

BL O/780/19

TRADE MARKS ACT 1994

IN THE MATTER OF:

TRADE MARK REGISTRATION NO. 3327620

IN THE NAME OF JULIAN WESTAWAY

FOR THE FOLLOWING TRADE MARK:

Melyth

IN CLASS 10

AND

AN APPLICATION FOR A DECLARATION OF INVALIDITY

UNDER NO. 502341

BY MELYTH LTD

BACKGROUND AND PLEADINGS

1. Julian Westaway (“the proprietor”) is the registered owner of the mark shown on the cover page of this decision (“the Contested Mark”). The Contested Mark has a filing date of 27 July 2018 and it was registered on 19 October 2018 for the following goods:

Class 10: Feminine hygiene products.

2. On 12 November 2018, Melyth Ltd (“the applicant”) applied to have the Contested Mark declared invalid. The application is based upon section 3(6) of the Trade Marks Act 1994 (“the Act”), under the provisions of section 47(1), and is directed against all of the goods in the registration.
3. The claim is stated as follows: The Director and founder of the applicant, Mr Ivan Molcan, states that the brand name ‘MELYTH’ was invented by the applicant. Mr Molcan states that the registered trade mark has been created in bad faith with the intention of brand stealing.
4. Mr Molcan also stated: *“seeing that the product was selling well and having an advantage over me as an Amazon employee, he (Mr Westaway) might have decided to register the brand name created by me and to make profit from it; and “Since the brand name is included in the product title, it can be assumed that he was aware of it, otherwise he would not have registered it. Of course, I have not a way to prove this.”*
5. On 8 April 2019 the proprietor filed its Form TM8 and counterstatement. On 11 April 2019 the Registry issued a preliminary view that in the format presented it was not acceptable since it did not contain full reasons for its defence and “more information is required before any further action can be taken”. Further, the Registry informed the proprietor that amendments to the submitted witness statement were required, i.e. the evidence filed was not in the correct format since the exhibits did not include header sheets, did not refer to the case details and contained an electronic signature which at the time was not acceptable to the Registry. The proprietor was advised in the letter that “You may wish to provide the evidence in the correct format now or wait until the ‘evidence rounds’ at a later stage in the proceedings.”. Despite the Registry inviting

the proprietor to file evidence on 16 May 2019, nothing was received and confirmation of this was issued on 26 July 2019. Accordingly, it is clear that the proprietor had ample opportunity to file evidence and sufficient warning that the evidence filed in the incorrect format was not admitted.

6. In his counterstatement the proprietor, Mr Westaway, also denied the basis of the invalidation, stating:

- The claim of Mr Molcan that Mr Westaway has stolen the Melyth brand is not true. Mr Westaway claims that he created the Melyth Menstrual Cups. The date of first use is listed in the Amazon catalogue as 08 September 2016. Mr Westaway stated that he could provide further evidence at a later stage.
- Mr Westaway states that he created the product at issue in 2016 on an old Amazon Seller Central account that he no longer has access to. The only proof he has that Mr Molcan did not create the brand is by Mr Molcan's own admission that the applicant did not start selling the product (under the brand name Melyth) until July 2017, which is after Mr Westaway began selling the products in September 2016.
- Mr Westaway notes that Mr Molcan has changed his amazon seller account name from Liner2 to Melyth Marketing and then to the applicant Melyth Ltd.
- Mr Westaway states that he is an amazon vendor supplier which is different to that of a basic amazon seller and when, in May 2018, he started to supply his Melyth branded goods directly to Amazon, he found that Mr Molcan (under the applicant) was already selling the product he had created.
- Mr Westaway was subsequently advised to protect any brand he sold on Amazon and that is why he applied, on 27 July 2018, to register the trade mark which is the subject of this action. Mr Molcan then filed to register his Melyth figurative mark as a European Union Trade Mark at the European Union Intellectual Property Office, on 28 July 2018, one day after Mr Westaway's UK application was filed at the UK IPO.

