



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S49/2025
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Important Information

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BETWEEN:

KATIE JANE TAYLOR
Appellant

and

KILLER QUEEN LLC
First Respondent

KATHERYN ELIZABETH HUDSON
Second Respondent

KITTY PURRY INC
Third Respondent

PURRFECT VENTURES LLC
Fourth Respondent

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of oral submissions

2. **Ground 1 (s 60 of the Act):** Opposition under s 60 of the Act involves a two-stage inquiry. It must be established: (a) another trade mark has a reputation in Australia; and (b) because of that reputation, there is a likelihood of deception or confusion in the use of the mark for which registration is sought. The Full Court did not depart from this inquiry.
3. None of the appellant’s criticisms of the Full Court’s finding that the primary judge erred in unduly confining the reputation of the Katy Perry Mark withstand scrutiny.
 - a. *First*, the Full Court did not err in failing to disaggregate the reputation of Ms Hudson as a musical artist and the reputation of the Katy Perry Mark. There is no requirement in s 60 that the reputation of a trade mark can only be derived from individual uses of that mark: **RS [17]-[19]**.
 - b. *Second*, the public recognition of a trade mark can extend beyond the goods or services in relation to which it has been used: **RS [20]**.
 - c. *Third*, there is no error in the Full Court’s reliance on the fact (established on the evidence and accepted by the primary judge) that as at the Priority Date, it was a common practice of pop stars to market and sell clothes bearing their names or marks at concerts and elsewhere: **RS [10], [21]-[23]**.
 - d. *Fourth*, the Full Court did not err in relying on the uncontroversial matter that the marks were deceptively similar. The degree of similarity between the marks was relevant to the s 60(b) inquiry, in that the Full Court was recognising that as at the Priority Date, the Katy Perry Mark’s reputation was not so notorious that the Australian public generally would have been aware of the correct spelling of the mark: **RS [24]-[25]**.
 - e. *Fifth*, there was no error in the Full Court’s conclusion at FCJ [296] that the primary judge placed undue weight on the absence of evidence of actual confusion. Such evidence is not required for the purposes of the s 60(b) inquiry: **RS [26]**.
4. **Ground 2 (s 88(2)(c) of the Act):** On the proper construction of s 88(2)(c) of the Act, the likelihood of deception and confusion is to be assessed by reference to any notional normal and fair use of the mark: **RS [29]-[36]**. That construction is consistent with:
 - a. The text of s 88(2)(c). Nothing in the text of s 88(2)(c) indicates that the “use of the trade mark” is to be limited to the actual use of that mark. *First*, the use of the words

“is likely” in s 88(2)(c), as opposed to “would be likely”, reflects that s 88(2)(c) is concerned with a mark which has been registered. *Second*, the text of s 88(2)(c) mirrors the language of the definition of “deceptive similarity” in s 10 of the Act, which assumes that the notional buyer has an imperfect recollection of the mark *as registered*, with that notional buyer assumed to have seen the registered mark used in relation to the full range of goods to which the registration extends. *Third*, the reference to “the circumstances applying at the time when the application for rectification is filed” is a reference to the circumstances of the trade – the circumstances in which goods or services of the kind covered by the ambit of the registration will be bought and sold and the character of the probable purchasers or such goods or services.

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- b. The context and purpose of s 88(2)(c). Section 88(2)(c) depends on the registration of a mark with a specification of goods and/or services. Registration grants exclusive rights to the owner across the breadth of the specification, with those rights not constrained by any actual use of the mark (ss 20(1) and 120 of the Act). Section 88 counterbalances those rights and assists to ensure that the purity of the register is maintained.
 - c. The legislative history of the provision. Section 88(2)(c) was introduced to resolve the uncertainty as to whether s 28(a) of the *Trade Marks Act 1955* (Cth) (**1955 Act**) permitted a validly registered mark to be expunged due to circumstances arising after the date of application for registration and whether those circumstances had to involve blameworthy conduct. What there was no uncertainty about, however, is that to the extent s 28(a) did have that operation, the likelihood of deception or confusion arising from the post-registration circumstances was to be assessed by reference to a notional normal and fair use of the mark.
5. In any event, the Full Court was correct to conclude that the s 88(2)(c) ground was established irrespective of the proper construction of the provision: **RS [37]-[38]**.
 6. **Grounds 3 and 4 (s 89 of the Act)**. The Full Court’s construction of s 89 of the Act at FC [311]-[312] is correct: **RS [39]-[44]**. The statutory language of “any act or fault” is intended to cover the full range of conduct in which the registered owner might engage, not only positive acts, but also omissions, and combinations of the two. It is broader than the historical concept of “blameworthy conduct” which developed in connection with s 28(a) of the 1955 Act. The words “arisen through” in s 89(1) do not require some closer causal relationship than the words “contributed to”. The fact that s 89 is intended to provide a measure of protection for trade mark owners against the operation of s 88 is not determinative, particularly when the Act represents an accommodation between the

interests of traders, in the use of trade marks in developing the goodwill of their businesses, and the interests of consumers, in recognising trade marks as a badge of origin of goods or services, and avoiding deception or confusion as to that origin.

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7. Applying that construction, the Full Court did not err in finding that the grounds of cancellation under ss 88(2)(a) and 88(2)(c) arose through the “act” of the appellant in applying for the Appellant’s Mark, with knowledge of the reputation of the Katy Perry Mark in entertainment and music, and the fact that pop stars commonly sold clothing bearing their names at concerts and that celebrities often branched into clothing merchandising. That act, so informed, exposed the Appellant’s Mark to be liable to be opposed under s 60 and, if it obtained registration, to be removed from the Register under s 88(2)(a). The registered owner’s knowledge is, as the Full Court found, relevant to the question of whether the s 89 discretion is enlivened.
8. Even if the appellant establishes that the Full Court erred in concluding that the discretion in s 89 was not enlivened, the Full Court reasoned as to why it would not exercise the discretion and there is no *House v The King* error in the Full Court’s reasoning: **RS [46]-[50]**. *First*, there was no error in the Full Court taking into account the appellant aligning herself with Ms Hudson to promote her business; s 89(2) permits the court to take into account any matter that it considers relevant and does not confine those matters to the circumstances existing at the time the ground for rectification is assessed. *Second*, there was no error in the Full Court having regard to the public interest in preserving the integrity of the Register; that was a mandatory consideration under s 89(2)(a) and reg 8.2(a) of the *Trade Marks Regulations 1995* (Cth). *Third*, it was open to the Full Court to have regard to the appellant’s refusal of co-existence in 2009, combined with bringing infringement proceedings years later in the absence of any actual confusion. *Fourth*, there was no error in the Full Court’s rejection of the appellant’s submission that the respondents were assiduous infringers, particularly when the Full Court found the Katy Perry Mark was honestly adopted and used by Ms Hudson in Australia on clothes and other merchandise (FC [204], [214]). That finding is not challenged.
9. **Relief:** The appeal should be dismissed with costs. If the appeal is allowed, the matter should be remitted to the Full Court to determine grounds 5 to 7 of the respondents’ notice of appeal below which the Full Court did not determine: **RS [51]**.

Dated: 9 September 2025



Matthew Darke