



**LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS**

**Citation: 2014 TMOB 170
Date of Decision: 2014-08-20**

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Costello Group Inc. against registration
No. TMA637,015 for the trade-mark BLOSSOM Design
in the name of Teh Yor Co., Ltd.**

[1] At the request of Costello Group Inc. (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on May 31, 2012 to Teh Yor Co., Ltd. (the Registrant), the registered owner of registration No. TMA637,015 for the trade-mark BLOSSOM Design (the Mark), shown below:

BLOSSOM

[2] The Mark is registered for use in association with the following wares: window blinds, door blinds, folding blinds and furniture covers.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares specified in the registration at any time within the three year period immediately preceding the date of the notice and, if no such use has occurred, to identify the date when the trade-mark was last in use and the reason for the absence of use since that date.

[4] In this case, the relevant period for showing use is between May 31, 2009 and May 31, 2012.

[5] The relevant definition of “use” is set out in section 4(1) of the Act:

4(1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

[6] In response to the Registrar’s notice, the Registrant furnished the affidavit of Cindy Kao, Manager of the Registrant, sworn on August 22, 2012 in Taipei, Taiwan. Both parties filed written representations; an oral hearing was not held.

Evidence of use

[7] In her affidavit, Ms. Kao attests that the Registrant is a Taiwan-based company established in 1978 that manufactures and supplies window and furniture coverings in various countries throughout the world. With respect to Canada, she asserts that the Registrant has continuously used the Mark in Canada in association with window blinds, door blinds and folding blinds since at least as early as 2005. In particular, she attests that the Registrant sold and distributed over USD\$1,900 of such BLOSSOM Design branded wares from 2009 to 2012. She explains that the Mark was displayed on the blinds themselves and that they were sold in Canada to the Registrant’s Canadian distributor, DH (Canada) International Limited in Mississauga, Ontario.

[8] In support, Ms. Kao attaches the following exhibits to her affidavit:

- Exhibit A consists of invoices, packing lists and quotations that Ms. Kao attests relate to wares bearing the Mark that were sold in Canada during the relevant period. Consistent with Ms. Kao’s statements, the documents are dated within the relevant period and show shipments of “Custom Made Roman Shades” from the Registrant to its Canadian distributor. I note that all of the documents identify the wares sold as either “classical folded” or “fantasy folded” styles of Roman shades. Ms. Kao attests that although these documents do not reference the Mark, “all of the blinds and shades referenced in these documents depict the Mark.”

- Exhibit B consists of four price lists entitled “Blossom® Roman Shades” that Ms. Kao attests are “copies of specifications sent to Canadian customers, since 2005 to present, for custom made Roman Shades for windows and doors”. The documents show the prices for various measurements of shades depending on the product’s “width” and “drop”. I would note that while reference is made to “classical folded” and “fantasy folded” styles, as reflected in Exhibit A, the documents also show prices for “classic flat” and “fantasy flat” styles that are not referenced in Exhibit A.
- Exhibit C consists of a picture of a folding blind that Ms. Kao attests “depicts the BLOSSOM Design Mark and was promoted and sold in Canada [during the relevant period].” She further attests that the manner in which the Mark is depicted “is how it is depicted in the products referenced in Exhibit A”. In its written representations, the Requesting Party describes the exhibit as “a picture of a window blind/folding blind that depicts what appears to be a photoshop image of the word BLOSSOM superimposed on a panel of the unfolded blind”. However, I do not agree with the Requesting Party’s suggestion that the exhibit does not constitute clear evidence of the Mark being affixed to the folding blind. In this respect, I note that statements in an affidavit must be accorded substantial credibility [*Ogilvy Renault v Compania Roca-Radiadores SA*, 2008 CarswellNat 776 (TMOB)]; while the picture quality is not ideal, Ms. Kao’s statements to the effect that the blinds and shades referred to in Exhibit A bear the Mark as depicted in Exhibit D are sufficient regarding the issue of the appearance of the Mark.
- Finally, Exhibit D consists of an advertisement for BLOSSOM® Roman Shades that Ms. Kao attests was distributed by its Canadian distributor “from 2005 to present”. However, as Ms. Kao provides no further particulars regarding the distribution of this promotional piece or of its use by potential customers, it is largely irrelevant to the question of use within the meaning of section 4(1) of the Act.

Analysis

[9] Upon review of Ms. Kao’s affidavit including the attached exhibits, I am satisfied that the Registrant has demonstrated use of the Mark in association with the wares “folding blinds” only. In this respect, I would first note that Ms. Kao does not assert use of the Mark in Canada in

association with the wares “furniture coverings” and none of the exhibits make reference to such wares whatsoever.

[10] With respect to the wares “window blinds” and “door blinds”, it is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with *each* of the wares specified in the registration during the relevant period.

[11] Given that the Registrant itself made a distinction in its statement of wares between “window blinds”, “door blinds” and “folding blinds”, the Registrant is required to provide evidence of use of the Mark for each of these wares [in this respect, see *Sharp Kabushiki Kaisha v 88766 Canada Inc* (1997), 72 CPR (3d) 195 (FCTD)]. Similar to the *Sharp* case, for the Registrant to maintain its registration for the wares “window blinds” and “door blinds”, it had to show use of such wares otherwise than by reference to “folding blinds”.

[12] However, as noted by the Requesting Party, the invoices at Exhibit A are for “folding” styles of Roman shades only and the photograph at Exhibit C only depicts a folding blind. Although Exhibit B makes reference to “classic” styles of shades in contrast to the two “folded” styles, there is no evidence before me of any transfers in Canada of such non-“folded” styles during the relevant period.

[13] As such, I am not satisfied that the evidence with respect to “folding blinds” is sufficient to demonstrate use of the Mark with respect to the potentially broader terms “window blinds” and “door blinds”; such terms would encompass styles of blinds other than the “folding” style evidenced and specified in the registration.

[14] Further, as there is no evidence before me of special circumstances excusing non-use of the Mark with respect to “window blinds”, “door blinds” and “furniture coverings”, the registration will be amended accordingly.

Disposition

[15] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act and in accordance with section 45 of the Act, the registration will be amended to delete the wares “window blinds, door blinds ... furniture coverings”.

[16] The amended statement of wares will be “folding blinds”.

Andrew Bene
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office