

[HIGH COURT OF AUSTRALIA.]

WILLIAM CHARLICK LIMITED . . . APPELLANTS;  
APPLICANTS,

AND

WILKINSON & COMPANY PROPRIETARY } RESPONDENTS.  
LIMITED . . . . . }  
OPPONENTS,

ON APPEAL FROM THE LAW OFFICER.

H. C. OF A. Trade mark—Application—Resemblance to registered trade mark—Likelihood of  
1913. deception—Colours, limitation of—Trade Marks Act 1905 (No. 20 of 1905),  
secs. 21, 25, 114.

MELBOURNE,  
May 14, 16.

Barton A.C.J.,  
Gavan Duffy,  
Powers and  
Rich JJ.

Where it appeared to the Court that a trade mark to be placed on packets of tea, for which registration was sought, possessed some points of similarity to an opponent's registered trade mark, but that the differences between the two were so marked and so easily discernible to a purchaser of ordinary perceptions and ordinary sense that it could not reasonably be said that the trade mark sought to be registered was likely to deceive him into the belief that when buying a packet of tea bearing the latter mark he was buying the tea of the opponent,

*Held*, that the application for registration should be granted.

An application for a trade mark set out a label bearing a design printed in several colours, requested the registration of the "accompanying trade mark," and stated that the essential particulars of the trade mark were "the distinctive label."

*Semle*, by Barton A.C.J. and Powers J., that the application was one for a trade mark limited to the particular colours as printed, within sec. 21 of the *Trade Marks Act 1905*.

APPEAL from the Law Officer.



William Charlick Ltd. applied for the registration of a trade mark in respect of tea. The nature of the trade mark and the other material facts are stated in the judgment of *Barton A.C.J.* hereunder. The application was opposed by Wilkinson & Co. Proprietary Ltd. The Deputy Registrar having dismissed the opposition, the opponents appealed to the Law Officer who found that the applicants' label was not distinctive, and that it was likely to lead to the goods of the applicants being mistaken for those of the opponents. He therefore allowed the appeal, and refused the application to register.

From this decision the applicants now appealed to the High Court.

*Schutt*, for the appellants. The trade mark sought to be registered does not so nearly resemble the respondents' registered trade mark as to be likely to deceive within the meaning of sec. 25 of the *Trade Marks Act 1905*, nor is it likely to deceive within the meaning of sec. 114. Although there are resemblances, no reasonable person would be likely to take a packet of tea bearing the appellants' label for a packet of tea of the respondents. The leading characteristics of the labels are what should be looked at, and those are quite distinct. [He referred to *Payton & Co. Ltd. v. Snelling, Lampard & Co. Ltd.* (1); *Sebastian on Trade Marks*, 5th ed., p. 612.]

*Mann*, for the respondents. The Court will consider very carefully the explanations offered for such points of resemblance as undoubtedly exist, and will draw its own inferences as to what was in the minds of the appellants as to the likely effect of those points. The position is different from that in a passing off action. The respondents have not to show that the appellants have done anything wrong, but the appellants must show that there is no likelihood of deception. The combination of colours is what the respondents object to. The appellants could use any colours, and they have chosen a scheme of colours almost identical with that of the respondents.

[*Schutt*. The words "distinctive label" in the application

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H. C. OF A. mean the label as printed in colours, and the applicants are  
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[RICH J. If that were so, an applicant whose distinctive label was not printed in colours would be limited to black and white.]

If the appellants are not limited by their application to any particular colours, and their application were granted, then they would be entitled to use the label as it is now coloured, in which case it would be likely to deceive, and the application should therefore be refused: *In re Worthington & Co.'s Trade Mark* (1); *à fortiori*, if the appellants are limited to the particular colours. [He also referred to *In re Turney & Sons' Trade Mark* (2); *Eno v. Dunn* (3); *Kerly on Trade Marks*, 3rd ed., p. 524; *Sebastian on Trade Marks*, 5th ed., p. 153.]

*Schutt*, in reply. Whether the appellants are limited to the particular colours or not, they may use these particular colours. As to likelihood of deception, the eyesight of the members of the Court is the ultimate test: *Bourne v. Swan & Edgar Ltd.* (4). [He also referred to *Schweppes Ltd. v. Gibbens* (5).]

*Cur. adv. vult.*

May 16.