- Mr Westaway concludes in his counterstatement that it is Mr Molcan who has left a clear trail of deceit.
7. The applicant filed evidence, which is summarised and assessed later in this decision.
 8. Neither party is professionally represented and neither party asked to be heard. This decision is therefore taken following a careful reading of all of the papers.

Evidence

The Applicant's evidence

9. As the director and founder of the applicant company, Mr Molcan provided a witness statement dated 14 May 2019, with accompanying evidence in the form of exhibits numbered 1-22.
10. In his witness statement, Mr Molcan states that he is the director and founder of Melyth Ltd, a position he has held since 19 July 2017. He states that he is also the creator of the Melyth brand.
11. Mr Molcan states that in 2016 he opened an Amazon seller account under the username Liner2 (Exhibits 1 and 2 refer). Exhibit 3 provides an email dated 23 June 2016, from Amazon confirming the opening of Mr Molcan's seller account. There is no reference to the mark Melyth.
12. Exhibits 4 and 5 show that the products on offer from the applicant have unique identifier codes tagged as either ASIN, SKU or UPC/EAN. Mr Molcan states that the confirmation email from Amazon regarding the offer of relevant products, based on their ASIN and SKU identifiers, matches the current products at issue. The Melyth brand had not, at that point, been created however, so it is not featured in those exhibits.
13. Exhibit 6 is a screen shot of an email page to GMX.com (Mr Molcan's email provider). The email is to 'Liner2'. The email is dated 07 September 2016 at 3.26pm and lists menstrual cups as the name of the products being listed by Liner2.

14. Exhibit 7 is an amazon.co.uk sales page which shows the menstrual cups at issue. The ASIN code matches previous exhibits.
15. Exhibits 8, 9, 10 and 11 provide information showing that the UPC/EAN code '614253818901' which is defined on the product at issue, is unique and was purchased by Mr Molcan on behalf of Melyth Ltd on 22 June 2016.
16. Exhibit 12 shows evidence of six sales from Mr Molcans Amazon account in September 2016. The total value of the sales shown in Exhibit 12 is £127.60. The products sold in each case are menstrual cups, but the Melyth name is not used in the product description. Exhibit 13 is an email confirmation that a product was dispatched to one customer during that time.
17. Exhibit 14 shows an invoice from Amazon dated September 2016, when the applicant was operating under a Slovak trade licence. In this case the Slovak address on the invoice matches the address on the Melyth Ltd company registration.
18. Mr Molcan states that the importance of this information is that it shows that a product which now bears the Melyth brand, but didn't initially, can be traced back to him in September 2016, due to the unique identifiers matching the product registered with Amazon since 08 September 2016. They do not refer or relate to the brand Melyth
19. Exhibits 15 and 16 comprise statements from other sellers on Amazon, expressing their concern and frustration that certain Amazon vendors are trying to misuse their position by misappropriating their existing and successful brands. The statements do not refer, or relate, to the mark Melyth.
20. Exhibit 17 provides information about the applicant's products by way of photographs taken at a professional studio in Las Vegas. Exhibit 18 is an invoice for that photo shoot and exhibit 19 contains the photographs from that shoot. Exhibit 20 comprises the main picture taken during that professional shoot. The photograph also shows the box used for packaging of the relevant goods.
21. Mr Molcan states that Mr Westaway, as an Amazon Vendor, could take control of the pictures that he uses to promote his products. Mr Molcan says that he would have

published the main picture, which is undated, (shown in Exhibit 21) featuring the Melyth brand on Amazon, but had chosen not to in order to avoid Mr Westaway having access to it, although Mr Molcan states that Mr Westaway probably wouldn't want to use the main picture, as the packaging it displays is not the same as that used by Mr Westaway when selling his products.

22. Exhibit 22 shows a further menstrual cup product, also displaying the Melyth brand, which Mr Molcan states he invented later. Mr Molcan states that it is strange that Mr Westaway started selling this same product much later, in 2018, which only confirms that Mr Westaway cannot have invented the Melyth brand.

DECISION

23. Section 3(6) of the Act states:

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

24. Section 47 also applies:

“47. - (1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration)”.

