



## **TRADE MARKS ACT 1955**

### **DECISION OF A DELEGATE OF THE REGISTRAR OF TRADE MARKS WITH REASONS**

#### **Opposition by COORS BREWING COMPANY to an Application for Removal under s23 of Trade Mark 482284 by CARLTON AND UNITED BREWERIES LIMITED**

As provided in the transitional provisions of Part 22 of the *Trade Marks Act 1995* the provisions of the *Trade Marks Act 1955* continue to govern this opposition. Accordingly, unless otherwise specified, any reference to the Act in this decision is a reference to the *Trade Marks Act 1955*.

#### **Background**

Coors Brewing Company of Colorado, United States of America, (Coors) became the registered proprietor of the trade mark SILVER BULLET in respect of ‘beer’ as from 26 February 1988 under no 482284. The registration is subject to the condition that Coors shall have no right to the exclusive use of the word SILVER.

On 25 October 1994 Carlton and United Breweries of Carlton, Victoria, (CUB) lodged an application for the removal of the trade mark from the Register pursuant to s23 of the Act. The application specified both of the possible grounds under that section, namely:

23. (1) Subject to this section and to section 93, a prescribed court or the Registrar may, on application by a person aggrieved, order a trade mark to be removed from the Register in respect of any of the goods or services in respect of which it is registered, on the ground-

- (a) that the trade mark was registered without an intention in good faith on the part of the applicant for registration that it should be used in relation to those goods or services by him or, if it was registered under sub-section (1) of section 45, by the body corporate or registered user concerned, and that there has, in fact, been no use in good faith of the trade mark in relation to those goods or services by the registered proprietor or a registered user of the trade mark for the time being earlier than 1 month before the application; or
- (b) that, up to 1 month before the date of the application, a continuous period of not less than 3 years had elapsed during which the trade mark was a registered trade mark and during which there was no use in good faith of the trade mark in relation to those goods or services by the registered proprietor or a registered user of the trade mark for the time being.

Coors responded on 9 June 1995 with a notice of opposition to the application claiming that CUB was not a person aggrieved by the registration and denying the allegations under paras (a) and (b) of s23(1). It also relied on the defences provided by s23(2) and s38(1) which are set out below:

(2) Except where an applicant has been permitted under section 34 to register a substantially identical or deceptively similar trade mark in respect of the goods or services to which the application relates, or the prescribed court or the Registrar is of opinion that the applicant can properly be permitted to register such a trade mark, a prescribed court or the Registrar may refuse an application made under the last preceding sub-section in relation to any goods or services if there has been, before the relevant date or during the relevant period, as the case may be, use in good faith of the trade mark by the registered proprietor or a registered user of the trade mark for the time being in relation to goods or services in respect of which the trade mark is registered, being-

- (a) where the application relates to goods-goods of the same description as those goods or services that are closely related to those goods; or
- (b) where the application relates to services-services of the same description as those services or goods that are closely related to those services.

### **Use of trade marks whether associated or otherwise**

38. (1) Where, under this Act, use of a trade mark is required to be proved for any purpose, the Registrar or a prescribed court may, if and so far as he or it thinks right, accept use of an associated registered trade mark or of the trade mark with additions or alterations not substantially affecting the identity of the trade mark, as an equivalent for the use required to be proved.

Coors also invoked the discretion of the Registrar to refuse removal of a mark from the Register.

### **The evidence**

The evidence stages of the proceedings were completed on 22 August 1996 with the service by CUB of its evidence in reply. The evidence consists of:

*evidence in support*

- declaration of Bruce Tritton, director of Probe Australia, made 22 June 1995, together with Exhibit BT1

*evidence in answer*

- declaration of Benjamin John Fitzpatrick, solicitor, made 22 December 1995, together with Exhibit BJF1 (the first Fitzpatrick declaration)
- declaration of Franck Bergès, director of BRIMPS Pty Ltd, made 18 June 1996 together with Exhibit FB1
- declaration of Benjamin John Fitzpatrick, solicitor, made 22 December 1995, together with together with Exhibits BJF1-BJF5

*evidence in reply*

- declaration of Harvey Hoile Webb, Company Secretary of CUB, made 13 August 1996, together with Exhibits HHW1 HHW5

On 4 October 1996 Griffith Hack, patent attorneys, requested that the matter be set down for hearing. The matter was heard in Melbourne on 6 February 1997. Mr Tim Allen of Griffith Hack appeared for CUB and Mr Ben Fitzpatrick of Davies Collison Cave, patent attorneys, for Coors.

**Submissions**

Mr Allen opened his submissions by establishing that for the purposes of para 23(1)(b) the relevant three-year period was 25 September 1991 to 25 September 1994. He then turned to Coors' evidence of use of the mark in Australia which allegedly consisted of sales of branded product in Australia and distribution here of advertising material. He referred in particular to the Berges declaration where it was stated that BRIMPS had on a number of occasions, between 25 September 1991 and 25 September, that is, between the relevant dates, received cases of Coors SILVER BULLET Light Beer and onsold those to liquor retailers. But, said Mr Allen, no attempt had been made by Mr Berges to quantify the number of occasions or the number of cases. It was only evidence that on two occasions two cases of Coors SILVER BULLET Light Beer were imported into Australia and sold. Mr Berges went on to say, in para 4 of his declaration:

Often these cases of Coors Silver Bullet Light Beer have been received by us by mistake, in that we had not specifically ordered the Light Beer. Other times, the Coors Silver Bullet Light Beer is included because BRIMPS has paid for a set amount of freight on the ship, and, in order to fully use the purchased freight, the ship chandler will include cases of Coors beer other than the standard Coors beer to make up the freight.

Mr Allen submitted that that evidence pointed to a lack of intention on the part of Coors actually to market the relevant product in Australia. Also in para 4 of his declaration Mr Berges had stated:

In the previous five years, we have sold many cases of Coors Silver Bullet Light Beer in Australia.

Again Mr Allen criticised the statement because of the failure to quantify "many". Furthermore, the reference to "the previous five years" meant that the sales could have taken place outside of the relevant three-year period and the statement was therefore meaningless in evidentiary terms. The likelihood that only a few cases of Coors SILVER BULLET Light Beer were imported into Australia and sold within the relevant period was confirmed, he said, by the evidence of Bruce Tritton of Probe Australia Pty Ltd which canvassed liquor outlets in metropolitan, regional and country centres of Victoria, NSW and Queensland. The results of that extensive search were that respondents had either not heard of SILVER BULLET or associated it with one of CUB's RESCH's products previously marketed in NSW.

