

*Cooper Engineering Co Pty Ltd v Sigmund Pumps Ltd [1952] HCA 15*

**HIGH COURT OF AUSTRALIA**

DIXON, WILLIAMS AND KITTO JJ

**THE COURT:**

This is an appeal by Cooper Engineering Co. Pty. Ltd. from a decision of the Registrar of Trade Marks dismissing its opposition to the granting of an application by the respondent, Sigmund Pumps Limited, for registration as the proprietor of a trademark consisting of the word "Rainmaster" in Class 7 in respect of water spraying installations for horticultural and agricultural purposes and parts thereof. The appellant has been since 27th January 1934 registered as the proprietor in the same class of the word "Rain King" in respect of spray nozzles, sprinklers and their parts. Since this date the appellant has used and advertised this trademark extensively on its spray nozzles and sprinklers and has built up a substantial business in these articles. It contends that the respondent's application to register the word "Rainmaster" as a trademark should be refused because registration is sought in respect of the same description of goods and so nearly resembles the appellant's trademark as to be likely to deceive (s. 25 of the Trade Marks Act 1905-1948) or alternatively that it should not be registered because it is a mark the use of which would be likely to deceive (s. 114 of the Act). The meaning of ss. 25 and 114 of the Act was discussed in *Lever Bros. Ltd. v. Abrams* (1909) 8 CLR 609, and it is there said that s. 25 is intended to protect one trader or one trademark against another trader or another trademark, while s. 114 is intended to protect the public from being deceived by the use of confusing marks. Section 114 is wider than s. 25 as it applies to cases where the goods are not of the same description and to cases where the mark is objectionable on grounds other than that it is likely to deceive. But these differences are immaterial in the present case as it is admitted that the respondent's goods are goods of the same description as the appellant's goods, and the sole question is whether the word "Rainmaster" so resembles the word "Rain King" as to be likely to deceive.

The proper approach to the answer to this question is well settled. It was summed up by Lord Parker (then Parker J.) in *In the Matter of an Application by the Pianotist Company Ltd. for the Registration of a Trade Mark* (1906) 23 RPC 774, in a passage appearing on p 777, "You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind

of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion - that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods - then you may refuse the registration, or rather you must refuse the registration in that case." To the same effect see *Australian Woollen Mills Ltd. v. F.S. Walton & Co. Ltd.* (1937) 58 CLR 641, at p 658 ; *Reckitt & Colman (Aust.) Ltd. v. Boden* (1945) 70 CLR 84 , in this Court. It is sufficient if persons who only know one of the marks and have perhaps an imperfect recollection of it are likely to be deceived: *Aristoc Ltd. v. Rysta Ltd.* (1945) AC 68, at p 86 . The onus of proving that there is no reasonable likelihood of deception lies upon the applicant for registration. If the question is left in dubio the application must be refused: *Eno v. Dunn* (1890) 15 App Cas 252, at p 256.

3. In the present case the prefix of the two words is the same word "Rain", but the suffix "master" differs from the suffix "King" in appearance and in sound. This makes the two marks as a whole quite distinct and the marks must be judged as a whole. "Rainmaster" does not look like "Rain King" and it does not sound like it. There is not a single common letter in master and in King. The two words are so unlike to the eye and to the ear that counsel for the appellant was forced to rely on the likelihood of deception arising from the two words conveying the same idea of the superiority or supremacy of the article as a mechanism for making a spray similar to falling rain or artificial rain as it was called during the argument. But it is obvious that trademarks, especially word marks, could be quite unlike and yet convey the same idea of the superiority or some particular suitability of an article for the work it was intended to do. To refuse an application for registration on this ground would be to give the proprietor of a registered trademark a complete monopoly of all words conveying the same idea as his trademark. The fact that two marks convey the same idea is not sufficient in itself to create a deceptive resemblance between them, although this fact could be taken into account in deciding whether two marks which really looked alike or sounded alike were likely to deceive. As Lord Parker said in the passage cited, you must consider the nature and kind of customer who would be likely to buy the goods. A purchaser of spray nozzles and sprinklers would not be likely to be lacking in discernment. He would not be in a hurry to buy. He would not be likely to pay any attention to the presence of a common word like rain in the combination. That prefix already

appears in other trademarks for goods of the same description sold on the Australian market such as Rainwell, Rainmaker, Rain Queen, and Rainbow. The learned registrar was right in holding that the only similarity between the two marks is the common prefix "Rain" and that this similarity is not sufficient to create a reasonable likelihood of deception when the remaining portions of the marks are so different.

The appeal should be dismissed.