25. The law in relation to s. 3(6) of the Act (“bad faith”) was summarised by Arnold J. in *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch):

“130. A number of general principles concerning bad faith for the purposes of section 3(6) of the 1994 Act/Article 3(2)(d) of the Directive/Article 52(1)(b) of the Regulation are now fairly well established. (For a helpful discussion of many of these points, see N.M. Dawson, "Bad faith in European trade mark law" [2011] IPQ 229.)

131. First, the relevant date for assessing whether an application to register a trade mark was made in bad faith is the application date: see Case C- 529/07 *Chocoladenfabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* [2009] ECR I-4893 at [35].

132. Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2008] EWHC 3032 (Ch), [2009] RPC 9 at [167] and cf. Case C-259/02 *La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 at [31] and Case C-192/03 *Alcon Inc v OHIM* [2004] ECR I-8993 at [41].

133. Thirdly, a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. The standard of proof is on the balance of probabilities but cogent evidence is required due to the seriousness of the allegation. It is not enough to prove facts which are also consistent with good faith: see *BRUTT Trade Marks* [2007] RPC 19 at [29], *von Rossum v Heinrich Mack Nachf. GmbH & Co KG* (Case R 336/207-2, OHIM Second Board of Appeal, 13 November 2007) at [22] and *Funke Kunststoffe GmbH v Astral Property Pty Ltd* (Case R 1621/2006-4, OHIM Fourth Board of Appeal, 21 December 2009) at [22].

134. Fourthly, bad faith includes not only dishonesty, but 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": see *Gromax Plastics Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 at 379 and *DAAWAT Trade Mark* (Case C000659037/1, OHIM Cancellation Division, 28 June 2004) at [8].

135. Fifthly, section 3(6) of the 1994 Act, Article 3(2)(d) of the Directive and Article 52(1)(b) of the Regulation are intended to prevent abuse of the trade mark system: see *Melly's Trade Mark Application* [2008] RPC 20 at [51] and *CHOOSI Trade Mark* (Case R 633/2007-2, OHIM Second Board of Appeal, 29 February 2008) at [21]. As the case law makes clear, there are two main classes

of abuse. The first concerns abuse vis-à-vis the relevant office, for example where the applicant knowingly supplies untrue or misleading information in support of his application; and the second concerns abuse vis-à-vis third parties: see *Cipriani* at [185].

136. Sixthly, in order to determine whether the applicant acted in bad faith, the tribunal must make an overall assessment, taking into account all the factors relevant to the particular case: see *Lindt v Hauswirth* at [37].

137. Seventhly, the tribunal must first ascertain what the defendant knew about the matters in question and then decide whether, in the light of that knowledge, the defendant's conduct is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people. The applicant's own standards of honesty (or acceptable commercial behaviour) are irrelevant to the enquiry: see *AJIT WEEKLY Trade Mark* [2006] RPC 25 at [35]-[41], *GERSON Trade Mark* (Case R 916/2004-1, OHIM First Board of Appeal, 4 June 2009) at [53] and *Campbell v Hughes* [2011] RPC 21 at [36].

138. Eighthly, consideration must be given to the applicant's intention. As the CJEU stated in *Lindt v Hauswirth*:

"41. ... in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration.

42. It must be observed in that regard that, as the Advocate General states in point 58 of her Opinion, the applicant's intention at the relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case.

43. Accordingly, the intention to prevent a third party from marketing a product may, in certain circumstances, be an element of bad faith on the part of the applicant.

44. That is in particular the case when it becomes apparent, subsequently, that the applicant applied for registration of a sign as a Community trade mark without intending to use it, his sole objective being to prevent a third party from entering the market.

45. In such a case, the mark does not fulfil its essential function, namely that of ensuring that the consumer or end-user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those of different origin, without any confusion (see, inter alia, Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 48)."

