

IN THE SUPREME COURT OF NEW ZEALAND

**SC 24/2007
[2007] NZSC 52**

BETWEEN	AQUA TECHNICS POOL AND SPA CENTRE NZ LIMITED Applicant
AND	AQUA-TECH LIMITED Respondent

Court: Elias CJ, Blanchard and McGrath JJ

Counsel: J G Miles QC and D L Marriott for Applicant
K W McLeod for Respondent

Judgment: 9 July 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of \$2,500 to the respondent.

REASONS

[1] This application for leave relates to a dispute about an application for a trade mark, “Aqua-Tech”, for swimming pools and spa pools. The respondent made the application on 31 August 2001. At that time the present applicant had been using the trade mark “Aqua Technics” on swimming pools since April 2001 and had also applied for trade marks. The applicant objected to the respondent’s application on the basis of that prior use. It was therefore necessary for the respondent to show that it had been using its mark on swimming pools and spa pools before 2001.

[2] The Assistant Commissioner of Trade Marks found that the respondent’s use was insufficient to establish proprietorship of the claimed mark. The High Court overturned that decision and the Court of Appeal agreed with the High Court. Both

Courts said there was prior use by the respondent; that the evidence established that it had used the trade mark prior to 31 August 2001.

[3] The critical difference between the Courts and the Assistant Commissioner seems to have been that the Assistant Commissioner did not think that there was shown to be a connection between Aqua-Tech and the relevant goods in the minds of members of the public. The Courts found that it was sufficient that people in the trade would, because of the use of the mark by the respondent in its catalogues, see the necessary connection, that is the link between the respondent and the origin of the goods. The Courts did not consider that the respondent was merely using the name Aqua-Tech as a company name.

[4] The major plank in the application for leave is that the Courts failed to have adequate regard or give adequate weight to the views of the Assistant Commissioner. The different view taken by the Courts was not, however, simply a matter of factual assessment concerning the use made of a mark. The Assistant Commissioner found that the trade would see a connection between the respondent and the relevant goods, although the wider public would not. The Courts differed from the Assistant Commissioner in their view of the legal consequences of this finding. That is not a matter on which an Assistant Commissioner has particular expertise, as would be the case if the issue were whether one mark was confusingly similar to another or whether there was likely to be deception or confusion among consumers.

[5] The application seeks to make something of what appears to be a passing comment in the Court of Appeal judgment where, saying that the evidence for the respondent was on its face sufficient to establish proprietorship and that issues said to impact on the reliability of the evidence of its witness had been dealt with, the Court added that if the appellant wanted to challenge the evidence it should have asked that the witness present himself for cross-examination. That is said to have been a wrong approach because it is not customary to have cross-examination before the Assistant Commissioner. (The proposed new evidence, if received, would establish that cross-examination is possible but quite rare.) The applicant says that the effect of the Court of Appeal's approach would be to allow applications to proceed on the basis of unsubstantiated decisions of fact in the absence of cross-

examination. We do not consider that the Court of Appeal was doing anything more than stating the obvious, namely that it may be difficult to controvert assertions of fact by a witness without cross-examining the witness. The crucial point is that the Court of Appeal did examine the criticisms. But it rejected them. There is nothing in this point.

[6] The application raises various other issues of law or procedure, none of which in our view raises a question of law of public or general importance.

Solicitors:

James & Wells, Auckland for Applicant

A J Park, Auckland for Respondent