

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-006525

IN THE MATTER OF Passing Off and Breach of the Fair Trading
 Act

BETWEEN FRUCOR BEVERAGES LIMITED
 Plaintiff

AND RED BULL GMBH
 First Defendant

AND RED BULL NEW ZEALAND LIMITED
 Second Defendant

Hearing: 8 December 2009

Counsel: J G Miles QC and K Duckworth for the plaintiff
 A H Brown QC and S Wheeldon for the defendants

Judgment: 12 February 2010 at 3.30 p.m.

**JUDGMENT OF POTTER J
On application for interim injunction**

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 4 p.m. on 12 February 2010.

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Introduction

[1] The plaintiff and defendants are both manufacturers of energy drinks. Both are major players in the New Zealand energy drinks market. Frucor has the major market share, but its percentage share is contested. The plaintiff's energy drink is marketed under the V label. The defendants' energy drink is marketed under the RED BULL label.

[2] In 2009 both parties released on the New Zealand market an "energy shot", a smaller, more concentrated version of an energy drink. The plaintiff's energy shot product is marketed as V POCKET ROCKET. The product's presentation follows that of other energy drink products of the plaintiff. It adopts the V emblem which features on the plaintiff's range of products. As described by Peter Lamb, the Chief Financial Officer of the plaintiff, in his affidavit dated 6 October 2009, the pocket rocket product "... is able to leverage off the popularity of V". The container is coloured green. Mr Lamb says that green V has always been the biggest seller for the plaintiff.

[3] The defendants' energy shot product is marketed in a blue and silver container on which there appears in red and white lettering RED BULL ENERGY SHOT.

[4] The energy shot products of the plaintiff and defendants are shown in schedule A attached to this judgment.

[5] The defendants have also produced and distributed promotional material including window decals and brochures which feature the phrase A BLUE AND SILVER POCKET ROCKET. This material is shown in schedule B. Item B1 is the window decal. Item B2 is the brochure and Item B3 is a media pack contained in a jeans pocket. Each of these items makes reference to A BLUE AND SILVER POCKET ROCKET. There is no such description on the defendants' energy shot product.

[6] The defendants' energy shot product was released to the trade in April 2009 and to the public from 6 August 2009.

[7] The plaintiff's energy shot product was released to the trade from 15 June 2009 and to the public from 26/27 August 2009. (The date varies in some of the evidence and the statement of claim.)

[8] The plaintiff pleads that the defendants' use of the words or term POCKET ROCKET in its promotional material constitutes passing off and is a breach of s 9 of the Fair Trading Act, 1986.

Plaintiff's application for injunction

[9] The plaintiff's application for interim injunction seeks an order from the Court:

Until the further order of the Court an interim injunction issues restraining the defendants and their servants, contractors, agents, marketers and distributors from using the name POCKET ROCKET or any name so resembling the name POCKET ROCKET as to be likely to cause a misrepresentation.

[10] The defendants oppose the application. They say that there is no serious question to be tried under either of the plaintiff's causes of action, passing-off or breach of s 9 of the Fair Trading Act 1986. The defendants also plead that, contrary to the plaintiff's pleadings and affidavits, the plaintiff's product is promoted and sold as V POCKET ROCKET.

Injunctions: applicable principles

[11] The principles are well established by the authorities of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129. The Court must consider:

- a) Whether there is a serious question to be tried;

- b) Where the balance of convenience lies;
- c) The Court must then take a step back and consider the overall justice of the case.

Factual background

[12] Both parties prepared a timeline which reflected the affidavit evidence. A timeline is attached to this judgment which is based on that provided by the plaintiff, extended to include items which appeared in the defendants' chronology but not in the plaintiff's timeline.

[13] As the timeline shows, by March 2009 both the plaintiff and the defendants (in conjunction with their American sister company) were engaged in the development of an energy shot product.

[14] In early March 2009 Adrian Blake of Frucor came up with the name POCKET ROCKET for Frucor's energy shot product.

[15] At about the same time, Red Bull US was toying with a suggestion from its advertising agency for a slogan "A pocket rocket for your pocket". This slogan was reworded to "The Blue-Silver Pocket Rocket" by Christopher Carter and another employee of the first defendant.

[16] There appears to be no dispute that the development of the POCKET ROCKET name or phrase was generated independently by the plaintiff and the defendants at approximately the same time.

[17] In April 2009, Red Bull launched its energy shot product in the United States. Some promotional material included reference to BLUE SILVER POCKET ROCKET. Later in April, Red Bull proceeded with an internal marketing phase in New Zealand and from the end of April presented externally to various leading clients in New Zealand. This continued through May and June. The presentations included reference to BLUE SILVER POCKET ROCKET.

[18] Through May, Frucor was conducting market research and preparing commercial marketing material. On 25 May 2009, Frucor filed a trade mark application for POCKET ROCKET in the name of Alexandra Coats, which was later assigned to Frucor. In June, Frucor registered domain names: www.vpocketrocket.co.nz and www.vpocketrocket.com.

[19] By mid-June Frucor was ready to present its product to the trade and in the latter part of June through to 1 July 2009 embarked on a series of presentations to leading clients.

[20] On 15 July 2009 Red Bull became aware that Frucor was intending to call its new energy shot product POCKET ROCKET. The information came from an unconfirmed industry source. In late July Red Bull became aware of the application in the name of Alexandra Coats for registration of the trade mark POCKET ROCKET in New Zealand.

[21] Frucor says that it did not become aware of Red Bull using POCKET ROCKET until 19 August 2009. By that time Red Bull had completed presentation to the trade, issued promotional material including the phrase BLUE SILVER POCKET ROCKET, made its first delivery to an Auckland convenience store and applied for a New Zealand trade mark for BLUE SILVER POCKET ROCKET.

[22] In the period 25-29 August 2009 Red Bull circulated the promotional material which is in schedule B to this judgment.

[23] On 26/27 August 2009 Frucor's energy shot product was released to the public, followed by an intensive promotional campaign.

[24] Red Bull continued with the promotion of its energy shot product including distribution of flyers containing the phrase BLUE AND SILVER POCKET ROCKET.

Is there a serious question to be tried?

[25] The threshold test was expressed in *Re Lord Cable (Dec'd)* [1976] 3 All ER 417 at 431 as requiring the plaintiff to satisfy the Court that the plaintiff has a real prospect of succeeding in a claim for a permanent injunction at the trial.

[26] The plaintiff's statement of claim pleads two causes of action, passing off and breach of s 9 of the Fair Trading Act.

Passing off

Pleadings

[27] The plaintiff's statement of claim pleads that the plaintiff recently released a 60 ml energy drink under the name of V POCKET ROCKET, that it began presenting this product to the trade in June 2009, and on or about 26 August 2009 released the product to the general public.

[28] The plaintiff pleads that it "has developed a goodwill and reputation in the trade mark POCKET ROCKET for an energy drink".

[29] The particulars in support of that pleading refer to significant sales of the product (wholesale value \$471,601 and retail value \$732,708), distribution on 2 September 2009 of 10,000 samples, commercial advertising, and promotion on the POCKET ROCKET websites and other websites such as Bebo, Facebook and Twitter.

[30] The statement of claim then pleads that the defendants "recently" began selling a 60 ml energy drink under the name RED BULL ENERGY SHOT/SUGAR FREE SHOT in New Zealand and that some of the defendants' advertising collateral, including flyers and posters, features the phrase BLUE SILVER POCKET ROCKET.

[31] The plaintiff pleads that the use of BLUE SILVER POCKET ROCKET by the defendants constitutes a misrepresentation made by a trader in the course of trade to prospective customers or ultimate consumers, which is calculated to injure the business or goodwill of the plaintiff and is causing actual or probable damage to the plaintiff.