26. The relevant date under section 3(6) is the date of application for the contested mark, i.e. 27 July 2018.

27. In any assessment of bad faith, there are a number of competing considerations. The first among them is that the trade mark registration system operates on a "first to file" basis. Unless cogent evidence is provided that an applicant (in this case, the proprietor) acted in bad faith, the assumption is that the application was filed in good faith (per *Arnold J., in Red Bull* at [133], cited above). It is, however, also possible for the claimant (the applicant in the instant case) to establish a prima facie case of bad faith which, in the absence of an adequate rebuttal from the proprietor, may succeed.¹

28. Having carefully assessed the applicant's evidence, I conclude that it shows the following:

- Exhibit 1 is a printout of a page from Amazon seller central Europe. The first three lists are from Amazon.fr and Amazon.es. The user name on show is 'Lineer2' not 'Liner2'. The name of the store involved is Melyth Ltd. The prices displayed are in pounds sterling and the address shown is the applicant's address, namely: 776-778 Barking Road. I can see no dates on any of the

¹ This appears to be consistent with the approach of David Kitchin Q.C. (as he then was) in *Ferrero SpA's Trade Marks* [2004] RPC 29

information in this exhibit. The exhibit does include reference to Amazon.co.uk, but the details are removed.

- Exhibit 2 is a screenshot of an email to Ivan Molcan. The email address is 'lineer2@gmx.com', which tallies with the email addresses shown in Exhibit 1. The exhibit merely shows that Ivan Molcan uses the email address 'lineer2@gmx.com'. The exhibit is not dated but shows that the last login was on 05 July 2019 at 10.11 pm, which shows that the screen shot can be dated no earlier than that. There is no mention of the Melyth brand name or Amazon, or any specific products.
- The information in exhibit 3 shows an email to 'Liner2', welcoming Liner2 to the Amazon programme and using the seller central account. The email is dated 23 June 2016 at 6.48pm. There is no mention of 'Melyth', 'Melyth Ltd', 'Lineer2' or Mr Molcan.
- Exhibit 4 shows Melyth Menstrual cups on offer on Amazon services seller central screen shot. The print-out shows the unique ASIN code B01I6YZSEO, and the UPC code 614253818901 (which matches the number referred to by Mr Molcan in exhibits 8, 9, 10 and 11). The seller SKU code is G5-VWTE-UO0R and the brand name is Melyth. The exhibit is not dated. Melyth Ltd is not mentioned. The price of the goods is £11.61.
- Exhibit 5 shows Melyth menstrual cups on sale on amazon.co.uk. The goods are sold by the applicant Melyth Ltd and the price of those goods is £11.61. The ASIN code is the same as in Exhibit 4. The exhibit is not dated and whilst I can take into account evidence which casts light back to the position at the relevant date, it is not explained by the applicant how this may be the case.
- Exhibit 6 is a screen shot of an email page to GMX.com (Mr Molcan's email provider). The email is to 'Liner2'. The email is dated 07 September 2016 at 3.26pm and lists menstrual cups as the name of the products being listed by Liner2. The SKU and ASIN codes match Mr Molcan's previous information. The word Melyth is not shown.

- Exhibit 7 is an amazon.co.uk sales page which shows the menstrual cups at issue, the ASIN code matches previous exhibits and it is stated: “Date first available 08 Sept 2016”. The brand is shown as Melyth and the ‘www’ address at the head of the page shows ‘Melyth-Menstrual-Cups’. The exhibit is not dated so may be much later than 2016, which would explain the use of the brand name Melyth, as Mr Molcan has stated that he did not create the name Melyth until July 2017.
- Exhibit 8 shows Melyth menstrual cups for sale on Amazon and the ASIN and UPC codes match Mr Molcan’s previous evidence, however this exhibit is not dated. Exhibit 9 shows a certificate of authenticity and states that Ivan Molcan is assigned the Global Trade Item Number (GTIN) 614253818901). This is the UPC number shown in earlier evidence and linked to the Melyth products on sale via amazon. The certificate is dated 22 June 2016 and issued by Bar Codes Talk, LLC. Exhibit 10 is a print from the Bar Codes Talk website. It shows that ‘Lineer2’ ordered bar code numbers from Bar Codes Talk, to the cost of \$5.00. It is dated 22 June 2016. There is no reference to Melyth as a brand or company name. Bar Codes Talk, LLC. is an American company. Exhibit 11 is an order receipt for the bar codes shown in Exhibit 10. The order is made to Ivan Molcan in the Slovak Republic and is dated 22 June 2016. There is no reference to ‘Melyth’.
- Exhibit 12 shows six sales of menstrual cups. These orders display the same ASIN and SKU numbers that Mr Molcan has referred to previously. The word ‘Melyth’ is not used in the descriptions of the goods but there is a thumbnail image with each order that appears to correspond with the image in Exhibit 21 (which is a photograph of the goods and the box/packaging that bears the word ‘Melyth’). These images are very small and the word cannot be seen clearly. These orders are all dated from September 2016.
- Exhibit 13 is a screen shot of Mr Molcan’s GMX email, with an email from Amazon confirming an order dispatched to Birmingham, England. The email is

