



HIGH COURT OF AUSTRALIA

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Form 27D – Respondent's submissions
 IN THE HIGH COURT OF AUSTRALIA
 MELBOURNE REGISTRY

No M32 of 2025

BETWEEN: **BED BATH 'N' TABLE PTY LTD (ACN 005 216 866)**
 Appellant

and

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GLOBAL RETAIL BRANDS AUSTRALIA PTY LTD (ACN 006 348 205)
 Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. *First issue:* In circumstances where a first trader (**BBNT**) enjoys a reputation in a composite mark comprised of largely descriptive words (**BBNT mark**), but does not enjoy any independent reputation in two of those words when disaggregated from the composite whole, can the use by a second trader (**GRBA**) of those two words, in a different composite mark (**House B&B mark**), which does not bear sufficient resemblance to the first trader's composite mark to give rise to a risk of deception or confusion, nevertheless contravene the *Australian Consumer Law (ACL)* or constitute passing off?¹
3. *Second issue:* In circumstances where: *(i)* GRBA adopted the House B&B mark without any intention to mislead, *(ii)* the House B&B mark did not bear sufficient resemblance to the BBNT mark to give rise to a risk of deception or confusion, and *(iii)* the only resemblance between the BBNT mark and House B&B mark resided in the use of the largely descriptive words BED and BATH, which did not indicate a commercial connection

¹ Particularly where the second trader's mark prominently features a word or mark in which it has its own substantial reputation: see paragraphs 6(f) and 44 below. The BBNT mark and House B&B mark are depicted at AJ [9], [18], and [19].

with BBNT, could the “wilful blindness” of GRBA as to the risk of (mere) confusion arising from the use of those words in the House B&B mark provide the Court with any real assistance in determining whether GRBA had contravened the ACL or engaged in passing off (hereafter, **ACL/PO Claims**)?

Part III: Notice of Constitutional Matter

4. Notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

5. There do not appear to be any factual issues in dispute.

6. The primary judge made findings:

- 10 (a) that the BBNT mark is a word mark comprised of “*three well understood English words*” and the conjunction “N” without any logo or device or invented word;²
- (b) as to the limited nature of BBNT’s reputation (“*it is the composite phrase “BED BATH N’ TABLE” which indicates a commercial connection with BBNT, and not simply “BED BATH” or “BED & BATH”*”) (PJ [122]; see also: [120], [123], [124], [438]);
- (c) as to the substantial third-party use of the navigational descriptors BED and BATH, both individually and in combination, for “*their descriptive nature*” (PJ [92], [95]-[96]);
- (d) that the House B&B mark is a single composite mark (PJ [391]);
- (e) as to the “*substantial and crucial differences*” between the BBNT mark and House B&B mark (PJ [437]-[441]); and
- 20 (f) that GRBA has a substantial reputation in the mark HOUSE (PJ [1], [56], [69], [509(f)]).
7. Further, the primary judge rejected BBNT’s contention that GRBA had adopted the House B&B mark with a commercially dishonest intention to mislead or deceive (PJ [422], [511], [536]).
8. The Full Court of the Federal Court (**FFC**) affirmed these findings on appeal.³

Part V: Argument

9. This is a case where a trader (BBNT) with a longstanding reputation in a composite mark

² *Bed Bath ‘N’ Table Pty Ltd v Global Retails Brands Australia Pty Ltd* [2023] FCA 1587 (**PJ** (CAB Tab 1, pp 5-123)), [438].

³ *Global Retail Brands Australia Pty Ltd v Ben Bath ‘N’ Table Pty Ltd* [2024] FCAFC 139 (**AJ** (CAB Tab 7, pp 180-229)), [21], [78], [82], [85], [87], [93]-[95], [102], [104], [107].

comprised of largely descriptive words, who is not known by any of those words when used separately, seeks to prevent a new entrant to the market (GRBA) from using two of those words in its own mark, even when those words are appended to the new entrant's own very well-known name. GRBA did not seek to trade off BBNT's reputation. Rather, it sought to compete with BBNT, using an obviously different trade mark, which included the words BED and BATH that largely described the nature of the products offered for sale.

Ground 1: overview

10. The thrust of ground 1 is that the FFC too closely examined (a) BBNT's reputation and (b) the BBNT mark and House B&B mark.
- 10 11. The FFC should not, BBNT says, have considered whether BBNT's reputation in its whole mark extended to a reputation in BED BATH (Appellant's Submissions (AS) [22], [25], [28], [34]). Rather, it should have considered only whether, because of BBNT's reputation in its whole mark, consumers would be likely to be misled or deceived by the use of the House B&B mark. The problem with that analysis is that it leaves unexplained the mechanism by which deception might arise. How and why, rhetorically, does BBNT say consumers might be misled or deceived, if not because BED & BATH caused them to think of BBNT? It was appropriate for the FFC to consider (in an appeal by way of rehearing: AJ [50]-[52]) whether BBNT enjoyed an independent reputation in the words BED and BATH. Once it is accepted, as it was by the time of the FFC appeal, that BBNT did not have any
20 reputation in those words, it is difficult to conceive how their use, in an obviously different trade mark, could mislead or deceive. No explanation is articulated in AS.
12. Next, the FFC should not, BBNT says, have engaged in a "mark-on-mark" comparison between the BBNT mark and the House B&B mark in determining the ACL/PO Claims (AS [28], [35]). However, BBNT does not explain what the FFC should have done that would not have involved comparing the marks. When two marks are said to be so similar that consumers exposed to them are likely to be misled or deceived, it is appropriate and orthodox for a court to look at the marks and consider their similarities and differences. The FFC committed no error.
- 30 13. At AS [25], BBNT says the FFC "failed to engage with the principle" that ACL/PO claims "can readily be found where part of a trader's trade indicia is misappropriated". Similarly, at AS [21], BBNT says the FFC found "that it was necessary for [GRBA] to take the whole of [BBNT's] branding for misleading or deceptive conduct to be made out", and thereby

erred (see also AS [25]). But that is not what the FFC found. The FFC’s reasoning was not that taking part of a well-known mark can *never* mislead or deceive consumers. It was that taking *this non-distinctive part* of this well-known mark and using it in the way GRBA did, was not likely to mislead or deceive.⁴

The FFC’s reasoning

14. There were two central planks to the FFC’s reasoning.

15. *First*, the FFC held that there were “*substantial and obvious*” differences between the BBNT mark and the House B&B mark, which would be apparent “*to anyone but the most careless observer*” (see AJ [82], [84], [127], mirroring PJ [414], [437]). Photographs of examples of the parties’ stores, featuring these marks, are in AJ [9], [18], and [19]. These differences underpinned the primary judge’s conclusion (affirmed by the FFC) that the House B&B mark was not deceptively similar to the BBNT mark (PJ [437]-[442]; AJ [64], [127]-[132]): that is, that the House B&B mark bore insufficient resemblance to the BBNT mark to be “*likely to deceive or cause confusion*” (*Trade Marks Act 1995* (Cth) (**TMA**) s 10). Significantly, BBNT has now abandoned its challenge to those findings.

