



# HIGH COURT OF AUSTRALIA

## NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 18 Jul 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

### Details of Filing

File Number: S49/2025  
File Title: Taylor v. Killer Queen LLC & Ors  
Registry: Sydney  
Document filed: Form 27E - Reply  
Filing party: Appellant  
Date filed: 18 Jul 2025

### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

No S49/2025

BETWEEN:

KATIE JANE TAYLOR

Appellant

KILLER QUEEN LLC

First Respondent

KATHERYN ELIZABETH HUDSON

Second Respondent

KITTY PURRY INC

Third Respondent

PURRFECT VENTURES LLC

Fourth Respondent

APPELLANT'S REPLY

Part I: Suitable for publication

1. This submission is in a form suitable for publication on the internet.

Part II: Reply to argument of the Respondents

2. In seeking to support the approach adopted by the Full Court, the Respondents pay insufficient regard to the detailed and careful findings of the primary judge.

3. **Factual matters.** (a) The phrase “*these facts*” in the first sentence of the Respondent’s Submissions (RS) [8] must refer to those in [7]. The primary judge found that two circumstances referred to in RS [6] did not give rise to a reputation in the Singer’s Mark (PJ [728(2), (4)]; CAB 251-252). (b) As to RS [9], those steps were not use in Australia. The earliest step taken to enable use of the Singer’s Mark on clothes in Australia was Ms Hudson’s application to register her mark here, *after* she was aware of the Designer’s Mark (PJ [685]-[689]; CAB 235-236). (c) RS [10] ignores the Appellant’s Submissions (AS) at [20]. Of the very few examples of merchandising in evidence, one involved a celebrity using a brand without her name, and Rihanna merchandised well after the Priority Date. Thus, there was no evidence establishing that it was commonplace around the Priority Date for celebrities to merchandise *their names*. (d) RS [13] is contrary to the express finding at PJ [197]-[198]; [819]-[822] (CAB 82, 275-276) that *after* the registration of the Designer’s Mark, Ms Taylor did *not* think that Ms Hudson would sell

clothing in Australia. (e) Additionally, the reason why Ms Taylor did not sue for infringement until 2019 (per RS [15]) was because, per AS [19], she did not know about litigation funding until 2018, and did not have means to sue before then.

4. **Section 60.** At RS [19]-[23], the Respondents attempt to defend the Full Court's reasoning by rewriting it. First, while per RS [20] it is correct that s 60 of the Act does not require that reputation be specific to the goods of Designer's Mark, the requirement of reputation in a *trade mark* requires reputation specific to *some* goods or services. Per AS [39], Ms Hudson went by Katy Perry generally, so the mere fact of reference to that stage name did not evidence reputation in music or entertainment services, contrary to the Full Court's express conclusion at FCJ [289] (CAB 409).

5. Secondly, notwithstanding the terms of s 60, it was significant that the services in respect of which Ms Hudson had a reputation (entertainment and music) were different to the goods of the Designer's Mark (clothes) *for which Ms Hudson had no reputation*, as the primary judge found (PJ [741]-[742]; CAB 254-255). RS [21] refers to a "*relationship*" between music and entertainment services and clothing being relevant to an assessment of confusion. The evidence as to such "*relationship*" as at the Priority Date was sparse; see paragraph 2(c) above, and AS [41]. But regardless, this was not how the Full Court reasoned. Rather, at FCJ [290]-[291] (CAB 409-410), it found that the primary judge unduly *confined* Ms Hudson's reputation to music and entertainment, and that there *was* a reputation in the Singer's Mark *for clothing*, when there was no evidence in favour of such conclusion. The Respondents make no attempt to defend this conclusion, nor to suggest that Ms Hudson had a reputation in respect of clothing at the Priority Date. In these circumstances, the Full Court's reasoning should be set aside, and the primary judge's approach should be preferred. It is this aspect of the reasoning of the Full Court that leads to the risks identified in AS [42], which is ignored in RS [22].