Mr Allen questioned whether the sales of Coors' Light Beer referred to in the Berges declaration constituted use in good faith of the mark SILVER BULLET in Australia. He submitted that to be bona fide within the meaning of s23, use should be substantial and genuine judged by ordinary commercial standards considered in relation to the trade concerned. "Use in good faith" required some genuine commercial intention or activity on the part of the registered proprietor: per Gummow J in *NSW Dairy Corp v Murray Goulburn Co-op Co Limited* (not disturbed on appeal) and the statement in Lahore *Patents Trade Marks and Related Rights* at 62,377 that the so-called doctrine of "substantial commercial use" as defined by the *Electolux* case, the *Nerit* case and the *Concord* case appears to coincide with developments in Canadian and United States trade mark law. He added that there was separate authority for the proposition that the sale of "left-over" goods would not be sufficient to establish bona fide use: *Swanfu Trading Pte Ltd v Beyer Electrical Enterprise Pte Ltd* 25 IPR 215 at 225; *Sunshine Products (NZ) Limited v The Great Outdoors Co Limited* 6 IPR 179 at 187. Referring then to the Berges declaration, it showed, he said, that there were only minimal volumes involved - only a few cases compared with 3000-4000 cases of standard Coors beer imported by Brimps each year. Furthermore, that amount of the product only entered Australia by mistake or because the US chandler sought to fill up space where a set amount of freight had been paid.

Mr Allen then referred to the declaration of Mr Webb who declared that the labelling of the Coors Light Silver Bullet beer contravened the Food and Standards Code (formerly known as the Australian Food Standard Code 1992). Standard P1 in the Code covered beer and beer products. In contravention of paragraph (3)(a) of Standard P1 the Coors Light Silver Bullet beer did not disclose the alcoholic content of the beer. He stated also that in 1991 CUB performed tests on a sample of the Coors Light Silver Bullet beer which had an alcoholic content well in excess of the maximum level for a "light" beer under para (3)(d) of Standard P1 of the Code. It was his understanding, he stated, that in the USA "light" beer signified a low level of kilojoules (or calories) rather than a low level of alcohol and according to tests carried out by CUB in July 1996 the Coors Light Silver Bullet beer contained significantly less kilojoules than the Coors standard beer. He stated further that, in his opinion, Coors and Brimps would be well aware of the requirements for beer labelling under the Code and that the *Food Act (Vic) 1984* and equivalent statutes in other

Australian States and Territories contained significant penalties for contraventions of the Code. The labelling of the Coors Light Silver Bullet beer further contravened the Victorian and other statutes by not stating the name and business address in Australia of the importer of the beer. On the basis of those statements together with the evidence of Mr Berges Mr Allen submitted that any sales in Australia of the Coors Silver Bullet Light beer were unintended by Coors and did not reflect any genuine commercial intention or activity on the part of Coors and therefore did not represent use in good faith of the mark SILVER BULLET in Australia during the relevant three-year period.

Mr Allen then turned to the advertising of the beer in magazines distributed in Australia. He submitted that the appearance of a trade mark in advertising in imported publications was not use of the trade mark for the purposes of s23 where the advertising was neither intended as, nor likely to be taken as, an invitation to treat made to the Australian public: *Riviera Leisure Pty Ltd v J Hepworth & Son Plc* (1987) 9 IPR 305. According to the declaration of Mr Fitzpatrick, he said, Coors Silver Bullet Light beer had been advertised in four US magazines which had been distributed and sold in Australia during the period 25 September 1991 to 25 September 1994. Mr Allen submitted that none of the advertisements invited reply from overseas or otherwise suggested that the brand of beer was available outside the US. The advertisements were clearly directed at end consumers who would not, realistically, order cans of beer direct from the US, and Australian consumers would not have been aware that a small quantity of the beer was available for purchase in Australia. There was no evidence that Coors exported the beer to any other country in which the advertisements would appear in the US magazines. Those advertisements therefore did not constitute evidence of Coors' intending to market the beer in Australia on a commercial scale. The circulation of the magazines carrying the advertisements did not reflect any genuine commercial intention or activity on the part of Coors.

Mr Fitzpatrick referred firstly to the requirement that an applicant for removal must make out a prima facie case of non-use: *Estex Clothing v Ellis and Goldstein* (1966) 116 CLR 294. He submitted that the Tritton declaration wholly failed to do so as the report of the investigators to Griffith Hack, dated 18 August 1994, fell within the relevant three-year period of 25 September 1991 to 25 September 1994 and therefore failed to address the period of 18 August 1994 to 25 September 1994. It was necessary, he said, for the evidence of non-use to cover the whole of the

relevant period: *Softsel Computer Products Inc v Studio Australia Pty Ltd* (1991) AIPC ¶¶90-751. In addition to that basic and fundamental defect, he said, the report did not in any way indicate the date on which the various persons in liquor outlets and liquor chains in Victoria, New South Wales and Queensland were contacted and that therefore it was possible, or even probable, that the investigations were conducted some time before the date of the report. In light of the failure to specify when the inquiries were made it was impossible to ascertain what portion of the relevant period was actually covered by the investigations. A further defect in the evidence, he said, was that there was no indication that the persons contacted had experience in the trade during the relevant period: *Prosimmon Golf (Aust) Pty Ltd v Dunlop Australia Ltd* (1987) 9 IPR 425. In light of those fundamental defects he submitted that the applicant's evidence wholly failed to make out a prima facie case of non-use during the relevant period.

Mr Fitzpatrick then referred to the Webb declaration and noted that Mr Webb did not indicate a lack of awareness of the SILVER BULLET trade mark but only that it had not appeared in *The Thompson's Liquor Guide* during the relevant period. No actual evidence of that publication available during that period had been advanced in evidence but only a copy of the issue for January/February 1996 in which there was a reference to "Coors" and its distributor Brimps. The fact that there was no express reference in a single liquor guide could not possibly satisfy the requirement of establishing a prima facie case of non-use.

