

No. 17 of 1937 8
IN THE HIGH COURT OF AUSTRALIA.

General Accessories Proprietary Ltd

v.

Abbott and Others.

REASONS FOR JUDGMENT.

High Court of Australia.
Principal Registry.

7/6/1939

Judgment delivered at Melbourne
on Wednesday, 7th June, 1939.

IN THE HIGH COURT OF AUSTRALIA

No. 17 of 1937

Between

GENERAL ACCESSORIES PROPRIETARY
LIMITED

Plaintiff.

and

EDWIN ABBOTT, JOHN JOSEPH FRANCIS KENNEDY
GEORGE FINLAY ASHTON MITCHELL and ROBERT
BRISBANE CURD.

Defendants.

Before His Honour Mr. Justice Rich.

WEDNESDAY the 7th DAY OF JUNE 1939.

THIS ACTION coming on for trial before this Court on the 3rd day of June 1939 UPON READING the Pleadings herein and the Mutual Admissions and Annexures thereto filed herein AND UPON EXAMINING the samples marked "A", "B", "C", "D", "E", "F", "G", "H" and "I" respectively referred to in paragraph 5 of the said Mutual Admissions and forming part of such Admissions AND UPON HEARING the viva voce evidence of Ralph Small on behalf of the abovenamed plaintiff AND UPON HEARING Mr. D.I. Menzies of Counsel for the said plaintiff and Mr. Reynolds K.C. for the abovenamed defendants THIS COURT DID ORDER that this action should stand for judgment and the same --- standing for judgment this day accordingly in the presence of Counsel for the said plaintiff and the solicitor for the said defendants

THIS COURT DOth ADJUDGE that the said plaintiff do recover against the said defendants the sum of £152:16: 7d with costs (including the costs of the shorthand notes) except in so far as the costs were increased by items 4, 10, 11, 12, 13 and 14 of the Statement of ---- Claim AND THIS COURT DOth ORDER that the said costs be taxed by the proper officer of this Court AND THIS COURT DOth FURTHER ORDER that the sum of £10: 4: 3d paid into Court by the said defendant on the 10th day of May 1938 be paid to the said plaintiff in part satisfaction of the said sum of £152:16: 7d.

By the Court

E. Davis
Principal Registrar



GENERAL ACCESSORIES PROPRIETARY LIMITED V. ABBOTT AND OTHERS.

JUDGMENT

MR JUSTICE RICH.

GENERAL ACCESSORIES PROPRIETARY LIMITED V. ABBOTT AND OTHERS.

Judgment.

Rich J.

In this action the plaintiff seeks to recover the difference^e between money paid by it under protest in respect of goods imported by the plaintiff into Australia and the money which it alleges is properly payable. The parties agreed upon mutual admissions which are as follows:-

(1) The plaintiff is a company duly incorporated in the State of Victoria which carries on business throughout the Commonwealth of Australia and is a manufacturer importer and seller of cycles, cycle parts and cycle accessories.

(2) The defendant Edwin Abbott was at all times material Comptroller-General of Customs and the defendants John Joseph Francis Kennedy, George^e Finlay Ashton Mitchell and Rupert Brisbane Curd were at all times material Collectors of Customs for the States of Victoria, New South Wales and Queensland respectively.

(3) The Plaintiff imported into Australia each item of goods set out in the second column of the Schedule hereto and the defendants or one of them other than the defendant Edwin Abbott classified each such item of

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goods under the item in the Customs Tariff 1933 - 1936 ~~set out opposite it~~ set out opposite it in the third column of such schedule and assessed customs duty thereon accordingly and the plaintiff pursuant to the demand of the defendants or one of them paid duty on each of such goods in the sum set out opposite it in the fourth column of such schedule on the date set out opposite it in the fifth column of such schedule.

(4) If the items of goods set out in the schedule and numbered 1 - 17 inclusive were properly classified under Item 367 of the Customs Tariff 1933 - 1936 the duty demanded and paid was the proper duty payable by the plaintiff in respect of all the items of goods set out in the schedule, if not the duty properly payable in respect of each item was that set out opposite it in the sixth column of the schedule.

(5) Accompanying and forming part of ~~xxx~~ these admissions and marked "A", "B", "C", "D", "E", "F", "G", "H" and "I" respectively are samples of every type of goods covered by Items 1-17 inclusive of the schedule.

PARTICULARS.