dated 10 September 2016. There is no indication of the Melyth brand or company name.

- Exhibit 14 comprises a print of an Amazon invoice, dated 30 September 2016, which shows that Amazon Services Europe S.a.r.L. invoiced Mr Molcan at his Slovakian business address, for sales fees of £59.65 on sales of goods in September 2016. There is no indication as to what goods were sold and no use of the name 'Melyth' at all. It is not clear that the invoice relates to the applicant's sales of the relevant goods.
- Exhibit 15 is a statement on the Amazon services seller forum dated August 2017. The user name 'averagesel' complains that Amazon began selling the product that he/she had created once they realised how profitable the product was. Exhibit 16 is the same type of information posted by username 'amzsell' and dated June 2017.
- Exhibit 17 is undated and does not show any information that relates to the matter at hand. The exhibit comprises a screen shot of the website of 'Productphotography.com' who appear to provide photographs of products that are to be sold online. There is nothing that links this exhibit to the matter at hand. Exhibit 18 is an invoice from ProductPhotography.com in Las Vegas, to Ivan Molcan, amounting to 233 US dollars and dated 26 June 2017. There is a description of the subject of the photographs being taken, but there is no mention of menstrual cups or 'Melyth'. Exhibit 19 shows a number of images that were taken by ProductPhotography.com, showing menstrual cups with fingers and packaging, a hand holding two cups and two cups without packaging. The screen shot is labelled Ivan Molcan > Project 01 (3 images). The exhibit is undated and the word 'MELYTH' is not on show.
- Exhibit 20 shows a screen shot from Amazon.co.uk with the image in Exhibit 19 of the cups with fingers and packaging, with a box in the background with the image of a ballet dancer on the front and the words 'Menstrual Cup'. The exhibit is not dated but shows the word Melyth and the ASIN code.

- Exhibit 21 comprises a single picture of the goods with the box displaying the Melyth figurative mark that Mr Molcan has applied for as an EUTM. The exhibit is not dated.
- Exhibit 22 is a screen shot from the Amazon website and shows the goods at issue in a photograph similar to that in Exhibits 19 and 20, i.e. the cups, fingers and bag or container. The goods are listed as Melyth Menstrual Cups x3 (2x Large & 1x Small). I cannot discern a date on this exhibit. The information on this exhibit is very small and some of it is impossible to read. The goods are sold by Melyth Ltd and cost £19.75.

29. In summary, Mr Molcan's evidence does not, in my opinion, demonstrate a *prima facie* case of bad faith. The majority of Mr Molcan's evidence does not assist in this matter for a number of reasons. Firstly, the evidence is largely focussed on the business activities of Mr Molcan and his company Melyth Ltd, and the chronology of events involving his sale of menstrual cups on the Amazon website, both before and after he began branding the goods with the mark 'Melyth'. Substantial parts of the evidence are undated and substantial parts of the evidence do not show any use of the mark Melyth. Often it is the undated exhibits that show use of the word and the dated exhibits that do not. Consequently, it is the case that a large majority of Mr Molcan's evidence has little or no weight in the matter to hand.

