IN THE MATTER OF AN OPPOSITION by Spacemaker Limited to application No. 601,827 for the trade-mark STOWAWAY filed by Heinz Georg Baus

On February 29, 1988, Heinz Georg Baus filed an application to register the trade-mark STOWAWAY based upon use of the trade-mark in Canada by the applicant and his predecessor-in-title, Showerlux Canada Limited, in association with "bathroom cabinet" since at least as early as July 1986.

The opponent, Spacemaker Limited, filed a statement of opposition on October 21, 1988 in which it alleged that the applicant's trade-mark is not registrable and not distinctive, and that the applicant is not the person entitled to its registration, in view of the registration and prior user by the opponent of its registered trade-mark STOW-AWAY, registration No. 268,393, covering "racks and shelving".

The applicant filed a counter statement in which it effectively denied the allegations set forth in the statement of opposition.

The opponent filed as its evidence the affidavit of Patrick Minshall while the applicant failed to file either evidence or a statement, as required by Rule 44 of the Regulations, that it did not intend to adduce evidence in this opposition.

The opponent alone filed a written argument and neither party requested an oral hearing.

The opponent's grounds of opposition all turn on the issue of confusion between the applicant's trade-mark STOWAWAY and the opponent's registered trade-mark STOW-AWAY. With respect to the ground of opposition based on Section 12(1)(d) of the Trade-marks Act, the material date would appear to be as of the date of my decision (see Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks, 37 C.P.R. (3d) 413 (FCA) and Conde Nast Publications, Inc. v. The Canadian Federation of Independent Grocers, 37 C.P.R. (3d) 538 (TMOB)). The material dates with respect to the non-entitlement and non-distinctiveness grounds are respectively the applicant's claimed date of first use (July, 1986) and the date of opposition (October 21, 1988).

In determining whether there would be a reasonable likelihood of confusion between the trade-marks at issue, the Registrar must have regard to all the surrounding circumstances, including

those specifically enumerated in Section 6(5) of the Trade-marks Act. Further, the Registrar must bear in mind that the legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks at issue.

With respect to the inherent distinctiveness of the trade-marks at issue, both trade-marks at issue are suggestive of the character of the respective wares of the parties and, as a result, possess relatively little inherent distinctiveness.

The Minshall affidavit establishes that the opponent's trade-mark STOW-AWAY has become known to some extent in Canada in association with "racks and shelving". On the other hand, no evidence has been furnished by the applicant and his trade-mark STOWAWAY must therefore be considered as not having become known to any extent in this country. As a result, both the extent to which the trade-marks at issue have become known and the length of time that the marks have been in use favour the opponent in this opposition.

The applicant's "bathroom cabinet" differs from the wares covered in the opponent's registrations, namely, "racks and shelving" although the opponent's "racks and shelving" could be installed in the applicant's cabinets. Further, the wares of both parties are used for storage. As to the channels of trade, Mr. Minshall in his affidavit states that the opponent's wares are sold in retail stores "including home improvement stores, hardware stores and building centres where bathroom cabinets are also offered for sale and sold". As a result, the channels of trade of the parties are overlapping.

The only remaining criterion for consideration under s. 6(5) is the degree of resemblance between the trade-marks at issue in appearance, sounding and ideas suggested. In this regard, the trade-marks STOWAWAY and STOW-AWAY are very similar in appearance and are identical in sounding and in ideas suggested.

Apart from the above, the applicant has taken no active steps in this opposition subsequent to filing its counter statement even though the legal burden is on it to establish that there would be no reasonable likelihood of confusion between the trade-marks at issue. As a result, and having regard to the degree of resemblance between the trade-marks STOWAWAY and STOW-AWAY as applied to the wares of the parties which travel through the same channels of trade, I have concluded that the applicant has failed to meet the legal burden on it of establishing that there would be no reasonable likelihood of confusion between the trade-marks at issue.

In view of the above, I refuse the applicant's application pursuant to s. 38(8) of the Trade-marks Act.

DATED AT HULL, QUEBEC THIS _30th____ DAY OF _November___, 1993.

G.W.Partington,
Chairman,
Trade Marks Opposition Board.