

H. C. OF A.

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BAIRD

v.

MAGRIPILIS.

Court of Queensland or a Judge thereof upon the new trial as aforesaid. Remit the cause to the Supreme Court of Queensland.

Solicitors for the appellants, *Tully & Wilson.*

Solicitors for the respondents, *MacDonell & Harris*, Cairns, by
Macnish & Macrossan.

B.L.

Appl
*Carnival
Cruise Lines
Inc v Simar
Cruises Ltd
(1994) 120
ALR 495*

Appr
*Carnival
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(1994) 31 IPR
375*

Cons
*Esprit
International v
Komesaroff
(1999) 46 IPR
420*

Foll
*Malibu Boats
West Inc v
Catanesi
(2000) 51 IPR
134*

Foll
*Malibu Boats
West Inc v
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(2000) 180
ALR 119*

[HIGH COURT OF AUSTRALIA.]

A. & F. PEARS LIMITED APPELLANT ;
OPPONENT,

AND

THE PEARSON SOAP COMPANY LIMITED . RESPONDENT.
APPLICANT,

H. C. OF A. *Trade Mark—Registration—Likelihood of deception—Onus of proof—Discretion of*
1925. *Registrar—Trade Marks Act 1905-1922 (No. 20 of 1905—No. 25 of 1922), secs.*
16, 24, 25, 44, 114.

SYDNEY,

Nov. 23, 24 ;

Dec. 18.

Knox C.J.,
Isaacs, Higgins,
Rich and
Starke J.J.

An application was made by a company named the Pearson Soap Co. Ltd. for registration of the words "Pearsonia" and "Pearsonette" as a trade mark in respect of detergents and cleansers. The applicant was the registered proprietor of a trade mark "Pearson's" in respect of sand-soap. The application was opposed by A. & F. Pears Ltd., a company which manufactured the well-known Pears' Soap, and which was the registered proprietor of many trade marks in connection with soap which included the word "Pears." The application was granted subject to a condition that the marks should be applied respectively to pumice powder and pumice paste put up in containers on which the name and address of the applicant company appeared in visible proximity to the mark.

Held, by Isaacs, Higgins and Rich J.J. (Knox C.J. and Starke J. dissenting), that on the evidence the applicant had not discharged the onus of showing that the marks were not likely to deceive, and, therefore, that it was not entitled to registration of the mark either with or without the condition.

APPEALS from the Law Officer.

Applications were made by the Pearson Soap Co. Ltd. for the registration as trade marks of the words "Pearsonia" and "Pearsonette" in class 47, each in respect of detergents and cleansers. The applications were opposed by A. & F. Pears Ltd. The Registrar upheld the opposition and refused to grant the applications. On appeal the Law Officer granted the applications with the following modifications and conditions: that the trade mark "Pearsonia" should be applied to pumice powder put up in tins or containers on which the name and address of the applicant Company appeared in visible proximity to the trade mark; and that the trade mark "Pearsonette" should be applied to pumice paste put up in tins or containers on which the name and address of the applicant Company appeared in visible proximity to the trade mark.

From the decisions of the Law Officer A. & F. Pears Ltd. now appealed to the High Court.

The other material facts appear in the judgments hereunder.

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Jordan (with him *Weston*), for the appellant. The Registrar's decision was right, and the Law Officer was not justified in overruling his decision. Having regard to the appellant's registered trade marks, the words are likely to deceive and are within the prohibition of secs. 25 and 114 of the *Trade Marks Act* 1905-1922. The burden is on the respondent to satisfy the Court that there is no likelihood of deception, and that burden has not been satisfied (*Eno v. Dunn* (1); *Robert Harper & Co. Pty. Ltd. v. A. Boake Roberts & Co.* (2); *In re Australian Wine Importers Ltd.* (3); *In re Gutta Percha and India Rubber Co. of Toronto's Application* (4); *Lever Bros. Ltd. v. Abrams* (5); *In re Pianotist Co.'s Application* (6)). Apart from secs. 25 and 114 the Registrar has a discretion, and unless he has exercised it on wrong principles his decision should not be lightly interfered with (*In re Garrett's Application* (7)). [Counsel also referred to *Gramophone Co. v. Magazine Holder Co.* (8).]

