there must be a striking degree of similarity before bad faith will be found. In some cases, the similarity was not found to be the determinative factor (as in *Rothmans, Nautical*) whilst in others, it gave the court an indication that the application mark was copied from another source (as in *Team Lotus, Polo Spirit, Grand Tec, Festina*). As stated in Professor Ng-Loy Wee Loon SC's *Law of Intellectual Property (Sweet & Maxwell, 2nd Ed, 2014)* at [21.4.6], "bad faith is a distinct and independent concept from the issue of confusing similarity between the marks."

58 In these cases, what appeared to swing the court's view either in favour of or against the finding of bad faith were the specific factual circumstances in each case. There are certain scenarios which could trigger a finding of bad faith, such as a situation where the applicant is "hijacking" a mark without intending to use it but merely as a preventive measure against competitors (*Weir Warman* at [42]). The court in *Weir Warman* went on to explain that without such *bona fide* use or intended use of the trade mark, its registration would create an unjust monopoly in favour of the applicant. In *Polo Spirit*, the hearing officer found the trade mark applicant's story as to how he derived the mark to be "quite incredible", noting that they did not have a single piece of documentary evidence to support purported licensing arrangements for the mark (see *Polo Spirit* at [80]). In *Grand Tec*, the court found that the two marks were confusingly similar, and given that the applicant had worked for the opponent for some 30 years in top management positions previously, he was likely to know about the goodwill in the "GT" mark when he applied for the mark "GT DRIVES & Logo". The hearing officer also observed that there were prominent uses of the word "USA" (the opponent's country of incorporation) on the packaging of the applicant's goods, even though the applicant's company was incorporated in Singapore. These circumstances led to the hearing officer's finding of bad faith.

59 In Bently and Sherman's *Intellectual Property Law (Oxford University Press, 3rd Ed, 2009)* (cited in *Festina* at [103]) the authors categorized possible instances of bad faith as falling into three possible categories: (i) no intention to use the mark (ii) abuse of a relationship and (iii) where the applicant was aware that a third party had some sort of claim to the goodwill in the mark. The High Court added that a possible illustration of (iii) was one where there had been "trade mark theft" (*Festina* at [109]). Citing this passage in *Festina*, Prof Ng-Loy SC concluded at [21.4.7] that

In many of the cases where the court found bad faith, references were made to the trade mark applicant misappropriating another's trade mark, or riding on or taking advantage of the reputation in this other trade mark. It has also been described in this way: the trade mark applicant has been guilty of 'trade mark theft.' This description is a useful guide to the concept of bad faith in s 7(6).

60 In the present case, the Applicants had reason to believe that "KYOORIUS" was their own mark, having commissioned Monkey Wrench to come up with it in 2004 and having

used it for about five consecutive years for promoting their design exhibition and showcase. The Applicants' story behind the derivation of the ("KYOORIUS") was satisfactory. The Applicants' instructions to Monkey Wrench were (a) to invent a word that revolves around creativity and curiosity (b) where the invented word must trigger a question such as a "why" or "how" and that (c) further the word must be Indian but with a global connection. Given that their target audience was primarily the creative design industry, it is conceivable that the invented word should "revolve around creativity." The concepts of "curiosity" and asking questions such as "why" and "how" are rather broad and are not so unique or specific such that it can be said that the Registered Proprietors had "stolen" it from the Applicants and were therefore guilty of "trade mark theft". The further instructions that the word should be "Indian but with a global connection" also make sense given that India was the target market. Further, the explanation from Mr Pawas Shah from Monkey Wrench that the word "KYOORIUS" was "a fanciful combination of the Hindi word "KYOON" for "why" and the English word "curious" (1st Rajesh at p 34), meets the criteria of the brief given to him by the Registered Proprietors and does not give rise to suspicion of any "trade mark theft."