"A"

Cycle saddle

Items 1 - 4

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"B" and "C"	Cycle Repair Outfits	Items 5 - 7
"D" and "E"	Inflators	Item 8
"F" and "G"	Mudguards	Item 9
"H" and "I"	Cycle Bells	Items 10 - 17

6. Bruce Small Proprietary Limited is a company duly incorporated in the State of Victoria which carries on business throughout Australia as a seller of cycles, cycle parts and accessories.

6a. Austral Cycles Proprietary Limited is a company duly incorporated in the State of Victoria which carries on business in the said State as a seller of cycles, cycle parts and accessories.

7. The plaintiff, Bruce Small Proprietary Limited and Austral Cycles Proprietary Limited are associated companies and are subsidiaries of Allied Bruce Small Limited a company incorporated in the State of Victoria.

8. Bruce Small Proprietary Limited is the registered proprietor of a trade mark consisting of the words "Malvern Star" registered in respect of cycles. A true copy of the Certificate of Registration of the said trade mark is annexed hereto and marked "J",

9. Bruce Small Proprietary Limited is also the registered proprietor of

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of a trade mark consisting of a six pointed star and registered in respect of push bicycles. Annexed hereto and marked with the letter "K" is a true copy of the Certificate of Registration of the said trade mark.

10. The plaintiff is the registered proprietor of a trade mark consisting of the word "Austral" registered in respect of cycles. Annexed hereto and marked with the letter "L" is a true copy of the certificate of registration of the said trade mark.

11. Bruce Small Proprietary Limited on the 4th day of May 1936 applied for the registration of^a design including a map of Australia in respect of cycles. Hereunto annexed and marked with the letter "M" is a true copy of the said application.

12. The word "Malvern Star" and the six pointed star appearing on some of the goods set out in the second column of the schedule hereto are replicas of the trade marks referred to in paragraphs 8 and 9 hereof respectively.

13. The name "Austral" appearing on some of the said goods is a replica of the trade mark referred to in paragraph 10 hereof.

14. The representation of a map of Australia appearing on some of

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the said goods is a replica of the design referred to in paragraph 11 hereof.

15. Such of the said goods as were marked with the words "Malvern Star" and /or the six pointed star were imported by the plaintiff for sale to Bruce Small Proprietary Limited or its agents exclusively.

16. The whole of the goods set out in the said schedule are intended for ultimate disposal to members of the public without any restriction as to user whatsoever and may be used with or in association with or by attachment to any brand or make of cycle or for any purposes for which such goods are suitable.

17. The duty paid by the plaintiff in respect of each of the items in the schedule numbered, 1, 2, 3, 4, 5, 6, 7, 8, 9, 15, 16, 17, 18, 19, 20, 21, and 22 was paid under protest in pursuance of ^{the} Customs Act 1901-1935 section 167.

18. The plaintiff alleges and the defendants deny that the duty paid by the plaintiff in respect of each of the items of the schedule numbered 4, 10, 11, 13, 13, and 14 was paid under protest in pursuance of section 167 of the Customs Act 1901-1935. Annexed hereto and forming part of the case and marked "N", "O", "P", "Q", "R", and "S" respectively are the Customs entries

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19. This action was not commenced within six months from the date on which the duty on Item 10 was paid.

SCHEDULE

Item	Goods	Customs Tariff Item under which classified	Duty assessed and paid	Date of payment of duty	Duty payable if good wrongly classified
1.	Cycle Saddles	367	£36:5:11	10/4/37	£10:7:5
2.	" "	"	£14:14:7	14/4/37	£ 4:4:2
3.	" "	"	£33:19:11	15/4/37	£9 :14:3
4.	" "	"	£32: 4:11	17/5/37	£ 9:4:2
5.	Cycle Repair Outfits	"	£ 6: -:10	10/4/37	£4:2:-
6.	" " "	"	£16:18:10	10/4/37	£11:9:11
7.	" " "	"	£13: 7: 1	22/6/37	£9:1:3
8.	Inflators	"	£79:10:11	9/6/37	£11:7:3
9.	Mudguards	"	£ 1: 2:11	17/6/37	-
10.	Cycle Bells	"	£ 7: 4: 5	7/4/37	£4:5:-
11.	" "	"	£10: 5: 3	22/4/37	£6:-:9
12.	" "	"	£ 9: 15:16	6/5/37	£6:10:7