BARTON A.C.J. This is an appeal from a decision of a Law Officer. The present appellants applied for registration of a trade mark to be used on packet tea. The Registrar, after calling for opposition and hearing it, granted the application for registration. Then the present respondents appealed to the Law Officer, who reversed the decision of the Registrar; and so, by appeal from him, the matter comes to us.

The trade mark for registration of which the appellants applied is one for labels to be placed on the four sides, but not on the ends, of packets of tea. On each of two of the sides there are the words "Jumbora Choicest Hillgrown Ceylon and Indian Tea" above a picture of a black elephant standing in a jungle coloured green. On each of the other two sides there appear on a pale blue background the words "Jumbora Tea" in red letters, a

(1) 14 Ch. D., 8.

(2) 11 R.P.C., 37, at p. 41.

(3) 15 App. Cas., 252.

(4) (1903) 1 Ch., 211, at p. 225.

(5) 22 R.P.C., 113, 601.



white scroll containing the words "Selected from Choicest Hill-grown Ceylon and Indian Teas," and below the scroll the words "Quality, Strength and Richness unequalled." The whole is richly surrounded with a golden border. The label coloured in the way I have described is attached to the face of the application, and under it are the words: "You are hereby requested to register the accompanying trade mark in Class 42 in respect of Tea. . . . The essential particulars of the trade mark are the following:—The distinctive label."

Sec. 21 of the *Trade Marks Act* 1905 is as follows:—"A trade mark may be limited in whole or in part to a particular colour or colours . . . If a trade mark is registered without limitation of colour it shall be deemed to be registered for all colours." Is this application one to register the trade mark without limitation of colour? I think that it is not. I think that the trade mark sought to be registered is limited to the colours in which it appears on the application form, because the application sets out the design in all its colours, which is followed by the words "You are hereby requested to register the accompanying trade mark," and the essential particulars of the trade mark are stated to be "the distinctive label." So that "the accompanying trade mark," which is the label with all its colours, is identified with "the distinctive label," and it seems to me quite clear that we are bound to assume that the label is depicted in the colours which are intended to be used.

The application was made on 31st May 1911, and before that time the appellants had been selling tea in packets bearing this particular label.

Having described the appellants' label with its golden bordering and pale blue background, I pass to that of the respondents. They had a trade mark registered on 29th July 1910, and which they had been using on packets of tea since 1901, and they had made large sales of tea in such packets. Theirs was a label which applied not only to the four sides but to the two ends of the packet. On each of the two ends is a distinctive design which is found also on two of the sides. That design is a device of a Cingalese or Indian with a cup of tea in one of his hands and with one foot on the prostrate body of a Chinaman. On each of

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the sides there are on a pale blue ground, in addition to the device I have described, the words "Viceroy Pure Indian and Ceylon Tea." On the third side there are, on a pale blue background, the words "Viceroy Packet," then, on a red ground, the words "Pure Indian and Ceylon Tea," and below the words "Strong, Rich and Fragrant." On the fourth side there are, also on a pale blue background, the words "Viceroy Packet" and "Proprietors, Wilkinson & Co. Ltd. Adelaide." I may mention that on the appellants' label there is no indication of who are the owners of the mark.

The points of resemblance between the label of the appellants and that of the respondents are that there is a blue ground in both, though the blue in the appellants' label is distinctly a darker shade than that in the respondents' label, and also the liberal use in both of the golden bordering which surrounds the panel on each side. In distinct letters the appellants' label bears on all four sides the words "Jumbora Tea," and on all four sides of the respondents' label in equally distinct letters is the word "Viceroy." So that, when comparing the two labels, the first thing that strikes the eye is that one bears the name "Jumbora" and the other the name "Viceroy," and that the device on the appellants' label is a black elephant standing in a jungle and that on the respondents' label is a Cingalese or Indian with one foot on the prostrate body of a Chinaman. Those seem to me to be very strong distinctions. Of course, it is a question how far the resemblances are calculated to deceive; and where there are points of resemblance, and, at the same time, strong points of distinction, the question arises whether the points of distinction are strong enough to overpower the points of resemblance. That is the question of fact which we have to consider.

The opposition to the appellants' application was on the main ground that the label sought to be registered by the appellants, except as to the word "Jumbora" and the device of an elephant, is copied from the respondents' label which is registered, and is calculated to deceive. The counter-statement of the appellants is that the only resemblance that might be thought to exist is the gold bordering, but that that is common to many packet teas now on the market. Secondly, they say that there is no similarity



except as to matter which is in general use on existing labels. When one considers a thing that is common knowledge, namely, the almost endless multiplicity of packet teas, it would be a strange thing, whether there was or was not a desire to copy details, if there should not be a recurrence here and there of such features as a gold bordering and a pale blue background.

