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[HIGH COURT OF AUSTRALIA.]

JAFFERJEE . . . . . APPELLANT ;  
OPPONENT,  
  
AND  
  
SCARLETT . . . . . RESPONDENT.  
APPLICANT,

Trade Mark—Registration—Opposition proceedings—Appeal to High Court—Function of court—To determine appeal as upon an original application—Similarity of trade marks—Likelihood of deception—Onus of proof on applicant—Foreign trade—Likelihood of deception in place of user—Trade Marks Act 1905-1934 (No. 20 of 1905—No. 45 of 1934), secs. 25, 43, 44, 45, 114. H. C. OF A. 1937. MELBOURNE, June 11, 15. SYDNEY, July 30. Latham C.J., Dixon and McTiernan JJ.

Upon an appeal to the High Court from a decision of the Registrar of Trade Marks on an application to register a trade mark, the question for the High Court to decide is whether on the merits the mark ought to be registered and not merely whether the decision of the registrar can or cannot be supported.

On such an appeal the applicant is in the same position in the High Court as he was before the registrar, and the onus is on him to show that, if his mark is registered, there will be no reasonable danger of the public being deceived.

Eno v. Dunn, (1890) 15 App. Cas. 252, applied.

Per Dixon J.: In a case where there are features in two marks which might tend to confuse, the question whether there is a real and substantial probability of deception must be decided by reference to the actual course of dealing and, if that takes place abroad, the conditions there prevailing must be considered.

APPEAL from the Registrar of Trade Marks.

Victor Alexander Scarlett applied for the registration of a trade mark in respect of flour. The mark consisted of a drawing of



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two figures with the words "Best Australian Roller Flour." The figures were those of runners in athletic costumes one of whom had reached the finishing tape in the race. The line of the tape was shown as bent where it was in contact with the body of the leading runner. The arms and legs of the runners displayed a state of activity. Abdulhusein Jafferjee gave notice of opposition, contending that the trade mark which the applicant sought to register so nearly resembled the opponent's trade mark, which was already on the register, as to be likely to deceive, and that, therefore, under sec. 25 of the *Trade Marks Act* 1905-1934, the registrar should not register the applicant's mark. The opponent also relied on sec. 114 of the Act, which provides: "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."

The opponent's trade mark, which was registered in respect of flour, consisted of two men in athletic costumes with javelins in their hands. The javelins were crossed in the air and the arms and legs of the figures displayed a state of activity. The figures were within a circle which was not carried under their feet. The trade mark also bore the words "Double Javan," which according to the evidence meant "two warriors" or "two strong men." The evidence disclosed that the flour which would be placed in the bags containing the marks might be sold not only in Australia but also in eastern countries where the English language is not ordinarily read by many of the purchasers of the flour.

The registrar came to the conclusion that there was not such a close resemblance between the two marks that the ordinary purchaser purchasing with ordinary care in Australia would be likely to be deceived by the use of the applicant's mark, and was also of opinion that the marks did not present a visual resemblance such that deception or confusion was likely to arise. He also held that the marks were so dissimilar both in their visual appearance and in their symbolical suggestion that, even if both marks were used in eastern countries, illiterate natives of those countries would not be deceived or confused by the use of the applicant's mark, having regard to the opponent's registered trade mark, and that the



applicant had discharged the onus that was on him of showing that the use of his mark would not be likely to deceive, and, accordingly, dismissed the opposition and granted the application.

From this decision the opponent appealed to the High Court.

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*Dean*, for the appellant. The marks are so similar as to be likely to deceive within the meaning of secs. 25 and 114 of the *Trade Marks Act*. The test is whether they are likely to deceive when viewed apart; not when they are viewed together (*Kerly on Trade Marks*, 6th ed. (1927), pp. 270, 271; *Eno v. Dunn* (1); *In re Chemische Fabrik Greisheim Elektron* (2)). It is likely that these marks would come to be described by the same name. All that the opponent has to show is a reasonable probability that there will be confusion (*In re Huxley's Application* (3); *In re Distributing Corporation (London) Ltd.'s Application* (4)). These cases show the length the courts have gone to preserve to traders the rights they have obtained by the registration of trade marks (See *Johnston v. Orr Ewing* (5)). The court should consider the uses to which the marks are put and that in use the marks may become partially obliterated, which would lead to confusion, and the court should also have regard to the imperfect recollection of customers. There are more points of similarity than there are of difference in these marks and there is no name to aid recollection (*Lever v. Goodwin* (6); *In re Price's Patent Candle Co.* (7)). There are various ways in which deception and confusion can arise if this mark is allowed to go into the market. The opponent has an established market in eastern countries, particularly in Ceylon, and the likelihood of deception in these places should also be taken into consideration.