(1) (1890) 15 App. Cas. 252, at p. 257.

(2) (1914) 17 C.L.R. 514, at p. 520.

(3) (1889) 41 Ch. D. 278, at pp. 282, 287, 291.

(4) (1909) 2 Ch. 10, at pp. 13, 16-17.

(5) (1909) 8 C.L.R. 609.

(6) (1906) 23 R.P.C. 774, at p. 777.

(7) (1916) 1 Ch. 436, at p. 443.

(8) (1911) 104 L.T. 259.

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Flannery K.C. (with him *Trealt*), for the respondent. The words are registrable under sec. 16 as being invented words, and also as being words which have no reference to the character or quality of the goods (*In re G. Kynoch & Co.'s Trade Mark* (1)). The Law Officer rightly decided that there was no reasonable likelihood of deception.

Jordan, in reply. If each of the words is obviously "Pearson" with a suffix, neither is an invented word, but each is a surname within the meaning of sec. 16, and is not registrable.

Cur. adv. vult.

Dec. 18.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. The Pearson Soap Co. applied for registration of two words, "Pearsonette" and "Pearsonia," as trade marks in class 47. A. & F. Pears Ltd., the well-known soap manufacturer, is the registered proprietor of many trade marks, in classes 47 and 48, in connection with soap, such as the words "Pears Soap," and of devices bearing the words "Pears" and "A. & F. Pears" as essential particulars. This Company opposes the application. The Law Officer has allowed the registration of the words applied for, but subject to the condition that the trade mark "Pearsonia" is to be applied to pumice powder put up in tins or containers on which the name and address of the applicant Company appear in visible proximity to the mark, and that the trade mark "Pearsonette" is to be applied to pumice paste put up in tins and containers on which the name and address of the applicant appear in visible proximity to the mark.

The law applicable to the case is well settled. The applicant is *in petitorio*, and *in dubio* its application should be refused. If there be reasonable danger of the public being deceived the application should be refused (*Eno v. Dunn* (2)). The application looks suspicious on its face, but we think that suspicion is satisfactorily removed when the facts are examined. The Pearson Soap Co. has carried on a considerable trade in Australia since the year 1890 in sand-soap. It obtained the registration as of the year 1922 of the

(1) (1897) 14 R.P.C. 905.

(2) (1890) 15 App. Cas. 252.

name "Pearson's" as a trade mark in respect of sand-soap, in class 47. That registration was based upon evidence that the word "Pearson's" was a distinctive word, and connoted, in the markets of Australia the applicant's goods and the applicant's goods only. The word has ever since remained on the register, without objection, and there is no evidence of any confusion whatever between the applicant's trade and the opponent's trade: indeed, they are not in competition. The applicant sought to register the words "Pearsonia" and "Pearsonette" in class 47 generally, but the Law Officer confined the words to use in connection with pumice powder and pumice paste respectively. These commodities are nearly allied to sand-soap, and the words "Pearsonia" and "Pearsonette" are but variations of the distinctive name "Pearson's," which is well known, and has long been used in the Australian markets to denote the goods of the applicant. In these circumstances, we see no reason for differing from the conclusion of the Law Officer.

Mr. *Jordan*, in his reply, suggested that neither word was registrable under the *Trade Marks Act*, sec. 16 (1) (c), as an invented word, or under sec. 16 (1) (d) as a word "having no direct reference to the character or quality of the goods, and not being according to its ordinary signification . . . a surname." It is unnecessary to decide whether the words be invented words (cf. *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs and Trade Marks* (1)), for there is nothing in the evidence which excludes them from the provisions of sec. 16 (1) (d) of the Act.

The appeal ought, in our opinion, to be dismissed.