30. What I have gleaned from the applicant's evidence and the submissions of the proprietor, is that both parties claim to have been selling the goods at issue, online, since 2016. Mr Molcan has stated that "The trade mark Melyth was first used in the UK in the date 2017 in Amazon sales" and also that "The date of first use is 20 July 2017". Mr Westaway claims to have been using the name Melyth since September 2016, but no evidence has been filed to support this claim.

31. In this regard, I turn to Exhibit 12 of the evidence provided by Mr Molcan. Exhibit 12 shows six sales of the goods at issue by Melyth Ltd. These sales, totalling £127.60, are dated September 2016, before Mr Molcan says he created the brand name. The name Melyth is not used in the description of the goods on these sales, however there is a thumbnail image with each order that appears to correspond with the image

provided by Mr Molcan that comprises Exhibit 21 of his evidence (which is a photograph of the goods and the box/packaging that clearly bears the word 'Melyth').

32. Mr Molcan has previously stated that Mr Westaway, as an Amazon Vendor, could take control of the pictures that he uses to promote his products. Mr Molcan says that he would have published the main picture shown in Exhibit 21 featuring the Melyth brand on Amazon but had chosen not to in order to avoid Mr Westaway having access to it. It seems somewhat strange therefore to see this image presented on a sheet of sales of the goods dated 2016. Whilst it is very small and the word Melyth is difficult to discern, it is clearly the same image as that shown in Exhibit 21, where the name Melyth is clearly and prominently placed on the packaging.

33. It might be the case that the sales information displayed in Exhibit 12, from sales in 2016, has been copied or transposed across to more recent Melyth Ltd promotional materials. That would explain the use of an image that according to Mr Molcan, could not have existed prior to July 2017 at the earliest. If this is not the case, I find it difficult to understand how the image from Exhibit 21, containing the brand Melyth, appears on sales order information dated 2016.

34. I find that the remainder, and vast majority, of the evidence of the applicant, does not, for reasons noted already, provide me with a basis to find that Mr Westaway has acted in bad faith. Mr Molcan does not provide any information of substance as to the actions or behaviours of Mr Westaway, that he believes show that the proprietor has acted in bad faith, other than the filing and registering of the UK trade mark at issue. Ultimately therefore, I find that the evidence provided by Mr Molcan does not establish a *prima facie* case of bad faith on the part of the proprietor.

35. In turn, Mr Westaway has stated that Mr Molcan admits that Melyth Ltd did not start selling products branded with the 'Melyth' name until July 2017, whilst Mr Westaway states that he began selling them in September 2016. When Mr Westaway became aware of the activities of Mr Molcan, he was advised to protect the Melyth brand and that is why he applied, on 27 July 2018, to register the trade mark which is the subject of this action. Mr Molcan then filed to register his Melyth figurative mark as a European

Union Trade Mark at the European Union Intellectual Property Office, on 28 July 2018, one day after Mr Westaway's UK application was filed at the UK IPO.

36. The fact that the proprietor and the applicant filed their trade marks at the UK IPO and EUIPO respectively, within a day of each other, is noted. I do not, however, have any evidence before me to suggest that either party were aware of the others intention to register the name Melyth as a trade mark. Therefore, whilst it is clear that each party was aware of the others business activities, I can only conclude that the filing dates of the respective applications being so close together should be put down to a simple case of coincidence or chance.

37. I also take into account the views expressed in *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others* [2009] RPC 9 (approved by the COA in [2010] RPC 16), where Arnold J. stated that:

“189. In my judgment it follows from the foregoing considerations that it does not constitute bad faith for a party to apply to register a Community trade mark merely because he knows that third parties are using the same mark in relation to identical goods or services, let alone where the third parties are using similar marks and/or are using them in relation to similar goods or services. The applicant may believe that he has a superior right to registration and use of the mark. For example, it is not uncommon for prospective claimants who intend to sue a prospective defendant for passing off first to file an application for registration to strengthen their position. Even if the applicant does not believe that he has a superior right to registration and use of the mark, he may still believe that he is entitled to registration. The applicant may not intend to seek to enforce the trade mark against the third parties and/or may know or believe that the third parties would have a defence to a claim for infringement on one of the bases discussed above. In particular, the applicant may wish to secure exclusivity in the bulk of the Community while knowing that third parties have local rights in certain areas. An applicant who proceeds on the basis explicitly provided for in Article 107 can hardly be said to be abusing the Community trade mark system.”

