

IN THE SUPREME COURT OF NEW ZEALAND

SC 74/2012
[2012] NZSC 118

BETWEEN	MARS NEW ZEALAND LIMITED Applicant
AND	ROBY TRUSTEES LIMITED Respondent

Court: McGrath, Chambers and Glazebrook JJ

Counsel: E C Gray and R Scott for Applicant
C L Elliot for Respondent

Judgment: 19 December 2012

JUDGMENT OF THE COURT

A The application for leave is dismissed.

B Costs of \$2,500 plus reasonable disbursements as fixed by the Registrar are awarded to the respondent.

REASONS

[1] Mars New Zealand Ltd (Mars) is the owner of several registered trademarks for OPTIMUM and OPTIMUM ‘Nutrition for Life’ for pet food, including dog rolls. Roby Trustees Ltd (Roby) applied to register the mark OPTIMIZE PRO ‘Lead the Pack’ to be used for dog rolls.

[2] The Assistant Commissioner of Trade Marks allowed Roby to register its mark. In the High Court, Venning J allowed Mars’ appeal against that decision.¹

¹ *Mars New Zealand Limited v Roby Trustees Limited* HC Auckland, CIV-2011-404-004613, 7 December 2011.

The Court of Appeal reversed Venning J's decision and allowed the mark to proceed to registration.²

[3] In its application for leave to appeal, Mars has set out what it maintains are a number of questions of law. It is difficult, however, to see them as other than questions of fact or complaints that not enough weight was accorded to particular factors.

[4] Roby submits that the Court of Appeal, under s 17(1)(a) of the Trade Marks Act 2002, compared the marks according to well established principles. We agree.

[5] Mars suggests that the Court of Appeal wrongly elided its consideration of ss 17(1)(a) and 25(1)(c) of the Trade Marks Act 2002. We accept Roby's submission that the Court merely considered that its factual findings that the marks are "distinctly different" was in this case the controlling consideration under both grounds.

[6] There are also complaints by Mars that certain matters were not taken into account of by the Court (or not adequately). Again, we accept Roby's submission that the matters in question were taken into account by the Court. Mars' complaints relate only to the weight that the Court of Appeal accorded those factors. This means that the complaints are confined to the particular facts of the case and are not matters of general public or commercial importance.

[7] The application for leave to appeal is dismissed.

[8] The applicant is to pay the respondent costs of \$2,500 plus reasonable disbursements as fixed by the Registrar.

Solicitors:
Simpson Grierson, Auckland for Applicant
Shanahans, Auckland for Respondent

² *Roby Trustees Limited v Mars New Zealand Limited* [2012] NZCA 450.