16. The finding of no deceptive similarity in the trade marks case properly flowed into the determination of the ACL/PO Claims – because for those claims, too, the degree of dissimilarity between the marks was relevant (cf. AS [29]).⁵ Thus, the differences between the marks led the FFC to reason, in the ACL/PO Claims, that a consumer would not “*confuse the two marks (i.e. by mistaking one for the other)*” (AJ [81]-[82]).

17. *Second*, although the BBNT mark and House B&B mark shared common elements – namely, the words BED and BATH – BBNT did not establish that it had *any* independent reputation in those two words (PJ [120]; AJ [77]). As the FFC explained, this was a “*significant finding*” (unchallenged by BBNT on appeal) because it confirmed that it was the use of the composite BBNT mark, and *not* BED BATH or BED & BATH (when

⁴ The authorities cited in AS fn 14 are readily distinguished. In *R&C Products Pty Ltd v Hunter Products Pty Ltd* (1987) FCA 705, it was the “*similarity of the two expressions*” (pg 6) that gave rise to a risk of deception, in circumstances where those expressions (“blue & fresh” and “fresh & blue”) involved a “*peculiar collocation*” of “*fancy words*” (pgs 9, 13). In contrast, the primary judge held that there are “*substantial and crucial differences*” between the BBNT mark and House B&B mark (PJ [437]). In *Sydneywide Distributions Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354, the Full Court was concerned with whether “*the copying of the distinctive aspects of the original get-up constitutes passing off*” (at [121], emphasis added), in circumstances where “*the Red Bull get-up as pleaded was distinctive of the Red Bull product*” (at [147]; see also [130]). In contrast, the primary judge held that BED and BATH were not distinctive of BBNT (PJ [120]-[124], [438]).

⁵ And, at any rate, the FFC did not simply rely on the finding of no deceptive similarity, but considered for itself the comparison between the marks, finding at AJ [81]-[82] that the differences were “*substantial and obvious*”.

disaggregated from the composite mark), that would “*indicate the existence of a commercial association*” with BBNT (AJ [77]-[78]).⁶

18. Having regard to BBNT’s limited reputation (PJ [120], [122]-[124], [438]), there would be no reason for a consumer, able to distinguish the House B&B mark and the BBNT mark, to nevertheless “*draw the inference*”, based on the common use of the largely descriptive words BED and BATH, that there was an association between BBNT and GRBA (AJ [81]).

19. Thus, the decision of the FFC turned on an assessment of the evidence, and in particular, the dissimilarities between the BBNT mark and the House B&B mark and the fact that BBNT’s reputation was limited to the whole of its mark. The FFC correctly concluded, in
10 undertaking a “*real review*”⁷ of the evidence, that “*the evidence did not justify the primary judge’s finding that GRBA had engaged in misleading or deceptive conduct*” (AJ [65]).

The difference between ACL/PO Claims and trade mark infringement

20. At AS [26]-[27], BBNT says the FFC’s reasoning was based on the disconformity between the result under the TMA and the result in the ACL/PO Claims. That is a straw man. GRBA does not say, and the FFC did not say, that the reason the determination of the ACL/PO Claims was wrong was that it did not conform with the result under the TMA. It is uncontroversial that such claims can, theoretically, have different results. The FFC was cognisant of this distinction, noting that reputation was irrelevant to the assessment of deceptive similarity under the TMA (AJ [122], [110]), whilst in contrast noting that “*the strength of BBNT’s reputation in the BBNT mark*” was relevant to the determination of the
20 ACL/PO Claims (AJ [68]). What the FFC found was that, in this case, the reputation enjoyed by BBNT did not properly produce a different result.

21. There are two differences between claims of trade mark infringement and ACL/PO claims that are relevant here. *First*, trade mark infringement requires only mere confusion, whereas ACL/PO Claims require that consumers are likely to be misled or deceived.⁸ As the FFC correctly noted, it is not sufficient, for ACL/PO Claims, for a consumer to “*question*

⁶ BBNT says it is “*critical*” that the findings at PJ [26]-[51] were not challenged on appeal (AS [9]). However, nothing in those paragraphs contradicts the finding that BBNT’s reputation was limited to its whole mark.

⁷ *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301 at [2]-[10].

⁸ TMA s 10. *Kosciuszko Thredbo Pty Ltd v Thredbonet Marketing Pty Ltd* (2014) 223 FCR 517 at [34]; *Verrocchi & Anor v Direct Chemist Outlet Pty Ltd & Anor* (2016) 247 FCR 570 at [62]; *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 at [8].

whether there was some kind of association” (AJ [79]; cf. AS [10], PJ [518]).⁹ *Second*, the reputation of a mark is relevant in ACL/PO Claims, but not in trade mark claims.¹⁰

22. Obviously, determining whether the marks in suit are deceptively similar is a necessary part of the analysis under the TMA. But it is also crucial for ACL/PO Claims.¹¹ This Court has explained that “[t]he resemblance of the marks... is, of course, important as an element ...” of an ACL/PO inquiry.¹²

The substantial differences between the BBNT mark and the House B&B mark

10 23. It is significant that BBNT has not challenged the finding of the primary judge (affirmed by the FFC) that the House B&B mark does not bear sufficient resemblance to the BBNT mark to give rise to a risk of deception or confusion (AJ [64], [127]-[132]).¹³ In *Hornsby*, this Court said that where the first mark is descriptive, “*quite small differences*” between the marks will be enough to negate a risk that consumers will be misled or deceived.¹⁴ Here, the primary judge held that there are “*substantial and crucial differences*” between the BBNT mark and the House B&B mark (PJ [437], emphasis added).