ISAACS J. The order of the Law Officer which is now appealed from permits the respondent to register as trade marks in respect of pumice powder and pumice paste respectively the two words "Pearsonia" and "Pearsonette," provided they are used on tins and containers on which the name and address of the respondent appear in close proximity to the respective marks. The articles in respect of which the registration was permitted are in class 47, and are in the nature of "sand-soap," a preparation used, among

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other purposes, for cleansing the hands as usually done by means of ordinary soap. One is said to be "sand-soap" in the form of powder, the other in the form of paste. Those alternative forms, in the case of ordinary soap, are, as a matter of common knowledge, of frequent occurrence. The name of the applicant Company is "The Pearson Soap Company Limited." The respondent Company was formed in 1903 to take over the soap business of two persons named Pearson, trading as Pearson Bros., sand-soap manufacturers. On 22nd December 1922, the respondent Company registered as a trade mark the word "Pearson's." The appellant Company, the well-known soap manufacturing company, opposed the present application on the ground of deception or confusion and it proved that among its registered Australian trade marks are the following:— In class 48 the word "Pears" and the words "Pears' Soap," and in respect of class 47 the words "A. & G. Pears Genuine Transparent Soap" for common soap of all kinds. The words "Pears' Soap" are in everyday use in the language for describing a special household commodity. The Registrar refused registration on the ground that he was not convinced there was "no reasonable likelihood of confusion." He declined to accede to the suggestion of the respondent's attorney to grant a conditional registration for a limited statement of goods. The Registrar thought that their representation of the marks in visible proximity to the name "Pearson" would not overcome "all reasonable likelihood of confusion" even confining the use to pumice paste and pumice powder. He concluded by saying: "I am unable, therefore, to accept Mr. Walsh's proposal as the basis of an equitable settlement of the rights of both parties to these proceedings." The Law Officer, while thinking there was no reasonable likelihood of confusion, did, in deference to the Registrar's opinion, adopt Mr. Walsh's suggested modification and suggestion.

This appeal is made on three grounds, namely, (1) that the marks are likely to deceive; (2) that it is not shown they are free from danger of deception and confusion, and (3) that the Registrar rightly exercised his discretion. It now becomes a question of what the Court thinks of the matter. The first question logically is as to the function of the Court in such a case. Sec. 44 says in

sub-sec. 2: "The Court shall hear the applicant and the opponent, and determine whether the application ought to be refused or ought to be granted with or without any modifications or conditions." It is to be observed that, though in one sense an appeal from either the Registrar or a Law Officer, it is original jurisdiction in the constitutional sense. The terms in which the jurisdiction is conferred are precisely those in which the powers of the Registrar and then the Law Officer are couched. Further sec. 24 referring alike to the Registrar, the Law Officer and the Court, employs the expression "his or its discretion." I entertain no doubt that the Court is under a duty to make up its own mind on the subject and to exercise its discretion accordingly. In doing that, however, it may have regard in any particular case to any special qualifications or opportunities enjoyed by the tribunal from which the appeal comes. In *Eno v. Dunn* (1) the duty of the Court to exercise its own discretion is undoubted. Lord *Halsbury* says (2): "We are now in the position of the Comptroller." Lord *Watson* appears to take the same view in his reference to sec. 62 of the English Act, because he concludes it by the words "or may refer the matter to the Court for its determination" (2). Lord *Macnaghten* says (3): "The Comptroller, to whom *in the first instance* is committed the 'discretionary power.'" This is in accordance with several individual expressions of opinion in England; for instance, as per *Fletcher Moulton* L.J. in *In re W. & G. Du Cros Ltd.'s Applications* (4): and it is in accordance with the majority view in *In re Garrett's Application* (5). But there were some contrary opinions of great weight in England, and an unsettled practice existed; and therefore the Legislature in the Act of 1919 (9 & 10 Geo. V. c. 79, sec. 8 (2)) found it necessary, or at least desirable, to free the Court's hand beyond question. This Court has not adopted any doubtful practice; and, in my opinion, it should be understood that the discretion of the Court is uncontrolled except by the Act, and, in its exercise, by the circumstances of the particular case.

