



Australian Government

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Hazan Hollander
Ashington Court
Level 2 Suite 201
147A King Street
SYDNEY NSW 2000

Re: Application by Spantec Systems Pty Ltd ('the applicant') for removal of trade mark registration no 331585 and opposition thereto by F.F. Seeley Nominees Pty Ltd ('the opponent')

Your ref: 081055

Dear Sirs

I refer to the above matter and to the official letter of 22 March 2010. I have been delegated by the Registrar of Trade Marks to determine the removal application as provided by section 101 of the *Trade Marks Act 1995* ('the Act'). This requires me to decide whether or not the grounds on which the application for removal was made have been established and whether registration 331585 should be removed as specified in that application.

Registration 331585 is for services in class 39 as follows:

Services associated with storing and caring of warehoused electrical appliances including washing machines, hot water installations, heaters and white goods

The applicant requested removal of the trade mark in respect of all of the services for which it is registered. It is relying on the grounds for removal contained in sections 92(4)(a) and 92(4)(b) of the Act.

Section 100 of the Act provides that the onus is on the person opposing removal to rebut the allegation of non-use. My role, as the Registrar's delegate, is that of an impartial decision maker.

I have taken into account relevant material on the official file. That material consists of the declarations filed and served by the opponent as follows.

- Declaration by Frederic Frank Seeley made 23 April 2009 with exhibits FFS-1 to FFS-6



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- Declaration by Barry John Mynott made 17 April 2009 with exhibits BM-1 to BM-5
- Declaration by Mark William de Koeyer made 17 April 2009 with exhibits MdK-1 to MdK-5.

The applicant did not file and serve any evidence. Neither party filed written submissions.

For convenience I will first consider the ground for removal pursuant to section 92(4)(b). In order to rebut that ground the opponent needs to show that it used its trade mark in the course of trade in the registered services during the 3 year period ending on 26 October 2008, one month before the removal application was filed with IP Australia.

I find there has been no such use. That is not to say the opponent has not used its trade mark at all. It has clearly done so but not in relation to the services covered by this registration.

According to the High Court use of a trade mark in the course of trade means “an actual trade or offer to trade in the services bearing the mark or an existing intention to offer or supply services bearing the mark in trade” - *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (No. 2) (1984) 156 CLR 414 at 443-4.

The opponent has provided examples of signage at its factory and warehouse in Albury. Those signs prominently display the trade mark of registration 331585. But they only establish that this is where the opponent’s goods are manufactured and stored until they are shipped to retail outlets. There is no evidence of the opponent offering storage and warehousing services per se. There is no evidence that members of the general public can pay the opponent to store their electrical goods. Nor is there any evidence to show that other manufacturers of electrical goods pay the opponent to warehouse their goods. That is not the opponent’s business. It manufactures and sells electrical goods. It does not store such goods for others.

I find there has been no use of the opponent’s trade mark in the course of trade in the storage and care of warehoused electrical appliances.

As the opponent has not rebutted the allegation of non-use in relation to the services specified in the removal application, I find the ground for removal pursuant to section 92(4)(b) has been established. Further, there is nothing on the official file to show why the trade mark should not be removed.

Decision

I direct that trade mark registration 331585 be removed from the Register one month after the date of this decision.

If the Registrar is served with a notice of appeal before the trade mark is removed I direct that removal may not proceed unless a court so orders or the appeal has been discontinued.

Appeal

This decision may be appealed in the Federal Court. Order 58, Rule 4(2) and (2A) of the *Federal Court Rules* states the time limits for an appeal to be as follows:

(2) an appeal must be instituted [at the Federal Court] within 21 days after the date of the decision appealed from or within such further time as the Court, on application, fixes, unless a law of the Commonwealth provides otherwise.

(2A) the notice of appeal must be served on the Commissioner (Registrar) and all other parties to the appeal within 5 days of the day on which the notice of appeal is filed [at the Federal Court].

Yours faithfully



Deirdre O'Brien
Delegate of the Registrar of Trade Marks
14 September 2010