24. *First*, the primary judge held that “House” (which does not form any part of the BBNT mark) is the most prominent feature of the House B&B mark. It is the “*significant visual and aural part at the start of*” the House B&B mark, “*clearly the more dominant visual cue*” and “*far more visually dominant and distinctive than “BED”, or even “BED BATH”*” (PJ [440]; see also [393]).

20 25. *Second*, the primary judge held that it is the N’ TABLE element (not the words BED BATH) that “*is visually and phonetically unusual, and unique to BBNT*” and “*a key feature*” of the

⁹ In any event, “*there was not one instance of direct evidence of customer confusion amongst the 10 best lay witnesses BBNT selected*”: PJ [262].

¹⁰ *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 277 CLR 186 at [28], [37]-[38], [40], [49].

¹¹ In passing off, the extent of resemblance or differentiation will bear on whether there is any misrepresentation: *Office Cleaning Services Ltd v Westminster Window and General Cleaners Ltd* (1946) 63 RPC 39 at 40 and 43 (approved by the Privy Council in *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1980] 2 NSWLR 851 at 857F); *Schweppes Ltd v Gibbens* (1905) 22 RPC 601 at 707. For ACL claims, see *Verrocchi* at [89]; *S & I Publishing Pty Ltd v Australian Surf Life Saver Pty Ltd* (1998) 88 FCR 354 at 364.

¹² *Henry Clay & Bock & Company Limited v Eddy* (1915) 19 CLR 641 at 664. See, to similar effect: *Schweppes Ltd v E Rowlands Pty Ltd* (1910) 11 CLR 347 at 354.

¹³ The matters addressed in AS [10], in the fourth line, were considered and rejected by the primary judge in the context of the trade mark infringement claim (PJ [440]-[441]) and were not relied on by the primary judge in determining the ACL/PO Claims (cf. PJ [509]).

¹⁴ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 229. See also: *McCain International Ltd v Country Fair Foods Ltd* [1981] RPC 69 at 75, 79 and 81; *Office Cleaning Services* at 42 (approved by the Privy Council in *Pub Squash* at 857F). Notably, BBNT does not challenge the correctness of any of these authorities.

BBNT mark (PJ [438]-[439]). Further, the primary judge held the “*composite arrangement*” that rendered the BBNT mark distinctive was “*entirely absent*” from the House B&B mark (PJ [439]).

26. *Third*, the primary judge held that the “*different presentation and orientation of the marks*” is “*important*”, with various differences that impact “*the fundamental impression*” conveyed by the BBNT mark and the House B&B mark. The BBNT mark and the House B&B mark have different “*dominant visual cue[s]*” (PJ [441]).

27. These findings underpinned the primary judge’s conclusion that the House B&B mark was not “*deceptively similar*” to the BBNT mark (PJ [437]-[442]). BBNT unsuccessfully sought to overturn these findings before the FFC (AJ [64], [127]-[132]). In rejecting BBNT’s cross-appeal, the FFC held that: (i) BED & BATH does not operate as a separate trade mark from the House B&B mark (AJ [119]); and (ii) the word “House” is the “*predominant component*” of the House B&B mark and “[i]ts presence could not be missed save through exceptional carelessness or stupidity” (AJ [127]). Thus, the FFC concluded, in respect of the allegations of trade mark infringement, that there is not “*any real, tangible danger that ordinary customers would be led to believe, or wonder whether, the goods or services in relation to which the House B&B mark is used are from the same source as, or sources related to, those in respect of which the BBNT mark is registered*” (AJ [132]). BBNT no longer seeks to challenge any of these findings.

28. The starting point for the resolution of the ACL/PO Claims is therefore that the House B&B mark bears **insufficient** resemblance to the BBNT mark to even give rise to a likelihood of confusion, far less deception.

29. Rather than tackling the finding that the marks are not deceptively similar, BBNT says the Full Court erred at AJ [81]-[82] by conducting a “*mark-on-mark*” assessment (at AS [28]). It says the correct assessment was “*what consumers might believe from [GRBA’s] use of the House B&B mark in comparative contexts as a whole*”. However, BBNT does not say what else the Full Court should have done in this part of its analysis, other than comparing the two marks. A necessary part of considering what consumers might believe from GRBA’s use of the House B&B mark is considering how closely it resembles the BBNT mark. What the FFC did at AJ [81]-[82] was to consider whether the marks were sufficiently similar that a consumer might mistake them. That is an orthodox part of the analysis in an ACL/PO case.

The limited nature of the reputation enjoyed by BBNT

30. The primary matter upon which BBNT relies, to justify a different outcome in respect of the ACL/PO Claims, as compared with the trade mark infringement claim, is the reputation enjoyed by BBNT in the BBNT mark (AS [18]-[20]).

31. Alleged failure to consider the reputation as a whole. BBNT says the FFC “*failed to properly consider the reputation as found by the Primary Judge*” (AS [10]). Similarly at AS [25], BBNT says the FFC failed to consider the primary judge’s factual findings at PJ [519] (as set out in AS [24]) “*in light of the relevant reputation in the brand as a whole*”. In fact, the FFC directly considered the primary judge’s findings about whether the conduct was likely to mislead in the context of BBNT’s reputation in the whole of the BBNT mark: AJ [75]-[77], [79], [84]. The question the FFC asked itself at AJ [81]-[82] is exactly the one BBNT proposes at AS [34]: did GRBA’s use of the House B&B mark create a risk of deception in the minds of consumers, given BBNT’s reputation in its whole mark? The FFC found that in this case, the answer was not affected by the reputation in the whole mark, because that mark was so obviously different from the House B&B mark.