As to the main point in controversy, I would first address myself to the most important question, because of general interest, namely,

(1) (1890) 15 App. Cas. 252.

(3) (1890) 15 App. Cas., at p. 263.

(2) (1890) 15 App. Cas., at p. 256.

(4) (1911) 29 R.P.C. 65, at p. 76.

(5) (1916) 1 Ch. 436.

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the test to be applied. In the first place, as I have stated in the recent case of *Thomson v. B. Seppelt & Sons Ltd.* (1), the Court must look beyond the immediate parties and have regard to public interests. There are numerous cases unnecessary to particularize which rest on this foundation. But there is one in which the principle is acted upon which may be specially referred to. It is *In re Havana Commercial Co.'s Application* (2). The Registrar had refused registration on the ground that the use of the mark "might possibly deceive" some of the public. On appeal to the Court the opponents, it was held, had no merits whatever and their personal rights were not in any way concerned. Nevertheless, *Peterson J.* disallowed registration. He said (3):—"If the present application were to succeed the result *might be*—it is not necessary to say that it would be—that members of the public who had been accustomed to purchase the British cigars which had been known as 'Cubanolas' would be led to suppose that the cigars which were sold by the applicants under the name of 'Cubanela' were of the same character and description. . . . In these circumstances it seems to me that I cannot say that it might not lead to confusion in the minds of the public if the present application were acceded to, and therefore I come to the conclusion that I cannot properly interfere with the discretion of the Registrar." The accuracy of the test there adopted is, I think, clear. The fount of authority is *Eno v. Dunn* (4). All the learned Lords were agreed that an applicant has no absolute right to the registration of a trade mark even though it conforms to the statutory description. The limitation on that right is expressed by Lord *Watson* in the words (5):—"He is *in petitorio*, and must justify the registration of his trade mark *by showing affirmatively that it is not calculated to deceive*. It appears to me to be a necessary consequence that, *in dubio*, his application ought to be disallowed." The expression "*in petitorio*" has reference, as I understand, to the Scottish petitory action, which is one where the plaintiff—the pursuer—is called upon to prove his right in the first instance. Read as a whole, and I am confirmed in that by the

(1) *Ante*, 305.

(2) (1916) 33 R.P.C. 399.

(3) (1916) 33 R.P.C., at pp. 404, 405.

(4) (1890) 15 App. Cas. 252.

(5) (1890) 15 App. Cas., at p. 257.

observations of *Phillimore* L.J. in *In re Geo. Cording Ltd.'s Application* (1), I take Lord *Watson's* words as intended to convey what Lord *Herschell*, with extreme precision, expressed at pp. 261-262. He said :— "I cannot avoid the conclusion . . . that the proposed use of the words 'fruit salt' would be calculated to deceive. *But I do not think it is necessary to go so far as this.* I think it is enough to say that *I am not satisfied* that there would be *no reasonable danger of the public being so deceived.*" Then, speaking of the discretion to refuse registration, Lord *Herschell* says : "It is, in my opinion, a reasonable exercise of it to refuse registration when it is not clear that deception *might* not result from it." Lord *Macnaghten* (2) speaks of the words as "calculated . . . to create a confusion in the minds of" certain of the public. It is true that the majority of the House found as a fact that the proposed mark was calculated to deceive. Nevertheless, the standard of right to registration appears, I think, clearly enough. In *In re United Kingdom Tobacco Co.'s Application* (3) *Parker J.*, as he then was, appears to me to have taken great trouble to express clearly the condition upon which, according to *Eno v. Dunn* (4) when properly understood, an applicant can rightfully claim registration. He says (5) : "Where a person applies for the registration of a new mark it is for him to show that that mark is free from all danger of leading, either on the part of the public or on the part of the trade, to deception or confusion ; and it is also clear, I think, on the authorities that unless the Comptroller is satisfied that there can be no deception or confusion arising out of the new mark so proposed to be registered he ought not to allow the application for registration to proceed." And the learned Judge says (6) :—"On the evidence I think I am bound to hold that there is a danger of the registration of this new mark leading to confusion or deception. . . . It appears to me on the whole that the applicants for registration have not discharged the onus upon them of showing that the mark in question is *free from all danger of leading* to confusion or deception, and on that ground the Comptroller *ought*, in the exercise of his discretion, to have refused

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(1) (1916) 1 Ch. 422, at p. 434.