If it were to be decided that the applicant had made out a prima facie case of non-use then Mr Fitzpatrick submitted that Coors had successfully rebutted that case. He referred in particular to the declarations of Berges and Fitzpatrick which established that goods bearing the mark had been imported into Australia and that the mark had also been advertised in magazines circulating in Australia during the relevant period. He said that the fact that the registered proprietor may have been unaware of the actual sales that had taken place in Australia was irrelevant to the issue of use. The test of use was an objective one and did not require any actual knowledge or contemplation by the manufacturer that its goods would reach the Australian market. In support of that proposition he referred to *Bass, Ratcliff and Gretton v Nicholson & Sons Ltd* (1932) 49 RPC (HL); also to *Champagne Heidsieck et Cie v Buxton* (1930) 47 RPC 28 and the cases following from that which held that unauthorised parallel importation, which by definition was without the knowledge of the

proprietor, did not constitute trade mark infringement: *R A Bailey & Co Ltd v Boccaccio Pty Ltd* (1986) 6 IPR 279, 285-286. That proposition, he said, was supported by statements of Lockhart J in *Johnson & Johnson Australia Pty Ltd v Sterling Pharmaceuticals Pty Ltd* 21 IPR 1, 11, where His Honour indicated that the test of whether there had been trade mark use was an objective one. Moreover, he submitted, there could be no argument that the words SILVER BULLET in the promotional material and on the packaging of the product was trade mark use, so as to indicate a connection in the course of trade between the beer and the registered proprietor.

Moreover, Mr Fitzpatrick submitted, use of the trade mark in Australia by a local distributor was use which accrued to the registered proprietor: *Estex v Ellis & Goldstein*, supra.

As to the use of advertising in journals circulating in Australia Mr Fitzpatrick submitted that it was established law that such use was trade mark use if the goods were available for purchase by consumers in Australia: *Re Registered Trade Mark "YANX"; ex parte Amalgamated Tobacco Corporation Ltd* (1951) 82 CLR 199; *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (1984) 156 CLR 414. The declaration of Berges clearly showed that the goods were available for sale during the relevant period. That being so, the advertising of the product in the magazines was use of the trade mark in Australia during that same period.

As to the quantity of use Mr Fitzpatrick contended that a registered proprietor of a trade mark had only to establish a single instance of use in good faith during the relevant period in order to defeat a removal action: *Settef Spa v Riv-Oland Marble Co (Vic) Pty Ltd* (1987) 10 IPR 402; *Nodoz Trade Mark* [1962] RPC 1; also *THUNDERBIRD Trade Mark* (1974) 48 ALJR 456. The applicant had not adduced any evidence to controvert the fact that a number of cases of Coors Silver Bullet Light beer were sold in Australia during that period. The Webb declaration in particular did not deny the fact that the beer was sold in Australia during that period.

The requirement of "good faith" in s23(1)(b) of the Act was discussed by Hill J in *Sterling Pharmaceuticals Pty Ltd v Johnson & Johnson Australia Pty Ltd* 18 IPR 309 at 342-344. His Honour stated that while the onus was on the respondent to show that its use was in good faith, the Court would be slow to make a finding of bad faith. His Honour also referred to a statement of

Lord Denning MR in *Central Estates (Delgravia) Ltd v Woolgar* [1972] 1 QB 48 at 55 to the effect that an assessment of good faith required an inquiry into the motives of the particular person. Hill J further stated that “what is involved is an investigation of the motives of the user of the mark, as well as the probable and actual consequences of the user.” The question was also considered by Gummow J in the same case where he said that the meaning of the term “good faith” in s23 was not necessarily the same as in s64. *A fortiori* therefore, submitted Mr Fitzpatrick, concepts of good faith taken from other legislation were even less applicable in determining the scope of its meaning in s23. Decided cases on the matter of good faith for the purposes of removal actions showed that there would not be use in good faith where it could be shown that the use of the mark had as an ulterior motive such as the desire to defend a registration against removal for non-use: *Electrolux Electrix Ltd* (1953) 70 RPC 127; *Imperial Group Ltd v Phillip Morris & Co Ltd* [1982] FSR 72 (CA). He submitted that the requirement for “good faith” was designed to prevent token use of a mark the purpose of which was to “lead rivals to think that the registered proprietor was using its mark in a way which gave it the protection of the legislation”: per Gummow J in *Johnson & Johnson v Sterling Pharmaceuticals*, supra, at 31. Mr Fitzpatrick submitted that CUB had led no evidence that the sales of Coors Silver Bullet Light beer were actuated by improper motives on the part of the registered proprietor to protect its registered trade mark rights or to defeat any action for removal of the mark from the Register by trade rivals. There was no evidence that Coors was aware of the potential for CUB to seek removal of its registration or that the sales were actuated by any improper motives. The requirement of use in good faith had therefore been satisfied. Furthermore, he argued that the test for good faith was a subjective one and that therefore the failure to comply with labelling laws was entirely irrelevant to the issue of “good faith”. He further submitted that the Registrar was not competent to decide matters pertaining to compliance with such labelling laws. In any case, he said, the evidence of Mr Webb was insufficient to sustain the allegation of non-compliance. No details of the nature of the alleged tests carried out on the opponent’s beer had been provided and the evidence consisted of no more than allegation.

As to the competence of the Registrar to rule on the legality of the labelling of Coors product Mr Allen responded that the present case could be distinguished from cases where a Hearing Officer had declined to resolve an argument arising from extraneous legal matters, such as contract or copyright law, on the ground that there was incontrovertible evidence before me that the sales of

Coors Silver Bullet Light beer was a contravention of the labelling laws. He argued that there was no dispute that those sales in Australia were illegal. He submitted that CUB was not asking me to decide whether Coors was liable to a penalty under the labelling laws but that the inappropriate labelling went to the issue of bona fide commercial use and that I must be able to consider it for that purpose where there was uncontested evidence that the labelling did not comply with Australian laws. The labelling only confirmed, he said, that Coors never intended the bottles of Coors Silver Bullet Light beer to enter Australia and I could have regard to that without making any ultimate finding under Australian labelling laws. It would be sufficient for me to say that the evidence before me demonstrated that the labelling was designed for the US and not the Australian market. This reflected the fact that Coors' sales in Australia were unintended and did not demonstrate any genuine commercial intention or activity on the part of Coors.

