



HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27F – Outline of oral submissions

IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No M32 of 2025

BETWEEN:

BED BATH 'N' TABLE PTY LTD (ACN 005 216 866)

Appellant

and

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

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

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

PART II: OUTLINE OF PROPOSITIONS TO BE ADVANCED

Ground 1

1. Comparison between marks:

- (a) Allegations of misleading or deceptive conduct under the *Australian Consumer Law* and passing off (**ACL/PO Claims**) involve a broader enquiry than an assessment of whether competing trade marks are “*deceptively similar*”. However, an assessment of the degree of resemblance between competing trade marks is an important aspect of the factual enquiry involved in determining ACL/PO Claims. If an impugned mark bears little resemblance to an earlier mark, use of that mark is less likely to convey any misrepresentation or otherwise mislead: GRBA’s submissions (**GRBA WS**) at [22], [29]; *Henry Clay & Bock & Company Limited v Eddy* (1915) 19 CLR 641 at 664.
- (b) Assessing resemblance does not involve “*methodological error*”. It is consistent with authority: cf. BBNT’s reply submissions (**BBNT RS**) at [4]-[6].

2. Substantial and crucial differences between House B&B mark and BBNT mark:

- (a) The primary judge held that the trade mark used by BBNT (**BBNT mark**) and that adopted by GRBA (**House B&B mark**) are not “*deceptively similar*”. There are “*substantial and crucial differences*” between them, such that the House B&B mark bears **insufficient** resemblance to the BBNT mark to deceive or even confuse: PJ [437]-[442].
- (b) The Full Court of the Federal Court (**FFC**) rejected BBNT’s cross-appeal – “[t]he word “House” is the **predominant component** of the House B&B mark” and “*could not be missed save through exceptional carelessness or stupidity*”; there is no real, tangible danger that consumers would be caused to wonder whether there is any association between the goods or services offered under the House B&B mark and BBNT: AJ [127], [132].
- (c) BBNT no longer challenges the findings of lack of deceptive similarity. It is an important consideration in the ACL/PO Claims that the House B&B TM bears insufficient resemblance to the BBNT mark to deceive or even confuse: *Trade Marks Act 1995* (Cth), s 10; GRBA WS [15]-[16], [23]-[29].

3. Relevance of BBNT’s lack of reputation in BED BATH:

- (a) The primary judge held that: *(i)* BBNT does not have any independent reputation in BED BATH; *(ii)* it is the composite phrase BED BATH N’ TABLE which indicates a commercial connection to BBNT, **not** BED BATH alone; *(iii)* BBNT is not recognised as BED BATH: PJ [120]-[124], [438]. BBNT did not challenge these findings: AJ [77].

- (b) The FFC correctly held that it was a “*significant finding*” that BBNT does not enjoy any independent reputation in BED BATH. That finding confirmed that, on the facts of this case, it is only the use of the composite BBNT mark, and **not** BED BATH, that would “*indicate the existence of a commercial association*” with BBNT: AJ [77]-[78].
- (c) The FFC did not “*erect almost as a rule of law*” any “*proposition*” that a party with a long-standing reputation in a composite name cannot succeed against a rival trader who only uses part of that name (cf. BBNT RS [17]). The FFC held, on the facts of this case, that using a ***non-distinctive part*** of the BBNT mark, in a competing mark with “*substantial and obvious*” differences, was not likely to mislead or deceive: AJ [77], [79], [82].

4. **BED and BATH are largely descriptive:**

- (a) The words BED BATH are “*largely descriptive*” – they convey that the products offered for sale relate “*in some way to beds [and] baths*”: AJ [80], [84], [118]. By the time GRBA adopted the House B&B mark, there had been substantial third-party use of BED BATH for “*their descriptive nature*”: PJ [92], [95]-[96]. Contrary to BBNT RS [14], it is BBNT who seeks to “*evade*” these findings (which are not challenged by either ground of appeal).
- (b) BBNT does not enjoy, and should not be granted, a monopoly in those largely descriptive words: ***Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd*** (1978) 140 CLR 216 at 226, 229-230; GRBA WS [39]-[43].
- (c) On the unchallenged findings of the FFC, the words BED BATH are not “*more ‘allusive’ than directly descriptive*” (cf. BBNT RS [13]). In any event, this is irrelevant: (i) there is a continuum between descriptive and invented names; (ii) there is no requirement that words be “*purely descriptive*” for the reasoning in *Hornsby* to apply: AJ [74], [80], [84]; *McCain International Ltd v Country Fair Foods Ltd* [1981] RPC 69 at 73-79, 81.

