HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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 OUTLINE OF ORAL PROPOSITIONS (HCR r 44.08)

Part I: Suitable for publication

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

Part II: Outline of oral submissions

2. ***Overview***. The Full Court erred in principle in its approach to ss 60/88(2)(a) and s 88(2)(c) of the TM Act. The primary judge was right to find that neither ground for rectification was established. The Full Court also erred in principle in its approach to s 89. It ought to have concluded that, if either ground for rectification was established, the discretion was enlivened and should be exercised in Ms Taylor's favour.

   (a) *Trade Marks Act 1995 (Cth)* (**TM Act**) ss 60, 88, 89 (JBA A/3)
   (b) *Trade Marks Regulations 1995* (Cth) (**TM Regs**) reg 8.2 (JBA A/4)

3. ***Statutory context***. Sections 60, 88(2)(c) and 89 had no direct counterparts in the previous trade marks legislation. They arose from recommendations directed to compliance with TRIPS and addressing then conflicting authority as to whether s 28(a) of the 1955 Act had a continuing operation after the date of application.

   (a) Appellant's submissions (**AS**) [28]-[31]
   (b) *Trade Marks Act 1955* (Cth) (**1955 Act**) ss 22, 28 (JBA B/5)
   (c) *Working Party Report* pp 9, 47, 53-55, 94-96 (JBA E/27)
   (d) *Campomar* (2000) 202 CLR 45 at [68]-[76] (JBA C/12)

4. ***Section 60/88(2)(a)***. Section 60(a) requires a prior trade mark having a reputation in Australia at the priority date of the challenged mark, not reputation alone. Reputation in a trade mark arises through use as a trade mark, to distinguish particular goods or

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services in the course of trade. The primary judge correctly held that the Katy Perry mark had no reputation in Australia as a trade mark for clothes as at the priority date. The Full Court erred in failing properly to distinguish between Ms Hudson's reputation as an entertainer and any reputation in Katy Perry as a trade mark, and in relying on a "*common practice*" of celebrities to sell merchandise including clothing.

(a) AS [14], [32]-[34], [37]-[42]; Appellant's reply (**AR**) [4]-[5]
(b) TM Act ss 17, 60 (JBA A/3)
(c) PJ [102]-[103], [711]-[728], [740]-[758] (CAB 43, 242-250, 254-259)
(d) FCJ [289]-[291] (CAB 409-410)
(e) *Self Care* (2023) 277 CLR 186 at [7], [9], [13], [23] (JBA C/16)

5. Section 60(b) requires that the challenged mark be likely to deceive or cause confusion because of the reputation of the other mark. This is incompatible with the concept of "*deceptive similarity*" which disregards any reputation in a mark. The Full Court erred by adopting a deceptive similarity analysis, and in putting aside authorities which recognise that reputation (if it arises) might lessen any likelihood of confusion. The primary judge was right to emphasise the absence of any evidence of actual confusion arising from Ms Taylor's use of her mark for a period of more than 10 years.

(a) AS [35], [43]-[46]; AR [6]
(b) PJ [743]-[749], [751] (CAB 255-258)
(c) FCJ [292]-[299] (CAB 410-412)
(d) *Self Care* (2023) 277 CLR 186 at [26]-[29], [36], [41]-[42], [46] (JBA C/16)

6. ***Section 88(2)(c)***. The ground in s 88(2)(c) should be assessed having regard to the registered owner's actual use of the mark at the time of the application for rectification, not any "*notional use*" which may in future be made across the scope of the registration. This is supported by the language, context, purpose and policy of the provision. The ground is not forward looking like other grounds assessed at the priority date.

(a) AS [48]-[55]; AR [7]-[9]
(b) TM Act, ss 7(3), 8, 21, 22, 23, 44(3)(a), 88(2)(a)-(e), 89 (JBA A/3)
(c) FCJ [331], [339] (CAB 418, 419-420)
(d) *Campomar* (2000) 202 CLR 45 at [40]-[61], [68]-[76] (JBA C/12)

7. On that construction of s 88(2)(c), the ground is not made out. The "*circumstances applying*" at the relevant time were that Ms Taylor's use of her mark had not, over a period of more than 10 years, given rise to any actual confusion. The Full Court erred in putting this aside. Even if s 88(2)(c) incorporates a concept of "*notional use*", the reasons of the primary judge should be preferred to those of the Full Court.

(a) AS [56]-[58]
(b) PJ [783]-[795] (CAB 267-270)
(c) FCJ [331]-[339] (CAB 418-420)

8. ***Section 89***. The discretion in s 89 arises if the trade mark owner satisfies the Court that a ground for rectification has not arisen through any "*act or fault*" of the owner. An

application to register a mark cannot be a relevant "*act*" in this context, otherwise the discretion would inevitably be denied. A trade mark owner's knowledge is not an "*act*", and does not bear upon the grounds for rectification arising. The Full Court erred in relying on Ms Taylor's "*act*" of applying to register her mark with knowledge of matters which led to the grounds for rectification being established. The Full Court also wrongly assumed that it was enough if the "*act*" merely "*contributed towards*" the grounds arising. The Full Court correctly did not rely on the "*fault*" limb of s 89.

(a) AS [60]-[69]; AR [10]-[15]
(b) TM Act s 60, 88, 89 (JBA A/3)
(c) *IW v City of Perth* (1997) 191 CLR 1 at 12
(d) *Working Party Report* pp 94-96 (JBA E/27)
(e) FCJ [312], [316]-[317], [342] (CAB 414-415, 420)

9. The Full Court's reasoning on the exercise of the discretion was *obiter*, and in any event, was undermined by its errors of principle in the misconstruction of s 89 and involved *House v R* errors. If a ground for rectification arises in this case, the discretion should be exercised so as to allow Ms Taylor's mark to remain on the Register.

(a) AS [70]-[76]; AR [16]
(b) FCJ [315], [318]-[323], [343]-[344] (CAB 415-416, 420)

10. Ms Taylor adopted her mark innocently; used it first in relation to clothes; applied to register it before she knew of Ms Hudson and before Ms Hudson had used the Katy Perry mark or had any reputation in that mark in relation to clothes in Australia; and used it for more than 10 years in a manner which, on the evidence, did not give rise to any actual confusion. The Respondents proceeded knowingly in the face of Ms Taylor's registration, giving rise to the findings of infringement and flagrancy made below. Ms Taylor as the first in time trader ought not to have been required to move aside for Ms Hudson merely because Ms Hudson was, or might become, famous. The mandatory considerations in reg 8.2 further support the exercise of the discretion.

(a) AS [9]-[19], [77]-[80]; AR [3], [17]
(b) PJ [40]-[59], [104]-[183], [220], [262]-[265], [714]-[728], [740]-[758], [819]-[826] (CAB 25-30, 43-76, 88-89, 102, 214-250, 254-259, 275-276)
(c) TM Regs reg 8.2 (JBA A/4)

11. ***Conclusion***. The appeal should be allowed and orders made in accordance with the notice of appeal. There is no utility in any remitter to the Full Court.

(a) AS [81]; AR [18]
(b) Notice of appeal, p 2 (CAB 490)

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