[32] The likely loss and damage pleaded includes loss of sales of the plaintiff's product to the defendants' energy shot product, and loss of distinctiveness of the trade mark POCKET ROCKET in connection with the sale and promotion of energy drinks in New Zealand by the plaintiff.

Elements of passing off

[33] There is no dispute between the parties that to establish passing off in relation to POCKET ROCKET the plaintiff must prove:

- a) Reputation or goodwill attached to its name/brand;
- b) A misrepresentation by the defendants (whether or not intentional) leading or likely to lead the public to believe the goods or services offered by the defendants are the goods and services of the plaintiff; or if unrestrained is likely to do so; and
- c) As a result, damage suffered or likely to be suffered to the plaintiff's business, reputation or goodwill.

[34] These three elements or requirements, known as the "classical trinity", were restated in the *Jif Lemon* case: *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341 (HL) per Lord Oliver at 406. In New Zealand see *Dominion Rent A Car Ltd v Budget Rent A Car System (1970) Ltd* [1987] 2 NZLR 395 (CA) and *Wineworths Group Ltd v Comité Interprofessionel du Vin-Champagne* [1992] 2 NZLR 327 (CA).

[35] The relationship between these three elements was addressed in *Kerly's Law of Trade Marks and Trade Names* (14th ed, Sweet & Maxwell, London, 2005) at 15-014:

The advantage of the classic trinity as restated in *Jif*, is that attention is properly drawn to the essential relationships between the three elements. In a true case of passing off, all three elements are intertwined. It is the existence of a mark or get-up with reputation distinctive specifically of the claimant's goods or services which provides the necessary foundation for misrepresentation; the misrepresentation must be one which causes or is likely to cause damage to goodwill (in other words the misrepresentation must be 'operative' in the transaction and causative of the damage claimed); and damage to goodwill is at the heart of the cause of action.

[36] Application of the three elements of the "classical trinity" in this case raises the following issues:

- a) Has Frucor established that there is some reputation or goodwill attached to its V POCKET ROCKET brand in the marketplace?

In the circumstances of this case that raises the important subsidiary issue, what is the relevant date at which the reputation or goodwill must be established?

- b) Has Red Bull used the phrase POCKET ROCKET so as to confuse or deceive, or in a way likely to confuse or deceive, the relevant public?
- c) Has damage been caused or is it likely to be caused to Frucor's business, reputation or goodwill because Frucor will lose sales to the defendants' product and/or lose the distinctiveness of the POCKET ROCKET trade mark in relation to its energy shot product?

Has Frucor established reputation or goodwill?

[37] It is convenient to start with a summary of the defendants' submissions. They submitted:

- a) In order for there to be a misrepresentation the plaintiff must be able to establish goodwill in the mark it claims, i.e. POCKET ROCKET, at the relevant date. The relevant date is clearly established as being the date when the defendants commenced the conduct complained of.
- b) In this case the relevant date is when the defendants first launched their product and used the POCKET ROCKET slogan.
- c) The defendants were first to launch in both the trade and retail markets. The plaintiff is not able to demonstrate any goodwill or reputation at that date; the plaintiff was not in the market.

[38] Mr Miles QC for Frucor accepted that the starting point for the relevant date is “first-past-the-post” on the basis of the authorities cited by the defendants: *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] 1 All ER 213 (PC) and *Wineworths Group Ltd v CIVC*. But he contended for a degree of flexibility. He referred to *Con Agra Inc v McCain Foods (Aust) Pty Ltd* (1992) 23 IPR 193 (FCA) where the Federal Court of Australia accepted in principle that a reputation can be established in a particular jurisdiction by a variety of means even though the party claiming the reputation is not physically present in the market of a particular country (although the plaintiff failed on the facts to prove the necessary reputation to establish claims in passing off and breach of the Trade Practices Act). He also referred to the decision of *Scandecor Development AB v Scandecor Marketing & Anor* [1999] FSR 26 (CA) at 41, 42 where the United Kingdom Court of Appeal stated that as a general rule the goodwill must exist at the date of the proceedings and that whether goodwill and reputation exist was a question for decision on the particular facts of the case.

[39] Mr Miles acknowledged the high authority relied on by the defendants. In the *Pub Squash* case, the Privy Council said at 221:

The judge, it is conceded, misdirected himself in holding that the relevant date for determining whether a plaintiff had established the necessary goodwill or reputation of his product is the date of commencement of the proceedings (i.e. 1st June 1977). The relevant date is, in law, the date of the commencement of the conduct complained of, i.e. 8th April 1975 when the

respondent began to market 'Pub Squash': see *Norman Kark Publications Limited v Odhams Press Limited* [1962] RPC 163.

[40] In *Wineworths*, Gault J at 338 noted that the *Pub Squash* decision:

... confirmed authoritatively that the relevant date for determining whether a plaintiff has established the necessary goodwill or reputation is the date of commencement of the conduct complained of – when the defendant commenced to market the product objected to.

[41] However, the plaintiff submitted at paragraph 17 of its submissions:

A few advantageous sales or promotions by a defendant prior to a plaintiff's launch can never be determinative as no or insufficient [goodwill] has been created. A cause of action is always dependent on the first to gain the goodwill and reputation necessary to support or defend the cause of action.

[42] Mr Miles expanded on that submission in oral submissions. He said there was no damage from the presentations made by Red Bull to the trade from 30 April 2009. The significant point in time was at the end of August when Red Bull's objectionable conduct started by the distribution to retail outlets of the window decals carrying the BLUE AND SILVER POCKET ROCKET slogan. That was also the time when Frucor's POCKET ROCKET was released to the general public.

[43] The plaintiff submitted that because of the way in which each party has used the name POCKET ROCKET, despite the defendants launching their product first, the plaintiff was first to gain goodwill and reputation in POCKET ROCKET because:

- a) The defendants' use is limited to window decals and leaflets;
- b) The defendants do not use BLUE SILVER POCKET ROCKET on the product itself or in any other advertising or promotion, other than the window decals and leaflets.

[44] On the other hand, it was claimed, Frucor quickly developed a goodwill and reputation in the name POCKET ROCKET because:

- a) The product is prominently branded POCKET ROCKET;

- b) Frucor's point of sale material is prominently branded POCKET ROCKET;
- c) There has been an extensive television and bus shelter campaign featuring the name POCKET ROCKET;
- d) Frucor's POCKET ROCKET is prominently promoted on the websites www.vpocketrocket.co.nz and others;
- e) Frucor has made sales of over 250,000 units of POCKET ROCKET product with a wholesale value of over \$600,000 and a retail value of \$1m;
- f) Frucor's POCKET ROCKET product is sold at over 4,000 retail outlets throughout New Zealand.

Discussion

[45] Even if the deliberate, concerted series of presentations and promotion to the trade by Red Bull which started on 30 April 2009 and extended to delivery on 7 August 2009 of Red Bull's energy shot product to stores, could be properly described as "a few advantageous sales or promotions", when the objectionable conduct of Red Bull commenced from 25-29 August 2009, as asserted in oral submissions, Frucor itself had only just entered the public marketplace, on 26 or 27 August 2009. It had not established any reputation or goodwill in the public marketplace.

[46] The defendants cited in submissions the following passage from Christopher Wadlow *The Law of Passing-off* (3rd ed, Sweet & Maxwell, London, 2004), at 5-134, which I consider is apposite:

... it cannot matter that at a later date the claimant may have generated goodwill or that the claimant may have rendered the mark distinctive of himself. In particular, it is not sufficient for the claimant to have goodwill and reputation at the date the writ is issued if those came into existence too late. *Dicta* giving importance to the date of commencement of proceedings

must be taken as overruled by *Cadbury Schweppes v Pub Squash Co* and being inconsistent with basic principles.