The decision of the Deputy Registrar was that the appellants' label was not likely to cause deception or confusion, and he thought that there was sufficient dissimilarity between the two labels to justify him in holding that no rational person ought to have been deceived. The Law Officer's finding is:—“(1) That the applicants have failed to discharge the onus of proving that their label is distinctive; (2) that their label is not in fact distinctive, and (3) that their label would be likely to lead to their goods being mistaken for” the opponents' “goods,”—which may be summed up by saying that the appellants' label is likely to deceive.

There are many declarations alleging and denying points of similarity and many opinions of differing experts. The question is: What is their value?

In *Bourne v. Swan & Edgar Ltd.*; *In re Bourne's Trade Mark* (1), *Farwell J.* said:—“It has been ruled by the House of Lords in the case of *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.* (2), and I think it must now be taken to be finally settled, that it is not a proper question to put to the witnesses—Is the picture or mark complained of calculated to deceive the public?” That is the kind of evidence running all through the declarations on both sides. The learned Judge continued:—“The House of Lords have put it on the ground, and the Lord Chancellor especially has put it on the ground, that that question is the very issue which the Court has to determine. It appears to me that there is also another reason against the admissibility, and that is that I do not see how you can call any individual to give what is in truth expert evidence as to human nature, because what they are asked in this form of question is, not what would happen to them individually, but what they think the rest of the world would be likely to suppose or believe.

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(1) (1903) 1 Ch., 211, at p. 224.

(2) (1899) A.C., 83.



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They are not experts in human nature, nor can they be called to give such evidence, and, apart from admissibility, one cannot help feeling that there is a certain proneness in the human mind to think that other people are perhaps more foolish than they really are. I do not think that Carlyle is alone in his estimate of the intelligence of the majority of the inhabitants of these islands. Therefore that is ruled out as a matter of evidence. It only remains, then, to call the evidence of people who can say that they themselves would be deceived. Now, it is obviously extremely difficult to get any such evidence. People are reluctant to admit that they are more foolish than their fellows. The result is that unless it is left to the eyesight of the Judge, to judge for himself, there is practically no evidence open to the plaintiff in an action of this sort."

Apart from the evidence of the experts, to which, in the light of that passage, I attach very little weight, there are two other declarations which I may mention. One is that of Mrs. Martin, a general storekeeper, who said:—"As a matter of fact I have been misled or confused by the similarity in the general appearance of the labels, and several times have taken down a packet of the applicant company's tea from the shelf in mistake for a packet of the opponent company's tea." The other is that of David Williams, a grocer and teaman, who said:—"The general construction and appearance of the two packets is such that I myself have mistaken the one for the other. I know that many customers ask for and purchase packet tea by its general appearance, not by any distinctive name." As opposed to the last statement there is the evidence of another witness, that persons generally purchase tea by name. The question is what is the value to be attached to these two declarations. The witnesses are both traders, but there is no evidence from a customer that he has been deceived, although for some time before the application the appellants were selling packet tea bearing their label. What is the criterion to determine whether a proposed trade mark is likely to deceive by its similarity to an existing one? The criterion according to all the cases is whether an ordinary purchaser would probably be deceived. I take an ordinary purchaser to be a purchaser having ordinary perceptions, and, among them,



ordinarily good eyesight. Would such a person, viewing the thing as an intending purchaser of an article of its kind, and transacting business with the seller under ordinary conditions and in a reasonably good light, not in an extreme hurry on the one hand, nor entirely at leisure on the other—would such a person probably take the one label for the other? It seems to me that that is not a probability, but an improbability. Looking at these two labels not placed closely in juxtaposition, and putting oneself as nearly as possible in the position of an intending purchaser, it seems to me that a person having an ordinary recollection of one label would not be deceived into asking for a packet bearing the other label, seeing it in a shop. I am talking of a person of ordinary sense, not such a person as *Farwell J.* spoke of in the passage I have quoted. On that I will read a short passage from the judgment of *Romer L.J.* in *Payton & Co. Ltd. v. Titus Ward & Co. Ltd.* (1). He said:—"Much has been said on behalf of the plaintiffs about what is commonly called the unwary customer; but the only customer that the plaintiffs can really be thinking of, as it appears to me, is either one so stupid as to be wholly unable to distinguish one coffee tin from another, or one who chooses to assume that every coffee tin which is enamelled and is of the same common size and shape as the plaintiffs' tins must of necessity be one of the plaintiffs' tins. If you determine the question as to whether the defendants' tins are calculated to deceive by considering customers of the kind I have just mentioned, you would be induced to hold that any tin was calculated to deceive which only resembled the plaintiffs' tin in matters common to the trade; in other words, you would confer on the plaintiffs' tins a monopoly to which they are not entitled."