*Herring K.C.* (with him *Pape*), for the respondent. On an appeal from the registrar to the High Court the registrar's decision should be upheld unless it is shown to be clearly wrong (*Re Clark, Son & Morland, Ltd.'s Trade Mark* (8); *In re Garrett's Application* (9)). These two marks do not resemble each other at all, and in such a case the onus

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

(2) (1910) 27 R.P.C. 201.

(3) (1924) 41 R.P.C. 423, at p. 430.

(4) (1927) 44 R.P.C. 225.

(5) (1882) 7 App. Cas. 219.

(6) (1887) 36 Ch. D. 1; 4 R.P.C. 492,  
at p. 498.

(7) (1884) 27 Ch. D. 681.

(8) (1936) 2 All E.R. 1125.

(9) (1916) 1 Ch. 436.



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of proof of likelihood of deception lies on the appellant. The appellant was not entitled to obtain the registration of a mark depicting two men engaged in an athletic contest. Looking at the two marks themselves the points of dissimilarity are sufficient to outweigh the points of similarity many times; and there is no evidence of the name under which this flour is asked for (*In re Holbrooks Ltd.'s Application* (1) ). If the traders really look at the mark there will be no cause of deception (*Boord and Son (Inc.) v. Bagots, Hutton & Co. Ltd.* (2) ). The court should presume that the trade mark will be used fairly and without fraud (*Kerly on Trade Marks*, 6th ed. (1927), at pp. 277, 278). The mere fact that a trade mark may be used improperly abroad is not sufficient ground for refusing registration (*Boord and Son (Inc.) v. Bagots, Hutton & Co. Ltd.* (3); *William Charlick Ltd. v. Wilkinson & Co. Pty. Ltd.* (4) ).

*Dean*, in reply. *A. & F. Pears Ltd. v. Pearson Soap Co. Ltd.* (5) shows that the High Court will exercise its own discretion, which is unfettered, and the onus of proof remains on the respondent as before.

*Cur. adv. vult.*

July 30.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of the Registrar of Trade Marks dismissing the opposition to an application for the grant of a trade mark. The applicant, Victor Alexander Scarlett, applied for the registration of a trade mark in respect of flour. The opponent, Abdulhusein Jafferjee, gave notice of opposition, contending that the trade mark which the applicant sought to register so nearly resembled the opponent's trade mark, which was already on the register, as to be likely to deceive, and that therefore, under the provisions of sec. 25 of the *Trade Marks Act* 1905-1934, the registrar should not register the applicant's mark. The opponent also relied upon sec. 114 of the Act which provides (*inter alia*) that no mark the use of which would by reason of its being likely to deceive or

(1) (1909) 26 R.P.C. 791.

(2) (1916) 2 A.C. 382.

(3) (1916) 2 A.C., at p. 391.

(4) (1913) 16 C.L.R. 370.

(5) (1925) 37 C.L.R. 340, at pp. 344, 345.



otherwise be deemed disentitled to protection in a court of justice shall be used or registered as a trade mark.

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The first question which arises is a question as to the functions of the court upon this proceeding, which is described in the *Trade Marks Act*, sec. 45, as an appeal, though it is really an exercise of the original jurisdiction of the court.

It has been contended for the respondent that it is the duty of the registrar to exercise a discretion upon opposition proceedings, and that the court, in determining an appeal from his decision, should regard itself as bound by the exercise of his discretion, unless it should appear that the registrar acted upon a wrong principle or that his decision is in some other way clearly wrong. This proposition does not accurately describe the functions of the court upon such an appeal. An appeal may be taken from the decision of the registrar either to the law officer or to the court (secs. 43 and 45). Sec. 44 provides for an appeal from the law officer to the court. Sec. 44 (2) specifies the duty of the court upon an appeal: "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." These words show that it is the duty of the court to decide the matter as upon an original application and not merely to decide whether the decision of the registrar can or cannot be supported. This is now the well-established practice of the court (See *Robert Harper & Co. Pty. Ltd. v. A. Boake Roberts & Co. Ltd.* (1); *Standard Paint Co. v. Hales Ltd.* (2); *A. & F. Pears Ltd. v. Pearson Soap Co. Ltd.* (3)). The result is that the applicant before this court is in the same position as before the registrar, that is, the onus is on the applicant to show that, if his mark is registered, "there would be no reasonable danger of the public being so deceived"—to use the words of Lord *Herschell* in *Eno v. Dunn* (4). If the matter is left *in dubio* the application for registration should be refused.