[47] Given that Frucor is not able to show that it had goodwill or reputation in its V POCKET ROCKET product as at either 30 April or 7 August 2009 or at the end of August 2009, being the date of the start of the alleged objectionable conduct as asserted by Frucor, there can be no misrepresentation by the defendants.

[48] Nor is there any authority to support the other relevant dates advanced by the plaintiff: the date of commencement of proceedings (6 October 2009) or the date of hearing (8 December 2009).

[49] I consider the situation in this case to be similar to that identified in *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650 at 657:

... where you find that two traders have been concurrently using in the United Kingdom the same or similar names for their goods or businesses, you may well find a factual situation in which neither of them can be said to be guilty of any misrepresentation. Each represents nothing but the truth, that a particular name or mark is associated with his goods or business.

It is *misrepresentation* which lies at the root of the action ...

[50] The plaintiff's first cause of action raises no serious question to be tried. Red Bull is entitled to continue with conduct which was innocent in its inception.

Section 9 Fair Trading Act

Pleadings

[51] As a second cause of action the plaintiff pleads in its statement of claim:

The defendants by their use of the trade mark POCKET ROCKET ... are engaging in conduct that is misleading or deceptive or is likely to mislead or deceive consumers and/or members of the trade.

[52] The pleading lists a number of respects in which it is alleged that consumers or members of the trade may be misled or deceived in relation to the plaintiff's

POCKET ROCKET product and the defendants' ENERGY SHOT/SUGAR FREE SHOT product.

[53] The statement of claim then pleads that the defendants' conduct contravenes at least s 9 of the Fair Trading Act.

[54] The defendants deny these claims.

Elements of misleading and deceptive conduct

[55] Section 9 of the Fair Trading Act provides:

9. **Misleading and deceptive conduct generally**

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[56] The relevant principles have been summarised in numerous cases, for example: *Cerebos Greggs v Unilever* (1994) 5 NZBLC 103,497 (HC); *Unilever New Zealand Ltd v Cerebos Gregg's Ltd* (1994) 6 TCLR 187 at 192 (CA) where the Court of Appeal accepted the principles as analysed by Fisher J in the High Court; *Magellan Corp Ltd v Magellan Group Ltd* (1995) 6 TCLR 268 (HC).

[57] In the circumstances of this case the following elements are relevant:

- a) The conduct must be "in trade".
- b) There must be a misrepresentation by the defendants: *Neumegen v Neumegen & Co* [1998] 3 NZLR 310 (CA); *Bonz Group (Pty) Ltd v Cooke* [1996] 7 TCLR 206 (CA).
- c) There must be conduct (whether express or by silence) that is misleading or deceptive or is likely to mislead or deceive. (No intention to mislead or deceive is required: *Parkdale v Puxu* (1982) 149 CLR 191.)

- d) The exercise of a discretion in granting a remedy will involve consideration of the public interest (not the plaintiff's reputation): *Tot Toys Ltd v Mitchell* [1993] 1 NZLR 325 (HC) (a breach of s 9 did not justify a remedy because of minimal public impact).
- e) There is no need for proof of damage arising from the misleading or deceptive conduct.

Misrepresentation

[58] The above elements were generally common ground between the parties. There is no dispute that the "in trade" requirement is satisfied.

[59] Mr Brown QC for the plaintiff made extensive submissions about the requirement for proof of a misrepresentation by words or conduct or a combination of words and conduct, citing from *Unilever v Cerebos Greggs, Bonz and Neumegen*. The defendants' response to the plaintiff's allegations under s 9 was essentially the same as its defence to passing off: that the defendants were first in the market, and their words and conduct could not amount to a misrepresentation in relation to the plaintiff's V POCKET ROCKET product because the plaintiff had not established any reputation or goodwill in its product at the time of the alleged objectionable conduct.

[60] In closing submissions Mr Miles confirmed that the plaintiff accepted the need for a misrepresentation. He said the issue in this case is timing: namely the relevant date at which the alleged misleading and deceptive conduct should be assessed. He submitted that Frucor had established a reputation and goodwill in respect of its V POCKET ROCKET product at either the date of issue of proceedings, 6 October 2009, or at the date of hearing, 8 December 2009, and that it does not matter which party launched its product first, so long as the plaintiff can show a reputation and a likelihood of misleading or deceptive conduct.

[61] In support of the plaintiff's position, Mr Miles relied significantly on the analysis of Fisher J in *Magellan*. He submitted that the cases cited by the

defendants, *Bonz* and *Neumegen*, did not need to confront, and did not deal with, the timing issue, because in those cases the plaintiff clearly entered the market first. But in *Magellan* the issue of timing in relation to the acquisition of reputation was squarely raised and dealt with by Fisher J. He said Fisher J's analysis has not been critiqued or criticised in subsequent Court of Appeal authority. He submitted the plaintiff can raise a serious question to be tried in the circumstances of this case, based on Fisher J's analysis.

[62] I turn to consider the cases of *Magellan*, *Bonz* and *Neumegen*.

Magellan Corp Ltd v Magellan Group Ltd (1995) 6 TCLR 598 (HC)

[63] The parties in *Magellan* were in the commercial and industrial property industry. The plaintiff companies ("Corporation") had been in business since 1984 under one name or another including the word "Magellan". By 1992 Corporation's business was active but the company was not listed in the telephone directory.

[64] In 1992 the defendants entered the commercial property industry. A company search revealed the existence of the two plaintiffs but the defendants did not recognise their names. They incorporated Magellan Group Limited ("Group") and immediately commenced business and promotion under the name "Magellan".

[65] There was immediate and continuing confusion. Both parties relied on the word "Magellan" as their primary means of identification. While their spheres of operation were not identical there was a major area of common activity.

[66] Group was the larger company with the stronger reputation but had entered the market after Corporation.

[67] It was common ground that representations were made to the public by Group as to its identity by using the name "Magellan" and that this was conduct in trade. Whether the conduct was a breach of s 9 turned on the question of whether it was, or was likely to be "misleading or deceptive" by causing confusion with Corporation.

[68] Fisher J concluded that Group's conduct in using the word "Magellan" was inherently likely to mislead customers dealing with the two entities and had done so. Accordingly Group was in breach of the Fair Trading Act. He then turned to consider the counterclaim by the defendant Group that Corporation, the plaintiff, was breaching the Act as well.

[69] Fisher J identified at 609:

The only legal issue in the present proceedings concerns the significance of a claim by the plaintiff that it was the first to acquire a reputation associated with the name in question.

[70] Corporation argued that it could not be in breach of s 9 if it was the first to use the name. In that respect Fisher J accepted Corporation's evidence that it had created and retained a reputation under the name Magellan over the eleven years since 1984.

[71] Group argued that the issue was not priority in time but the current reputation of the two parties.

[72] Fisher J at 608 noted that: "consumer protection is the primary object of the [Fair Trading] Act".

[73] At 612 he said it was important to distinguish between damages and injunctions. Damages were concerned, he said, with losses already incurred as the result of past breaches. But injunctions were different: they were concerned with the future. He continued at 612:

If a trader uses a name in a way which causes a customer to confuse the two companies or their products, associations or attributes, the trader's conduct is misleading. That is all that s 9 relevantly requires. Whether the trader acts in that way must ultimately turn upon the reputations of the two organisations as at the date of the conduct in question, however and whenever those reputations may have been derived. It could not turn upon temporal priority in adopting the name. Priority may have played its part in contributing to a superior reputation today but if the ultimate question is whether conduct is misleading it must be the reputation today which matters, not its causes or history.