32. Reasoning for the FFC’s finding. The FFC’s finding that the nature and extent of BBNT’s reputation could not support the ACL/PO Claims was also based on the primary judge’s finding that BBNT did not enjoy **any** reputation in the words BED BATH or “BED & BATH” *simpliciter*. In particular, the primary judge found the following:

(a) BBNT had failed to establish “*that it has **any independent reputation** in “BED BATH” or “BED & BATH” alone*” (PJ [120], emphasis added);

(b) BBNT had “*not made any institutional use of “BED & BATH”*”. It had never (in 40 years) contracted the BBNT mark to “BED BATH”, and had “*always used the whole of the BBNT brand name in unaltered form*”. Thus, BBNT had reinforced to consumers that “*it is the composite phrase “BED BATH N’ TABLE” which indicates a commercial connection with BBNT, and not simply “BED BATH” or “BED & BATH”*” (PJ [122], emphasis added);

(c) BBNT’s “*institutional consistency*” in using the BBNT mark, in unaltered composite form, had “*been digested by consumers*” (PJ [123]), as illustrated by the Google Analytics data (summarised at PJ [99]-[110]);

(d) BBNT had not established “*a reputation, in any formal or institutional sense, in “BED BATH” or “BED & BATH” alone*” (PJ [124]); and

(e) BBNT was not “*recognised by consumers simply as “BED BATH”*” (PJ [438]).¹⁵

33. Those unchallenged findings made clear that BBNT does **not** enjoy any reputation or goodwill in the words BED BATH, when disaggregated from the BBNT mark. The FFC correctly treated those findings as “*significant*” – they expose that in the context of this case it is only use of the entire composite phrase which constitutes the BBNT mark, and **not** BED BATH or BED & BATH *simpliciter*, “*that would indicate the existence of a commercial association [with BBNT]*”.¹⁶ It was for this reason that the FFC explained the reputation enjoyed by BBNT in the BBNT mark (as a whole) had “*little, if any, bearing*” on the risk of deception (AJ [82]).¹⁷

10 34. Institutional use. At AS [23], BBNT mischaracterises the FFC’s reasoning. BBNT says institutional use was “*not a logical prerequisite*” to success on the ACL/PO Claims. However, that type of use was not treated as a prerequisite by the FFC. Institutional use was treated by both the primary judge and the FFC as one of many factors indicating that BBNT had no reputation in the words BED BATH or BED & BATH alone (PJ [122], [99]-[124]; AJ [78], [93]-[95]).

20 35. Prof O’Sullivan’s evidence. BBNT relies on Prof O’Sullivan’s evidence to the effect that consumers were likely to rely on “bed” and “bath” as cues in quickly identifying BBNT’s brand (AS [23], [32]). This should be rejected. *First*, the primary judge considered such evidence to be “*of limited assistance*” (PJ [258]), and made no reference to it in determining the ACL/PO Claims. Contrary to AS [32], there was no need for the FFC to “*distinguish*” the reasoning of an expert that the primary judge did not accept. *Second*, the primary judge expressly accepted evidence to the contrary given by Assoc Prof Nyilasy, who explained that consumers would not expect BBNT to use the contracted words BED BATH (or BED & BATH) to indicate commercial origin unless they had been institutionally applied by BBNT (PJ [121]-[122]). This was endorsed by the FFC (AJ [121]). *Third*, the evidence of Prof O’Sullivan (summarised in PJ [248], [252]) was to the effect that consumers would

¹⁵ AS [45](c) is incorrect to say the PJ found that consumers “*tended to shorten*” BBNT to the impugned words (AJ [95]). The highest that finding got was that “*some*” consumers “*may*” have a tendency to “*occasionally shorten*” BBNT’s name “*in informal settings*” (PJ [124] and [423](i)). However, what mattered was not the “*meagre evidence*” of truncation in informal settings, but whether consumers would “*expect BBNT itself to use a shortened form of its name*” (AJ [93]).

¹⁶ AJ [77]; see also: PJ [122], [438]. This was consistent with established authority: *McCain* at 73 (lines 45-50) and 79 (lines 1-8).

¹⁷ That was a finding about the relevance, not the correctness, of the “*findings on reputation at trial*” (cf. AS [31]).

rely upon the words BED and BATH to identify BBNT. That evidence was directly contrary to the findings of the primary judge (PJ [120]-[124], [438]).

36. Reputation in the BBNT mark as a whole *decreases* the risk of confusion. BBNT fails to explain how its strong reputation in the BBNT mark as a composite whole could rationally increase the risk of deception (AJ [75]). In fact, it could only diminish the likelihood that any ordinary or reasonable consumer might have an imperfect recollection of the BBNT mark.¹⁸ Further, in light of the consistent use by BBNT of the whole BBNT mark, it is improbable that any ordinary or reasonable consumer would expect BBNT to launch a new brand,¹⁹ featuring only the words BED and BATH disaggregated from the remainder of the BBNT mark.²⁰ For the same reason, consumers would not infer an association or collaboration between BBNT and GRBA. As the primary judge held, BBNT’s “*institutional consistency*” in using the BBNT mark, as a whole, had “*been digested by consumers*” (PJ [123]).

The largely descriptive nature of the words BED and BATH

37. BBNT ignores the finding that the words BED and BATH are “*largely descriptive*” (AJ [118]): they convey that the products offered for sale relate “*in some way to beds [and] baths*”.²¹ Adding, to an existing brand, category descriptors that do not directly describe the goods sold, was common in this market (for example, “Adairs Kids” and “Cotton:On Kids” are stores operated selling products for children: PJ [90(a)-(b)]).²²

38. The primary judge made factual findings (unchallenged on appeal) that there had been widespread use of the words BED and BATH, in relation to the retailing of homewares products, for their descriptive significance. Those findings included the following:

(a) there had been “*substantial use by third party sellers of soft homewares*” of BED and BATH “*as navigational or category descriptors*” (PJ [92]; PJ [423(b)-(c)]);

¹⁸ So much was well illustrated by the Google Analytics data, which recorded that “*when internet users... searched for specific BBNT stores, they exclusively did so by reference to the BBNT name as a composite whole*”: PJ [123].

¹⁹ Whenever BBNT launched a new brand, it always included the whole of the BBNT mark in that brand: PJ [48]-[51].

²⁰ It does not assist BBNT to say that the reputation it had in its whole mark was “*longstanding*” or arose from the use of store branding (cf. AS [2], [9], [20], [25], [36], [45](a) and (b), [65]). Its longstanding use was consistently of the whole of the BBNT mark, in unaltered form, in strict compliance with BBNT’s brand guidelines: PJ [122]; AJ [92].

²¹ AJ [80]. The words “bed” and “bath” were widely used by BBNT and other traders as “category descriptors” to “navigate” customers to bedroom and bathroom products. PJ [95], [250] and [384].

²² Thus, contrary to fn 4 of AS, store branding is not necessarily distinct from category descriptions.

(b) BED and BATH were “commonly used in the industry for their descriptive nature;²³

(c) where BED and BATH had been used by third parties as part of a composite phrase, “the order [was] typically, but not always, “bed” and then “bath”” (PJ [96]); and

(d) BBNT had, itself, used BED and BATH as navigational aids on its website to “describe categories of products”, and this, along with the use by other traders, had educated consumers that “bed is a shorthand for bedroom ware, and bath is a shorthand for bathroom ware” (PJ [96]).