38. In the case law referred to previously (see paragraph 25), it has been established that a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. I have previously found that the evidence provided by the applicant is insufficient to establish a *prima facie* case of bad faith.
39. In order to determine whether the applicant acted in bad faith, the tribunal must make an overall assessment, taking into account all the factors relevant to the particular case. The tribunal must ascertain what the defendant knew about the matters in question and then decide whether, in the light of that knowledge, the defendant's conduct is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people.
40. In this matter the proprietor has stated that once he became aware that Melyth Ltd was selling the same goods as he was, and using the Melyth brand name, he took advice and subsequently applied to the UK IPO to register the trade mark 'Melyth' to protect his own business interests. Mr Westaway is adamant that he created the name Melyth in 2016. The evidence provided by Mr Molcan does not unpick the claims of Mr Westaway sufficiently to prove that Mr Westaway's claims are untrue or that Mr Westaway has acted in a dishonest manner or in bad faith.
41. The intention to prevent a third party from marketing a product (e.g. by filing and registering a trade mark) may, in certain circumstances, be an element of bad faith on the part of the applicant. That is in particular the case when it becomes apparent, subsequently, that the applicant applied for registration of a sign without intending to use it, his sole objective being to prevent a third party from entering the market. In this regard Mr Westaway has stated that he has been using the name Melyth and selling menstrual cups online since September 2016. Mr Molcan has stated that he was aware of the business activities of Mr Westaway, which satisfies me that Mr Westaway did not make his application to register the mark at issue with no intention of using it in the market place.
42. In *John Williams and Barbara Williams v Canaries Seaschool SLU*, BL O-074-10, Mr Geoffrey Hobbs QC as the Appointed Person stated that:

“21. I think it is necessary to begin by emphasising that a decision taker should not resort to the burden of proof for the purpose of determining the rights of the parties in civil proceedings unless he or she cannot reasonably make a finding in relation to the disputed issue or issues on the basis of the available evidence, notwithstanding that he or she has striven to do so: *Stephens v. Cannon* [2005] EWCA Civ. 222 (14 March 2005).”

43. In this case both parties are using the word Melyth and selling the same goods under that name. The dispute centres around the question of creation of the brand name and first use. Both parties claim to have created the name Melyth. Neither party has provided sufficient evidence to prove this conclusively. The proprietor Mr Westaway claims (but has not proven) to have been selling the relevant goods under the name Melyth since September 2016. The applicant Melyth Ltd (Mr Molcan) also claims to have been selling the relevant goods since 2016 but did not create and start using the brand name Melyth until July 2017. The burden of proof lies with the applicant Melyth Ltd.

44. In *Red Bull GmbH v Sun Mark Ltd*, Amanda Michaels, sitting as the Appointed Person, held that:

“47. Where an allegation of bad faith is made, it should be properly and specifically pleaded, and before a finding of bad faith will be made the allegation must also be supported by the evidence.”

45. In this case the evidence provided by Mr Molcan has not established a *prima facie* case of bad faith and therefore cannot support a finding that the behaviour of Mr Westaway has been dishonest or fell short of the standards of acceptable commercial behaviour judged by ordinary standards of honest people. The applicant’s claim that the proprietor stole its mark is a broad claim which has not been proven.

46. That being the case, I find that the invalidation action in respect of section 3(6) fails.

CONCLUSION

47. The application for invalidity fails in its entirety and the Contested Mark will remain registered.

COSTS

48. The Registered Proprietor has been successful. A Tribunal Costs Pro Forma was sent to the Registered Proprietor in which he was informed that no costs would be awarded in the event it was not returned to the Tribunal. No response was received. As such, I make no order as to costs.

Dated this 19th day of December 2019

**Andrew Feldon
For the Registrar
The Comptroller-General**