The applicant's mark consists of a drawing of two figures with the words "Best Australian Roller Flour." The figures are those of runners in athletic costume, one of whom has reached the finishing

(1) (1914) 17 C.L.R. 514.  
(2) (1920) 27 C.L.R. 350.  
(3) (1925) 37 C.L.R. 340.  
(4) (1890) 15 App. Cas., at p. 261.



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tape in the race. The line of the tape is shown as bent where it is in contact with the body of the leading runner. The arms and legs of the runners may be described as being in a state of activity. The words "Best Australian Roller Flour" are plainly descriptive, and any person would be at liberty (so far as trade mark law is concerned) to use them in relation to flour. The opponent's trade mark is registered in respect of flour. It consists of two men in athletic costume with javelins in their hands. The javelins are crossed in the air and the arms and legs of the figures are in a state of activity. The trade mark also bears the words "Double Javan" which, according to the evidence, means "two warriors" or "two strong men." Thus both marks show two men in athletic costume in a state of activity with a bent line across the figures. Any direct comparison of the marks shows clear differences between them. Runners are different from men throwing javelins, and the relation of the figures and the position of the limbs varies in the two pictures. There are, however, the similarities mentioned, which may perhaps be fairly summed up by saying that both designs show men in athletic costume engaged in a contest.

Both the applicant and the opponent have filed declarations expressing opinions, on the one hand, that no person is likely to be deceived by the registration of the applicant's mark, and on the other hand, that many persons are likely so to be deceived. The court must of necessity decide this question for itself upon an inspection of the two marks, bearing in mind the circumstances under which the marks will be used and under which goods will be bought and sold, and the character of the probable purchasers of the goods. The marks will be used on jute bags containing flour, and therefore will be rather rough and not very precise in outline and detail. There may doubtless be a tendency towards blurring of the marks as the bags become rubbed in transport.

The evidence shows that the flour which will be placed in the bags containing the marks may be sold not only in Australia but also in eastern countries where the English language is not ordinarily read by many of the purchasers of the flour. It is urged on the one hand that native customers in the east are more likely than Australian purchasers to be deceived by the similarity in marks.



There is, however, no precise evidence one way or the other on this aspect of the case. There are the expressions of opinion to which I have referred, but there is no direct evidence of the habits and customs of purchasers in eastern countries. The court is left to speculate whether eastern purchasers would be more or less likely than others to appreciate differences in the markings of the goods. In my opinion there is no material before the court which would enable it to form any satisfactory judgment upon this question. It is, however, unnecessary in this case, in my opinion, to decide whether it is proper, in determining whether the trade mark should be registered in Australia, to consider the probability of deception in markets other than the Australian market (See the discussion of this question in *Boord and Son (Inc.) v. Bagots, Hutton & Co. Ltd.* (1), especially per Viscount *Haldane*).

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In my opinion this appeal can be determined upon an examination of the characteristics of the marks in question as they will be used, without any particular reference to the fact that much of the flour bearing the mark may be sold in eastern countries.

It is important to consider what has been described as the “idea of the mark,” that is, the idea which the mark will naturally suggest to the mind of one who sees it. Lord *Herschell’s* committee (quoted in *Kerly on Trade Marks*, 6th ed. (1927), at p. 270) put the point very clearly in the following passage:—“Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same; so that a person acquainted with the mark first registered, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. Take, for example, a mark representing a game of football; another mark may show players in a different dress, and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade-marked goods, and relying, as they frequently do, upon marks, should be able to

(1) (1916) 2 A.C. 382; 33 R.P.C. 357.



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remember the exact details of the marks upon the goods with which they are in the habit of dealing.”