39. The significance of those findings is that ordinary and reasonable consumers, confronted with the use of BED & BATH (as part of the House B&B mark) on the outside of a homewares store, would understand those words “to be describing the nature of the products on sale in the store” as part of a sub-brand of the well-known parent brand HOUSE, rather than conveying any representation as to a commercial association with BBNT (AJ [84]). BBNT asserts that there was “no basis for such a conclusion” (AS [31]). In fact, that conclusion, reached by the FFC on an appeal by way of rehearing, followed inexorably from: (i) the unchallenged findings of the primary judge that BBNT did not enjoy any reputation in the words BED and BATH (PJ [120]-[124], [438]), (ii) the largely descriptive nature of the words BED and BATH (AJ [80]), (iii) the widespread descriptive use of those words (PJ [92]; AJ [80]), and (iv) the “significant differences” between the House B&B mark and BBNT mark (AJ [82], [84], [127]; PJ [414], [437]).

20 40. The fact that BBNT was, for many years, the only trader in Australia²⁴ to use a trade mark that included the words BED and BATH on its storefront, does not mean that BBNT is “entitled to a monopoly” in those two words²⁵ when stripped from the composite BBNT mark (cf. AS [9]) and used in a substantially different mark.²⁶ As the FFC explained, it does not follow from such usage that the words BED and BATH are distinctive of BBNT (AJ [84]). Indeed, the findings of the primary judge were to the opposite effect (AJ [76]-[77]). ACL/PO claims are “not concerned” with perceived “unfairness of competition”, nor the “possibility of blunders” arising from the use of descriptive words.²⁷

41. The use, in the House B&B mark, of the commonly used descriptive words BED and

²³ This was conceded by BBNT’s Managing Director in cross-examination. PJ [95].

²⁴ The words BED & BATH have been used in store branding in other jurisdictions (see: PJ [534]).

²⁵ *McCain* at 81 (lines 20-21) (see also: 77 (line 38) - 78 (line 2); 79 (lines 3-8, 40-42)).

²⁶ This would “mock the manifest intent of the legislation”: *Hornsby* at 230.

²⁷ *Hornsby* at 226 & 229 (approved in *Pub Squash* at 857D).

BATH, did not convey any misrepresentation. Those words, when used in relation to the retailing of “*products for the bedroom and bathroom*” (PJ [7]), were “*a very appropriate, apt and neat description*”²⁸ of the products being offered for sale. As the FFC held, the ordinary and reasonable consumer “*would do no more than infer that both businesses were engaged in the supply of soft homewares for bedrooms and bathrooms*” (AJ [84]).

42. The effect of BBNT’s argument is that a trader who uses a composite phrase is entitled to prevent a rival trader from making use of **any** words in that phrase, irrespective of whether those words, in isolation, indicate any association with that trader. The FFC’s refusal to accept BBNT’s argument was not a “*fail[ure] to afford protection to the valuable goodwill accruing to [BBNT]*”; and if the Court rejects this appeal, it will not be “*curtailing the means by which a trader can protect [its] valuable goodwill*” (cf. AS [20], [25], [31], [33]). The effect of the findings of the primary judge and the FFC was that BBNT has no goodwill to protect in the words BED and BATH.²⁹

43. Rather, to accept BBNT’s contention would be to allow ACL/PO claims to be used “*as an instrument for the creation*” of the very sort of “*unfair monopoly*” which this Court rejected in the strongest terms in *Hornsby*,³⁰ where the Court explained that “[*t*]here is a price to be paid for the advantages flowing from the possession of an eloquently descriptive trade name”, namely, that “*quite small differences in a competitor’s trade name will render the latter immune from action*”.³¹ In such cases, evidence of confusion attributable to the common use of descriptive words should not be conflated with conduct which “*is itself misleading or deceptive*”.³² The FFC correctly identified and applied these principles (AJ [73]-[74], [80], [84]) and BBNT does not challenge their correctness.

Other matters bearing, or said to bear, on the likelihood of deception

44. Prominent use of GRBA’s own brand. GRBA enjoys a substantial reputation in its own HOUSE brand (PJ [1], [56], [69], [393], [509(f)]; AJ [115]). The House B&B mark featured that brand prominently (PJ [115]; AJ [118]). That was an “*appropriate means*” to avoid

²⁸ *McCain* at 75 (lines 38-44). See also: 79 (line 18); *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202.

²⁹ Goodwill is “*the attractive force which brings in custom*”: *Commissioner of Taxation v Murry* (1998) 193 CLR 605 at [23]. The unchallenged findings of the primary judge were to the effect that BBNT does not enjoy any goodwill in the words BED and BATH, because those words by themselves are not used by consumers to identify BBNT (and the FFC agreed).

³⁰ *Hornsby* at 229-230. See also: *Pub Squash* at [44].

³¹ *Hornsby* at 229. See also: *McCain* at 75, 79 and 81.

³² *Hornsby* at 230.

deception.³³ Further, the primary judge noted that the House B&B mark was consistent with GRBA's other use of sub-branding in, for example, House WAREHOUSE, House CHRISTMAS, and House PETS (PJ [394]).

45. Get-up. AS refer repeatedly to both BBNT and House B&B stores using a "*Hamptons style*" layout and similar get-up (AS [10], [36(c)-(d)]). However, the primary judge found that such a layout was typical in the soft homewares market (PJ [40], [74], [423(e)], [507], [509(d)], [515], [517]). The primary judge did not find that BBNT enjoyed any reputation or goodwill in its store get-up, and held that the appearance of the House B&B stores was "*much like other soft homewares stores*" (including those of BBNT) (PJ [507], [515], [509(d)]). BBNT did not challenge any of those findings on appeal. The primary judge's findings were consistent with the evidence of BBNT's managing director Mr Dempsey that "*Adairs or anyone else... in the category... have a similar sort of look and feel*".³⁴ The evidence was that the appearance of many soft homeware stores was entirely generic.³⁵ In these circumstances, the alleged similarities in store get-up could not render GRBA's conduct misleading or deceptive.

Ground 2: overview

46. BBNT attempts to use other findings made by the primary judge, and authorities, to bolster the seriousness of the "wilful blindness" finding, in an attempt to move away from the idiosyncratic meaning the primary judge gave that term and bring it closer to a finding of intention. There are two problems with that approach.