That view would seem entirely consistent with the consumer-protection orientation of the Act. ...

[74] At 613 he said:

... the primary object of the statute is to protect consumers. It matters not to the consumer who uses a name first if the result of its current use is confusion. Thirdly, a newcomer will normally begin with no significant reputation in the name. At that stage the original user will be misleading nobody by continuing to use its own name. Only the newcomer's conduct will be misleading and only the newcomer could be restrained.

So far as I can see an original user could lose the right to use its own name only if its own apathy allowed that to happen. ...

... I can see nothing anomalous in the basic proposition that the original user of a name could breach the Fair Trading Act by continuing to use its own name if it has allowed an interloper to acquire its own reputation in the use of the same name. In the end the only relevant thing which matters under s 9 is whether conduct is misleading or deceptive.

[75] Fisher J distinguished a number of passing off cases, such as *Pub Squash*, as being concerned with a defendant's infringement of the plaintiff's extant rights at common law. He said at 613:

The Fair Trading Act has the wholly different purpose of preventing deception of the public whatever the historical causes of the deception. So priority in establishing a reputation is not a defence to an action based on breach of the Fair Trading Act.

[76] On the facts of the case, the Judge held that the conduct of Corporation in continuing to use its own name was causing confusion to those members of the public more familiar with Group and that Corporation also was breaching the Fair Trading Act. He concluded that both parties should be allowed to continue to use the name "Magellan", providing they introduced suitable distinguishing information.

[77] The fact that Corporation was first to use the name was a discretionary consideration the Judge took into account. He ordered Group to pay substantial costs to Corporation.

Bonz Group (Pty) Ltd v Cooke (1996) 7 TCLR 206

[78] Bonz sued the defendant, Mrs Cooke, for infringement of copyright and breach of s 9 of the Fair Trading Act. Bonz manufactured and sold woollen garments. The defendant had worked for Bonz but had been dismissed. A short

time later she started business on her own account manufacturing and selling woollen garments. Bonz contended she had been manufacturing and selling three garments too similar to its own. The main issue was whether the Bonz garments had copyright protection and whether there had been infringement of the copyright, but Bonz also claimed that the defendant was acting in breach of s 9.

[79] Tipping J, who decided the case in the High Court, determined there was insufficient similarity between Mrs Cooke's garments and those of Bonz for there to be a real risk of confusion or deception arising from the appearance of the garments. He also looked at the issue from the point of view of misrepresentation. He held that Bonz had not satisfied him that Mrs Cooke had misrepresented her garments as Bonz garments or as having a connection or association with Bonz.

[80] The judgment of Tipping J was upheld by the Court of Appeal. Gault J, delivering the judgment for the Full Bench, said at 210:

There is nothing in the authorities referred to indicating that in a case such as the present one the Judge must be said to have erred in his approach by requiring the plaintiff to establish a misrepresentation.

[81] At 211, Gault J said:

In this case counsel did not identify any conduct of Mrs Cooke which could be said to be misleading or deceptive but did not amount to a misrepresentation. On the contrary, the case for Bonz is that by placing before prospective customers garments the design and appearance of which so nearly resembled those of Bonz Mrs Cooke was conveying that her garments were those of Bonz, or associated with Bonz. That plainly is an allegation of misrepresentation ...

[82] Similarly in this case, Mr Miles accepted that the plaintiff is required to establish a misrepresentation by Red Bull. The plaintiff does not assert misleading or deceptive conduct by Red Bull which does not amount to a misrepresentation. In *Bonz* the Court of Appeal observed at 210 that in some circumstances, such as those involving silence in the face of an inference, there may be misapprehension without any misrepresentation. However, that was not of relevance in the *Bonz* case, and it is not of relevance in this case.

[83] This case involved a contest between an established legal partnership which had operated for many years under the name “Neumegen & Neumegen”, although it practised under the name of “Neumegen & Co” at the time of the proceedings. Mr Peter Neumegen who had practised under that name since 1984 proposed, when joined by his cousin Mark Neumegen, to adopt as the firm name, Neumegen & Neumegen.

[84] In the High Court, Paterson J granted a permanent injunction restraining Peter Neumegen from carrying on practice under the name Neumegen & Neumegen. This decision was upheld on appeal. Blanchard J, delivering the judgment of the majority of the Court of Appeal, said at 317:

Generally, indeed it may be thought in virtually all cases, a defendant's conduct will not be deceptive or misleading unless it amounts to a misrepresentation. The misrepresentation may be express or arise from silence or from conduct. It need not be intentional and often will not be. (*Bonz Group Pty Ltd v Cooke* (1996) 7 TCLR 206.)

However, there will be no misrepresentation by means of the adoption of a trading name unless the name has already acquired a reputation amongst a class of consumers as denoting the goods or services of another trader, so that members of that class will be likely mistakenly to infer that the goods or services are connected with the business of that other trader (*Chase Manhattan Overseas Corp v Chase Corp Ltd* (1986) 8 IPR 69 at p 78 and *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303). The more unusual the name, the more likely it will be that its use by another trader has given rise to a secondary signification.

Discussion of authorities

[85] In *Bonz* and *Neumegen* the plaintiffs had, in each case, clearly entered the market well in advance of the defendants and had established a reputation. In neither case was the issue regarding timing, which arose in *Magellan* and which arises in this case, faced or addressed. The judgments of the Court of Appeal in *Bonz* and *Neumegen* do not deal directly with the issue of timing, nor the analysis of Fisher J on this aspect, although the statements in *Neumegen* cited above at [84], anticipate the necessity for the plaintiff to have acquired a reputation in the relevant market. This is the interpretation strongly advanced by the defendants.

[86] Mr Brown submitted for the plaintiff:

- a) No authority was cited by Fisher J for the proposition that “... priority in establishing a reputation is not a defence to an action based upon breach of the Fair Trading Act: *Magellan* at 613.
- b) The passage from *Neumegen* at 317 (cited above at [84]) is quite inconsistent with Fisher J’s proposition. There can be no misrepresentation as a result of Red Bull adopting the slogan BLUE SILVER POCKET ROCKET unless the mark V POCKET ROCKET belonging to the plaintiff had *already* acquired a reputation amongst a class of consumers as denoting the goods or services of the defendants. It was significant that while the majority of the Court of Appeal in *Neumegen* referred to the *Magellan* case there was no reference to Fisher J’s propositions and the Court’s decision is quite contrary to Fisher J’s propositions as a matter of law.
- c) The consequences of Fisher J’s proposition are “startling”. Counsel instanced a situation where A innocently commences use of a slogan and continues to use it in a consistent fashion. A later trader, B, commences use of a similar mark, outspends trader A, acquires a substantial reputation and then alleges breach of the Fair Trading Act based on its subsequently acquired reputation. Mr Brown submitted that Fisher J’s rationale for dealing with such a situation (at 613 of the *Magellan* judgment) were flawed and not applicable in the present case.

[87] It is incontrovertible that there is no misrepresentation in adopting a name at a point before any other trader has acquired a reputation in that name. This was the situation at the point when Red Bull began to use its BLUE AND SILVER POCKET ROCKET slogan, which was before the V POCKET ROCKET product entered the market, whether in promotion to the trade or at retail. At that point there was no conduct by Red Bull that could be deceptive or misleading in relation to the plaintiff’s product.

[88] However, if the alleged objectionable conduct is assessed at a later point, for example when the proceedings were issued on 6 October 2009 or at the date of hearing on 8 December 2009, it might be arguable on the basis of Fisher J's approach in *Magellan*, that once Frucor was in the marketplace with its V POCKET ROCKET product, the continuation of the use by Red Bull of the BLUE SILVER POCKET ROCKET slogan could create confusion in the minds of consumers to the point that it misleads or is likely to mislead consumers of energy shot products. In short, it may be an arguable proposition for the plaintiff that the defendants are not automatically immune in continuing to use the phrase, merely because at the time they began to use it the plaintiff did not have a reputation in the phrase.