61 This may be compared to the *Festina* case, where the appellant's mark, "FESTINA", contained a meaningless word, "ESTINA", which was reproduced in the respondent's mark "J.ESTINA". The respondent's explanation that "J.ESTINA" was derived from the name of a princess named Jovanna Elizabeth Anotnia Romana Marie did not impress the High Court, which held that this did not explain why the meaningless word "ESTINA" was chosen as the six letters in "ESTINA" were not even the initials of the said princess (see *Festina* at [122]). In the present case, there is no such unique, meaningless word in the Applicants' "Curious Collection" that was reproduced in the Application Mark ("KYOORIUS"). Similarly, in *Polo Spirit*, the hearing officer was not convinced that the trade mark applicant had entered into a licensing arrangement for the application mark simply by making verbal arrangements with a Chinese company whilst on a business trip to China, with no other supporting documentation to corroborate his evidence (see *Polo Spirit* at [75]-[80]). In the present case, Mr Rajesh's explanation is corroborated by Mr Pawas Shah, as well as documentation of the Registered Proprietors' use of "KYOORIUS"-prefixed marks for the events they organized.

62 In addition, the evidence in 1st Rajesh shows that the Applicants' "Curious Collection" and other "Curious"-prefixed signs co-existed alongside the "KYOORIUS"-prefixed signs. At Exhibit 4, labelled "2004 Swatch Book", "Curious Collection" appears as one of the paper products alongside "Conqueror", "Rives" and "Sensation", where a relatively prominent sign "KYOORIUS EXCHANGE: Where Creatives Meet" appears on the cover of the said booklet. In another example, labelled "Translucent & Colors Swatch", the same "KYOORIUS EXCHANGE: Where Creatives Meet" appears on the cover, and within the booklet, paper variety of various types are listed, including from the "Curious Collection" range (e.g. "Curious Translucent Clear", "Curious Translucent Silver", "Curious Translucent Gold"). The same format applies to several other booklets as well, for the years 2007 and 2008.

Was the Registered Proprietors' registration of "KYOORIUS" made in bad faith?

63 The Registered Proprietors' subjective knowledge included the knowledge of the Applicants' "Curious Collection" paper products that was launched in 2002. However, their instructions to Monkey Wrench some two years later to invent a word based on "creativity and curiosity" and "why" and "how" are simply too broad to infer that they had intended to copy the concept behind the Applicants' "Curious Collection" paper products *per se*. The fact

scenario is different from the *Festina* case, which involved a unique name. I note that the Applicants have tendered substantial evidence of the annual sales turnover figures for their “Curious Collection” brand in Singapore between 2005 to 2013 (1st Mitchell at [15] and at Exhibit 14) as well as sample invoices for the sale of the “Curious Collection” brand in India from 2006 to 2010 (1st Mitchell at [23] and Exhibit 19). As for the sales in Singapore, it is not clear if the Registered Proprietors were aware of the same before they applied for the Registered Mark in Singapore. As for the sales in India, the Registered Proprietors should have been aware of these. However, there is also evidence of sales of “Conqueror” brand paper between those dates, and some indication that the parties’ focus was more on “Conqueror” rather than “Curious Collection”, given that the advertisements and collaterals for KYOORIUS DESIGNYATRA events typically featured “Conqueror” (1st Rajesh, Exhibit 3), and the Registered Proprietors’ reference in the Email to his business being “Conqueror”-led. I find that the effect of the Registered Proprietors’ knowledge of “Curious Collection” sales is somewhat neutralized by the fact that there were sales of other types of paper as well and there would be no reason for them to choose “Curious Collection” over “Conqueror”. More importantly, the word “KYOORIUS” had been independently commissioned by them and had been used for events such as the “KYOORIUS DESIGNYATRA” and other “KYOORIUS”-prefixed events (see [45] and [46] above).