13.	Cycle Bells	367	£3:14: 6	6/5/37	£2 : 9: 8
14	" "	"	£7: 6: 9	23/6/37	£4 :6 : 4
15.	" "	"	£10:3: 7	16/6/37	£5 :19: 9
16	" "	"	£ 4:15:10	16/7/37	£2 :16:5
17	" "	"	£ 7:11:11	16/8/37	£4 : 9: 4
18	Outside packages	408B2	14:10	10/4/37	4: 11
19.	" "	"	2: 6	15/4/37	10
20	" "	"	5: 9	15/4/37	1: 11
21	" "	"	£1 : 6: 5	9/6/37	8: 10
22	" "	"	3 -	17/6/37	-

Evidence was also given on behalf of the plaintiff company which so far as it is relevant amounts to this. The plaintiff company is an organisation comprising certain subsidiary companies viz - Bruce Small Proprietary Limited, Austral Cycles Proprietary Limited and Bicycle Finance Proprietary Limited. The business of the plaintiff company is set out in paragraph 1 of the admissions. This business originated in the purchase of the businesses (including goodwills) carried on by separate owners of

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the bicycles known as Malvern Star and Austral Star. At and before the date of these purchases the owners sold bicycles and accessories under the separate names of Malvern Star and Austral Star. Both bicycles and accessories were branded accordingly. The bicycles were widely advertised and well known. After the purchase in question these names were registered in connection with the bicycles. But before and since registration the accessories were advertised under the respective names of Malvern Star and Austral Star and the organization had and has a considerable trade in them. The articles in question are branded either with the ~~name~~ or trade mark "Malvern Star" in conjunction with the six pointed star or with the word "Austral" in conjunction with the map of Australia. In these circumstances the question for my decision is whether ~~the~~ ^{these} goods fall within article 367 of the Customs Tariffs 1933-1936 which reads as follows:

Tariff Items

British
Preferential
Tariff

General
Tariff

Articles of an advertising character, which would not otherwise be dutiable at a higher rate of duty under any other heading, including all Articles which would be free but for their advertising characteristics

ad val. 45 per cent 65 per cent

And on and after 3rd November, 1933 Articles of an advertising character, which would not

otherwise be dutiable at a higher rate of duty under any other heading, including all Articles which would be free but for their advertising characteristics ad val.

25 per cent 42½ per cent

Articles may be wholly of an advertising character such as a poster or the balloons one sees in the sky, or may be substantially of an advertising character such as an almanack. But a name such as Rolls Royce branded on a car or the name of the maker stamped on a piano identifies the particular article. No doubt goods themselves may be used as advertising mediums such as ashtrays with brands of cigarettes or liquor stamped on the back. Whether a name or mark appearing on or used in connection with goods is such as to make it proper to include such goods within the description of "articles of an advertising character" is a matter of degree and really a question of fact. The pumps and other accessories - the exhibits in the case - like similar ~~alike~~ branded or marked component or spare parts of other articles imported into Australia do perform the purpose for which they are intended. They are the component parts of accessories to and are sold with the Malvern Star and Austral Star bicycles. So far as they find a sale apart from these bicycles ~~but~~ for use with or by attachment to other brands or makes of bicycles they do so, I

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infer, because they are of good quality and suitable for the purpose for which they are made. They are at most self advertising. It cannot, I think be said that their ordinary or predominant use is advertising in character. 6f. Meyer v. Cadwalder, 89 Fed. Rep. 963; Meyer v. United States, 124 Fed. Rep. 293. Adapting the words of Isaacs J. in Chandler & Co. v. Collector of Customs, 4 C.L.R. 1719 at p. 1739 I consider the articles in question are not ordinarily or chiefly of an advertising character and in my opinion they do not fall within article 367 of the Customs Tariffs 1933 - 1936. For these reasons I think the plaintiffs entitled to relief in respect of the ~~value~~ of all items except items 4, 10, 11, 12, 13, and 14 as to which it is admitted that the technical objection prescribed by section 167 of the Customs Act 1901 - 1935 prevails. With regard to items 5, 6, and 7 a refund has been made and the money therefor has been paid into Court. Judgment for the plaintiff with costs except in so far as the costs were increased by the items 4, 10, 11, 12, 13, and 14. The costs to include the costs of shorthand writing. Order for payment of ^{the} amount due to plaintiff. Order payment to the plaintiff of the sum in Court.