## **Decision**

That CUB was a person aggrieved by the registration of trade mark 482284 was alleged by it in the application for removal and denied by Coors in its notice of opposition. Nevertheless, the issue was not addressed by CUB in its evidence in support, which consisted solely of an investigator's report on the use or non-use of the mark, neither was it addressed by either Mr Allen or Mr Fitzpatrick at the hearing. This is a fatal omission in the conduct of these proceedings by the applicant. It is for an applicant who seeks to have a mark removed to establish his or her case. The applicant bears the onus of establishing that he or she is a "person aggrieved" for the purposes of s23(1) of the Act: *Kraft Foods Inc v Gaines Pet Foods Corporation* 34 IPR 198. Moreover, this a threshold issue: per Gummow J in *NSW Dairy Corp v Murray Goulburn Co-op* 14 IPR 26. Therefore I think that this application must fail at the threshold. If, however, I am wrong in that and if I ought to take notice of the fact that CUB is one of the largest brewers of beer in Australia and/or if I ought to take notice of the fact that CUB has applied to register the trade mark SILVER BULLET and that the registration of that trade mark has been prevented by the existence on the Register of the trade mark here in suit then I will go on to consider, nevertheless, whether those facts would make it a person aggrieved for present purposes.

***"person aggrieved"***

The meaning of “person aggrieved” in the context of removal applications has been considered by the courts on a number of occasions.

In *Powell's Trade Mark* (1894) 11 RPC 4 at 7-8 Lord Herschell LC said:

Wherever it can be shewn, as here, that the applicant is in the same trade as the person who has registered the trade mark, and wherever the trade mark, if remaining on the Register, would, or might, limit the legal rights of the applicant, so that by reason of the existence of the entry on the Register he could not lawfully do that which, but for the existence of the mark upon the Register, he could lawfully do, it appears to me he has a locus standi to be heard as a person aggrieved.

If an entitled to take notice of the fact, CUB is a well-known brewer of beer even though that has not been established by the evidence.

In a more recent case McLelland J in *Ritz Hotel Ltd v Charles of the Ritz & Anor* (1988) 12 IPR 417, said, at 454:

*Meaning of "person aggrieved"*

The meaning of the expression "person aggrieved" in legislation cognate with ss 22(1) and 23(1) of the Act has been the subject of consideration in numerous cases, the reconciliation of which I do not propose to attempt, even if it were thought possible. Decisions of high authority appear to me to establish that the expression has no special or technical meaning and is to be liberally construed: see *Attorney-General (NSW) v Brewery Employes Union of NSW* (1908) 6 CLR 469; *William Powell (trading as Goodall, Backhouse & Co) v Birmingham Vinegar Brewery Co Ltd* [1894] AC 8; *"Daiquiri Rum" Trade Mark* [1969] RPC 600; *Crean & Co v Dobbs & CO* [1930] 3 DLR 22. It is sufficient for present purposes to hold that the expression would embrace any person having a real interest in having the register rectified, or the trade mark removed in respect of any goods, as the case may be, in the manner claimed, and thus would include any person who would be, or in respect of whom there is a reasonable possibility of his being, appreciably disadvantaged in a legal or practical sense by the register remaining unrectified, or by the trade mark remaining unremoved in respect of any goods, as the case may be, in the manner claimed. In my opinion the concept does not admit of further refinement. In deference to a submission by the defendants based on, inter alia, *"Consort" Trade Mark* [1980] RPC 160 at 166, I would merely add that in my view there is no legitimate basis for introducing into the concept of "person aggrieved" for the purposes of ss 22(1) or 23(1) any restriction based on the conditions required to be fulfilled by an applicant for registration of a trade mark. I reject the defendants' submission that "the plaintiff must show a trade rivalry by demonstrating that it is either in trade or has a fixed and present intention to enter trade in Australia in goods

sufficiently similar to those covered in Classes 3 and 26 as to be likely to cause confusion". In the present case the question whether the plaintiff is a person aggrieved in relation to any of the claims made in the proceedings has no necessary relationship to the question whether the plaintiff could itself successfully apply for registration of any of the subject marks: for example, see *Re Riviere's Trade Mark* (1884) 26 Ch D 48; *Re Trade Mark of La Societe Anonyme des Verreries de L'Etoile* (1984) 11 RPC 142; *Pink v J A Sharwood & Co Ltd* (1913) 30 RPC 725.

Moreover, CUB has applied, under application 639736, lodged on 7 September 1994, to register the trade mark SILVER BULLET in respect of "beers" and the acceptance of its application has been prevented by the existence on the Register of Coors' trade mark in respect of the same goods. In *Continental Liqueurs Proprietary Limited v G.F.Heublein and Bro. Incorporated* 103 CLR 422 Kitto J. said, at 428:

The applicant has applied for registration of three trade marks consisting of or containing the word "Smirnoff" and the examiner has made adverse reports under s33(2) on the ground, amongst others, that each of the three proposed marks so closely resembles the respondent's mark as to be likely to deceive. This would suffice even by itself to give the applicant a *locus standi*.

However, in *Kraft General Foods Inc v Gaines Pet Foods Corporation* 28 IPR 617 and 31 IPR 439, a delegate of the Registrar refused applications under s23 of the *Trade Marks Act 1955* to remove from the Register three trade marks registered in the name of Gaines Pet Foods Corporation on the grounds of non-use of the mark during the period specified in the section. He found that the applicant for removal was not a person aggrieved by the registration of the trade marks because, despite applications lodged by it to register the same mark, a predecessor in business of Kraft had assigned the mark to a predecessor of Gaines on condition that the latter should not use the mark in Australia during a certain period. He also found that Kraft had not discharged the onus on it to prove lack of use of the mark in Australia during the relevant period and that he was not prepared to exercise the Registrar's discretion to order removal of the marks. Kraft appealed to the Federal Court.

On appeal Hill J held that the words "person aggrieved" are not unique to trade mark law but occur in various statutes where the consequence is to exclude from standing persons whose interest is no greater than that of an officious bystander. The question whether a person is aggrieved is always a

matter of fact and, in a trade mark removal action, the mere lodgment of an application to register the same trade mark is not in itself enough to make a person aggrieved. The applicant must also show that it uses or proposes to use the mark. The onus to show that it was a “person aggrieved” as at the date of lodgment of the removal applications lay upon Kraft. It had provided no evidence on oath of actual or proposed use and, in the absence of evidence other than the mere making of the application for registration, on the balance of probabilities it was not a “person aggrieved”. Leave to appeal from this decision was granted to Kraft.

