

IN THE COURT OF APPEAL OF NEW ZEALAND

CA680/2015
[2016] NZCA 141

BETWEEN

HONEY NEW ZEALAND
(INTERNATIONAL) LIMITED
First Appellant

MANUKA DOCTOR LIMITED
Second Appellant

AND

DIRECTOR GENERAL OF THE
MINISTRY FOR PRIMARY
INDUSTRIES
Respondent

Hearing: 4 February 2016
Court: Randerson, Cooper and Winkelmann JJ
Counsel: A H Brown QC and A I K Franks for Appellants
R E Schmidt-McCleave and P H Higbee for Respondent
Judgment: 20 April 2016 at 11:30 am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The judgment of the High Court is set aside including the order for costs.**
- C We declare that the trademark MANUKA DOCTOR used on the appellants' honey products for export does not constitute a health claim nor a therapeutic claim in breach of Standard 1.2.7 of the New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002.**
- D The respondent must pay costs to the appellants for a standard appeal on a band A basis with usual disbursements.**

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] The appellants produce and export honey from this country under the brand MANUKA DOCTOR, a registered trademark. For some time, the appellants have been unable to export their product because the respondent (to whom we shall refer as MPI) has been unwilling to issue export certificates for the product.¹

[2] MPI's reason for declining to issue the certificates is that it contends the appellants' label breaches the New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002 (the Code). In particular, MPI considers the words "MANUKA DOCTOR" constitute an impermissible "health claim" or a "therapeutic claim" in terms of the standards prescribed by the Code.

[3] After unsuccessful discussions with MPI, the appellants sought a declaratory ruling in the High Court that its brand was not in breach of the Code. In a judgment delivered on 9 November 2015, Simon France J declined to make the declaration

¹ More formally, export certificates are described as official assurances and are issued under s 61 of the Animal Products Act 1999.

sought.² He found that the use of the impugned words implied that, in an unspecified way, mānuka honey had properties that would be “good for your health”. The Judge found that unsubstantiated and insufficiently ratified claims about the health benefits of food are not permitted.³

[4] Given this finding, the Judge did not consider it necessary to address the issue of whether the label was a “therapeutic claim” but he recorded his view that “this was a rather more doubtful allegation”.⁴

[5] The appellants challenge the finding made in the High Court as being wrong in law. A number of points are raised but the central submission is that the term “health claim” requires that there be a claim to an identifiable or measurable “health effect” as that term is defined in the Code. Mr Brown QC submitted for the appellants that the Judge accepted this interpretation but did not apply it in reaching his conclusion. The correct conclusion was that the words in question make no claim to an identifiable or measurable health effect and do not breach the Code.

[6] For MPI, Ms Schmidt-McCleave supported the conclusions of the High Court Judge and also submitted that the appellants’ label was a “therapeutic claim” that breached the Code.

[7] We record that a second brand used by the appellants (MANUKA PHARM) was in issue in the High Court but no appeal is pursued in connection with those words.

The statutory scheme

[8] Our description of the background to the Code and its key terms is largely drawn from the Judge’s summary. In 1995 the governments of New Zealand and Australia agreed to operate under a single food standard. A new Part 2A of the Food

² *Honey New Zealand (International) Ltd v Director General of the Ministry for Primary Industries* [2015] NZHC 2764.

³ At [28].

⁴ At [47].

Act 1981 was introduced by statutory amendment in 1996.⁵ The purposes of the amending legislation were identified in s 11B of the Food Act:

11B Purposes of this Part

The purposes of this Part are—

- (a) to provide for greater flexibility in the regulatory arrangements relating to food manufactured or prepared for sale or sold in New Zealand, or imported into New Zealand, having due regard to the following matters:
 - (i) the need to protect public health;
 - (ii) the desirability of avoiding unnecessary restrictions on trade;
 - (iii) the desirability of maintaining consistency between New Zealand's food standards and those applying internationally;
 - (iv) the need to give effect to New Zealand's obligations under any relevant international treaty, agreement, convention, or protocol; and
- (b) in particular, to give effect to the Australia – New Zealand Joint Food Standards Agreement.

