IN THE SUPREME COURT OF NEW ZEALAND

SC 79/2011
[2011] NZSC 113

BETWEEN	N V SUMATRA TOBACCO TRADING COMPANY Applicant
AND	NEW ZEALAND MILK BRANDS LIMITED Respondent

Court: Elias CJ, Blanchard and William Young JJ

Counsel: B W F Brown QC and C A Warbuton for Applicant
K W McLeod for Respondent

Judgment: 22 September 2011

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay the respondent costs in the sum of $2,500.

REASONS

[1] The applicant seeks leave to appeal against a judgment of the Court of Appeal[1] largely dismissing its appeal against a High Court judgment[2] which, in allowing an appeal against a decision of the Assistant Commissioner of Trade Marks, had refused to allow the registration of the applicant's ANGKOR mark to proceed. The respondent had opposed registration essentially because of the risk of confusion with its ANCHOR word mark and a range of anchor device marks. The litigation was predominantly addressed to the similarities between the marks in the particular context of the goods in respect of which they are, or may be, used. The case required

1 *N V Sumatra Tobacco Trading Co v New Zealand Milk Brands Ltd* [2011] NZCA 264.
2 *New Zealand Milk Brands Ltd v N V Sumatra Tobacco Trading Co* HC Wellington CIV-2007-485-2485, 28 November 2008.

consideration, and the application, of ss 17(1)(a), 25(1)(b), 25(1)(c) and 26(b) of the Trade Marks Act 2002.

[2] The case involved the practical application of familiar principles (largely derived from *British Sugar plc v James Robertson & Sons Ltd*[3]) to the facts of the case at hand. The applicant has not identified any particular challenge to those principles, which would be necessary for the appeal to involve a matter of general or public importance or a matter of general commercial significance. The proposed appeal does not raise a particular point of law. And while the difference of opinion between the Assistant Commissioner of Trade Marks, the High Court and Court of Appeal demonstrates that there is scope for legitimate difference of opinion, the appeal does not meet the criteria discussed in *Junior Farms Ltd v Hampton Securities Ltd (in liq)* for invoking the miscarriage of justice limb of the Supreme Court Act 2003, s 13(2), in a civil appeal.[4]

[3] The application for leave to appeal to this Court does not challenge the Court of Appeal's decision as it relates to s 17(1)(a) (that the ANGKOR mark should not be registered in relation to certain products due to the reasonable likelihood of causing deception or confusion amongst a substantial number of persons).[5] The respondent suggested that this in itself warrants dismissal of the application for leave to appeal because the outcome of the case would not be affected irrespective of what this Court might decide as to the application of s 25(1)(b) and (c). We think that the failure to challenge the Court of Appeal's determination in relation to s 17(1)(a) was probably an oversight and accordingly do not see it as being of controlling significance.

Solicitors:
Acacia Law, Wellington for Applicant
A J Park Law, Auckland for Respondent

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3 *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281 (Ch).
4 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, [2006] 3 NZLR 522.
5 At [76]–[79].