In a unanimous decision the Federal Court dismissed the appeal. The Court held that an applicant for removal of a trade mark from the Register bears the onus of establishing that he or she is a person aggrieved by the registration. The material date is that of the lodgment of the removal application. The mere fact of having filed an application to register the same mark which application is blocked by the mark sought to be removed is not sufficient in itself to make the applicant a person aggrieved or to support an inference that the applicant intended to use the mark. If the application had been accompanied by material which clearly demonstrated such an intention the position is likely to be different. Sackville J in the leading judgment said, at 206, after referring to the onus on the applicant who seeks to have a mark removed to establish his or her case:

Similarly, the applicant bears the onus of establishing that he or she is a “person aggrieved” for the purposes of s23(1) of the TM Act. The material time for determining whether the applicant is a person aggrieved is the date of the application - ie the date of commencement of the proceedings in which the claim for removal of the mark is made: *Ritz Hotel Ltd v Charles of the Ritz Ltd* (1988) 15 NSWLR 158 at 194-5; 12 IPR 417 (SC(NSW), McLelland J)

He cited with approval the judgment of Hill J in the Court below:

...the mere fact that the person is an applicant [for registration] would not result in the conclusion that the person was a person aggrieved. It follows that the submission made on behalf of Kraft that an applicant for a trade mark will always be a person aggrieved could not be accepted in such wide terms. It is not the application per se for registration of a new mark which makes the applicant the person aggrieved in an expungement applicant (sic), it is the fact that the applicant must, to obtain registration of the mark, either use it or propose to use it. So much is clear from the definition of “trade mark” in s6(1) of the Act and the reference in that definition to “used or proposed to be used”

It must be accepted that the onus of showing that it is a person aggrieved lies upon Kraft. The relevant time at which the onus must be satisfied is the date of the application of expungement which in the present case was 23 June 1989.

In that case Kraft had lodged an application to register the trade mark GAINES on 22 June 1989 and , on the following day, 23 June 1989, had lodged an application under s23 to remove the trade mark GAINES in the name of Gaines Pet Foods from the Register. It subsequently lodged a statement of user pursuant to reg 8 on 11 August 1989, some six weeks after the lodgment date of the trade mark application. Kraft relied on the mere fact of its having applied to register the same trade mark to make it a person aggrieved. Sackville J went on to say, at 209:

In the present case, Kraft bore the burden of establishing the facts necessary to show that it was a “person aggrieved” for the purposes of an application under s23(1) of the TM Act to remove Gaines’ trade mark from the Register. It was perfectly clear from an early stage of the proceedings that Kraft’s standing to claim relief was an issue. Yet, in substance, the only evidence adduced by Kraft to support its claim to be a “person aggrieved” was proof that it had filed the application for registration of the GAINES mark on 22 June 1989 (the day before the removal application was filed and that it had subsequently lodged a statement of user.

The statement of user merely recited the words of reg 8(1) of the TM Regulations, without providing any further information to clarify which of the two apparently mutually exclusive propositions (current use or intention to use ) Kraft was asserting was true. In my opinion, Hill J was fully justified in regarding that statement as carrying no probative weight on the issue of whether Kraft, in June 1989, intended to use the mark

...

It follows that the only evidence from which it might be inferred that Kraft intended to use the mark in June 1989 was the filing of its application for registration on 22 June 1989. The filing of the application, of itself, does not necessarily require an inference to be drawn that the applicant intended to use the mark. If the application had been accompanied by a clear statement of such an intention, the position is likely to have been different. But Kraft’s application was accompanied by a statement of user that carried no probative weight in the present proceedings on the issue of intention to use... Hill J was, with respect, plainly right in concluding that the evidence fell well short of establishing that in June 1989 Kraft had used or intended to use the mark. Such a finding precludes Kraft from establishing that it is a person aggrieved by the registration of Gaines’ mark on the ground that it had used or intended to use an identical or similar mark.

In the present case CUB lodged its application to register the trade mark SILVER BULLET on 7 September 1994. On 29 September 1994 it lodged a statement of user pursuant to reg 8(1) which

was signed by the company secretary on 13 September 1994. CUB's application under s23 was lodged on 25 October 1994. At that date therefore, which is the relevant date to establish that it was a person aggrieved, the application for registration was accompanied by a clear statement of intention to use the trade mark SILVER BULLET. On that basis I am prepared to accept that CUB would have been entitled to be considered a person aggrieved for the purposes of its application for removal.

*prima facie case*

Having established its standing the onus would then have been on CUB to make out a prima facie case of non-use of the challenged mark. It is well established that the onus of proof of the non-use of a trade mark rests with the applicant for removal: *Estex Clothing Manufacturers Pty Limited v Ellis & Goldstein Limited* (1967) 116 CLR 254 per Windeyer J at 258:

It is for the applicant who seeks to have a mark removed to prove his case. The onus is on him to show an absence of use in good faith *during the period*. ... If persons who, by reason of their connexion with the relevant trade, might be expected to have seen or heard of the mark if it were used as a trade mark upon goods for which it is registered, swear that they had not seen or heard of it in use as a trade mark at any time *during the relevant period*, that is prima facie evidence of the fact which the applicant must prove. Slight evidence may suffice at this stage, for the applicant has the task of proving a negative and the registered proprietor is probably in a better position to prove user than is the applicant to prove non-user. ...but ...when all the evidence is complete, the question is still, has the applicant proved his case?

Mr Fitzpatrick pointed to the emphasised words in this passage and submitted that the applicant had not met the requirement there stated because its evidence did not address the entire three-year period. The investigator's report of his findings was dated 18 August 1994 whereas the relevant period ended on 25 September 1994. Therefore there was a period of approximately one month during which there was simply no evidence as to the non-use of the mark in suit. Mr Fitzpatrick referred to *In the Matter of an Application under Section 23 of the Trade Marks Act 1955 by Monier Limited* [1985] APOR 73. In that case the delegate of the Registrar said, at 74:

It is a requirement for the making of an application under section 23 that a mark to which the application refers shall have remained unused for a continuous period of three years up to one month before the date of the application. The present application was filed on 30 March 1982. The period of three years up to one month before that date, namely 28 February 1982, commenced on 28 February 1979. But Mr Dalton's evidence only covers the three years period up to the date of the making of his declaration, namely, 1 April 1982, that is it covers a period commencing 1 April 1979 or a period just short of two years eleven months up to the filing date of the application. The application must therefore fail on that account alone.

