

"HEARING CARE" succeeds

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The New Zealand High Court recently awarded an interim injunction preventing National Hearing Care (New Zealand) Limited ("National Hearing") from using a stylised version of "national hearingcare" in certain regions of New Zealand - *Hearing Care Manawatu Ltd v National Hearing Care (New Zealand) Ltd* (unreported, CIV-2009-404-8506, High Court Auckland, 31 March 2010, Heath J).

The plaintiffs, Hearing Care Manawatu Limited and Hearing Care Wellington Limited ("Hearing Care"), had been using a trade mark incorporating the words HEARING CARE since 2005. National Hearing began to use the name "Hearing Care New Zealand" or "HearingCare New Zealand" in about July 2008.

Hearing Care raised the issue of National Hearing's use of "Hearing Care" in March 2009 but took no formal steps to prevent it until November 2009. As a result, National Hearing said that the delay was too long and fatal to the interim injunction application.

National Hearing also claimed that Hearing Care, having chosen a descriptive name, could not prevent others from using the same name. The judge chose deliberately not to deal with the merits of the competing claims and so this issue was not explored further.

A decisive factor in granting the interim injunction, despite the delay and alleged descriptiveness, may have been the fact that Hearing Care was able to point to examples of confusion and deception that had taken place. These included invoices that had been directed to the wrong entity, a Government entity who had changed Hearing Care's vendor numbers to National Hearing, as well as confusion amongst patients.

Despite the stylisation being different, there were said to be distinctive aspects of the trade marks that give rise to a potential for confusion, which appeared to be borne out by the evidence of confusion and deception. The judge said that if National Hearing had focussed on the words NATIONAL HEARING as opposed to HEARING CARE there would have been less room for confusion.

The judge concluded that there is a real risk of confusion in certain areas of New Zealand but not in others where Hearing Care did not have patients. On balance, the judge ruled that an interim injunction was justified but only to ensure the minimum amount of protection was granted.

The judge indicated that the matter should be brought on for substantive hearing as soon as practicable.

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