[89] The application of Fisher J's approach in *Magellan* immediately raises the question whether Frucor could also be in breach of s 9 by entering the market with a product that could be confused with the defendants' product. In the circumstances of this case where the entry into the market by Red Bull was so closely followed by Frucor's entry into the market with their respective energy shot products, the question of timing is acutely relevant. But that question is not in issue at this point.

[90] Those are issues that must await determination at a substantive hearing. At this interim stage, the most that can be said is that the plaintiff may have an arguable case under s 9 if it can prove that the defendants' conduct is, or is likely to, mislead and deceive consumers of the parties' respective energy shot products.

Deceptive or misleading conduct?

[91] The timing question aside, to establish a case for a permanent injunction, Frucor must establish that Red Bull's conduct in using the BLUE SILVER POCKET ROCKET slogan in brochures, window decals and promotions to the public is either misleading or deceptive or likely to mislead or deceive potential consumers of energy shot products. There was no evidence of actual confusion in the marketplace, as Frucor accepted.

[92] In *Bonz* at 213-214 the Court of Appeal said:

That which is misleading or deceptive (where there is no evidence of actual deception) will be that which is assessed as likely to mislead or deceive in postulated circumstances – that is when encountered by reasonable members of a significant section of the public. To be meaningful and capable of application to particular fact situations the degree of likelihood that the result will happen must be taken into account. ... that there must be a real and not remote chance or possibility – that the minimal is to be disregarded. That seems no different in substance from what this Court has said in *Taylor Bros Ltd* ... that there must be a real likelihood that persons will be misled or deceived. That, of course, is a question of fact and degree in the circumstances of each case.

[93] In *Neumegen* the Court said at 317:

It is not necessary to show that any consumer has suffered economic loss nor that a rival trader has lost custom because of the defendant's conduct.

However, in our view, if the number of affected members of the public is or will be very small and the impact upon those persons is or will be minimal a Court may be justified in taking the view that, looked at in the round, the conduct of the defendant is not properly to be characterised as deceptive or misleading or that, even if it has to be so characterised, what has occurred or is likely to occur is so lacking in real importance to any consumers who may be affected that the Court's discretion may fairly be exercised against the granting of a remedy. In considering these questions the Court will make a judgment about whether the conduct is of a kind which it is the object of the legislation to curb.

[94] There are a number of factors which in combination lead me to the conclusion that the plaintiff is unable to establish that the alleged objectionable conduct of the defendants in its use of the BLUE SILVER POCKET ROCKET slogan is conduct that is misleading or deceptive or likely to be misleading or deceptive, to reasonable numbers of that section of the public who are consumers or potential consumers of energy shot drinks:

- a) There is no evidence of confusion or deception during the first approximately three and a half months the competing energy shot products have been on the market. The plaintiff has provided no evidence of actual confusion. Messrs Rowell and Elson who filed affidavits for the defendants have both given evidence that they are not aware of any consumer complaints to the second defendant, nor in the trade.

- b) Red Bull is using the BLUE SILVER POCKET ROCKET slogan in material to promote its energy shot product. It does not appear on the product itself (refer blue and red can in Schedule A).
- c) On the other hand, Frucor's product is clearly branded "V POCKET ROCKET" (refer Schedule A).
- d) Where the defendants' slogan A BLUE AND SILVER POCKET ROCKET is used on brochures and window decals it is consistently shown alongside a photograph of the distinctive RED BULL blue and silver packaging (refer Schedule B). Thus, when the slogan is used, the consumer is unmistakably directed to the blue and silver product of the defendants.
- e) The energy shot products of both Frucor and Red Bull are designed as extensions of their existing strong brands in the New Zealand marketplace. The distinctive bright green V products of Frucor and the equally distinctive blue and silver energy drink products of Red Bull have co-existed in the New Zealand market for some thirteen years without any evidence of confusion or deception. The energy shot products in both cases lever off and extend the existing well known and established brands and adopt the same distinctive features.
- f) Evidence given by Mr Ian Buchanan, Frucor's marketing manager, which was not contested by the defendants, is that the target market for energy drinks is the 18-34 year old group of consumers. These consumers are "brand savvy" as is shown by the research material referred to by Mr Buchanan and also by Mr Rowell, general manager of the second defendant.

[95] Further, if both the plaintiff and defendants were to continue to use the phrase POCKET ROCKET in the way they presently do in relation to their respective energy shot products, I consider there is sufficient and suitable distinction in the manner the phrase is used by each party, so as to negate or minimise any potential

for confusion in the marketplace. In other words, the outcome that Fisher J ordered in the *Magellan* case, which enabled both parties to continue to use the name Magellan provided they introduced suitable distinguishing information, is in my view being achieved in the present situation.

[96] The plaintiff filed an affidavit by David Innes, an independent marketing and communications consultant of Auckland. Mr Innes has impressive credentials in relation to marketing communications and has given expert evidence on numerous occasions since 1997. However, Mr Innes does not claim any specialised experience or expertise in the energy drink market, nor detailed knowledge of the parties' brands.

[97] Mr Innes says it is widely accepted that advertising materials at point of sales, such as window decals, can contribute significantly to the success of a brand. He says this case is "unusual" since the promotional materials, i.e. the window decals and promotional leaflets, could be seen as "non-core" to the Red Bull energy shot brand.

[98] He expresses the view that there is unlikely to be confusion between the two brands in the case of regular users highly loyal to one brand or the other, but in the area of significant overlap, around twenty percent, it is "entirely possible ... that in a moment of confusion" such consumers may assume that Red Bull is the plaintiff's product.

[99] He goes on to express the view that there is significant potential damage for the POCKET ROCKET brand because, he says, it will impede Frucor's ability to develop a distinctive and thus valuable sub-brand in the POCKET ROCKET. He concludes:

... failure to obtain exclusive use of the words "pocket rocket" will be damaging to the future of the "V Pocket Rocket" brand and could well destroy that brand.

[100] As the defendants pointed out in their submissions, Mr Innes' views seem to be predicated on the assumption that Frucor has some exclusive use of the words "pocket rocket" which they seek to retain. That, of course, is not the situation.

[101] Mr Innes does not explain why he considers it is “entirely possible” and “quite reasonable to assume” that consumers will assume some linkage between the two brands, when the energy shot products as presented to the market are so distinctly different, and distinction between the two brands has been well established, without any evidence of confusion, over a period of approximately thirteen years while both parties have been successful players in the energy drinks markets in New Zealand.

[102] Further, Mr Innes, referring to the evidence of Mr Lamb and Mr Buchanan for the plaintiff, accepts that V is an undisputed brand leader within the energy drink sector, probably with a market share in the order of 50-60 per cent, and that the sub-brand V POCKET ROCKET has since August 2009 achieved significant success and has “overtaken Red Bull within three weeks of its launch in terms of market share and dollar sales”. He further states: “It is reasonable to assume that it is headed for success as part of the overall V brand in terms of its goodwill and reputation amongst consumers of energy drink in the retail trade”. From these acceptances of strength in the market and assumptions of future strength of the V POCKET ROCKET product, Mr Innes provides little by way of reasons or analysis to support his conclusion that the V POCKET ROCKET brand could well be destroyed by failure to “retain” exclusive use of the words “pocket rocket”.