Likewise, the applicant's evidence in the present case covers a period of just short of two years and eleven months, namely, 25 September 1991 to 18 August 1994 at the very latest. Therefore CUB has failed to make out a prima facie case of non-use of the trade mark throughout the relevant three-year period. If, however, I am again wrong in that, the evidence is otherwise satisfactory. The details of the survey were given, including the nature of the questions put by the interviewer and the responses received. The respondents were identified by name, their positions and length of experience in the trade were stated and the survey was extensive: see *Softsel Computer Products Inc v Studio Australia Pty Ltd* (1991) ¶¶90-751. Several of the respondents appear to have associated the words "Silver Bullet" with Carlton or Carlton United or Resch's but not one of them made mention of Coors. To that extent only I find that CUB would have made out a prima facie case of non-use of the mark in suit by Coors.

In that case the onus would have shifted to Coors to prove use of the trade mark during the same period. As was said in *Dewar v Dewar* (1900) 17 RPC 341 per Lord Kinnear, at 355:

As to use before 1875 - the *onus* of proving use of their Trade Mark prior to 1875 was upon the Defenders, who had the evidence, if any existed, in their own hands. It was impossible for the Pursuer to prove the negative. But the result of the evidence was to show that the Defenders had not used their Trade Mark before 1875. The Pursuer had obtained under diligence all the Defenders' labels, &c., and none with the words "Dewar's Whisky" had been recovered. Further, the Defenders' manager had deposed that there were no labels of date prior to 1875. That was enough to shift the *onus*, if it lay in the first instance upon the Pursuer. He had made every possible effort to produce evidence, and the result was to negative the Defenders' averment of use prior to 1875.

Again, in *Day v Riley & Whittaker* (1900) 17 RPC 517 per Buckley J, at 522:

The Respondents say the onus of proving that there was no user before 1875 lies upon the Applicants. Suppose that it does, it seems to me that the Applicants make out by the production of bottles, and by what is shown as to the way which the goods were sold, that *prima facie* there was no user of the mark in connection with the goods. It is sufficient to say that assuming that *onus* to be upon the Applicants, that is sufficient *prima facie* evidence to shift that *onus*, and to throw upon the Respondents the obligation of showing that it was used in connection with the goods. That *onus* certainly they have not discharged. I think that the Applicants have discharged the *onus* that lies upon them; at any rate, I think that *onus* is shifted; and the Respondents have not discharged themselves of the *onus* of showing that it was used in connection with the goods

In “*NODOZ*” *Trade Mark* [1962] RPC 1 Wilberforce J said, at 5:

That being the position as regards general enquiries and records generally available in this country, it seems to me that a *prima facie* case of considerable strength is established to the effect that medical preparations bearing the mark NODOZ have not been sold in this country and that the mark has not been used in this country with medicinal preparations over the requisite period. That being so, it appears to me that the onus of proof of showing actual user shifts to the respondents in this case.

In the present case I think that the opponents, Coors, would not have discharged the onus of proving use of the trade mark in the relevant three-year period. Mr Fitzpatrick stated in his declaration that he purchased one case of Coors Silver Bullet Light beer at the premises of BRIMPS Pty Ltd at 116 Queen Street, Alexandria in Sydney on 18 December 1995. This was confirmed by Mr Berges, a director of Brimps, and supported by a copy of an invoice evidencing the sale. Although this sale was well outside the relevant period, which ended on 25 September 1994, Mr Berges stated that BRIMPS had on a number of occasions between 25 September 1991 and 25 September 1994, that is within the relevant period, received cases of Coors Silver Bullet Light beer and onsold them to liquor retailers.

Mr Fitzpatrick also relied on advertisements for the SILVER BULLET beer in magazines circulating in Australia, such as *Men’s Health*, *Muscle and Fitness*, *Car and Driver* and *Inside Sports* during the relevant period. Copies of extracts from those magazines showing the advertisements were exhibited to his second declaration and figures for the number of each of the magazines circulating in

Australia provided for two of them, 3000-3500 for *Men's Health* and 1750-2000 copies for *Inside Sports*.

What constitutes a connection in the course of trade for establishing use of a mark in Australia was discussed by the High Court in *Moorgate Tobacco v Philip Morris* 3 IPR 545 at 557:

The court was referred to a large number of cases and to some administrative decisions in which consideration has been given to what constitutes a use or user of a trade mark for the purposes of the statutory notion of proprietorship of the mark before registration. The cases establish that it is not necessary that there be an actual dealing in goods bearing the trade mark before there can be a local use of the mark as a trade mark. It may suffice that imported goods which have not actually reached Australia have been offered for sale in Australia under the mark (*Re Registered Trade Mark "Yanx"; Ex parte Amalgamated Tobacco Corporation Ltd, supra*, at 204-5) or that the mark has been used in an advertisement of the goods in the course of trade (*Shell Co of Australia v Esso Standard Oil (Australia) Ltd, supra*, at 422). In such cases, however, it is possible to identify an actual trade or offer to trade in the goods bearing the mark or an existing intention to offer or supply goods bearing the mark in trade.

In order to establish use in the relevant sense then it must be possible to identify an actual trade or offer to trade in the goods bearing the mark or an existing intention to offer or supply goods bearing the mark in trade. In the *Moorgate* case the Court found that there had been no actual trade or offer to trade in goods bearing the mark in Australia or any existing intention to offer or supply such goods in trade.

Mr Allen claimed that there was no invitation to treat made to the Australian public in any of those advertisements and referred to *Riviera Leisure Pty Ltd v J Hepworth Plc* 9 IPR 305. In that case Chief Assistant Registrar, after referring to the above passage from the *Moorgate* case said, at 310:

As I have indicated earlier in this decision, the opponent's advertisements consist of illustrations of the goods available under the mark, together with information on where these goods may be obtained. There is no indication in any of this material that the goods are obtainable in Australia, nor, in my opinion can the advertisements be taken as inviting orders from Australia. To all intents and purposes they are directed to the UK market, and the UK market alone. There are indications elsewhere in the evidence that the opponent intended to expand its business activities to Europe, specifically, West Germany, Belgium and Holland, but there is nothing to suggest that at the relevant date there was any intention to trade under the mark in Australia. I do not think, therefore, that "it is possible to identify an ...offer to trade in the goods bearing the mark in Australia," in the words of Deane J above.

