No. 26 of 1949

IN THE HIGH COURT OF AUSTRALIA

COLDSTREAM REFRIGERATORS LIMITED.

V.

AIRCRAFTS PROPRIETARY LIMITED.

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on THURSDAY, 24th NOVEMBER, 1949

H. E. Daw, Gov. Print., Melb.
C.12280/45

COLDSTREAM REFRIGERATORS LIMITED

v.

AIRCRAFTS PROPRIETARY LIMITED

ORDER.

Appeal dismissed with costs. No order as to costs of Registrar.

COLDSTREAM REFRIGERATORS LIMITED

v.

AIRCRAFTS PROPRIETARY LIMITED.

REASONS FOR JUDGMENT. LATHAM C.J.

COLDSTREAM REFRIGERATORS LIMITED

v.

AIRCRAFTS PROPRIETARY LIMITED

REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal under secs. 43 and 45 of the Trade Marks Act 1905-1936 from a decision of the Deputy Registrar of Trade Marks dismissing opposition by Coldstream Refrigerators Limited to an application by Aircrafts Proprietary Limited for the registration of the word "Airstream" as a trade mark in respect of refrigeration apparatus included in class 18 - "engineering, architectural and building contrivances". The opponent company is registered as proprietor of the word "Coldstream" for other classes of goods (scientific instruments, cutlery, carriages, furniture, sporting articles etc.) and is registered as proprietor of the words "Coldstream Guards" for class 6, which includes refrigeration machinery. The opponent company, before the date of the applicant's application, applied for registration of "Coldstream" in respect of class 18. This application was granted and the grant relates back to the date of the application - Trade Marks Act 1905-1936, sec. 47. Class 18, it is agreed, includes domestic refrigerators. Both companies manufacture and sell such refrigerators.

The evidence showed that the opponent company has used the word "Coldstream" as a mark in connection with refrigerators very extensively and almost invariably in conjunction with a drawing or picture of a soldier and often with the word "Guard" or "Guards". In my opinion the word "Coldstream" suggests Coldstream Guards rather than a stream which is cold. "Airstream" has no similar suggestion. Apart from the fact that the word "Coldstream" naturally suggests "Coldstream Guards", I am of opinion that the words "Airstream" and "Coldstream" are so distinct that it is

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most unlikely that one would be mistaken for the other - more particularly so because refrigerators are not cheap articles sold to undiscriminating and casual purchasers. The registration of the word "Coldstream" and its extensive use do not entitle the opponent to a monopoly in the use of the word "stream" as an element of a trade mark. "Airstream" suggests a stream of air. "Coldstream", apart from the suggestion of "Coldstream Guards"? suggests a flow of something which is essentially cold.

I agree with the Deputy Registrar that there is no risk of confusion between the words "Airstream" and "Coldstream" as applied to refrigerators, and I am therefore of opinion that the appeal should be dismissed with costs. Counsel for the Registrar was heard upon the appeal by the leave of the Court, but there is no reason why the unsuccessful party should pay the costs of the Registrar.

COLDSTREAM REFRIGERATORS LTD.

v.

AIRCRAFTS PROPRIETARY LTD.

REASONS FOR JUDGMENT. DIXON J.

COLDSTREAM REFRIGERATORS LTD.

v.

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REASONS FOR JUDGMENT. DIXON J.

The respondent to this appeal filed an application on 21st March 1946 for the registration of a trade mark consisting in the word "Airstream". The application has been amended and as it now stands it seeks registration of this word mark in class 18 in respect of refrigeration machinery included in that class. The appellant filed an opposition dated 4th June 1947. By a decision given on 17th May 1949 the Deputy Registrar of Trade Marks dismissed the opposition and granted the application. Hence this appeal. The dates are of some importance, because a good many of the facts set up in opposition to the application occurred after the date of the application, which is the date as ~~to~~ of which an applicant's title to registration of a trade mark is in most respects to be determined. The situation as at that date was briefly as follows. The appellant company, which was registered in 1931 under the name Refrigerators Ltd. but afterwards changed its name to Coldstream Refrigerators Ltd., had manufactured refrigerators and had sold them under the name of Coldstream and had acquired for its refrigerators a reputation under that name. In August 1935 a mark to which the appellant company became entitled was registered in class 6 for refrigeration machinery. The mark consisted in the words "Coldstream Guards". On 15th April 1945 the appellant applied for the registration of the word "Coldstream" in respect of eight different classes of goods. Before the decision of the registrar under appeal was given these applications had all been granted and of course took effect as from the date of the application: Shell Oil Co. v. Rohm & Haas Co., 1949 A.L.R.661. But the only relevant class of goods covered is class 18, engineering, architectural

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and building contrivances, under which, by the practice of the office, commercial as distinguished from domestic refrigerators are considered to fall.

The appellant's refrigerator was sold in various parts of the Commonwealth. It was widely advertised under the name "Coldstream"; but nearly all the advertisements and publications put in evidence make use of the connexion of the name with the Guards Regiment. There are pictures of soldiers or soldiers' heads with bearskins, of conventional figures of guardsmen in a variety of postures and there is a lavish employment of the play upon words, "Coldstream Guards the Nation's Health". These advertisements included references to the local distributing agencies. A firm in Sydney, whose members afterwards became interested in the company claiming the rival mark, were the distributors of Coldstream refrigerators for New South Wales and Queensland. So much for the appellant's position in March 1946, when the mark "Airstream" was applied for by the respondent.