(2) (1890) 15 App. Cas., at p. 263.

(3) (1912) 29 R.P.C. 489.

(4) (1890) 15 App. Cas. 252.

(5) (1912) 29 R.P.C., at p. 496.

(6) (1912) 29 R.P.C., at p. 497.

H. C. OF A. to proceed with the registration according to the doctrine laid down
1925. in *Eno v. Dunn* (1).” In *Garrett’s Case* (2) Lord Cozens-Hardy
A. & F. M.R. quoted from Lord *Herschell’s* judgment the passage: “I
PEARS think it is enough to say that I am not satisfied that there would
LTD. be no reasonable danger of the public being so deceived.”
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The question then for me is: Is it clear that there is no reasonable danger of the public being misled by the use of the proposed marks? Unless that is clear, the Court ought not to exercise its discretion by granting a monopoly which would assist the applicant to expose intending purchasers to that danger. I certainly am not satisfied there is not such danger. If it were necessary to form a decided opinion on the subject, I should think there was such a danger. The purchase of commodities of this nature takes place under circumstances which makes the risk of confusion very real. But, guided by the authorities quoted, I need not go so far. It is sufficient to say the applicant has not sustained the burden which for public protection the law requires of an applicant for a statutory monopoly.

The appeal should, therefore, be allowed and the applications dismissed.

HIGGINS J. I am of opinion that the appeal from the Law Officer must be allowed. I base this opinion on sec. 114 of the *Trade Marks Act* 1905-1912, on the words “no mark the use of which would by reason of its being likely to deceive or otherwise be deemed disentitled to protection in a Court of Justice . . . shall be used or registered as a trade mark or part of a trade mark.” After we gave our decision in *Lever Bros. Ltd. v. Abrams* (3), Parliament altered the words in sec. 25 so as to be more in accord with the corresponding English provision; but I still rely with more confidence on sec. 114. This section, in effect, prohibits the registration of any trade mark which is likely to deceive the public. It does not treat the applicant for the trade mark as fraudulent in any way; it does not involve that an injunction would necessarily be issued to prevent the applicant from using the mark; but it means that the privilege of registration, and, with registration, the right to exclusive user (sec.

(1) (1890) 15 App. Cas. 252.

(2) (1916) 1 Ch., at p. 441.

(3) (1909) 8 C.L.R. 609.

50), are not to be granted for a trade mark which is likely in fact to deceive, however innocent the intention of the applicant. H. C. OF A.
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This case is on the border line ; and I should not give my decision with confidence were it not for the principle established by the Courts, and not disputed before us, that the onus lies on the applicant for registration to show that there is no likelihood of deception, of confusion (*Eno v. Dunn* (1) ; and see *In re Australian Wine Importers Ltd.* (2)).

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Higgins J.

The company that opposes the application is the present successor of one Pears, who gained a reputation many years ago for soap ; and the various successors have had many variations in the description of their goods and in their registered trade marks ; but they have always retained the word “ Pears ” as the main characteristic. The applicant here has been successful in getting registered, in 1922, a trade mark “ Pearson’s ” ; and it now seeks to have “ Pearsonette ” and “ Pearsonia ” registered, as separate trade marks in class 47, in respect of detergents and cleaners. The first five letters constitute, if alone, the name Pears ; but that name is usually pronounced as the fruit. The other letters are meaningless ; but the names are said to be “ invented ” words within sec. 16. The Registrar refused to grant the applications ; but the Law Officer has granted them, with the condition that “ Pearsonia ” is to be applied to pumice powder, and “ Pearsonette ” to pumice paste, both to be put up in tins or containers in which the name and address of the applicant Company appear in visible proximity to the trade mark. The Registrar was evidently impressed by the three circular tins put before him as exhibits, with “ Pearsonia ” and “ Pearsonette ” on the label. These are his words :—“ Taking first the appeal to the eye, I have before me the three circular tins containing goods of the applicant’s manufacture, filed as exhibits, one having the word ‘ Pearsonette ’ and two the word ‘ Pearsonia ’ printed prominently on the label. It is apparent from the particulars exposed on the labels that these tins may be placed side by side upon a shelf in such a position that the word or compendious phrase ‘ Pears ’ printed in large type immediately attracts the eye. It is,