5. **Cause of alleged risk of deception remains unexplained:**

- (a) The primary judge erred (at PJ [509]) by failing to have regard to her findings that: (i) there are substantial and crucial differences between the House B&B mark and the BBNT mark (PJ [437]-[442]) and (ii) the words BED BATH do **not** indicate a commercial connection with BBNT (PJ [120]-[124], [438]). The FFC correctly did so, when undertaking a “*real review*”: AJ [77]-[79], [82]-[83]; *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301 at [2]-[10].
- (b) BBNT has failed to explain how the use by GRBA of two largely descriptive words, which do not indicate a connection with BBNT, in a trade mark which has substantial and obvious differences to the BBNT mark, could mislead. BBNT’s “*answer to the Respondent’s rhetorical question*” at BBNT RS [15] is deficient, because it ignores the critical findings at PJ [120]-[124] and [437]-[442].

Ground 2

6. The probative relevance of intention:

- (a) ACL/PO Claims are determined objectively and involve quintessential questions of fact. Intention is merely a “*relevant consideration*”: *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 277 CLR 186 at [30], [81]-[82]; GRBA WS at [51], [64]-[67].
- (b) The intention of a dishonest trader “*may lead nowhere*” and its role in the analysis “*should not be overstated*”. It is merely a form of expert opinion as to the likely effect of the impugned conduct, which cannot override the Court’s own assessment: *Windsor Smith Pty Ltd v Dr Martens Australia Pty Ltd* (2000) 49 IPR 286 at [33]-[34]; *Hashtag Burgers Pty Ltd v In-N-Out Burgers, Inc* (2020) 159 IPR 186 at [68]; *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* (2004) 139 FCR 215 at [20]-[22].

7. **GRBA’s “wilful blindness” and the scope of ground 2:** The primary judge held that GRBA was “*wilfully blind*” to the “*potential for confusion*”, but did **not** have a dishonest intention to appropriate BBNT’s trade or reputation: PJ [422], [511], [536]. The FFC correctly rejected BBNT’s attempt to overturn those findings, which were not “*capable of providing any reliable evidence on the objective question*”: AJ [85]-[86], [88], [102]-[108]. There is no ground of appeal which challenges those findings: GRBA WS [52]-[56].

8. **GRBA’s “wilful blindness” does not fall within *Australian Woollen Mills*:** The reasoning in *Woollen Mills* may assist the Court where a trader has turned their mind to, and formed an opinion about, the likely effect of impugned conduct. However, the primary judge used the term “*wilfully blind*” idiosyncratically: GRBA WS [48]. The findings of the primary judge were to the effect that GRBA had **not** formed any relevant opinion: GRBA WS [57]-[60].

9. GRBA was not blind to any relevant matter:

- (a) It is not sufficient, to establish ACL/PO Claims, that conduct is merely “*confusing or caused people to wonder*”: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198.
- (b) The “*possibility of blunders*” and “*risk of confusion*” arising from the common use of descriptive words “*must be accepted*” to avoid unfair monopolies: *Hornsby* at 229.
- (c) GRBA’s “*wilful blindness*” to the “*potential for confusion*” (PJ [234], [244], [422]) arising from the common use of the largely descriptive words BED BATH, which were **not** distinctive of BBNT, was therefore irrelevant or peripheral: GRBA WS [61]-[63].

11 August 2025



Bret Walker



Bruce Caine



Peter Creighton-Selvay



Frances St John