[103] I consider the evidence of Mr Innes largely unhelpful to inform the assessments the Court must make. As Richardson J stated in *Pioneer Hi-Bred Corn Co v Hy-Line Chicks Pty Ltd* [1978] 2 NZLR 50 (CA), 61-62 where goods are sold or may be sold to the general public for consumption, the Judge or officer making the decision is to take into account his own experience and his own reactions as a member of the public. The plaintiff accepted at paragraph 34 of its submissions that deception of the ordinary consumer, whether actual or likely in future, is for the Court to determine.

[104] The plaintiff has failed to satisfy me that there is any reasonable likelihood of confusion or deception amongst the relevant public as the result of use by the defendants of the slogan A BLUE AND SILVER POCKET ROCKET. Given the manner in which the defendants use that slogan on their promotional material, and

against the background of Mr Carter's evidence that the defendants have no current intention of extending its use of the phrase A BLUE AND SILVER POCKET ROCKET to the packaging of its energy shot products or their retail display boxes, the plaintiff has failed to establish that the conduct of the defendants is deceptive or misleading or is likely to be deceptive and misleading in the marketplace for energy drinks, such as to result in confusion amongst consumers as to the energy shot sub-brands of the parties.

[105] I am mindful that the application is for an interim injunction. But in the absence of any evidence at this stage that Frucor is or would be able to establish a real possibility of deceptive or misleading conduct on the part of Red Bull at either of the points it contends is the relevant point in time (filing of the proceedings or the hearing date of this application), there is no basis for the application to be granted.

[106] I conclude that there is no serious question to be tried under the second cause of action.

Balance of convenience

[107] The plaintiff emphasised that if the defendants are not enjoined at this stage and the plaintiff is ultimately successful at trial, damages will not be an adequate remedy for it. It will be virtually impossible, Frucor says, to assess the monetary value of the damage to the reputation and, in particular, to the distinctiveness of its brand.

[108] Frucor emphasised its huge investment in its V POCKET ROCKET product, estimated at some \$4m to date.

[109] Frucor says if the injunction is not granted the damage to the plaintiff will continue and escalate. On the other hand, Frucor submitted, the cost to the defendants of withdrawing the objectionable material from the marketplace would be in replacing the leaflets (\$10,000), reprinting costs (\$10,000) and additional costs of redefining the leaflets and window decals (\$3,500). This, submitted Frucor, is a quantifiable loss.

[110] Red Bull, for its part, contended that if the defendants were to be enjoined now but were successful at trial, there would be significant damage to Red Bull's credibility because of the inevitable perception that because Red Bull was forced by a Court order obtained by Frucor to withdraw the BLUE AND SILVER POCKET ROCKET slogan from the marketplace, it had made use of another company's intellectual property. It says there would be no way of managing the damage from such an inevitable inference, if an interim injunction were granted in favour of Frucor.

[111] Red Bull contended, therefore, that the actual costs involved in changing its promotional material in no way reflect the unquantifiable damage it would suffer, which could not be compensated by a remedy in damages following trial.

[112] The defendants also raised as a factor in assessing the balance of convenience, that there is evidence that Frucor was aware of the defendants' prior public use in the United States of a slogan using "Rocket in your Pocket" for its new energy shot product. Red Bull noted the evidence for Frucor that it was acutely aware of the activities of its competitors, both in New Zealand and overseas, it was aware from approximately January 2009 that Red Bull was looking to release an energy shot product in the United States; it had a photograph of the RED BULL energy shot product on 18 March 2009; it had access to an article on the "bevnet" website on 14 April 2009 which referred to the phrase "a blue and silver rocket in your pocket" for the RED BULL energy shot product (which Frucor clearly considered because Mr Buchanan said in evidence that Frucor did not consider the information in that article to be an indication that Red Bull intended to use POCKET ROCKET for its energy shot product); and Frucor was accessing information on the US energy shot market through AC Nielsen at the relevant time.

[113] The defendants submitted that the plaintiff should not be able to create its own inconvenience by taking a risk in proceeding with its V POCKET ROCKET brand name, and then seeking the intervention of equity in the form of an interim injunction; that it acted with its eyes open.

[114] I have considered the defendants' submissions about the evidence of the plaintiff's early knowledge about the activities and promotions of the RED BULL energy shot product in the United States, and find it perhaps surprising that in a closely monitored and highly competitive environment the plaintiff was not alerted by these early signs to the impending risk of competitive use of POCKET ROCKET. But the matter is largely one of conjecture, and I have not taken it into account.

[115] I accept there is the potential for inconvenience and cost for each of the parties if this judgment goes against them and that party is ultimately successful at trial. On the evidence presented by the plaintiff, the amount it has invested in promoting its V POCKET ROCKET product is significant, but on the other hand all the evidence is that the product has proved extremely successful in the marketplace in the first three and a half months since its launch.

[116] The defendants may have invested a comparatively modest amount in their promotional leaflets and window decals. I note too, that the BLUE SILVER POCKET ROCKET slogan is not core to the defendants' energy shot product; they also use in the promotional material the slogan "RED BULL gives you wings". Nevertheless I accept that there is likely to be damage to the defendants if they were required pursuant to Court order, to remove reference in the promotional material to the BLUE SILVER POCKET ROCKET slogan, for which damages could not adequately be assessed or compensated.

[117] I consider the balance of convenience is fairly equal and in those circumstances there is justification for the status quo to prevail.

Overall justice

[118] I have found there is no serious question to be tried. While I have concluded that the plaintiff may have a successful case under s 9 of the Fair Trading Act based on the reasoning in *Magellan*, I have concluded that the plaintiff is unable to establish deceptive or misleading conduct on the part of the defendants or conduct that is likely to mislead or deceive, such as would justify the interim injunction sought.

[119] There is no basis in my view for the defendants being required to amend or remove from the market on an interim basis, their promotional material in relation to their energy shot product, in the circumstances of this case.

Result

[120] The application for interim injunction is declined.

Costs

[121] The defendants are entitled to costs. If costs cannot be agreed memoranda may be filed.

FRUCOR – RED BULL TIMELINE

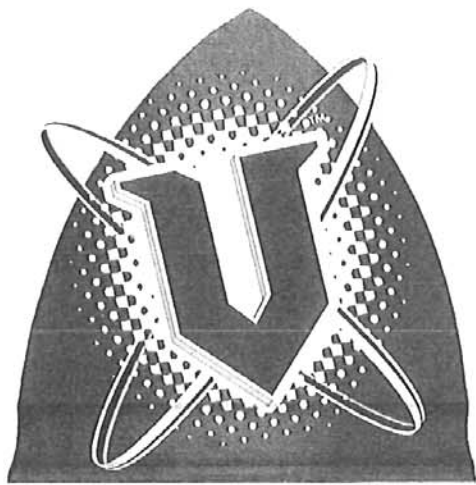
[“BSPR” means “BLUE SILVER POCKET ROCKET”
NORMAL TEXT INDICATES EVIDENCE OF THE PLAINTIFF
ITALICS INDICATE EVIDENCE OF THE DEFENDANT