When a matter such as this comes before the court, the court has before it the two marks themselves, clearly shown, and available for direct and immediate comparison. Cases in which the marks are identical do not ordinarily come before a court. The question which arises is always whether there is a probability of deception because there is a resemblance, though there are also differences, between two marks. The court naturally and readily appreciates the distinctions between the marks which are seen side by side. When, however, the court has to determine the probability of deception arising from simultaneous user of the same marks in the same market, it is very important to remember that the purchasers in that market will not ordinarily have an opportunity of comparing the two marks side by side. They will compare the actual mark which they see upon goods which are offered to them with the memory of the other mark, which they will retain in a more or less distinct form. They therefore will not be in the same position as that in which the court finds itself when it is endeavouring to determine whether or not they are likely to be deceived. The court must endeavour to put itself in the position of ordinary purchasers of goods who have noticed a trade mark as being distinctive of particular goods, but who have not compared that mark with any other mark, and who are quite probably not aware of the fact that another more or less similar mark exists. Such purchasers have not had the opportunity or the occasion to make a precise comparison of the two marks. They will be guided, so far as they are influenced by trade marks at all, by a general recollection or impression of the mark which they have seen.

It should not be assumed by the court that the probable purchaser is a specially stupid man, or, on the other hand, that he is a man who sets trade marks side by side and examines them with particularity. Taking, as well as I can, the point of view which I have indicated, I think that there is a real and substantial similarity between the two marks now before the court. There are, as I have said, many differences between them, but the general idea of men in athletic costumes engaged in an athletic contest with a line across their fronts



is to be found in each mark. Looking merely at the marks themselves, I am unable to say that there is no probability of purchasers being deceived. It is necessary also to consider the ear as well as the eye. Purchasers very frequently endeavour to describe a mark in order to obtain the same goods as they have bought on a prior occasion. In this case I am not prepared to say that purchasers would not naturally describe the opponent's flour as the flour with the "two men" on it, or the "two athletes" or the "two runners" and then, in the latter case, mistake a poorly stencilled mark of the javelin men for the mark of the running men.

The result is that, in my view, the matter is at least left *in dubio* and therefore that the application should be refused. For these reasons the appeal should be allowed and the application for registration dismissed.

DIXON J. This is an appeal by an opponent from a decision of the Registrar of Trade Marks dismissing the opposition and granting registration of the respondent's trade mark. The respondent's application is for a mark in respect of flour. It consists in a picture of two runners finishing a race with the leader breasting the tape. Both are dressed in running costume. The tape is represented by a thin line. The mark includes the four words—"Best Australian Roller Flour"—two of which are above and two below the picture. The appellant already had upon the register a mark in respect of flour. He is a merchant in Ceylon who imports into that and other eastern countries Australian flour bearing his trade mark. It consists in a representation of two men apparently engaged in a fight with javelins. The men are dressed somewhat as the runners. The javelins, which are depicted by two lines, are crossed, one warrior holding his in his left hand and stretching out his right to his adversary, while the latter holds out his left hand towards him and bears the javelin in his right. The figures are within a circle which is not carried right under their feet. There the words "Double Javan" are printed. According to an indorsement on the example of the mark registered, these words mean "two warriors." In practice the mark is applied by stencilling and the like to flour bags.

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The ground of opposition is that the mark applied for by the respondent so nearly resembles the appellant's existing mark as to be likely to deceive. Sec. 25 forbids registration of a trade mark identical with one belonging to a different proprietor which is already on the register in respect of the same goods or description of goods or so nearly resembling such trade mark as to be likely to deceive. Sec. 114 prohibits the use or registration as a trade mark of any mark the use of which would by reason of its being likely to deceive or otherwise be disentitled to protection in a court of justice. The likelihood of deception in sec. 114 is not confined to cases where it arises from the existence on the register of a similar mark in respect of the same goods. But, no doubt, as a result of *Eno v. Dunn* (1), these two provisions have been applied in opposition proceedings in cases of resemblance without much, if any, distinction. The principles there laid down have been regarded as flowing from them together. According to those principles the applicant must sustain the burden of excluding real likelihood of confusion between the marks among reasonable persons behaving with as little or as much vigilance as is commonly displayed by those who buy goods of the description in question in the ordinary course of affairs. If the court is not satisfied that there is no serious risk of deception or confusion, the application must fail.