[9] Section 11C of the Food Act provided that the Minister of Primary Industries may issue standards in respect of food manufactured or prepared for sale or sold in New Zealand or imported into New Zealand. After extensive consultation, the Code at issue in this appeal came into force on 20 December 2002. Of prime relevance to the present case is Standard 1.2.7 which relates to “Nutrition, health and related claims”. Although parts of the Code have been replaced with effect from 1 March 2016, there are no material changes in terms of the matters at issue.⁶

[10] Standard 1.1.1 of the Code included matters of interpretation, application, and general prohibition. The following definitions are critical to the disposition of the appeal.

⁵ By s 9 of the Food Amendment Act 1996.

⁶ The Food Act 1981 has been repealed and replaced by the Food Act 2014 with effect from 1 March 2016. Our analysis of the statutory scheme, including the relevant version of the Food Standards Code, is based on how it stood prior to the 1 March 2016 amendments. The Food Act 2014 does not appear to be materially different from its predecessor so far as it is relevant to this appeal.

[11] A “**claim**” was defined in Standard 1.1.1 as meaning:

An express or implied statement, representation, design or information in relation to a food or property of food which is not mandatory in this Code.

[12] Further definitions were found in cl 2 of Standard 1.2.7:

health claim means a claim which states, suggests or implies that a food or a property of food has, or may have, a health effect.

health effect means an effect on the human body, including an effect on one or more of the following—

- (a) a biochemical process or outcome;
- (b) a physiological process or outcome;
- (c) a functional process or outcome;
- (d) growth and development;
- (e) physical performance;
- (f) mental performance;
- (g) a disease, disorder or condition.

general level health claim means a health claim that is not a high level health claim.

high level health claim means a health claim that refers to a serious disease or a biomarker of a serious disease.

[13] Health claims were dealt with in Division 2 of Part 3 of Standard 1.2.7. Clause 17(1) imposed a general prohibition on a “health claim” unless certain conditions were met. The first condition was that the claim met the relevant nutrient profiling scoring criterion. The second was that the health claim complied with the requirements of a high level health claim or a general level health claim as the case may be.⁷

[14] As to high level health claims, the Code referred in sch 2 of Standard 1.2.7 to a number of foods, identified claims of specific health effects, the context in which the claims were made, and the conditions under which the claims were permitted. Taking calcium as an example, one specific health effect identified in sch 2 was

⁷ Clause 17(3) or (4) of Standard 1.2.7.

enhancing bone mineral density; the context of the claim was a diet high in calcium; and the condition under which such a claim may be made was that the food must contain not less than 200 mg of calcium per serving.

[15] MPI contends that the appellants' label is a general level health claim. Clause 17(4) provided two routes by which a general level health claim may be permitted. The first was that the relevant food or property of food complied with sch 3 of Standard 1.2.7. The second route was that the maker of the health claim had to notify the Chief Executive Officer of MPI of the relevant details of the food in question and the health effects that had been established by a process of systematic review described in sch 6 of Standard 1.2.7. It is common ground that the appellants' product does not fall within the permitted health claims in either sch 2 or sch 3. Nor has any health claim been submitted for review under the sch 6 process.

[16] It is relevant to consider each of these two routes in a little more detail. Addressing the first option (compliance with sch 3), the Code set out a number of "foods or properties of foods" and "specific health effects" as well as specifying the conditions under which a general level health claim may be made in respect of those items. For example, in respect of calcium a specific health effect identified is a claim that calcium is "necessary for normal teeth and bone structure". For such a claim to be permissible, the food must meet the general claim conditions for making a nutrition content claim about calcium (described elsewhere in the Code). Similar conditions applied for iron where one of the specific health effects identified is a claim that iron is "necessary for normal oxygen transport".

[17] If there is a general level health claim as defined but it is not covered by sch 3, the alternative process of a systematic review under sch 6 applied. To give the flavour of the information which had to be provided under that process we set out cls 1 and 2 of sch 6:

1 A description of the food or property of food, the health effect and the proposed relationship between the food or property of food and the health effect.