(1) (1890) 15 App. Cas., at pp. 257, 261-262.

(2) (1889) 41 Ch. D. 278.

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of course, understood that fraudulent use of the mark must not be assumed, but apart from any intentional action on the part of the applicant or his salesmen the mere possibility of the goods being so placed must naturally have a bearing upon the matter to be decided. In addition, the first five letters of the applicant's mark are identical with the opponent's mark 'Pears.' Other matter certainly appears upon the applicant's labels, but with this I am not concerned, as the applicant is seeking registration of the words 'Pearsonette' and 'Pearsonia' without additional added matter and if registered such words may be used alone upon the goods or conjoined with other matter according to the applicant's desire." This reasoning seems to me to be sound. It also appears that the opponent markets in Australia, not only ordinary soap, but Fuller's earth also, and several other detergents in the form of a powder, and a dental paste—all with the name "Pears" prominently shown. Under all the circumstances, I am clearly of opinion that the applicant has failed to show that the words proposed to be registered as trade marks are not likely to deceive the public into the belief that in purchasing detergents marked "Pearsonia" or "Pearsonette" they are purchasing goods manufactured by the opponent. To refuse to allow the registration of these words as a trade mark will still leave to the applicant an infinite area of choice, of invention (as it is called), of marks or names for his commodity; and I think the appeal ought to be allowed.

RICH J. The Registrar, the Law Officer and the Court have a discretion in matters of this kind. How should this discretion be exercised? I consider that the Registrar exercised the discretion vested in him aright when he refused the respondent's application. "Where a person applies for the registration of a new mark it is for him to show that that mark is free from all danger of leading, either on the part of the public or on the part of the trade, to deception or confusion" (*In re United Kingdom Tobacco Co.'s Application* (1)). The applicant must discharge the burden of

proof; and it is not enough to leave it in doubt. In my opinion the matter is *in dubio* and the appeal should be allowed.

Appeals allowed. Order of Law Officer discharged. Order of Registrar restored. Respondent to pay costs of appeals.

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Solicitors for the appellant, *Allen, Allen & Hemsley.*  
Solicitors for the respondent, *McDonnell & Moffit.*

B. L.

Cons Pamas  
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(1992) 35  
FCR 117

[HIGH COURT OF AUSTRALIA.]

THE YOUNG MEN'S CHRISTIAN ASSOCIA-  
TION OF MELBOURNE . . . . . }

APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF  
TAXATION . . . . . }

RESPONDENT.

*Income Tax—Exemption—“ Religious institution ”—“ Charitable institution ” —  
Income Tax Assessment Act 1915-1918 (No. 34 of 1915—No. 18 of 1918), sec.  
11 (1) (d).*

H. C. OF A.  
1926.  
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An association incorporated under the *Hospital and Charities Act 1890* (Vict.) was formed, as stated in its by-laws, on a certain declaration that it “ seeks to unite those young men who, regarding the Lord Jesus Christ as their God and Saviour according to the Holy Scriptures, desire to be His disciples in their doctrine and their life, and to associate their efforts for the extension of His kingdom amongst young men.” The by-laws also stated that the object of the association was “ the improvement of the spiritual, intellectual, social and physical condition of young men.”

Held, by *Isaacs, Gavan Duffy* and *Rich JJ.*, that the association was a “ religious institution,” and, by *Higgins J.*, that it was a “ charitable

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