I think, myself, that such matters as the gold bordering and the pale blue ground are matters common to the trade. Then, looking at the fact that the devices on the two labels are essentially different, the difference being between an Indian and an elephant, and at the fact that the one is branded "Viceroy" and the other "Jumbora," each word being printed in letters so plain that it can be read at any ordinary distance at which a purchaser is

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likely to observe one of the packets, it seems to me that the fact that on both are the gold bordering and the pale blue ground is not a fact which can for a moment be said to establish deceptive similarity. It must be remembered that, when a person goes to buy a packet of tea like one that he has seen before, if he looks at what he is buying he will take notice of anything which, in reference to the packet, is distinctive, such as its size or the name printed on it. In this case the differences between these two labels is so very strong that I think it is highly improbable that any person with ordinary eyesight would take the one which he newly saw for the one which he had previously seen.

Most of the authorities on this question are passing off cases, and it is objected that those cases are not relevant to the proposed registration of a trade mark. That is partly but not entirely true, for where it is alleged that a proposed trade mark is likely to deceive, the question is the same in both cases.

In *Burford & Sons Ltd. v. Mowling & Son* (1), it was held, as stated in the headnote, that “the fact that A., a trader, had for many years put up his goods for sale in packages of a particular shape, size and colour, such packages not being used by others in the trade, does not prevent B., even with the object of capturing the trade of A., from putting up his goods of the same kind in packages of the same shape, size and colour, provided that B. sufficiently distinguishes on the packages his goods from those of A.” *O'Connor J.*, who heard the case in the first instance, said (2):—“There is no doubt about the law in such a case. Every trader has *prima facie* a right to put up his goods in any packages which he may think attractive and convenient, and in any method which he may consider suitable for the carrying on of his trade. But that right is subject to limitations. He must not use the registered trade mark of another, and he must not put up his goods in such a form as to be likely to deceive ordinarily intelligent persons into mistaking his goods for goods known in the market as manufactured, put up, or sold, by another. Subject to these limitations every trader has a right to use any material or any shape he may think fit for packing his goods and for putting them on the market. The plaintiffs have no

(1) 8 C.L.R., 212.

(2) 8 C.L.R., 212, at p. 216.



monopoly in the particular kind of packing which they have adopted." His Honor then gave a description of the kind of packing which was used, and continued :—" I take it, therefore, that the material of the package, its shape, colour, size and method of make up, are all common to the trade, and may be used by any trader. But that which distinguishes the plaintiffs' packages from what is common to the trade is the large and distinctive lettering on the package 'Signal Soap.'

"Now it must, I think, be admitted in the plaintiffs' favour that where, as in this case, a certain method of get up, though open to all traders, has been for many years solely identified with the plaintiffs' goods in a particular market, it is incumbent on a trader, who adopts the same method of get up for the purpose of pushing his trade in a similar article in the same market, that he shall clearly differentiate his goods on the face of the package from those of the plaintiffs. The matter which I have to determine is, therefore, in substance, narrowed down to the question whether the defendants, in adopting cartons of the same material, colour, shape and size as the plaintiffs', have made the difference of manufacture and ownership clear on the face of the package." The question seems to me exactly the same in this case. "The principles applicable to the determination of that question were clearly laid down by Lord Justice *Lindley*, then Master of the Rolls, in *Payton & Co. Ltd. v. Snelling, Lampard & Co. Ltd.* (1). The case had been decided by a Judge of first instance, went to the Court of Appeal, and afterwards to the House of Lords. The judgment in the Court of Appeal, from which I am about to quote, was approved in the House of Lords. *Lindley* L.J. said :—" After all said and done, what have we to consider ? What is it that the plaintiffs must make out in order to entitle them to succeed in this action ? They must make out that the defendants' goods are calculated to be mistaken for the plaintiffs', and, where, as in this case, the goods of the plaintiff and the goods of the defendant unquestionably resemble each other, but where the features in which they resemble each other are common to the trade, what has the plaintiff to make out ? He must make out not that the defendant's are like his by

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(1) 17 R.P.C., 48, at p. 52.



