

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No: 2202092
by Punjab Textiles Ltd to register a
Trade Mark and**

**IN THE MATTER OF Opposition No: 50283 by Fatima
Dudhia of Touchwood Boutique.**

1. On 5th July 1999 Punjab Textiles Ltd of 1-3 Featherstone Road, Southall, Middlesex UB2 5AA applied to register the trade mark:



for 'Dress fabric' in Class 24. The colours black, gold and red are claimed as an element of the mark.

2. The application is opposed by Fatima Dudhia of Touchwood Boutique on the basis of ss. 3(1)(b), 3(6) and s. 5(4)(a) and s. 5(4)(b) of the Act. A Counter Statement was provided by the applicants, in which the grounds of opposition are denied. Both parties ask for costs to be awarded in their favour.
3. The matter came to be heard on 6th April 2001. The opponent was represented by Mr Dudhia; a private litigant. The applicants did not attend.
4. The applicants have submitted no evidence. That of the opponent can be divided into two classes: a Statutory Declaration by Ms Fatima Dudhia, which I will consider in a moment, and 15 other Declarations and Affidavits from various persons supporting the first Declaration.
5. Ms Dudhia is the proprietor of Touchwood Boutiques, which has carried on a business selling ladies fashions since 1990. She states:

'In about 1990 I was introduced to Mrs. Inderjit Sethi, a Graphic Designer, by her sister. Mrs. Inderjit Sethi is a resident of India. We became friends and Touchwood Boutique became a client of her business. At my request, Mrs. Inderjit Sethi designed a logo for Touchwood Boutique. ... The logo is that of an elegant woman. Mrs. Inderjit Sethi gave to me as a gift the logo for use by Touchwood Boutique.

Since 1992 Touchwood Boutique have used the logo as their business identity and trademark throughout the United Kingdom. This was the first time that the logo was published in the United Kingdom. Touchwood Boutique also has clients in Africa and Canada. The logo has been printed onto business cards, letterheads, paper carrier bags, hanger covers and clothes labels as well as onto some of our products. ...

In or around January 1998, Mr. Babbi Malik of Punjab Textiles Limited visited Touchwood Boutique in Preston with a view to mutual business benefits. During his visit he inquired as to the source of some of our bags. I told him that the bags were manufactured in India for Touchwood Boutique and upon his request for the manufacturers name, we gave him one of the bags. The bags had the manufacturing company's name and address on the bottom of the bag.

A few weeks after Mr. Malik's visit, I received a telephone call from our manufacturer, Kallaa Graphics. I was told that Punjab Textiles Limited had asked them to manufacture bags for Punjab Textiles Limited, using the Touchwood Boutique logo, but in the name Punjab Textiles Limited I objected to this and told Kallaa Graphics that I did not consent to the logo being used by Punjab Textiles Limited or anybody else. I was told that Kallaa Graphics would not manufacture bags for Punjab Textiles Limited.

I immediately contacted Mr. Malik by telephone and asked for an explanation. He accepted that he had produced stationery and bags with our logo on them. He did not believe that he was doing anything wrong by copying our logo, but when I told him that I objected to him using our logo, he assured me that once his current stock had run out he would not use it again.

However, I later discovered that Mr. Malik had not acted upon his assurances and had continued to use our logo on Punjab Textiles Limited's stationery and bags. On 5th January 1999, I therefore wrote to Mr. Malik again asking him to stop using our logo. ... By this time we were receiving an increasing number of comments from customers who were saying that they had seen our logo on the stationery and bags of Punjab Textiles Limited. They were confused as to whether or not we were in some way associated.

After receiving no reply from Mr. Malik and after a period of attempting to contact him without success I again spoke to him by telephone in early July 1999. I asked him "what he was playing at". He told me that he would not refrain from using our logo and when I asked him if he was comfortable being called a thief he replied "yes, I am a thief".

It was after this that Ms Dudhia found, on attempting to register her own trade mark, that the application in suite had already been made.

6. Ms Dudhia also refers to evidence of use. That of significance can be listed as follows:

Exhibits FD1 and FD2 contain two business cards and one label clearly referring to the opponent, and carrying the 'elegant lady' logo. One of the business cards has the pre 01- phone number format. This would place the document at least before April 16th 1995.

Exhibit FD3 contains a letter from Kallaa Graphics, dated May 29th 1995, in respect of artwork for paper carrier bags. Again, the logo is central to the design depicted.

In Exhibit FD4 is a copy of a letterhead for the Touchwood Boutique. Again, the area code is in the pre 01- number format.

In Exhibit FD8 is one receipt which carries the logo, and is dated 1st February 1995.

7. There is also included in the opponent's evidence a number of Statutory Declarations which support use of the logo well before the application date in this matter. There are 13 of these, which follow a 'proforma' format:

'I have been a customer/supplier/employee of Touchwood Boutique since 19 . There is now produced and shown to me and annexed hereto marked Exhibit 1 a copy of a logo. Within my own knowledge this logo has been used as a trademark by Touchwood Boutique since at least 19 .'