The present case, however, raises two questions, one of which may turn upon a distinction between the provisions. From a practical point of view the competition between the parties is or will be in the markets of the east and not among the Australian public or among Australian traders. The appellant does not sell flour here. He buys it here and sells it in the east. It is fairly evident that the respondent's mark is or will be applied in a similar course of trade. In consequence of *Johnston v. Orr Ewing* (2), it was long supposed that the habits of those who bought English goods in foreign countries must be taken into account in estimating the deceptive tendencies of a challenged mark. But in *Boord and Son (Inc.) v. Bagots, Hutton & Co. Ltd.* (3) a distinction has been drawn between innocent likeness and an actual intention to deceive which,

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

(2) (1882) 7 App. Cas. 219.

(3) (1916) 2 A.C. 382.



under sec. 114, would disqualify the mark from registration because wherever the deception was intended it would deprive the mark of protection in a court of justice. Their Lordships appear to decide that, if a mark has been adopted in good faith and the resemblance is not such that in domestic trade it would deceive buyers, then registration cannot be refused simply because in a foreign market it might do so. The exact limits of this decision are not easily ascertained. But under the general law it is, I think, clear enough that, as between two marks or two methods of getting up similar goods, one would not be protected if it appeared that, although there had been no fraudulent intention in its adoption, yet in fact, in that market where the real competition existed, it gave the trader who used it all the advantages of confusion and deception. If so, I do not see why sec. 114 should be less applicable than in the case of actual fraud, provided, that is, that the substantial use of the mark is in foreign trade and therefore the possibility of confusion abroad is not hypothetical or speculative. The difficulty in all cases where similarity is in question lies not in discerning the actual physical resemblances and differences of the marks side by side, but in determining what impressions will be formed and retained by potential buyers. It, therefore, must often really beg the question to inquire first whether there is such a resemblance as to deceive in the domestic market and then, having answered that inquiry in the negative, to treat as irrelevant the tendencies of the people to whom the goods are actually sold under the trade mark. It appears to me that, in a case where there are features in the two marks which might tend to confuse, the question whether there is a real and substantial probability of deception must be decided by reference to the actual course of dealing and, if that takes place abroad, the conditions there prevailing must be considered. This view accords with what is said in *In re Chemische Fabrik Greisheim Elektron* (1); *In re La Société Anonyme Dubonnet* (2), as well as in *Johnston v. Orr Ewing* (3), and I do not think it is in conflict with that expressed by Lord Dunedin in *George Banham & Co. v. F. Reddaway & Co.* (4). For there the question was whether a mark not otherwise registrable could obtain distinctiveness by foreign use alone.

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(1) (1910) 27 R.P.C. 201.  
(2) (1915) 32 R.P.C. 241.

(3) (1882) 7 App. Cas. 219.  
(4) (1927) A.C. 406, at p. 415.



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The other question raised by the present case is whether under the Commonwealth provisions, viz., sec. 44 (2), the court is called upon to decide the question in substance or to examine only the correctness in law of the grounds upon which the registrar proceeded in exercising his discretion. I think the nature of the jurisdiction under sec. 76 of the Constitution and the terms of the sub-section alike show that the court is to determine judicially whether the application should succeed on the merits, and not whether an administrative officer has lawfully discharged his duties. Of course weight will be given to the registrar's opinion as that of a skilled and experienced person.

Upon the question whether in fact there is a real likelihood of deception, I have found some difficulty. Side by side the pictures and sketches are not very like. But, on the whole, I think that the memory of the appellant's mark carried away by a buyer whose attention was directed to it only in the ordinary course of trade would be such that a real probability of his mistaking the respondent's mark for it would exist. At any rate I am not convinced of the contrary. In forming this view I have been influenced very much by two considerations. The first is that the words of neither mark would have much effect among eastern peoples and the figures would be the chief feature. The second and perhaps the more important is the fact that the representation would be made by stencilling upon flour bags. Such pictures would not exhibit the differences in the marks in the same way as a clear representation on flat paper.

On the whole, I am not satisfied that the respondent's mark is not likely to deceive by reason of its resemblance to the appellant's.

The appeal should be allowed.

McTIERNAN J. I agree with the judgment of the Chief Justice.

*Appeal allowed with costs. Application for  
registration dismissed.*

Solicitors for the appellant, *Arthur Robinson & Co.*

Solicitor for the respondent, *L. A. Chisholm.*

H. D. W.