

“LIKE BRANDS. ONLY CHEAPER” - ALDI GETS UP ON COPYING BUT FALLS ON NATURAL CLAIM

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Legal Briefings - By **Claire Agius** and **Alison Laughlin**

On Tuesday this week the Federal Court of Australia (**Court**) published its judgment in the long running battle between Moroccanoil Israel Ltd and Aldi Foods: *Moroccanoil Israel Ltd v Aldi Foods Pty Ltd* [\[2017\] FCA 823](#). Aldi’s conduct was found to be misleading and deceptive in relation to claims regarding the performance benefits and natural content of its products.

Aldi’s slogan is “Like brands. Only cheaper”. This article demonstrates that even intentional copying of get-up in order to appropriate trade may not be enough to establish misleading and deceptive conduct, passing off or trade mark infringement.

The Court considered whether Aldi’s “Moroccan Argan Oil” product range is not only “like brands” but, in fact, is deceptively like Moroccanoil branded products in contravention of the prohibition on misleading and deceptive conduct under the *Australian Consumer Law (ACL)*, passing off and trade mark infringement. This is one of the very few times the Court has ruled on Aldi’s very similar get-up and, with Aldi successfully defending these claims, it confirms the approach that “Like Brands. Only Cheaper” is acceptable.

THE FACTS

Moroccanoil Israel Ltd (**MIL**) sells a highly successful range of products under the name Moroccanoil. These products contain argan oil, an oil extracted from the nut of a tree that is native to Morocco, and which is said to have benefits as a component of hair and beauty products. MIL was the registered owner of two composite marks consisting of “Moroccanoil” and a signature M.

Evidence from Aldi showed that it sought to identify “on trend” products and introduce its own version of such products. In developing “Aldi versions” of such products, the objective was to make Aldi packaging “consistent with” the packaging of the on trend competitor product/s. This included taking “cues” on colour, wording associated with the product and packaging. Taking this approach ensured that the product was ultimately consistent with Aldi’s pitch to customers that is captured in its advertising slogan: “Like Brands. Only Cheaper”.

Having identified Moroccan argan oil products as an on trend product, Aldi launched a range labelled PROTANE® NATURALS “Moroccan Argan Oil”. This included oil treatment for hair, shampoo and conditioner.

FINDINGS ON MISLEADING AND DECEPTIVE CONDUCT / PASSING OFF ALLEGATIONS

The Court accepted that Aldi intentionally adopted a get-up for its oil treatment product in order to appropriate part of the trade of MIL. This included having a very similar style, size, shape and colour; packaging in a cardboard box; and the use of a similar colour for the packaging.

The Court noted that the “mere fact” that Aldi copied aspects of the get-up of MIL did not mean that a finding of misleading and deceptive conduct follows. This is because the differences between the get up must also be considered alongside the similarities in deciding whether a reasonable consumer is likely to be misled. In this case, key differences included the use of the mark PROTANE® NATURALS, the absence of the signature M found on MIL products and the use of a plastic bottle in contrast to the glass bottle used by MIL.

The Court also considered it significant that MIL products are not in direct competition with Aldi products as MIL is sold as a ‘salon only’ brand and targets a different market with roughly a six-fold price disparity between the products. Having made these findings, the Court dismissed the primary allegation of misleading and deceptive conduct and the action of passing off.

FINDINGS ON “NATURAL” CLAIM

While MIL was unsuccessful on its challenge to Aldi’s get-up, the Court agreed that the use of the word ‘naturals’, in the PROTANE NATURALS Moroccan Argan Oil range, represented that each of the labelled products contains only or substantially natural ingredients. There was no “logical reason” for why Aldi would choose to call a product line “natural” unless it was intended to convey the message that the product was comprised of substantially natural ingredients.

An interesting point was whether water should be considered part of the tally of natural ingredients. The Court held that the substantial use of water will not be enough to sustain a claim to “natural”, drawing the analogy that no reasonable consumer would consider Coca-Cola a drink containing substantially natural ingredients simply because it has a high water content. Having categorised the remaining ingredients as either natural or synthetic, the Court held that it was misleading and deceptive for Aldi to represent that a predominantly synthetic product was natural by including such products as part of a product range called “naturals”.

FINDINGS ON TRADE MARK INFRINGEMENT ALLEGATIONS

The Court also considered whether “Moroccan Argan Oil” was deceptively similar to, and therefore infringed, MIL’s registered trade marks. The relevant comparison was between the composite mark as registered and “Moroccan Argan Oil”. The composite marks on the register had turquoise as a background colour and the signature M was orange. However, as these colours were not specified as features of the registered mark, the colours were irrelevant to the question of trade mark infringement. The Court held that the Aldi mark “Moroccan Argan Oil” was not deceptively similar to the composite marks. This decision therefore serves to highlight the importance of a comprehensive portfolio of trade mark protection. To create a monopoly in a particular colour, a mark must be registered with limitations as to colour.

LEARNINGS

While each case will turn on its facts, sufficient differences in get-up, trade channels and price point may ultimately get you out of hot water. This case is also notable in its approach to a claim of “natural”. A product range represented as “naturals” must contain substantially natural ingredients, excluding water. MIL was also successful under the ACL with respect to specific misrepresentations of the performance benefits of the products.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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