2 A description of the search strategy used to capture the scientific evidence relevant to the proposed relationship between the food or property of food and the health effect, including the inclusion and exclusion criteria.

[18] Schedule 6 also required other specified information to be provided. This included, for example, the method used to measure the health effect, the size of the effect and its statistical significance. There must be a conclusion based on results of studies made as to whether a causal relationship has been established between the food and the health effect.

[19] It is immediately apparent that every one of the health claims described in schs 2 and 3 identifies specific health effects. So too the process for substantiating other health effects set out in sch 6, which focuses on measurable health effects substantiated by scientific studies. Clause 19 of Standard 1.2.7 also used the expression “specific health effects” when specifying how health claims (whether high level or general) were to be made.

Did the Judge err in finding that a health claim under the Code could be a general claim to unidentified benefits?

[20] We deal with this question first since it is purely a question of interpretation, the outcome of which will determine whether the Code applies to the appellants’ product. An analysis is required of the language used in the Code in light of its several purposes.

[21] It is common ground that the words “MANUKA DOCTOR” constitute a “claim” as defined in the Code. The issue is whether those words constitute a “health claim” as defined. We accept that the definition of health claim is expressed in wide terms. A claim may state, suggest or imply that a food has or may have a health effect. But the separate definition “health effect” is more narrowly drawn. First, the effect must be on the human body. Second, the effect may be any one or more of the specific effects identified in (a) to (g) of the definition. Although the list is non-exclusive, the expression “effect on the human body” takes colour from the enumerated list. This focuses on effects on specific processes or outcomes, identified and measurable targets such as growth, development or physical or mental performance and effects on diseases, disorders or conditions.

[22] We agree with the Judge that the appellants’ analysis of the Code “convincingly establishes” that any permissible health claim will always require an

identified effect.⁸ That conclusion follows from the definition of health effect for the reasons given and from our analysis of cls 17 and 19 in particular of Standard 1.2.7 as discussed at [13]-[19] above.

[23] Where we part company with the Judge is his conclusion that a general claim about unidentified benefits is a health claim and is not permitted under the Code. We set out the principal reasons given by the Judge for this conclusion:

[27] The legislation is consumer protection legislation. It is designed to achieve uniformity and accuracy in food presentation, and to ensure consumers are properly informed. Misleading statements are to be prevented. A regime of authentication is established and must be met before a health claim can be made. It is instructive to detail these requirements:

- (a) there must be a description of the search strategy used to identify the scientific evidence relied on;
- (b) the studies must include studies about humans – studies about the effect on animals and *in vitro* studies are not enough;
- (c) rules are prescribed for how studies are to be analysed and presented;
- (d) the conclusions drawn must include verifiable data about the amount of the food or food product required to produce the claimed benefit.

[28] The clear import is that unsubstantiated and insufficiently ratified claims about the health benefits of food are not permitted. There is no policy reason to support the proposition that these strictures do not apply to general vague claims. It would be a surprising situation. The better interpretation of the scheme is that the *only* health claims that are permitted are substantiated claims about identified benefits. A general claim about unidentified benefits is a health claim, just not a permitted one.

[29] The purpose provision of Standard 1.2.7 identifies its aims as being to set out the claims that can be made and to describe the conditions under which such claims can be made. This articulated purpose in Standard 1.2.7 reflects the wider purposes that were identified in the background documents and agreements, such as the original inter-government agreement. The annex to that Joint Agreement included amongst its purposes the provision of adequate information to allow informed choice, the prevention of misleading or deceptive conduct, and the facilitation of access to markets including by the promotion of fair trading. None of this is suggestive of allowing unproven general claims about the health effects of a food.

⁸ *Honey New Zealand*, above n 2, at [25]. The Judge used the term “benefit” rather than “effect” but we do not consider anything turns on this since it is very unlikely any food producer would claim anything other than a beneficial effect.