The respondent company, Aircrafts Proprietary Ltd., appears to have been concerned with aeroplanes, as its name might indicate. But it decided to turn to the manufacture of refrigerators as part of a project to keep together its technical staff after the war. If the declaration of the manager is to be relied upon as accurate this was in January 1945. At that date he adopted the word "Airstream" as the name of the refrigerator to be produced and he says that he did so in ignorance of the use for a like purpose of the name "Coldstream". Then in March of the following year the respondent company lodged the application for Airstream as a mark. But in November 1946 a company called A.P.L. Constructions Pty. Ltd. purchased the refrigeration business of the respondent company. Apparently it became entitled to the benefit of the application and the mark. On 16th November 1946 it resolved to change its name to Airstream Proprietary Ltd. On or before that

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date the two partners in the firm which had represented the appellant company in New South Wales and Queensland became substantially interested in Airstream Pty. Ltd. as shareholders and in the following year they became directors. A breach had occurred between the firm and the appellant company because the latter discovered that the firm had been manufacturing or causing to be manufactured refrigerators for sale on its own account. The firm had also applied for the registration of the word "Snowstream" as a trade mark. The appellant company terminated the agency and by a document dated 31st December 1946 obtained an assignment of the application for Snowstream and an undertaking that the members of the firm would not whether alone or with any other person firm or company use the word "Snowstream" or any colourable imitation of the word or seek registration thereof. The appellant has, for reasons that are not material, dropped the application for Snowstream but it has applied under nine separate classes for the word "Stream". In the two classifications which, according to office practice, cover commercial and domestic refrigerators respectively (classes 18 and 6) the respondent has lodged opposition. But the other applications have now been granted.

The question for our decision is whether we should be satisfied that there is no real probability or tangible risk of deception or confusion by any fair and normal use which may be made of the mark "Airstream" if it is registered. We should, I think, for the purposes of sec. 25, treat the mark "Coldstream" as well as the mark "Coldstream Guards" as on the register, although the former was actually placed on the register after the date of application. For it is now on the register as from 21st April 1945: sec. 47. I do not think that for the purposes of sec. 25 it matters that in actual use and in advertisements by the appellant the word "Coldstream" has been associated in idea with the Guards Regiment of that name. But no doubt it is a circumstance to be taken into account when sec. 114 is applied. It does not matter under sec. 25 because that

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provision is designed to keep the register free from resembling marks even if owing to the use made for the time being of one of them the risk of confusion from the resemblance may be reduced or excluded. That method of use may be abandoned. It is, however, clear enough that by the connexion in idea with Guardsmen which the appellant has habitually given the word Coldstream it is less likely that people will think of the word as suggesting a stream of low temperature or a stream of anything when it is used as the name of the appellant's refrigerator, if ever they would have so thought of it. That is a consideration which must be taken into account in deciding for the purpose of sec. 114 whether "Airstream" is a mark the use of which would be likely to deceive because it would or might in fact be mistaken for a designation of Coldstream refrigerators or of goods produced by the makers of those refrigerators.

The relevance of many of the facts occurring after the date of the respondent's application was denied. If they establish that the word "Snowstream" had been chosen, and then the word "Airstream", in an attempt to find a mark for the purpose of obtaining part of the appellant's custom in the same rival trade and that it had been done in concert by those whose actions the respondent company had adopted, the facts would be relevant as tending to show a purpose which the Court might take into account on the question of its probable effectiveness. But I think that the facts fail to establish such a thing. The issue, therefore, simply is whether/the identity of the termination "stream" in the two words, having regard to the differences between the entire words, causes any reasonable risk of confusion. It is necessarily a question depending upon impression rather than upon analytical reasoning, upon one's conceptions of how people recollect, associate, apply and confuse the names of things rather than upon logic. The word "Airstream" does

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not seem to me to have anything in common with "Coldstream" but the terminal syllable. It does not summon up similar ideas. Coldstream is familiar as a geographical name. It is more familiar perhaps than most names of places because the Coldstream Guards have made it famous. That may be taken into account, even where the appellant's particular use of the association of the ideas it summons up may not. There is not much likelihood of people regarding Coldstream as a combination of two words describing a flow of cold water or other liquid. "Airstream" even then would be a little removed from the same meaning. Left to my own impression of the matter I should think that there was no such risk of confusion as would warrant a refusal of the application to register. It is true that the confidence which I should have felt in this view has been a little lessened by a certain amount of uneasiness occasioned by the manner in which the two members of the firm representing the appellant in Sydney first chose "Snowstream" as a rival mark and then joined in interest with Airstream Pty. Ltd. But the preference shown by these gentlemen for a word with "stream" in it is not enough to displace my opinion, which coincides with the Registrar's that the words are sufficiently unlike. I think the appeal should be dismissed.

COLDSTREAM REFRIGERATORS LTD.

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JUDGMENT WILLIAMS J.

COLDSTREAM REFRIGERATORS LTD.

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JUDGMENT WILLIAMS J.

I agree substantially with the reasons for judgment of Dixon J., and am therefore of opinion that this appeal should be dismissed. The appellant should pay the costs of the respondent of the appeal. There should be no order as to the costs of the Registrar.