47. First, there is no ground in this appeal by which BBNT seeks to challenge the primary judge's wilful blindness finding. BBNT's appeal rests on the footing that the state of mind found by the primary judge is enough to fall within the reasoning in *Woollen Mills*.³⁶

48. Second, the wilful blindness finding cannot be bootstrapped up to the same footing as a finding of intention (and the FFC said exactly that at AJ [107]). The primary judge found that GRBA did **not** intend to mislead (PJ [422], [511], [536]) – and the FFC correctly rejected BBNT's attempt to overturn that finding (AJ [85], [105], [108]). Indeed, it is clear that what the primary judge meant by the term "wilful blindness" was something *less* than

³³ *McCain* at 76.

³⁴ Dempsey at T283.46 - T284.3 (Respondent's Book of Further Material (RFM) p 4-5).

³⁵ See for example: Annexure BAM-6 (the storefront of the BBNT Store at Northland and the adjoining Adairs store) (RFM p 9); Annexure BAM-6 and Annexure SGT-1 (the storefront of the BBNT store at Perth DFO and the store fronts of nearby Adairs and Sheridan stores) (RFM p 7-8, 11).

³⁶ *Australian Woollen Mills Ltd v F S Walton & Co Ltd* (1937) 58 CLR 641 at 657.

its usual meaning. As BBNT points out at AS [59]-[60], in the context of equitable claims, wilful blindness is a type of actual knowledge: a person who is wilfully blind has deliberately shut their eyes, because they know what the result will be. Such a person is acting dishonestly. Plainly, that is not how the primary judge used the term “wilful blindness”, because she found that the evidence fell short of establishing a commercially dishonest intention on the part of GBRA (PJ [422]); and that GRBA and Mr Lew were *not* consciously dishonest (PJ [470]). In fact, the primary judge directly contrasted “*commercially dishonest intention*” with wilful blindness, finding the latter but refusing to find the former (PJ [422]). Thus, the finding that Mr Lew had been “wilfully blind” was not a finding of wilful blindness in the sense that term was used in *Farah*³⁷ and *Baden*.³⁸ The primary judge used the term “wilful blindness” idiosyncratically, and in fact, neither BBNT nor GRBA made any submission to the primary judge (written or oral) as to wilful blindness; the first reference to wilful blindness was in the PJ and it referenced none of the authorities now relied upon by BBNT. The FFC appreciated the primary judge’s idiosyncratic use of the term “wilful blindness” (AJ [39], [85], [103], [133]).

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49. GRBA also says that “wilful blindness” as found by the primary judge is not enough to enliven *Woollen Mills*; that Mr Lew was not blind to any relevant matter; and that ground 2 ultimately goes nowhere, because the conduct was not objectively misleading.

50. The FFC did not err by departing from the weight the primary judge gave her primary findings of fact as to the subjective state of mind of GRBA in determining the objective ACL/PO Claims (as is implied at AS [43]). The FFC was conducting an appeal by way of rehearing and was required to (and did) undertake a “*real review*” to determine whether the primary judge erred.³⁹

No “fitted for purpose test”

51. BBNT repeatedly refers to a “*fitted for purpose test*” (eg, AS [37]-[38]). That implies there is a test the Court will apply in which it will enquire whether conduct was fitted for the purpose of misleading or deceiving consumers. BBNT is incorrect to elevate *Woollen Mills* to a test.⁴⁰ *Woollen Mills* merely says that where a trader who is accused of misleading or

³⁷ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at [174]- [176].

³⁸ *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France* [1983] BCLC 325 at [250].

³⁹ *Aldi* at [2]-[10].

⁴⁰ *Hashtag Burgers Pty Ltd v In-N-Out Burgers, Inc* (2020) 159 IPR 186 at [68], [103].

deceptive conduct did intend to mislead or deceive consumers, the Court may take that into account as evidence of an expert opinion that the conduct was likely to mislead or deceive. However, *Woollen Mills* does not involve any “test”: it simply allows the Court to have regard to the intention of a dishonest trader as one piece of evidence in determining whether impugned conduct is, objectively assessed, likely to mislead or deceive.

BBNT’s submissions about matters not the subject of this appeal

52. In AS, BBNT seeks to support the primary judge’s invocation of *Woollen Mills* based on matters irrelevant to ground 2.

10 53. *First*, it says *Woollen Mills* applies because of the primary judge’s findings about Ms McGann. BBNT refers repeatedly to the state of mind of Ms McGann (AS [11], esp [42], esp [44], fn 21, [49], fn 23, [52], [55], esp [63], esp [64]). The finding of the primary judge that Ms McGann had an “*intention to divert trade away from BBNT*” (PJ [468]) was **not** a finding that Ms McGann intended to mislead or deceive. The primary judge refused to make that finding (PJ [422], [536]). Further, the FFC did not “*ignore*” the findings about Ms McGann. The FFC noted those findings (AJ [31], [33], [34], [40], [61]), but concluded at AJ [86] that neither Mr Lew’s nor Ms McGann’s intentions provided any real assistance.

20 54. In any event, more importantly, Ms McGann’s state of mind is not relevant to ground 2. Ground 2 asks whether the FFC was correct to find that wilful blindness was insufficient to enliven *Woollen Mills*. The witness who was found to be “wilfully blind” was Mr Lew (PJ [242], [469]). Thus, the only question in ground 2 is whether Mr Lew’s wilful blindness should have been treated as expert evidence that the conduct was likely to mislead or deceive.