12 December 2008	“Project 5AM Idea Gen” document circulated within Frucor
January 2009	Sean Wiggins, Senior Brand Manager, Frucor, states that he “became aware” that Red Bull was planning on releasing energy shot product
12 February 2009	Frucor employee (Adrian Blake) received AC Nielsen data; no mention of POCKET ROCKET
Early March 2009	Frucor employee (Adrian Blake) suggested the name POCKET ROCKET for V energy shot
<i>11 March 2009</i>	<i>Kastner & Partner, Red Bull’s advertising agency, includes the slogan “A POCKET ROCKET FOR YOUR POCKET in draft copy for sampling leaflet sent to Red Bull HQ</i>
<i>11 March 2009</i>	<i>Red Bull US sends email to Red Bull GmbH with mention of ROCKET for your POCKET</i>
11 March 2009	Frucor meets with Colenso BBDO and discusses POCKET ROCKET brand
<i>12 March 2009</i>	<i>Red Bull HQ re-word slogan to THE BLUE-SILVER POCKET ROCKET and circulate to various individuals at Red Bull HQ and Red Bull North America</i>
<i>12 March 2009</i>	<i>Red Bull GmbH email with BSPR sent</i>
17 March 2009	Colenso BBDO presentation to Frucor including brand POCKET ROCKET reference to “V POCKET ROCKET”
18 March 2009	Frucor “Research Brief” sent to Stent Research & Planning including reference to “V POCKET ROCKET”
<i>23 March 2009</i>	<i>Pre-launch sales of Red Bull Energy Shots made by Red Bull North America Inc to a store in Pennsylvania</i>
26 March 2009	Frucor receives email from Dashwood Design incorporating reference to “V POCKET ROCKET brand in product design
31 March 2009	Dash Design creates “Project 5AM Research Stimulus” including brand POCKET ROCKET
X April 2009	<i>Red Bull GmbH launches product in USA – some promotional material includes BSPR</i>
2 April 2009	Frucor email to Colenso BBDO including name POCKET ROCKET
<i>9 April 2009</i>	<i>Red Bull US trade press release includes phrase BSPR</i>
<i>9 April 2009</i>	<i>Article appears on Bevnet.com on Red Bull Energy Shot which is said to be entering the US market “this June”. Article includes byline “A blue and silver rocket in your pocket”.</i>
<i>14 April or 24 April 2009</i>	<i>Red Bull’s BSPR mentioned on beverageworld.com</i>
16 April 2009	Presentation by marketing team at Frucor including reference to POCKET ROCKET
23 April 2009	Baldwins does TM availability search for Frucor for POCKET ROCKET, GREEN BULLET and BULLET
<i>25 April 2009</i>	<i>Red Bull NZ start using BSPR as an internal marketing phrase</i>

30 April 2009	<i>Red Bull NZ presentation to Foodstuffs including reference to BSPR</i>
X May 2009	Frucor concept packaging mock-up ready including with brand POCKET ROCKET
X May 2009	Frucor engages Kudos Organisational Dynamics Ltd to conduct market research - POCKET ROCKET more popular
8 May 2009	<i>Red Bull NZ presentation to mobil including reference to BSPR</i>
8 May 2009	Frucor works with Colenso BBDO to produce commercial – TV scenario
25 May 2009	Frucor applies for NZ trade mark application No 806941 POCKET ROCKET
25 May 2009	<i>Red Bull allege that Alexandra Coats applies for NZ trade mark application No 806941 POCKET ROCKET – later assigned to Frucor</i>
27 May 2009	<i>Red Bull NZ presentation to Red Circle Petroleum Buying Group including reference to BSPR</i>
2 June 2009	Dashwood Design completes first round of design for POCKET ROCKET for Frucor
9 June 2009	Frucor registers www.vpocketrocket.co.nz (domain name)
X June 2009	Frucor registers www.vpocketrocket.com
Mid June 2009	Frucor presents V POCKET ROCKET product to trade
15 June 2009 – 1 July 2009	Frucor presents V POCKET ROCKET product to buyers at Progressive, Foodstuffs, BP, Shell, Exxon Mobil and Chevron
16 June 2009	<i>Red Bull NZ presentation to Caltex including reference to BSPR</i>
24 June 2009	<i>Red Bull NZ presentation to Shell</i>
15 July 2009	<i>Red Bull NZ becomes aware of Frucor intending to use POCKET ROCKET</i>
Late July 2009	Frucor's Auckland production starts
28 July 2009	<i>Red Bull applies for Austrian trade mark application No AM4519/2009 BLUE SILVER POCKET ROCKET</i>
X August 2009	Frucor presents to smaller retailers – Night N Day and Four Squares
6 August 2009	<i>Red Bull NZ issued promotional material including the phrase BSPR</i>
7 August 2009	<i>Red Bull NZ's first delivery to Auckland convenience store</i>
13 August 2009	<i>Red Bull applies for NZ trade mark application No 810898 BLUE SILVER POCKET ROCKET</i>
13 August 2009	<i>Red Bull NZ samples product and distributes flyers which include phrase BSPR</i>
Over August 2009	<i>Red Bull NZ distributes over 4000 flyers which include phrase BSPR</i>
19 August 2009	Frucor becomes aware Red Bull using POCKET ROCKET
25-29 August 2009	<i>Red Bull NZ circulates window decals to retail outlets which includes phrase BSPR</i>
26 August 2009	Frucor is assigned NZ trade mark application No 806941 POCKET ROCKET
26 or 27 August 2009	Frucor's POCKET ROCKET released to general public (Wiggins evidence is 27 August)
27 August 2009	Frucor's POCKET ROCKET released to 'organised' petrol stations
28 August 2009	<i>Red Bull NZ's BSPR ads shown on LCD displays at Shell stations (for a period of 6 weeks)</i>
X September 2009	Frucor presents to dairies
Over September 2009	<i>Red Bull NZ distributes over 5000 flyers which include phrase BSPR</i>
2 September 2009	Frucor distributes 10,000 samples to website (vrepublik) members
2 September 2009	Frucor's POCKET ROCKET websites go live

6 September 2009-29 November 2009	Frucor's commercials run/scheduled to run
7 September 2009	Frucor's POCKET ROCKET released to all petrol stations
<i>7 September 2009</i>	<i>Red Bull NZ presented to trade buyers</i>
14 September 2009	Frucor's POCKET ROCKET released to all grocery and dairy retailers
21 September 2009	Frucor's other websites introduce POCKET ROCKET promotional material
<i>24 September 2009</i>	<i>Red Bull opposes Frucor's trade mark application No 806941</i>
27 September 2009	Frucor's nationwide bus shelter campaign begins - over 500 poster places
28 September 2009	10,000 hits on YouTube for Frucor's Sky Tower commercial
30 September 2009	Frucor has 354,000 units of product ready for distribution
<i>Over October 2009</i>	<i>Red Bull NZ distributes over 5000 flyers with BSPR</i>
6 October 2009	These proceedings issued by Frucor

SCHEDULE A



**POCKET
ROCKET**

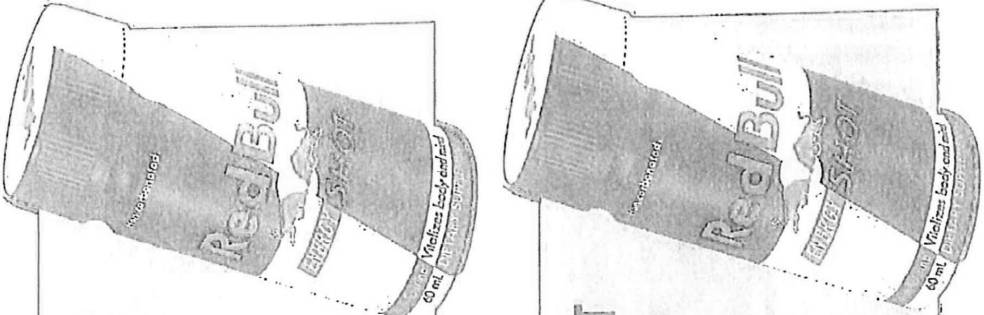
**GUARANA
ENERGY
SHOT**

**60ml
DIETARY
SUPPLEMENT**

SCHEDULE A



SCHEDULE B – ITEM B1



**A BLUE AND SILVER
POCKET ROCKET**

- IN YOUR SPORTS BAG
- IN YOUR DESK DRAWER
- IN YOUR GLOVE BOX
- IN YOUR POCKET

**THE ONLY SHOT THAT
GIVES YOU WINGS.**

- IN YOUR SPORTS BAG
- IN YOUR DESK DRAWER
- IN YOUR GLOVE BOX
- IN YOUR POCKET

**A BLUE AND SILVER
POCKET ROCKET**

- IN YOUR SPORTS BAG
- IN YOUR DESK DRAWER
- IN YOUR GLOVE BOX
- IN YOUR POCKET

**THE ONLY SHOT THAT
GIVES YOU WINGS.**

- IN YOUR SPORTS BAG
- IN YOUR DESK DRAWER
- IN YOUR GLOVE BOX
- IN YOUR POCKET

**THE ONLY SHOT THAT
GIVES YOU WINGS.**

- IN YOUR SPORTS BAG
- IN YOUR DESK DRAWER
- IN YOUR GLOVE BOX
- IN YOUR POCKET

SCHEDULE B – ITEM B2

THE ONLY SHOT THAT GIVES YOU WINGS.