“The next question is, what amounts to a misleading resemblance, a resemblance likely to deceive? The ultimate test of whether a package is likely to deceive must be how it is likely to affect the customer. As to that we must see what kind of customer, in respect of intelligence and knowledge, the law considers in this relation. In the case from which I have already quoted *Romer* L.J. in the Court of Appeal makes these observations, which have been approved in many cases since (1): ‘It seems to be a sort of popular notion of some witnesses that in considering whether customers are likely to be deceived, you are to consider the case of an ignorant customer who knows nothing about, or very little about the subject of the action. That is a great mistake. The kind of customer that the Courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiff’s goods, those characteristics which distinguish his goods from other goods on the market so far as relates to general characteristics. The customer must be one who, knowing what is fairly common to the trade, knows of the plaintiff’s goods by reason of these distinguishing characteristics. If he does not know that he is not a customer whose views can properly, or will be, regarded by the Court.’”

That case was subject to appeal ; and on the appeal *Griffith C.J.* said (2):—" At the trial a great point was made of the name of the plaintiffs' soap—' Signal Soap '—and it was contended that the defendants' soap, made up in the way it was, might be mistaken for the plaintiffs' Signal soap. But the case is put forward by Mr. *Irvine* in a somewhat different way. The contention is that the packages in which the plaintiffs' soap was put up and sold for many years, having regard to their shape, size and colour, had

1) 17 R.P.C., 48, at p. 57. (2) 8 C.L.R., 212, at p. 222.



induced the public to believe that goods sold in such packages were the plaintiffs' goods. It may be that was so, but Mr. *Irvine* properly admits that the plaintiffs could not have a monopoly of packages of that shape, size and colour, and that it was perfectly free to any other person engaged in the same trade to use similar packages provided he took proper care to say that the goods he was selling were his own goods and not the plaintiffs' goods. Therefore the only question which has to be considered is whether the defendants took sufficient care to distinguish their goods from those of the plaintiffs?"

Both of those judgments seem to me to be particularly applicable to the present case.

When the case of *Payton & Co. Ltd. v. Snelling, Lampard & Co. Ltd.* (1) went to the House of Lords, Lord *Macnaghten* said (2):—"The principle is perfectly clear—no man is entitled to sell his goods as the goods of another person. The difficulty lies in the application, and, when it is a case of colourable imitation, I think it is very desirable to bear in mind what Lord *Cranworth* said on one occasion—that no general rule can be laid down as to what is a colourable imitation or not; you must deal with each case as it arises, and have regard to the circumstances of the particular case.

"My Lords, having said that, I really think I have said enough. I know there are differences between the tins of the plaintiffs and the tins of the defendants. There are some minor differences; but the main difference is that one is distinctly labelled 'Royal Coffee' and the other is distinctly labelled 'Flag Coffee.' The minor differences I do not propose to go into. They satisfy me that the defendants had no intention of stealing the plaintiffs' trade. Beyond that I do not think it worth while to refer to them. The main distinction, as I have said, is between 'Flag Coffee' and 'Royal Coffee.' Nobody has been deceived, and I do not think anyone will be deceived. Suppose a person goes into a shop with a vague idea of having seen something pretty and attractive at some time or other, if you could trace the history of that impression on his mind back to the very first moment it got there, it may be you would find that it was derived from 'Royal

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(1) 17 R.P.C., 48.

(2) (1901) A.C., 308, at p. 310.



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Coffee' and not from 'Flag Coffee'; but if he chooses to take 'Flag Coffee' instead of 'Royal Coffee,' there is no deception on the part of the defendants that I can see at all.

"One word with regard to the evidence I should like to say. I think, as I have said before, that a great deal of the evidence is absolutely irrelevant, and I do not myself altogether approve of the way in which the questions were put to the witnesses. They were put in the form of leading questions" (and this remark applies equally well to declarations), "and the witnesses were asked whether a person going into a shop as a customer would be likely to be deceived, and they said they thought he would. But that is not a matter for the witness; it is for the Judge. The Judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness."