6. As to RS [24], Ms Taylor has *not* submitted that similarity between marks is irrelevant to the s 60 analysis. She has submitted that the Full Court, by its reasoning, adopted the wrong test for s 60. There are express references to "*imperfect recollection*" and "*deceptive similarity*" in FCJ [294], [295] (CAB 411). That entails a substantively different test to s 60 because it ignores reputation, as accepted in RS [24]. The assertion at RS [25] that the Full Court in FCJ [294] (CAB 411) referred to the strength of the reputation in the Singer's Mark is wrong. Again, the Full Court was expressly considering deceptive similarity, which ignores reputation. The primary judge,

unburdened by this incorrect frame of reference, correctly considered that the different spelling of the marks was significant (PJ [751]; CAB 258). That approach should be preferred. Finally, per RS [26], if the Singer's Mark was well known, *any* use of the Designer's Mark over 10 years was likely to lead to confusion, but none arose (PJ [752]; CAB 258).

7. **Section 88(2)(c)**. The suggestion at RS [32], [34] that Ms Taylor's approach would allow a trade mark owner who has made narrow use of a mark to maintain a broad infringement action is wrong, both as to the circumstances of this case, and in principle. The Designer's Mark is registered in respect of "*clothes*". Ms Taylor has used the mark on clothes. The Respondents infringed it through the sale of clothes. The infringement claim is thus coextensive with Ms Taylor's use of her mark on goods. And in other cases, the "*counterbalancing*" the Respondents are concerned with is achieved by s 92: if a trade mark owner sues on a broad specification in respect of goods or services for which it has not used the mark, this can be dealt with by a non-use action. The other hypothetical, of a trade mark user ceasing use after a threat of a cancellation action, is contrived. In any event, it goes nowhere. The fact of use ceasing shortly before an action was commenced would not mean that there was no risk of confusion.
8. Section 88(2)(c) expressly opens "*because of the circumstances applying at the time...*". Those words are, in terms, apt to apply to an analysis of extant circumstances, not future ones. RS [33] simply inserts the words "*fair and normal use*" into the words of s 88(2)(c). AS [50]-[54] provides cogent policy reasons why s 88(2)(a) and 88(2)(c) adopt different frames of analysis. Further, s 88(2)(a) takes account of grounds of cancellation going beyond those related to deception or confusion: eg ss 58, 62A of the Act. In short, there is no reason to treat ss 88(2)(a) and (c) as equivalent.
9. RS [35] begs the question. In effect, the Respondents simply assert that the analysis under ss 88(2)(a) and (c) should be identical. There is nothing in the text of the provisions or in policy which requires such a conclusion. The reference in RS [36] to the position under s 28(a) of the 1955 Act does not assist the Respondents. Section 28(a) was directed to preventing a mark being registered but, as discussed, was initially also treated as having a continuing operation post registration. In that context, s 28(a) was treated as directed to notional use because the provision was *in the same form prior to and post registration*. That is not so under the Act. No argument appears to have been put in the cases referred to in footnote 17 that notional use was not the test.