Always on the go, by day, by night, at work and at play, people today want to accomplish and experience more than ever before. When nothing but the sky's the limit, it would help to have a pair of wings.

Red Bull Energy Shot, the only shot that gives you wings, is the perfect answer for those times when you need energy in a sip.

A BLUE AND SILVER POCKET ROCKET.

Red Bull Energy Shots fit everywhere, from your pocket and purse to your jacket and glove box. And since they don't need refrigeration, they always fit into your schedule, too. A long drive, the middle of a meeting, non-stop workouts and overnight study sessions are just a few of the times when an energy shot helps keep you going without you needing "to go." In a sip, Red Bull Energy Shots vitalize body and mind.



A UNIQUE INGREDIENT: WINGS.

Like its siblings, Red Bull Energy Shot contains taurine, glucuronolactone and caffeine, but with less liquid and only 27 calories.

This means Red Bull Energy Shot:

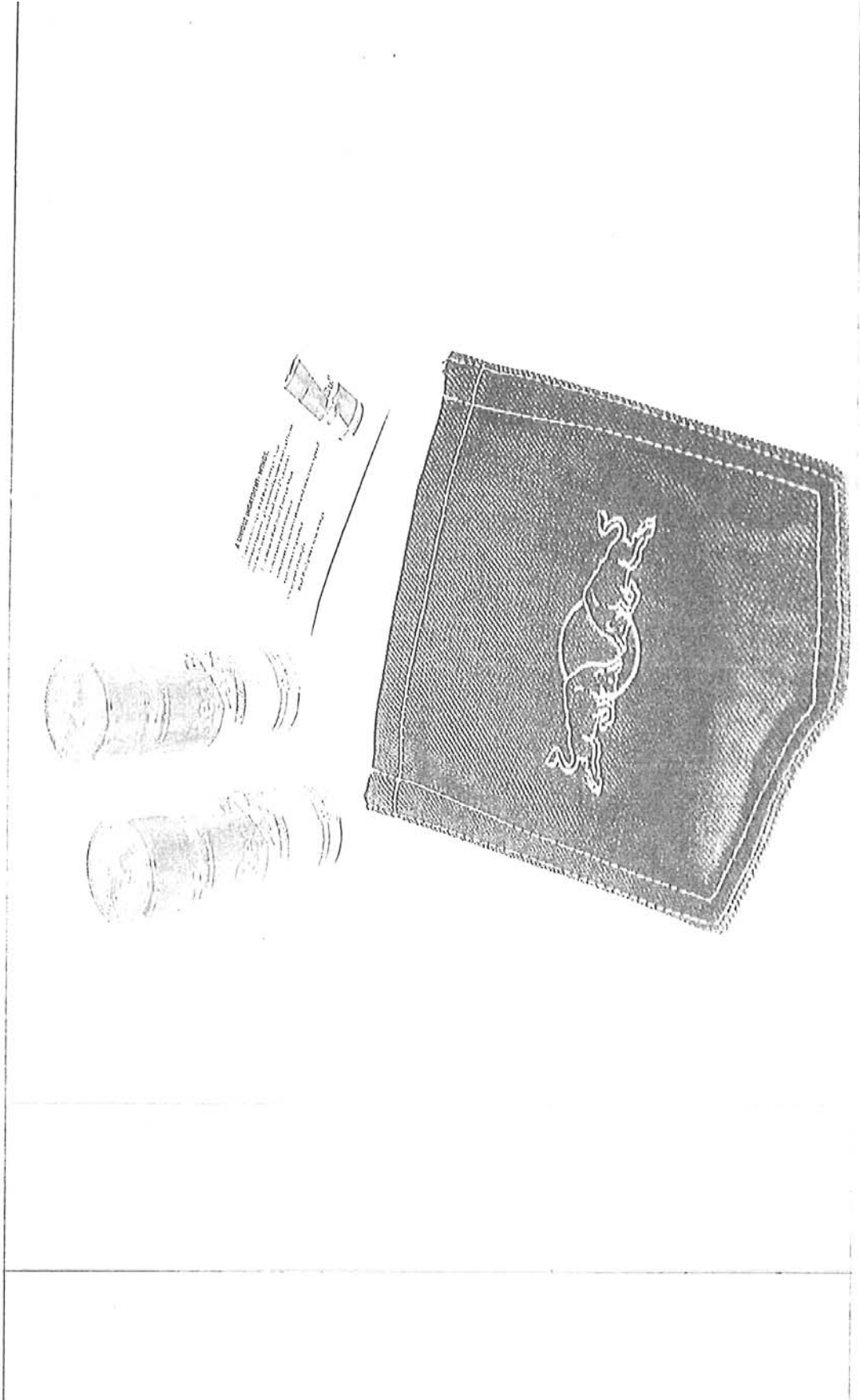
- increases performance
- increases concentration and reaction speed
- improves vigilance

Or to put it simply:

Red Bull gives you wings.



SCHEDULE B – ITEM B3



LABORATORY INFORMATION
The following information was obtained from the examination of the items shown above:
1. The items are consistent with the items described in the report.
2. The items are consistent with the items described in the report.
3. The items are consistent with the items described in the report.
4. The items are consistent with the items described in the report.
5. The items are consistent with the items described in the report.
6. The items are consistent with the items described in the report.
7. The items are consistent with the items described in the report.
8. The items are consistent with the items described in the report.
9. The items are consistent with the items described in the report.
10. The items are consistent with the items described in the report.

SCHEDULE B – ITEM B3

A UNIQUE INGREDIENT: WINGS.

Like its siblings, Red Bull Energy Shot contains taurine, ginseng, ginsenosides and caffeine, but with less liquid and only 27 calories.

This means Red Bull Energy Shot:

- increases performance
- increases concentration and reaction speed
- improves vigilance

Or to put it simply:

Red Bull gives you wings.



SCHEDULE B – ITEM B3

THE ONLY SHOT THAT GIVES YOU WINGS

Always on the go, by day, by night, on the road or at play, people today want to accomplish and experience more than ever before. When nothing but the sky's the limit, it would help to have a pair of wings. Red Bull Energy Shot, the only shot that gives you wings, is the perfect answer for those times when you need energy in a sip.

A BLUE AND SILVER POCKET ROCKET.

Red Bull Energy Shots fit everywhere, from your pocket and purse to your jacket and glove box. And since they don't need refrigeration, they always fit into your schedule, too. A long drive, the middle of a meeting, non-stop workouts and overnight study sessions are just a few of the times when an energy shot helps keep you going without you needing "to go." In a sip, Red Bull Energy Shots vitalize body and mind.