In the present case there is no indication in any of the advertisements of where the goods might be obtained, simply an illustration of the goods, including the words "The Silver Bullet", with the name and address of the manufacturer in very small letters at the foot of the page. There is certainly no invitation to treat with, or offer to trade with, members of the Australian public. This material therefore does not constitute use of the trade mark in Australia.

However, in view of the statements of Mr Berges I think it more likely than not that cans of beer bearing the SILVER BULLET trade mark were imported into Australia during the relevant period.

In para 5 of his declaration Mr Berges stated:

BRIMPS has been in possession of two cases of Coors Silver Bullet Light Beer, which were received by us in early 1995. One of these cases was purchased by Ben Fitzpatrick, a solicitor acting for Coors Brewing Company, on 18 December 1995. I understand that this case will be used in evidence. Accompanying this Declaration and marked Exhibit "FB1" is a copy of the invoice evidencing this sale. The cases of Coors Silver Bullet Light Beer sold by BRIMPS between 25 September 1991 and 25 September 1994 were identical to the case sold on 18 December 1995. The other case will be sold to a liquor retailer.

However, that the two cases of the Silver Light beer were received "early" in 1995 and were still in the possession of BRIMPS on 18 December 1995, together with Mr Berges' statement that his company had received cases of the beer "on a number of occasions" during the relevant period appears to indicate that the receipt and sale of the goods were few and far between, unless 1995 was an exceptional year.

In *New South Wales Dairy Corporation v Murray Goulburn Co-operative Co Ltd* (1989) 14 IPR 26 Gummow observed at first instance:

The issue under s23(1)(b) is not whether the mark has been in use for the 3-year period, but whether there was no use during that period; further, the word "during" does not mean "throughout" so as to require a regular and continuous course of conduct for the whole period.

However, the fewer the instances of use relied on by the opponent the stronger the proof required. Thus in *NODOZ Trade Mark* [1962]RPC 1 Wilberforce J held, at 7:

It may well be, of course, that in a suitable case one single act of user of the trade mark may be sufficient; I am not saying for a moment that that is not so; but in a case where one single act is relied on it does seem to me that that single act ought to be established by, if not conclusive proof, at any rate overwhelmingly convincing proof. It seems to me that the fewer the acts relied on the more solidly ought they to be established, and it does not seem to me that the evidence which I have heard, which is that an order was received many thousands of miles away in San Francisco or Missouri and that steps were taken within the company to have the order executed, is sufficient evidence to satisfy the onus which is required.

...

I put my decision solely on the point that I am not satisfied as a matter of proof that there has been any user in this country, as it is admitted that there has got to be sufficient evidence to displace the general evidence tendered by the appellants that there has been no user in the relevant 5 years.

While I do not for a moment doubt the veracity of Mr Berges I think that the evidence of what must have been relatively few instances of receipt and sale of cases of Coors Silver Bullet Light beer during the relevant period has not been sufficiently solidly established. No records or other proof of such receipts and sales have been produced to support the bald statement that cases of the beer were received on a “number of occasions” during that period. I therefore find that the opponent has would not have discharged the onus on it of displacing the prima facie case made out by the applicant had one been made out.

However, Mr Allen put his objection to the use claimed on another ground. He contended that the use relied on should be substantial and genuine judged by ordinary commercial standards considered in relation to the trade concerned and that therefore the use relied on by Coors was not use of the trade mark in “good faith”. He referred to the so-called doctrine of “substantial commercial use” as it had evolved through the cases of *Electrolux Ltd v Electrix Ltd* (1954) 71 RPC 23; *Imperial Group Ltd v Philip Morris & Co Ltd* [1982] FSR 72 and *Concord Trade Mark* [1987] 13 FSR 209. In the first of those cases the proprietor of the marks ELECTROLUX and ELECTRUX commenced the use of the latter mark for the purpose of, as it was put by Evershed MR, “enabling the plaintiffs...to challenge the defendant’s use of their own name and mark ELECTRIX” in order to “protect and promote the business interests of the plaintiffs and particularly their more valuable and better known word ELECTROLUX, under which their business was substantially at all times carried

on. Does it, however, follow from those facts that the use of this word ELECTRUX was not *bona fide*?" His answer to that question was "no", and he went on to find:

There is, I think, no evidence which would justify the conclusion that the use was **merely spasmodic or temporary. Commercially speaking**, it is not shown that the use made by the plaintiffs of this mark was not an **ordinary and genuine use**, and it certainly was **substantial**.

Jenkins LJ said, at 41:

On the question of *bona fide* user, there is no doubt that from March 1947 onwards, apart from the year or thereabouts when the machine was withdrawn from circulation owing to some defect in it, the plaintiffs consistently used their mark ELECTRUX to designate and distinguish one of their products, namely, their cheaper type of vacuum cleaner. There is no doubt that such use was perfectly **genuine and** was **substantial** in amount.

Morris LJ, at 42:

In my judgment, there was in this case *bona fide* user by the plaintiffs of the mark ELECTRUX. The evidence which is before us ... relating to the volume and extent of the use of the mark since it was applied to one of the models manufactured by the plaintiffs, is such as to put it, in my view, beyond all question that, **judged by ordinary commercial standards**, there was a **genuine use** by the plaintiffs of this mark.

(The emphasis in the above passages has been added.)

In *Imperial Group Limited v Philip Morris & Co Ltd* [1982] FSR 72, on the other hand, the use by the registered proprietor of the "ghost-mark" NERIT in order to stave off a possible attack by the defendant who had commenced use of the trade mark MERIT was held to be not *bona fide*. The judge at first instance held that : "the plaintiffs never intended to and never did use NERIT as a genuine commercial trade mark, and since neither their actual use nor their intention to use the mark were *bona fide* ... the mark NERIT should be expunged from the Register." On appeal Lawton LJ said, at 79:

Could such a use be *bona fide*? When considering whether it was, it is irrelevant that the plaintiffs had a motive for the use which was to protect their use of the unregistrable mark

MERIT: see *Electrolux Limited v Electrix Limited*, per Lord Justice Evershed, Master of the Rolls, page 36, and Lord Justice Jenkins at page 41. According to the judgments given in this court in that case, a *bona fide* use should be “ordinary and genuine” (*per* Lord Evershed), “perfectly genuine”, substantial in amount”, “a real commercial use on a substantial scale” (*per* Lord Justice Jenkins at page 41) and not “some fictitious or colourable use but a real or genuine use” (*per* Lord Justice Morris at page 42). The plaintiffs never intended to use the mark NERIT in the ordinary course of their business; their use of it was not substantial; it was not a real use in any commercial sense; it was a colourable stratagem for making their trade mark rivals think that they were using the mark NERIT in a way which gave it the protection of the Act.

