

Look Alike Products- Why a label or get up trade mark registration is what you need

Aldi is a German discount supermarket chain that now has around 500 stores in the UK. It has been running an advertising campaign using the strapline 'Like Brands. Only Cheaper'. Aldi is well known for using get up similar to major brands for its own brand products. In 2012 Aldi launched their 'Miracle Oil' hair product, containing argan oil, using packaging similar to the well-known argan oil based product Moroccanoil, - a similar shaped brown bottle, and a turquoise label with orange, white and black text.

Moroccanoil Israel Ltd (MIL) took action for passing off, but failed because, although Aldi's packaging was deliberately similar to MIL's packaging, there was no evidence of customers being deceived about the source of Aldi's product.

To succeed MIL would have had to show:

- (a) goodwill in their Moroccanoil product in the UK,
- (b) a misrepresentation to a significant proportion of the public on the part of Aldi that their Miracle Oil product originated from MIL, and
- (c) damage to the MIL's goodwill by reason of that misrepresentation.

For there to have been a misrepresentation, the public must have been led to assume that, because of the get-up and name of the Aldi's product, it either (a) was the MIL's product or (b) was made or licensed by the manufacturer of the MIL's product. The UK courts clearly differentiate this from the confusion required for trade mark infringement where similarity of marks is relied on. That merely requires the public to wonder whether the products are the same, or are made by the same manufacturer or are licensed.

MIL had no evidence of misrepresentation and this hampered their likelihood of success. The judge held that if a customer makes an initial false assumption as to a trade connection between the MIL's and Aldi's goods, which is dispelled before purchase without causing damage, then there can be no passing off.

It is worth noting that the judge did not address the situation where there is an initial misrepresentation, which is transient and which is dispelled, but which does cause damage to a claimant.

Aldi appears to have made a conscious decision to make the packaging for Miracle Oil reminiscent of that of Moroccanoil. However there was nothing inherently unlawful in them creating a product which brought Moroccanoil to the minds of customers and, without evidence of those customers then believing that Aldi's product was manufactured by MIL, there could be no passing off.

This case illustrates well how much easier it can be to bring a trade mark action than a passing off claim. In that case confusion, rather than misrepresentation, will suffice and the position on initial interest confusion is clearer. If copycat packaging is likely to be an issue, then obtaining registration for the packaging of products must therefore be worth considering.