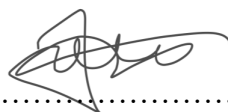
10. **Section 89**. Plainly, s 89 is directed to ameliorating harsh outcomes. It contemplates the perpetuation of confusion in the market, which could only be justified by countervailing considerations, such as fairness for a blameless trade mark owner.
11. RS [41] is wrong. Ms Taylor submits that the Full Court erred in its construction of s 89 by proceeding on the basis that the registered owner's act of applying to register a trade mark can constitute a disentitling "*act*" under that provision, or that an "*act*" can include "*knowledge*" of certain matters. The flaw in the Full Court's approach is exposed by RS [42], which seeks to support the result by relying on "*objective facts*" which meant that Ms Taylor's application to register the Designer's Mark could be successfully opposed. Section 89 refers to an "*act*" of the registered owner, not "*objective facts*".  
10 Whenever a ground for cancellation under s 88(2) is present, there will by definition be "*objective facts*" which exist and render the mark liable to cancellation, so the existence of such facts cannot be determinative of the outcome. What matters is that these "*objective facts*" were not in any sense "*acts*" of Ms Taylor, or caused by her.
12. Contrary to RS [43], Ms Taylor has not submitted that the knowledge of the registered owner is irrelevant to s 89. It could be relevant to the "*fault*" limb of s 89, but contrary to RS [43], the Full Court expressly disclaimed reliance on that limb: see AS [65]. Further, Ms Taylor does not suggest that knowledge cannot be relevant to the exercise of the discretion under s 89, where it is enlivened. The point is that the registered  
20 owner's knowledge is not an "*act*" through which a ground for rectification can arise for the purposes of s 89, so as to render the discretion unavailable.
13. In the present case, the only act of Ms Taylor identified and relied upon by the Full Court is that of her *applying to register the Designer's Mark*. As submitted, that cannot be a relevant act, otherwise the evident purpose of s 89 would be undermined.
14. At RS [40], the Respondents submit that prior authority as to blameworthy conduct ought not be considered, yet they rely on such authority to seek to justify the Full Court's use of the lower threshold of "*contributed to*", as opposed to the statutory text of "*arisen through*". The statutory text should be applied. The reasoning of the Full Court suggests that it adopted a lower standard, per AS [66], which was in error.
- 30 15. RS [45] should be rejected. The Respondents have not filed a notice of contention, and are well out of time to do so. There is no basis for any assertion of alternative grounds on which the Full Court ought to have found the discretion unavailable. The Full Court did not rely on any of the additional matters raised by the Respondents.

16. In response to RS [47]-[50], the brief reasons given by the Full Court as to how it would have exercised the s 89 discretion are *obiter*, and undermined by its misconstruction of the provision. While it is correct that s 89(2)(b) permits the Court to take into account any matter that it considers relevant, this presupposes that there is a criterion or framework by reference to which such relevance is to be considered. This must incorporate the terms of s 89, including the concept of an “*act*” of the registered owner, which the Full Court plainly misconstrued. It is also important to recall that there were no findings from trial on this issue, and that the Full Court did not have the benefit of seeing or hearing the evidence given first hand, as the primary judge did.

10 17. When regard is had to the text of s 89, properly construed, it is hard to understand how Ms Taylor’s refusal to capitulate to Ms Hudson prior to applying for her mark, or statements made many years after her mark was registered, could be relevant to the exercise of the discretion. As to the assertion that Ms Taylor “*stood by for 10 years before commencing proceedings*”, this compliant was raised, and rejected, in the context of the Respondents’ laches argument: see paragraphs 2(d) and (e) above, and paragraph 18 below. As to RS [49], the Full Court did not find that the deception or confusion was at a level not sanctioned by the Act; it simply referred to the fact there is a public interest in registrations only being made by those entitled to make them, and then proceeded to refer to an authority regarding *ownership*. RS [50] does not engage with the reasoning  
20 in *Firstmac* at [376]-[387]. There is a relevant public interest in trade mark owners being entitled to protect their rights against infringers like the Respondents.

18. **Remitter**. There is no utility in any remitter to the Full Court. At FCJ [347], [349] (CAB 421) the Full Court correctly observed that the Respondents’ submissions on the issues of laches and additional damages “*simply re-agitate[d] the evidence before the primary judge with a view to securing a different outcome on appeal*”. That clearly provided no basis for interfering with the primary judge’s exercise of discretion on those issues. This Court is well placed to determine the form of the injunction having regard to the findings of infringement made by the primary judge and the Full Court.

30 Dated: 18 July 2025



.....  
**C Dimitriadis SC**  
Telephone: (02) 9930 7944  
Email: cd@nigelbowen.com.au



.....  
**R Clark**  
Telephone: (02) 8066 6152  
Email: rob.clark@5wentworth.com