Shaw LJ said, at 82:

In my judgment “a *bona fide* course of trade” involves a trading activity pursued with the primary intention of deriving from it a trading profit coupled with a trading goodwill, these being the ultimate and legitimate objectives of trade ... In reality the sparse and intermittent selling of cigarettes under the name NERIT was not in pursuit of a course of trade at all. ... They were a mere charade from a commercial point of view.

In *CONCORD Trade Mark* the use of a mark which had not been used for many years was hurriedly commenced in order to defend the mark from an application for removal. Falconer J said, at 225:

Was that *bona fide* use in the sense of the authorities? I have no doubt that, as regards the hurried launch without any preliminary market research, investigation or preparation, such as it is common ground is the normal manner in which the launch of a new cigarette brand is approached, the reason for that haste and the absence of any such preparation was to generate use of the mark as soon as possible after learning of the Philip Morris launch in America, in the hope of preventing registration of their mark in this country being vulnerable for non-use; but that motive is really not relevant for present purposes; that is to say, whether or not the use has been *bona fide* ...

However, disregarding that motive, was this a *bona fide* use within the meaning of section 26(1)(b)? In deciding that question, I have to try to apply the criteria stated in the Court of Appeal in the ELECTROLUX and the NERIT cases.

First, what is substantial use?... Plainly, “substantial use” in this context in any particular case has to be considered in relation to the trade concerned. The numbers would be very different for cigarettes from those, for example, if you were dealing with refrigerators or motor cars. You obviously have to have regard, in considering what is “substantial”, to the particular trade concerned.

Was it a genuine use, judged by ordinary commercial standards?... As to that there was no preliminary preparation of any kind, none of the usual market research or, indeed, financial research; and that has to be compared with what in the ordinary way Gallaher themselves and others, including Philip Morris, according to the evidence ... embarked on before the marketing of a new brand. The effort in that regard was really nil. As I have pointed out, there was no advertising plan, and there was no advertising.

Again, the evidence establishes that it was not intended to seek substantial sales by the standards of the trade. Salesmen had ... limited targets. Again, the evidence establishes quite clearly ... that it was only intended to be an effort to last about a year; and therefore it was only to be a temporary selling or marketing operation. It will be remembered that one of the criteria of Jenkins LJ in *ELECTROLUX* was whether it was intermittent or temporary use, as opposed to steady sales

On the whole of the evidence, I think the brand quite plainly was not intended by Gallaher to establish itself on the market as a going brand. There was not a course of trading, as it seems to me, embarked upon as an end in itself.

The *Concord* case was followed by Gummow J in *NSW Dairy Corp v Murray Goulburn Co-op* 14 IPR 26. He said, at 45:

In "*Concord*" *Trade Mark* [1987] FSR 209, Falconer J held that to be bona fide within the meaning of the equivalent provision in the British legislation (s26 of the 1938 Act) use should be substantial and genuine judged by ordinary commercial standards considered in relation to the trade concerned. On the facts of that case, which involved a trade mark for cigarettes His Lordship concluded that the effort that had been made was intended only for a temporary operation and the registered proprietor had not embarked upon a genuine attempt to establish a course of trade under the trade mark. A comparable situation was found to exist by the Assistant Registrar in *S Smith & Son Pty Ltd v Browne* [1986] AIPC 90-352

What are the facts in the present case? In paragraph 4 of his declaration Mr Berges stated:

Often these cases of Coors Silver Bullet Light beer have been received by mistake, in that we had not specifically ordered the Light Beer. Other times, the Coors Silver Bullet Light Beer is included because BRIMPS has paid for a set amount of freight on the ship, and, in order to fully use the purchased freight, the ship chandler will include cases of Coors Beer other than the standard Coors beer to make up the freight. In the previous 5 years, we have sold many cases of Coors Silver Light Beer, in Australia.

Did the cases received by mistake and those included to make up the freight account for all of the Silver Bullet beer shipped to Australia? Mr Berges nowhere states that he did specifically order the light beer from Coors.

STANDARD P1 of the Food Standards Code relating to “Beer and Beer Products” was published in the *Commonwealth of Australia Gazette* No P27 on 27 August 1987 and was amended, as far as is relevant here, on 9 March 1994. Clause 3(a) of the Standard states:

There shall be written in the label on or attached to a package containing beer, in standard type, a statement of the percentage by volume at 20°C of ethanol in the beer-

- (i) in the form-  
“X% ALCOHOL BY VOLUME” or “X% ALC/VOL” or
- (ii) in a form containing words and expressions having the same or a similar effect.

The samples of the beer in evidence, purchased by Mr Fitzpatrick on 18 December 1995, contain no such statement either in the labels on the bottles or on the packaging. There is no reason to believe that the previous deliveries were any different. The imported beer quite clearly failed to comply with Australian labelling laws.

Again, there was no advertising of the goods in Australia. The only advertising produced was in American magazines which were said to circulate in Australia but which contain no offer to trade with members of the public in Australia.

The above facts indicate quite clearly, I believe, that the use of the trade mark was merely spasmodic or temporary and was not substantial in amount. There appears to have been no intention by either Coors or its local distributor to establish a genuine course of trade in the goods in Australia. Rather the goods arrived in Australia quite by accident. Commercially speaking, it was not an ordinary and genuine use of the trade mark.

## **Conclusion**

I have found that this application must fail at the threshold because of the lack of any attempt on the part of the applicant to establish that it was a person aggrieved by the registration of the trade mark it sought to have removed. If I am wrong in that, I have found that the applicant failed to make out a prima facie case of non-use of the mark by the registered proprietor during the whole of the relevant three-year period. It was unnecessary for me to go on to consider the opponent's evidence of the use of the mark but as indicated above I would have found that it had failed to demonstrate use of the mark for one of the following reasons:

- the slight use of the mark was not adequately supported by the evidence;
- there was not a bona fide use of the mark because such use as there was merely intermittent and pointed to lack of a genuine attempt to establish a course of trade in the goods by ordinary commercial standards.

In the result I dismiss the application and refuse to order the removal of trade mark 482284 from the Register.

The opponent is entitled to its costs in the matter and I so award them.

Michael Homann  
Hearing Officer

12 May 1997