[30] It is important not to impose a gloss on the core definition of health claim. It is defined as a claim which states, suggests or implies that a food has or may have an effect on the human body. What follows thereafter are examples, but they do not qualify or limit this general definition. It does not stretch this general definition at all to regard claims such as “this food will be good for you” as coming within it. It is not credible that it was intended that it would be permissible to make a general claim to a benefit as long as one avoids saying how it would be good for you. The fact that the definition goes on to identify numerous categories of effects that come within the definition should not be seen as limiting the definition. Rather they emphasise its broad all encompassing nature.

(footnotes omitted)

[24] The Judge added that there would be a “considerable gap” in the consumer protection purpose of the Code if unproven general claims about health benefits could be made.⁹

[25] We accept that the legislation and the Code promulgated under it have a consumer protection purpose. Consumers are to be properly and accurately informed so that appropriate choices can be made. As well, misleading statements are to be prevented. Where claims of health effects are made they are to be made in accordance with the standards prescribed by the Code or are to be substantiated by the processes laid down.

[26] But it does not follow that general claims of unidentified health benefits are prohibited. First, as already discussed, the Code is clearly aimed at claims of specific measurable health effects. Second, it is clear from the Final Assessment Report prepared by Food Standards Australia New Zealand that although a “broad capture” of claims was intended, the Code would not cover certain categories of claims:¹⁰

11.2 Capture of a claim and determination of claim type

There will be a broad capture of all claims through the application of the definition of ‘claim’ under Standard 1.1.1 whether presented explicitly or implicitly. The definition of ‘claim’ encompasses any voluntary representations made in relation to a food. This covers words or other artwork on food labels or conveyed through mediums such as advertisements and also verbal representations in relation to food. In order for something to

⁹ *Honey New Zealand*, above n 2, at [45].

¹⁰ Food Standards Australia New Zealand *Final Assessment Report, Proposal P293: Nutrition, Health and Related Claims* (11 April 2008).

constitute a nutrition content, general level health claim or high level health claim, it must first be captured by the definition of ‘claim’.

The definitions around ‘general level health claim’, ‘high level health claim’ and ‘health claim’ and ‘nutrition content claim’ will determine the type of claims, both explicit and implicit, that will be captured by the draft Standard. Claims that will not be captured are those claims that do not explicitly or implicitly indicate the presence or absence of a property of the food or claims that do not describe or indicate the relationship between food or a specific component of food and a health effect, as per the definitions for ‘nutrition content claim’ and ‘health claim’ respectively.

Examples of such claims are *this food is organic*, *halal food* or *farm fresh*. These types of claims are subject to general fair trading legislation. FSANZ will provide further detail in a User Guide through the use of examples in relation to statements, representations, graphics, designs etc.

This approach will assist in addressing ‘implied claims’. It will do this firstly through the broad prohibition on nutrition content or health claims (including implied claims) and then only permitting the use of those claims, which explicitly reference a specific property of the food (for nutrition content claims) and health effect (for general level health claims). For more detail around FSANZ’s proposed approach for the regulation of implied claims refer to Attachment 4.

...

(original emphasis)

[27] Mrs Schmidt-McCleave relied on the last paragraph of this quotation but this must be read with the preceding paragraph which states explicitly that claims such as “farm fresh” in relation to food would not be captured by the Code. There are, we consider, very close parallels with the use of the description “farm fresh” and the Judge’s view that the words “MANUKA DOCTOR” imply that the appellants’ product would be “good for you”.

[28] Third, the gap in the regulatory framework which the Judge perceived is filled by the existence of the Fair Trading Act 1986,¹¹ and by s 10 of the Food Act 1981 which prohibits false and misleading statements in relation to food (including labels) purporting to indicate the nature, quality or effects of foods.

[29] Fourth, as Mr Brown emphasised, the other statutory purposes of the Code are not to be overlooked, including the desirability of avoiding unnecessary restrictions on trade. To interpret the Code as applying to general claims of

¹¹ See particularly ss 9, 10 and 13.

unidentified benefits or effects would not achieve that aim. Further, as we note below, we consider it very unlikely that a claim that MANUKA DOCTOR is “good for you” (if established) would mislead consumers into buying the appellants’ products when they would not otherwise have done so.