64 Furthermore, the parties were still in a business relationship pursuant to the Distribution Agreement when the Registered Proprietors commissioned the creation of “KYOORIUS” in 2004. The “Kyoorius Exchange” concept and branding was discussed with the Applicants’ representatives in attendance during a presentation in March 2006. The Applicants did not raise any issue about the similarity between “KYOORIRUS” and “Curious Collection” at the time and did not do so in the Email. As concluded above at [41], the thrust of the Email was an assurance that the Registered Proprietors would not use the KE platform in a way that would jeopardize the Applicants’ paper products or business in India, not that they would only use “KYOORIUS” as a brand for a design service centre, rather than paper products. The latter is merely an inference made from a reading of the Email and there are no other documents or evidence which corroborates such assurance. As stated in *Valentino* at [30] (extracted above at [21]), bad faith must be distinctly alleged and distinctly proved, and as stated in *Polo* citing *Festina* (see above at [39]-[40]), this will rarely be possible by a process of inference. Further, the Applicants went on to provide sponsorship for KE in 2007 and 2008 (after the Email) and did not comment on the Registered Proprietors’ “KYOORIUS”-prefixed signs appearing alongside the Applicants’ “Curious Collection” series for several years. Nevertheless, in 2010, the Distribution Agreement was terminated without explanation.

65 The overall picture that emerges from these facts is that the Registered Proprietors were honest businessmen who were simply trying to keep their business afloat by picking up where the Applicants had left them off. At the hearing, the Applicants submitted that they did not object to the sale of paper products by the Registered Proprietors either, just that they should have used a different name. However, in the circumstances, any conceptual similarity does not distinctly prove that the Registered Proprietors were guilty of “trade mark theft” from the Applicants. The Registered Proprietors had merely registered a sign that they had *themselves* commissioned and then used. It is not in dispute that KYOORIUS DESIGNYATRA had run for 4 years from 2006 to 2009 and the evidence in 1st Rajesh shows the same. I also note that the Registered Proprietors’ website description of their paper products does not attempt to imitate the Applicants’ “Curious Collection” but rather seeks to rely on their own name as a brand for paper products. In 1st Mitchell at Exhibit 23, the Registered Proprietors have

advertised their paper products with the header, “Papers by Kyoorius”, and a description that reads as follows:

Kyoorius is an initiative by Trans Asia Fine Papers. After 15 years of distributing and marketing premium fine papers, Papers by Kyoorius is Transasia’s foray into launching definitive fine paper collections under the Kyoorius brand. (sic)

66 The description is then followed by two pictures showing two boxes of paper titled “K” Series and “O” Series respectively. On the right hand corner of these boxes is printed “Papers by Kyoorius” (the word “Kyoorius” in larger font). The get-up of the Registered Proprietors paper products appears quite different from the samples of the Applicants’ “Curious Collection” papers and packaging in 1st Mitchell at Exhibit 3. The samples show the words “curious collection” printed in lowercase across the length of the packaging, in bright colours such as blue, red and purple. One of the samples features a question mark (“?”) on the packaging as well. None of these features are present in the website description of the Registered Proprietors’ paper products. These facts may be distinguished from *Grand Tec*, where the hearing officer found that there was no plausible explanation as to why the applicant would include the word “USA” on the packaging of its products when it was a Singapore company.

67 In light of the Registered Proprietors’ subjective knowledge, as well as the relevant facts and circumstances in the present case, the Registered Proprietors’ action of going into the supply of paper products using the “KYOORIUS” sign and then registering it as a trade mark in Singapore does not fall short of the objective standard of acceptable standards of commercial behaviour.

Conclusion

68 I find that the Applicants have not met the high standard of proof that is required to establish bad faith. As discussed above, I find that the Registered Proprietors’ registration of “KYOORIUS” as a trade mark for their paper products is acceptable commercial behaviour in light of the present facts and circumstances.

69 Having considered all the pleadings and evidence filed and the submissions made in writing and orally, I find that the application for a declaration of invalidity on Section 7(6) of the Act fails. The Registered Proprietors are entitled to costs to be taxed, if not agreed.

Dated this 7th day of April 2016.

Diyanah Binte Baharudin
Assistant Registrar of Trade Marks
Hearings and Mediation Group
Intellectual Property Office of Singapore