Not making a surrender of my own independent judgment to any of the witnesses, and having observed the points of similarity and dissimilarity, I have come to the distinct and definite conclusion that, whether portion of the respondents' label has been copied or not in the way of the gold bordering and the pale blue ground—as to which I say nothing—it cannot reasonably be said that the appellants' label is likely to deceive. I come to the conclusion that the mark tendered for registration possesses some points of similarity to the respondents' label, but that the differences between them are so marked and so easily discernible to a purchaser of ordinary perceptions and ordinary sense that it cannot reasonably be said that the proposed trade mark is likely to deceive him into the belief that when buying a packet of tea bearing that mark he is buying the tea of the respondents. Therefore I have come to the conclusion that the appeal must succeed.

I mentioned at the beginning that, although the appellants' packets have very distinctive ends, the devices on those ends are not sought to be registered but only the devices on the four sides, while the respondents have registered the designs on the ends of their packets as part of their trade mark. That is a fact which has cropped up in the arguments, and it will be a question for the appellants to consider whether, in view of what has happened,



it will be worth while to register the designs on the ends. On that, however, I make no suggestion.

The question now is whether, the appeal being allowed, the appellants should have their costs. I admit that an argument can be founded on the evidence of the deponent Hughes, but that argument rests upon the conclusion that the appellants copied the gold bordering and light blue ground from the respondents' label. It may be that they have, but, upon the evidence before us, I cannot come to the conclusion that they did or that that particular resemblance is anything more than a coincidence. Therefore, speaking for myself, I cannot think that the declaration of Hughes ought to affect the judgment of this Court as to costs.

The order that I propose is: that the appeal be allowed, that the order of the Law Officer be reversed, that the appeal to him from the Deputy Registrar be dismissed with £18 18s. costs, that the order of the Deputy Registrar be restored, and the appellants' application granted, and that the respondents pay the costs of this appeal.

GAVAN DUFFY J. My brother *Rich* and I agree in thinking that the trade mark sought to be registered does not so nearly resemble the respondents' registered trade mark as to be likely to deceive. This application, therefore, ought to be accepted.

The appellants' counsel has contended that, on a true construction of the application for a trade mark in this case, it is limited to the particular colours shown on the label attached to the application. We are not to be taken as assenting to that proposition.

POWERS J. I concur in the judgment of my brother the Acting Chief Justice as to sec. 21. That section says that "a trade mark may be limited in whole or in part to a particular colour or colours." I hold that that can be done by a statement in writing, as was done in the case of the "Viceroy" trade mark application, accompanied by a coloured representation of the mark showing the colours to be used, and how they are to be used, or by asking for the registration of a label which is shown in particular colours, as in the case of the "Jumbora" trade mark application. I think

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1913. the distinctive coloured label lodged by them as part of the appli-  
cation. I concur in the judgment of the Court.

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*Appeal allowed. Order of Law Officer  
reversed, and appeal to him dismissed  
with £18 18s. costs. Order of Deputy  
Registrar restored, and appellants' ap-  
plication for registration granted.  
Respondents to pay appellants' costs  
of this appeal.*

Solicitor, for the appellants, *F. B. Waters.*  
Solicitors, for the respondents, *Braham & Pirani.*

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Commissioner  
of Taxation v  
Packer 90  
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Cons  
Enterprise  
Gold Mines  
NL v Mineral  
Horizons NL  
91 FLR 403

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69 ALR 265

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61 ALJR 102

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Asion v DPP  
45 SASR 181

Appl  
Jennings  
Construction  
v Burgundy  
Royale  
Investments  
161 CLR 681

Cons  
Bunnings  
Forest  
Products Pty  
Ltd v Bullen  
(1994) 126  
ALR 660

Refd to  
Bryant v  
Common-  
wealth Bank  
of Australia  
(1996) 90  
LGERA 126

[HIGH COURT OF AUSTRALIA.]

THE MARCONT'S WIRELESS TELEGRAPH } PLAINTIFFS ;  
COMPANY LIMITED . . . . }

AND

THE COMMONWEALTH . . . . DEFENDANTS.

[No. 3.]

H. C. OF A. Practice—High Court—Stay of proceedings pending appeal to the Privy Council—  
1913. Special terms.

SYDNEY,  
April 10.  
Barton A.C.J.,  
Isaacs and  
Rich JJ.

In an action against the Commonwealth for infringement of patent the High  
Court had, on the application of the plaintiffs, made an order for inspection  
against the Commonwealth. A motion for a stay of proceedings under the  
order, pending an application to the Privy Council for special leave to appeal,  
was made by the Commonwealth, and the circumstances were such that unless  
a stay was granted the appeal would be rendered nugatory, and that if it was  
simply granted the whole benefit of the action might be lost to the plaintiffs.