Did the Judge err in determining that MANUKA DOCTOR was an implied general level health claim?

[30] In view of our conclusion on the first issue, it is not strictly necessary to determine whether the Judge was correct to find that the use of the words “MANUKA DOCTOR” amounted to an implied general level health claim that the appellants’ product would be good for your health. We address this issue for completeness.

The Judge’s approach

[31] Simon France J accepted the appellants’ submission that, in considering this issue, the relevant group was the general buying public. He also accepted that the public would approach the product using a reasonable measure of commonsense. He was content to adopt the test counsel for the appellants had submitted was appropriate based on the Supreme Court’s decision in *Red Eagle Corp Ltd v Ellis*.¹² This was expressed as whether the labels objectively implied a health claim or therapeutic claim to a substantial number of relevant consumers exercising reasonable care. Simon France J also accepted that the buying public was, to a certain extent, able to discern labelling that was “mere puffery”.¹³ None of these principles is in dispute.

[32] The Judge considered that the use of the word “DOCTOR” carried the clear possibility the appellants’ product would be seen as suggesting it was “good for you”. The Judge relied on three main reasons for this conclusion:¹⁴

- (a) the common association of these concepts of DOCTOR and PHARM with health, healing and medicine;

¹² *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.

¹³ *Honey New Zealand*, above n 2, at [39], referring to *Unilever New Zealand Ltd v Cerebos Gregg’s Ltd* (1994) 6 TCLR 187 (CA).

¹⁴ *Honey New Zealand*, above n 2, at [40].

- (b) the absence of any alternative meaning that could be attributed to them;
- (c) the lack of any other connection between these concepts and the product that could explain the use of the words other than this health context. If these trade marks are seen by the consumer to contain any message, then in my view it is a health message that will be inferred by the consumer.

[33] The Judge also took into account evidence of the recognised health benefits of honey as a wound dressing as well as claims having been made in the past to antibacterial benefits. He considered that the likelihood of a general health benefit claim being inferred from the words used was increased because of this context, especially given the premium price for the goods and the fact that they had advertised health benefits when used in a different way.¹⁵

[34] The Judge rejected a submission made on the appellants' behalf that the impugned words were trademarks and therefore likely to be seen as identifying the source of the goods rather than any implied representation as to their nature or effect.

Discussion

[35] In this section of his argument, Mr Brown repeated in part the submissions he had already made on the first main issue. In particular, he re-emphasised the absence of any claim to an identified or measurable health effect; the lack of any clear articulation of exactly what the words "MANUKA DOCTOR" were said to convey; the significance of the trademark context; and the failure by the Judge to give weight to the degree of care expected on the part of the relevant section of the consumer public when considering purchasing the appellants' product.

[36] Ms Schmidt-McCleave supported the Judge's decision for the reasons he gave. She submitted that the interpretation adopted by the Judge was available to him although, as the Judge himself acknowledged, the meaning he attributed to the words was not one advanced by MPI. Before us, Ms Schmidt-McCleave submitted that the associations of the word "DOCTOR" were important. The consumer public would associate the word "DOCTOR" with someone qualified to treat sick people or

¹⁵ This was based on the evidence of an MPI witness, Ms Miller.

to “make them better”. It followed, she submitted, that the appellants’ product under the impugned label would be likely to be seen as making the consumer better or making them feel better. Another way of putting this was that the words implied that the appellants’ product would promote wellbeing. In terms of the definition of health effect, the words implied there would be an effect on the consumer’s physiological, physical or mental performance and/or on any diseases, disorders or conditions suffered by the consumer.

[37] We consider the meanings adopted by the Judge and advanced by MPI are somewhat strained. As Mr Brown pointed out, there are well known overseas marks such as DR PEPPER (a soft drink) and DOCTOR KRACKER (crackers and crisps). Closer to home, the use of the trade name the Rug Doctor is a familiar example. While it is possible some members of the consumer public might associate the word “DOCTOR” with health, healing and medicine (as the Judge thought), we consider it unlikely that a substantial number of relevant consumers exercising reasonable care would make that association.

