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DE NATUURHOEVE WINS PACKAGING CASE AGAINST FRIESLANDCAMPINA

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INTERLOCUTORY COURT UTRECHT 6 JULY 2011 (FRIESLANDCAMPINA VS. DE NATUURHOEVE)

De Natuurhoeve is represented by Maarten Haak, Eva den Ouden and Daan van Eek.

The Interlocutory Court of Utrecht ruled that the shape of the ready-made pudding made by dairy farm De Natuurhoeve and FrieslandCampina's pudding packaging for its MONA brand are sufficiently different. De Natuurhoeve delivers its pudding a.o. to large Dutch supermarket chains Albert Heijn and Lidl, which sell the pudding under their own private labels. The Interlocutory Court decided on 6 July 2011 that De Natuurhoeve's packaging does not infringe on the Mona shape marks: no similarity between the registered shape marks and the packaging used by De Natuurhoeve, so – according to the court - no risk of confusion or detriment to the trademarks. The packaging cannot be deemed a 'slavish imitation' of the Mona packaging either. The court denied the claimed cease order and FrieslandCampina was ordered to compensate the (legal) costs made by De Natuurhoeve.

SCOPE OF PROTECTION OF THE REGISTERED TRADEMARKS

The core of this case concerns the scope of protection of the registered trademarks. FrieslandCampina registered the following trademarks, as shape marks:



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FrieslandCampina stated that the scope of protection was solely determined by the three-dimensional shape of the packaging. To sustain this, FrieslandCampina argued that 1.) the marks are registered as (three-dimensional) shape marks and 2.) the distinctive and dominant component of the trademark is only the shape of the Mona container and not the graphical components. The court ruled that this premise is incorrect. The scope of protection for trademarks - including shape marks - exclusively follows from the registration. The scope cannot be extended to one or more separate elements or components of the registered trademark, regardless of the extent to which these (either through marketing and/or advertising) are considered to be distinctive for the shape of the mark. The court ruled that if FrieslandCampina only wanted to protect the three-dimensional shape of the pudding cup, including the rectangular cardboard clip, it should have registered these shapes as such, without the MONA logo. That, however, would have caused FrieslandCampina to establish that the packaging alone has acquired distinctiveness in the whole of Benelux, while the product is only sold in the Netherlands. Thus, FrieslandCampina registered the shape marks as printed above. Hence, the court ordered that these registrations must be compared to the shapes used by De Natuurhoeve.

DISTINCTIVE PARTS – SIMILARITY?

To assume similarity between the trademark and other shapes, it needs to be clear that the average, informed, cautious and attentive ordinary consumer makes a link between the registered (shape) trademark and – in this case - the packages of De Natuurhoeve. Although FrieslandCampina had conducted substantial market surveys, these were not sufficient to assume such a link.

The court considered the most distinctive and dominant element of the shape mark to be the white/gray cardboard clip that is folded around the cup, including (both on the top and front) the logo "Mona" in white letters in a red square. Because of the way the clip is folded around the cup, the upper half of the cup looks square as well. The court ruled that the cups produced by De Natuurhoeve are totally different compared to the shape marks of FrieslandCampina.



The shapes of the pudding packages made by De Natuurhoeve are - in contrast to the FrieslandCampina shapes - multi-coloured, have a printed foil lid and a large colourful plastic printed band wrapped around them. The 'fingers' do not go all the way up to the top of the cup. Hence the court held that the overall impression is - partly due to the difference in materials - completely different. The court ruled that there is no likelihood of direct confusion, on the part of the public that buys pudding, between the Mona pudding and the puddings made by De Natuurhoeve. The fact that both packages are sold by the same supermarkets is not enough reason to believe that the average pudding consumer may believe that Mona produces the pudding of De Natuurhoeve as well, so there is no chance of indirect confusion either.

SLAVISH IMITATION AND LEGAL FEES

Next to the trademark infringement allegations, FrieslandCampina argued that the cups used by De Natuurhoeve are 'slavish imitations' as well, and therefore an act of unfair competition. In order to determine whether a product is a slavish imitation of another product, it still needs to be established that the average consumer can be confused. As the overall impression of the packaging is totally different, the court ruled that there is no likelihood of confusion. Therefore the cups of De Natuurhoeve are not slavish imitations. Finally, the court ordered FrieslandCampina to pay the full legal fees of De Natuurhoeve, including the costs for its market research (in total almost €60,000).

FrieslandCampina has appealed the decision.

Maarten Haak, Daan van Eek

The authors have represented De Natuurhoeve in this case.