55. *Second*, BBNT refers, throughout its submissions on ground 2 but especially at AS [46]-[50], to other findings that the primary judge made about the state of mind of Mr Lew and GRBA. Those findings are not relevant to ground 2. They were intermediate findings made in the course of considering whether Mr Lew had an intention to mislead or deceive.⁴¹ The primary judge, having considered such matters, held that Mr Lew’s state of mind was “wilful blindness”, **not** intention (PJ [422], [469], [511], [536]). If BBNT means to contend

⁴¹ Further, it is not correct to say, as BBNT does at AS [39], that the PJ considered the finding of wilful blindness “*together with the reputational and other evidence*” in deciding that the conduct was “*fitted for the purpose*” (cf. AS [39]). The primary judge’s reasoning went directly from wilful blindness to fitted for the purpose (PJ [511]). The “*reputational and other evidence*” was taken into account on the ultimate question of whether the conduct was likely to mislead or deceive, not the question of whether *Woollen Mills* applied.

that the primary judge’s findings concerning Mr Lew went beyond wilful blindness (which is what AS [51] & [69] appear to suggest), that is beyond the scope of this appeal.⁴²

56. *Third*, BBNT submits at AS [52] and [72] that the FFC erred in its consideration of the “running scared” email. There is no ground of appeal directed to that email because BBNT has not sought to reopen the “wilful blindness” finding. But, at any rate, the FFC considered the email and was entitled to make findings about what it meant. The thrust of the email was twofold. *First*, Ms McGann expressed her view that the new venture would “*work and more than that – SOAR*”. *Second*, Ms McGann said GRBA should reconsider using “MyHouse” and instead use “House”, because “*We have all this BRAND LOYALTY TO LEVERAGE*” (AJ [32], [105]). That brand loyalty resided in the “House” brand (PJ [56]). That was what Ms McGann was proposing to leverage (AJ [105]). In context, it is clear that the email conveys relish for a contest, not consciousness of wrongdoing. The FFC was correct to find that it “*says nothing at all about any intention to deceive or even confuse, but is an allusion to BBNT’s response to the entry of a new competitor into the soft homewares market under the House B&B name*” (AJ [104]-[105]).

Wilful blindness does not enliven Woollen Mills

57. The primary judge did not cite, and BBNT has not cited, any case in which wilful blindness (howsoever defined) has been considered sufficient to fall within *Woollen Mills*, or otherwise constitute probative evidence of whether conduct is objectively likely to mislead.⁴³ As the FFC said at AJ [102], a finding that a person has been wilfully blind to the risk of confusion occurring is “*not the same*” as a finding that they intended to mislead or deceive. There are good reasons why those two states of mind should be treated differently when considering whether the reasoning in *Woollen Mills* is enlivened (cf AS [57]).

58. The reasoning in *Woollen Mills* provides forensic assistance to the Court in limited circumstances. It arises when a trader has turned their mind to, and thereby formed an opinion about, the likely effect of the impugned conduct. The Court can then treat that opinion as tantamount to expert opinion on the likely effect of that conduct. A trader who is blind to the issue (even wilfully so) has not formed any such opinion. Where the evidence

⁴² And the same submission was rejected by the FFC at AJ [107]-[108].

⁴³ To the extent that BBNT refers, in AS [54], to the decision of the Full Court in *Sydneywide*, that case involved findings that the respondent had “*deliberately appropriated aspects of the Red Bull get-up*” (at [45]) when adopting a get-up that “*was calculated to deceive*” (at [130]).

goes no higher than wilful blindness as found by the primary judge as lacking in any dishonesty, the Court does not have evidence of an expert opinion at all. The evidence is that the expert has *not formed* an opinion. That is not relevant to the question of whether the conduct is likely to mislead or deceive. An analogy arises with *Jones v Dunkel*:⁴⁴ even when an inference is available, it does not go so far as to allow the Court to use a party's silence as positive evidence on a point. BBNT's argument would permit the fact that a party has not formed a view to be used as positive evidence of intent.

59. The inapplicability of *Woollen Mills* on the primary judge's understanding of wilful blindness is clear. In *Woollen Mills* at 657, Dixon and McTiernan JJ explained: "...when a **dishonest** trader fashions an implement or weapon **for the purpose of misleading potential customers he at least provides a reliable and expert opinion...**". Here, the primary judge found that GRBA had not been dishonest nor intended to mislead potential customers. There is no relevant expert opinion.

60. BBNT says treating wilful blindness differently from actual intention "would allow the decision maker to avoid the consequences of its senior employee's actions" (AS [63]) or would give a trader an advantage (AS [69]). That treats intention as if it were an element of the cause of action in ACL/PO Claims. It is not:⁴⁵ whether conduct is misleading is a question that a Court "must decide objectively".⁴⁶ Intention can only ever contribute to the evidentiary picture. The point of *Woollen Mills* is not to punish wrongdoing.

20 *Not blind to a relevant matter*

61. If wilful blindness could fall within *Woollen Mills*, a crucial consideration must be to what the trader was wilfully blind. The primary judge found that what GRBA, through Mr Lew, had been wilfully blind to, was the prospect of "confusion" between the names (PJ [234], [242], [422], [469], [511], [536]). Mere confusion is not enough to establish a contravention of the ACL (or passing off).⁴⁷ Thus, wilful blindness as to the possibility of confusion is either irrelevant or peripheral – and the distinction drawn by the FFC between blindness to "confusion" and an intention to "mislead" was appropriate (AJ [102], [107]).

62. Further, it is plain, from the findings made by the primary judge (set out above), that any

⁴⁴ (1959) 101 CLR 298.

⁴⁵ *Google* at [9].

⁴⁶ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198-199.

⁴⁷ AJ [73], citing *Google* at [8] and *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at [106].

potential for confusion can only have been attributable to the common use of the ordinary words BED and BATH in store names (as noted by the FFC at AJ [86]). That is precisely the type of confusion referred to in *Hornsby*.⁴⁸ Wilful blindness to the possibility of that type of confusion was irrelevant.

63. Contrary to AS [71], it is irrelevant that the primary judge rejected GRBA's evidence that the impugned words were chosen "*purely because those words are appropriate category descriptors*" (PJ [513]). The point made by the FFC at AJ [86] is that the use of trade names including descriptive words "*frequently gives rise to confusion*", and even if a trader has knowledge of a risk of confusion, that is not the same as an intention to mislead or deceive. That is correct, particularly when BBNT no longer contends that the House B&B mark bears sufficient objective similarity to the BBNT mark to give rise to a risk of deception.

Woollen Mills evidence cannot override the Court's own assessment

64. Importantly, even if the Court were to find that Mr Lew's wilful blindness did fall within *Woollen Mills*, that would not change the result. A trader's opinion is not determinative. Even if a trader has a positive intention to mislead or deceive, it is "*simply one piece of evidence to be assessed with such other evidence as may be adduced*".⁴⁹ As this Court explained in *Woollen Mills*, the "*issue of intention*" should not distract from the "*question of fact*" as to whether there is "*a reasonable probability of deception or confusion*".⁵⁰ Thus, whilst intention to mislead might assist "*in a borderline case*",⁵¹ as the FFC recognised (AJ [87]), it cannot render deceptive conduct that is not of itself deceptive.⁵²

65. The FFC correctly held that this is "*not a borderline case*" (AJ [87]). The FFC adjudged that GRBA's use of the House B&B mark was not likely to mislead or deceive consumers (AJ [65], [89]) – and that finding was correct, for the reasons given above. Even if the primary judge had found a positive intention to mislead, that could not overwhelm the objective facts. That intention would have misfired, having regard to the objective (and now, undisputed) facts, including that *(i)* the House B&B mark bore insufficient

⁴⁸ *Hornsby* at 229-230; *McCain* at 72.

