



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M32/2025

BETWEEN: **BED BATH 'N' TABLE PTY LTD (ACN 005 216 866)**
Appellant

and

10 **GLOBAL RETAIL BRANDS AUSTRALIA PTY LTD (ACN 006 348 205)**
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of oral submissions

2. ***Self Care* (AS [12] - [17]):** *Self Care* (2023) 277 CLR 186 [28], [29], [32], [33], [37], [40],
20 [49], [80] – [84] clarifies the critical distinction between trade mark infringement, which
excludes use of and reputation in the registered mark; and the *ACL* claim, which requires a
four step approach under which reputation and use are *included* in ascertaining the meaning
of the impugned conduct and whether it is misleading.
3. **The Primary Judge's approach (AS [6]-[11], AR [3]):** The Primary Judge correctly
applied *Self Care*. The trade mark infringement claim was assessed against the statutory
monopoly expressly *excluding* reputation and use: PJ [371], [415]-[417], [423], [425]-
[426], [431], [435], [436], [438]-[442]. Conversely, under the *ACL* claim, the Primary
Judge identified:
 - (1) The impugned conduct: PJ [1], [504], [507].
 - 30 (2) That it was in trade or commerce: PJ [506].
 - (3) The immediate and broader context (PJ [509], [510]), and other relevant circumstances
(PJ [511]-[517]), such that the impugned conduct conveyed a meaning to a reasonable
consumer that the Respondent's stores are operated by, or otherwise associated with,
the Appellant: PJ [496], [498], [518]-[521].
 - (4) Which meaning, once conveyed, was undoubtedly false: PJ [533], [536].
(See also the form of Order at CAB 147).
4. **Further on step (3) (AR [15]):** Critical to the Primary Judge's reasoning on the meaning
conveyed was that consumers: (1) would bring to mind the Appellant's long standing
reputation in BED BATH N TABLE in *soft* homewares stores presented in the Hampton's

style (PJ [69]; cf [120]); **(2)** combined with their knowledge of the uniqueness of the Appellant's use of BED & BATH in such a store name (PJ [96]); **(3)** conversely would know that the Respondent's substantial reputation was to date confined to the *hard* homewares segment of the market under the stylised presentation of HOUSE and the cluttered discount store look (PJ [135]); **(4)** yet would be confronted with the Respondent incorporating that unique part of the Appellant's name into its new composite name House BED & BATH as it sought to expand into the soft homewares market; **(5)** while adopting the very "Hamptons" style used by the Appellant and choosing a font and style for "BED & BATH" similar to the Appellant and distinct from "House" presentation.

10 5. **Important concurrent finding (AR [10]-[14]):** **(1)** The Respondent's primary defence at trial was that its use of BED & BATH was "purely descriptive"; the words were mere "category descriptors" and did "no work" in designating commercial origin when read in conjunction with the well-known HOUSE mark: PJ [11]. **(2)** The Primary Judge rejected that defence, holding that the words were more "allusive" than descriptive and did serve as a badge of origin. This was so, both objectively: PJ [382], [391], [399], [404], [431], [436] and subjectively: PJ [146], [405], [468]-[469]. **(3)** The Full Court rejected Ground 4 of the NOA which challenged these findings and confirmed that the words, even if in part performing a descriptive function, function as a trade mark: AJ [80], [84]; cf [118].

6. **Errors in the Full Court:**

20 **(1)** The Full Court paid little attention to the 4 step approach required by *Self Care* or to the full reasons of the Primary Judge between PJ [502]-[522] applying that approach.

(2) Instead the Full Court started, and kept returning, to how the ACL claim could possibly succeed once the two "marks" had been found not deceptively similar under the trade mark claim: AJ [75], [81], [82], [84].

(3) In so doing, the Full Court also erred at step one of the ACL enquiry. It did not grapple with the full nature of the impugned conduct, as correctly identified by the Primary Judge; instead it repeatedly narrowed the enquiry into the Respondent's trade mark shorn of its full manner of use: AS [26]-[29], AR [4]-[5]; cf RS [15], [16], [23]-[29].

30 **(4)** As to step 3 of the ACL enquiry, the Full Court wrongly focussed as a contextual matter not on the Appellant's reputation in BED BATH N TABLE as found, but in a reputation it did not have, in BED BATH separately. That skewed the entire enquiry: AJ [76]-[79]: AS [21]-[25], AR [17]-[19]; cf RS [17]-[19], [30]-[36].

(5) Further as to step 3, the Full Court wrongly responded to the concurrent rejection of the Respondent's case that it was using BED & BATH purely descriptively with a new finding,

contrary to each party's case below, and to all findings, that the consumer '*would do no more than infer that both business were engaged in the supply of soft homewares for bedrooms and bathrooms*': AJ [84], last sentence: AS [30]-[32]; cf RS [37]-[43].

7. **The 'fitted for the purpose test' (AS [37]-[38], [53]-[54]):** If one trader knowledgeable in the market borrows the whole or part of the name or get up of another, an inference is available that the trader perceived a market benefit in doing so, by way of attracting custom that would otherwise have gone to the rival trader. The inference can be rebutted but, if the first trader propounds an alternative explanation which is rejected by the court, the inference can be comfortably drawn. "Commercial dishonesty" is not a pre-requisite for the inference; rather it is a usual but not invariable concomitant of it.
8. **Application of the test (AS [11], [39], [44]-[51], [52]-[56])** (1) The Primary Judge found the conditions for the inference potentially to arise: the Respondent, with full knowledge of the market, borrowed a key part of the Appellant's name: PJ [133]-[166], [175(b)], [234], [242], [422], [469], [511]-[514], [536]. (2) The Respondent lead an alternative explanation for its conduct, which was thoroughly rejected, including on credit grounds, leaving the Primary Judge comfortably able to draw the inference that the Respondent carried out the borrowing intending to "leverage" off the Appellant's reputation. (3) Whether the Respondent consciously intended deception, or knew all of the facts and likelihoods and shut its eyes to them, did not alter the basis for drawing the inference.
9. **Full Court error (AS [63]-[72]):** As the Full Court did not, and could not, overturn the facts upon which the inference arose, or the rejection the Respondent's alternative explanation, it had no basis to find error.
10. **Wider considerations:** (1) This approach to the matter is supported by wider consideration of equity: PJ [470], [478]; *Anheuser-Busch*. (2) It is consistent with the UK and US approach: AS [61]-[62], AR [22]. (3) The topic of "wilful blindness" was fully raised and debated below sufficient for the Primary Judge to rule on it.

Dated: 12 August 2025



Justin Gleeson SC