I have examined the evidence in each of these Declarations carefully, and believe that most of it is flawed. None of these Declarations appear to have been submitted with properly endorsed 'Exhibit 1's. Only that by Mumtaz Patel contains a copy of the logo, not indicated as Exhibit 1 to that Declaration, but signed by Mr Patal. Mr Patel states that the logo has been used, within his own knowledge, since 1994.

8. Finally, I also wish to make reference to the Affidavit of Mrs Inderjit Sethi, the designer of the mark:

'At the request of my friend and client, Mrs. Fatima Dhudia, in or around 1990 I created a logo in the form of a woman. There is now produced and shown to me and annexed hereto marked Exhibit ISI a copy of the logo. The logo was an original creation of mine and I am the author of it.

Shortly after I created the logo I gave it to Mrs. Fatima Dhudia as a gift. This was in 1990 or 1991.

Since 1991 or 1992 my business, Kalla Graphics, have manufactured for Touchwood Boutique various items. These include business cards, paper carry bags and sling tickets for garments. Each of these items have printed upon them the logo.

Although I do not believe that I have had any legal claim on the logo or any rights in respect of it since 1991, I have, at the request of Mrs. Fatima Dhudia, effected a written assignment of all rights that I might still have in the logo. This includes copyright and any causes of action. This assignment was signed on 14th June 2000.'

This would be powerful corroboration for the events described in paragraph 2 of Ms Dudhia's Declaration. However, no Exhibit ISI is attached to the Affidavit, and this rather reduces its evidential value.

9. That completes my comments on the evidence. Turning to the grounds pleaded, I dismiss that under s. 3(1)(b): there is no evidence to show that the mark is devoid of any distinctive character. Of those grounds that remain, I am going to consider only the bad faith ground in detail. S. 3(6) of the Act reads:

‘A trade mark shall not be registered if or to the extent that the application is made in bad faith.’

10. The Trade Marks Act 1994 does not define bad faith, leaving it to the Tribunal or Court to determine whether an application was made in bad faith based upon the circumstances of a particular case. However, guidance on the approach to dealing with a bad faith claim was given by Lindsay J in *Gromax Plasticulture v Don & Low Non-wovens Ltd*, 1999 RPC 367:

‘I shall not attempt to define bad faith in this context. Plainly it includes dishonesty and, as I would hold, includes also some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined. Parliament has wisely not attempted to explain in detail what is or is not bad faith in this context; how far a dealing must so fall-short in order to amount to bad faith is a matter best left to be adjudged not by some paraphrase by the courts (which leads to the danger of the courts then construing not the Act but the paraphrase) but by reference to the words of the Act and upon a regard to all material surrounding circumstances.’

Thus dishonest business dealings are caught by the provision, but so also is behaviour which falls below that of accepted commercial standards. I do not think I have to dwell on what may be examples of the latter in this case. On the facts before me I can come to no other conclusion than that the action of the applicants, in the person of Mr Malik, as described by Ms Dudhia, is plainly dishonest and, in all of the circumstances, I must find in favour of the opponent. My reasons are as follows.

11. Despite the reservations I have about the opponent’s evidence, I think there is enough here for me to conclude that they have used the ‘lady’ device - which I find to be both novel and distinctive - before the application date, they have common law rights in that device, and also have copyright in it. In short, the logo was not just designed for use of the opponent, but used by them as a mark of trade. This logo is clearly the dominant feature of the applicants mark.
12. In view of these findings, *prima facie*, the sequence of events recalled by Ms Dudhia describe a clear theft of intellectual property. Further, Ms Dudhia has not only accused Mr Malik of being dishonest; she says he has admitted it himself. This is a very serious allegation and yet there is no denial by Mr Malik. In fact, the applicant has not chosen to put in evidence and has said nothing that rejects the sequence of events described in Ms Dudhia declaration. I think it would be difficult to find a more self-evident example of bad faith; the most distinctive part of the opponent’s mark has been procured by the applicant and use in the same trade; this does not just fall beneath the standards of acceptable commercial behaviour, it is clearly dishonest.
13. The opponent has been successful, and the application fails.
14. Following this result, I do not believe I need make any comments on the ss. 5(4) (a) and (b) grounds, though I would say in passing that the opponent appears to have a sufficient case under these grounds as well.
15. The opponent has been successful and are entitled to a contribution towards her costs. In view of the nature of this case, and the lack of evidence from the applicants, I regard pursuit of this matter to the point of a full hearing to have been wholly unnecessary. I order the applicants to pay the

opponents £1200. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 18 Day of April 2001.

**Dr W J Trott
Principal Hearing Officer
For the Registrar, the Comptroller General**