⁴⁹ *Windsor Smith Pty Ltd v Dr Martens Australia Pty Ltd* (2000) 49 IPR 286 at [33]; and see *Hashtag* at [67]-[68], citing *Woollen Mills* at 658, as reproduced at AJ [87]. It is merely a "*relevant consideration*": *Self Care* at [30].

⁵⁰ *Woollen Mills* at 658. Indeed, the Court held (at 657, emphasis added) that "*the examination made of the respondent's motives and good faith seems to us to leave the question of infringement and passing off very much in the same position as it stood in without it*".

⁵¹ *Verocchi* at [103]. Similarly, in the United States, an intention to confuse or deceive can "*tip the balance where questions are close*": *Virgin Enterprise Ltd v Nawab*, 335 F 3d 141 at 151 (2nd Cir, 2003).

⁵² *Hashtag* at [68].

resemblance to the BBNT mark to cause deception (or even confusion), and *(ii)* BBNT enjoyed no independent reputation in the only common part of those marks. Thus, any “*expert opinion*” of Mr Lew (and, if relevant, Ms McGann) could not have tipped the scales. The FFC was correct to find, at AJ [89], that the primary judge’s findings with respect to wilful blindness were not sufficient to establish (considered alone or with other evidence, including the evidence of purported confusion) that GRBA’s use of the House B&B mark was misleading or deceptive.

66. Further, it has been repeatedly held that expert opinion as to consumer behaviour will rarely be of assistance where the Court’s primary concern is the behaviour to be expected of ordinary members of the community intent on making a purchase in a conventional way.⁵³ Whether conduct is misleading or deceptive “*is a question for the tribunal of fact and not for any witness to decide*”.⁵⁴ There is no reason why the opinion of an alleged wrongdoer ought be afforded greater probative value than any other expert.

67. Thus, the FFC was correct to find that GRBA’s “wilful blindness” did not provide “*any real assistance in determining*” the ACL/PO claims (AJ [86]) and was not “*a sound basis for inferring that GRBA’s use of the House B&B mark would be likely to mislead or deceive consumers*” (AJ [107]).

The position overseas

68. There is no support for BBNT's contentions in equivalent common-law jurisdictions.

69. In the United States, it has been held that an intention to deceive is “*only one of the factors which should be carefully weighed*” in determining whether deception is likely.⁵⁵ GRBA is not aware of any United States authority for the proposition that an intention to deceive can transmute a lawful act into an unlawful act. Further, it is only a deliberate intention to deceive that is capable of being relevant – not a state of mind falling short of that.⁵⁶

⁵³ *Cat Media Pty Ltd v Opti-Healthcare Pty Ltd* [2003] FCA 133 at [55], applied in: *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* (2004) 139 FCR 215 at [21]-[22]; *Change Group International PLC v City Exchange Mart Pty Ltd* [2013] FCA 1048 at [114]-[119]; *Taxiprop Pty Ltd v Neutron Holdings Inc* (2020) 156 IPR 1 at [204]; *Chevron Global Energy Inc v Ampol Australia Petroleum Pty Ltd* (2021) 159 IPR 430 at [78]; PJ at [258].

⁵⁴ *Domain* at [21]-[22].

⁵⁵ *Maternally Yours Inc v Your Maternity Shop Inc*, 234 F 2d 538 at 543 (2nd Cir, 1956).

⁵⁶ See *A & H Sportswear Inc v Victoria's Secret Stores Inc*, 237 F 3d 198 at 232-233 (3rd Cir, 2000), where the Court held that mere carelessness, as opposed to a deliberate intent to confuse, was irrelevant.

70. In the United Kingdom, *Woollen Mills* applies⁵⁷ – but the statement extracted at AS [61] is not apt. BBNT did not “[*prove*] that [*GRBA*] was aware of the risk of deception and proceeded recklessly”. Rather, GRBA, without dishonesty, failed to turn its mind to the risk of confusion arising from the use of largely descriptive words. Further, it has been emphasised in the United Kingdom that “*it must be kept firmly in mind that the ultimate question*” as to the likelihood of deception “*is one for the court to determine*” in light of “*all material factors*”, of which the “*intention of the defendant...is only one*”.⁵⁸ BBNT has not identified any United Kingdom authority for the proposition that even a positive intention to mislead or deceive can render misleading or deceptive conduct which, objectively assessed, is unlikely to mislead or deceive.

Other alleged error not the subject of the notice of appeal

71. AS [65] seeks to rely on an alleged error not identified in the notice of appeal: whether the number of other retailers using “BED & BATH” was large. *First*, this alleged error is not relevant to ground 2. *Second*, there was no error. The primary judge identified Big W, Kmart, Myer, David Jones, Temple & Webster, Freedom and Harris Scarfe as “*examples*” of “*substantial use by third party sellers*” of the exact phrase BED & BATH (PJ [92], [96]).

Part VI: Respondent's notice of contention or cross-appeal

72. Not applicable.

Part VII: Estimated Time

73. GRBA estimates that it requires two hours for the presentation of its oral argument.

Dated: 19 June 2025



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⁵⁷ See, for example, *easyGroup Ltd v Easy Live (Services) Ltd* [2024] Bus LR 141 at 149.

⁵⁸ *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24 at [115].

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	<i>Trade Marks Act 1995</i> (Cth)	Compilation No. 40 (18 December 2020 to 31 August 2021)	s 10	The version of the Act in force at the time proceedings were commenced. The relevant provision remains unchanged.	11 June 2021, being the date on which proceedings were commenced.
2.	<i>Competition and Consumer Act 2010</i> (Cth), Schedule 2 – The Australian Consumer Law	Compilation No. 134 (3 March 2021 to 16 June 2021)	s 18	The version of the Act in force at the time proceedings were commenced. The relevant provision remains unchanged.	11 June 2021, being the date on which proceedings were commenced.