[38] Second, contrary to the Judge’s view, there is another explanation for the use of the words “MANUKA DOCTOR”. On the opposite side of the label (admittedly in smaller print) the following is stated:

“Manuka Doctor – the specialists in quality New Zealand harvested Manuka honey. With levels certified by an independent validated laboratory, you can be assured of the rating in every batch of Manuka Doctor honey. The UMF grading system appraises natural markers found in Manuka honey & assures purity & quality. ...”

[39] This indicates that the use of the words “MANUKA DOCTOR” is intended to signify that the producers of the product are specialists in the quality and purity of honey. This is associated with the UMF grading system which also features on the primary side of the label immediately under the reference to “MANUKA DOCTOR”. We consider that consumers exercising reasonable care would have regard to the label as a whole and conclude that the use of the words “MANUKA DOCTOR” relates to the expertise of the producers and the assurance of the purity and quality of the honey through the UMF grading system. MPI makes no complaint

about these aspects of the labelling. The only complaint is about the words “MANUKA DOCTOR”.

[40] We are inclined to agree with the Judge that the fact that the impugned words are a registered trademark does not materially assist the analysis.

[41] Finally, we agree with the appellants’ submission that matters such as the price at which mānuka honey is sold and the health benefits of honey as a wound dressing do not materially support the Judge’s conclusion. MPI’s evidence confirmed that all mānuka honey products are in the high value range so the price factor is not unique to the MANUKA DOCTOR brand. No reference is made on the labelling of the appellants’ product to the health benefits of honey as a wound dressing. We consider it unlikely that substantial numbers of the consumer public would make the connection between the health benefits of honey as a wound dressing and the words “MANUKA DOCTOR” so as to conclude that these implied that honey would be “good for you”.

Do the words “MANUKA DOCTOR” constitute a therapeutic claim?

[42] As noted, the Judge did not reach any final conclusion on this issue and, again, it is not strictly necessary for us to address it in light of our earlier conclusions. However we briefly address the submission made on behalf of MPI.

[43] Clause 7 of Standard 1.2.7 provided:

7 Claims not to be therapeutic in nature

A claim must not–

- (a) refer to the prevention, diagnosis, cure or alleviation of a disease, disorder or condition; or
- (b) compare a food with a good that is –
 - (i) represented in any way to be for therapeutic use; or
 - (ii) likely to be taken to be for therapeutic use, whether because of the way in which the good is presented or for any other reason.

[44] Ms Schmidt-McCleave submitted that the words “MANUKA DOCTOR” would be interpreted by the ordinary consumer as referring to the prevention, diagnosis, cure or alleviation of a disease, disorder or condition. She submitted that this would be implied by the use of the word “DOCTOR”, meaning a person qualified to achieve that effect. Alternatively, it was submitted that the use of those words amounted to comparing the appellants’ honey product with a good in terms of subpara (b) of cl 7.

[45] We find these submissions unconvincing. While Mr Brown accepted that a therapeutic claim might be implied, we accept his submission that in terms of subpara (a) of cl 7 no reference (express or implied) is made to any disease, disorder or condition, let alone to the prevention, diagnosis, cure or alleviation of the same. We also accept there is no express or implied comparison between the appellants’ product and any other good within the meaning of subpara (b) of cl 7.

Conclusion

[46] In summary, for the reasons given, we conclude that the words “MANUKA DOCTOR” on the appellants’ product do not constitute a health claim or a therapeutic claim within the meaning of the Code.

[47] In formal terms:

- (a) The appeal is allowed.
- (b) The judgment of the High Court is set aside including the order for costs.
- (c) We declare that the trademark MANUKA DOCTOR used on the appellants’ honey products for export does not constitute a health claim nor a therapeutic claim in breach of Standard 1.2.7 of the New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002.
- (d) The respondent must pay costs to the appellants for a standard appeal on a band A basis with usual disbursements.
- (e) Costs in the High Court are to be as agreed or fixed by that Court.

Solicitors:

Jackson Russell, Auckland for Appellants

Crown Law Office, Wellington for Respondent