

**FOKKER BROTHERS LTD v FOKKER BROTHERS INC LTD**

5 INTELLECTUAL PROPERTY OFFICE OF NEW ZEALAND

J GLOVER (Assistant Commissioner of Trade Marks)

13 December 2018, 28 February 2019 — Wellington

10 [2019] NZIPOTM 2

**Trade marks — “Aggrieved person” — What amounts to genuine use in New Zealand — Special circumstances preventing revocation of trade mark for non-use — (NZ) Trade Marks Act 2002 s 65.**

15 The decision was in respect of an application to revoke trade mark registration no 743062 FOKKER BROTHERS on the basis of non-use.

Fokker Brothers Ltd, (the owner of 743062) was incorporated on 11 January 2006 for the purpose of owning all intellectual property rights associated with the “Fokker Brothers” concept, name and brand, including the FOKKER BROTHERS trade mark. 20 Until his removal as director on 28 August 2015, Mr Leo Molloy was the sole director of Fokker Brothers Ltd, and his wife, Ms Ingrid Molloy, was the sole shareholder.

In 2014 there was limited use of the FOKKER BROTHERS trade mark via an establishment called Harry’s Place in Parnell, Auckland. This establishment was operated by Mr and Mrs Molloy. The limited use was in respect of gravy products and beer.

25 On 13 December 2014, the Molloy’s separated. Between December 2014 to July 2015 Mr Molloy attempted to persuade Ms Molloy to sell the trade mark to Ms Christie, Mr Molloy’s sister. Ms Molloy refused to do so. On 14 July 2015, Ms Christie incorporated a similarly-named company, Fokker Brothers Inc Ltd (the applicant). On 24 July 2015, the applicant filed an application for revocation of the registered trade mark FOKKER 30 BROTHERS on the basis of non-use. At this time, Mr Molloy was still the sole director of Fokker Brothers Ltd. He indicated that he would take no steps on behalf of Fokker Brothers Ltd to resist the applicant’s application for revocation.

On 28 August 2015, Ms Molloy’s solicitors wrote to the applicant notifying it that Fokker Brothers Ltd intended to oppose the application for revocation. Ms Molloy’s 35 solicitors also sought undertakings that the applicant would cease making preparations for the use of the FOKKER BROTHERS trade mark. Ms Molloy also appointed herself as director of the owner so that the application for revocation could be contested.

On 31 August 2015, the applicant refused to provide the undertakings sought. The applicant also indicated that it would not hesitate to take personal action against Ms 40 Molloy if there was any attempt by Ms Molloy to interfere in its legitimate business operations.

In September 2015, the applicant opened a Fokker Brothers hamburger restaurant in Market Square, Auckland and under the trade name FOKKER BROS.

In its application for revocation on the basis of non-use, the applicant relied on a single 45 ground of revocation, namely that at no time during a continuous period of 3 years or more was the FOKKER BROTHERS trade mark put to genuine use in the course of trade in New Zealand by the owner and in relation to goods or services in respect of which the trade mark was registered.

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**Held**, refusing the application to revoke trade mark:

*Application for revocation for non-use*

(i) As required by s 66 of the Trade Marks Act 2002, to defeat an application for non-use, the owner of the trade mark at issue must establish that during the relevant period, it put the mark to genuine use, in the course of trade in New Zealand, in relation to the relevant goods and services: at [88].

(ii) Use of the mark FOKKER BROS amounts to use of the mark FOKKER BROTHERS; “Bros” is a common abbreviation of “Brothers”, and both marks share the more distinctive element, “Fokker”: at [89].

(iii) Genuine use of the mark requires use of it in relation to goods or services which have already been, or are about to be, marketed and for which preparations to secure customers are underway. Although it is not necessary for actual sales to have taken place, an owner will not have “used” its mark unless it has acted to show that it has gone beyond the stage where it can be seen objectively to have committed itself to using the mark: at [91].

*Preparatory use*

(iv) A subjective intention to use the mark in question, and various preparatory steps taken toward that end are insufficient to establish “use”. Objective commitment to use the mark is required. Similarly, exploratory actions with respect to potential use of a mark do not demonstrate a commitment to the use of the mark sufficient to establish “use” for the purposes of s 66 of the Trade Marks Act 2002: at [98], [111].

*Use of trade mark*

(v) Use of the FOKKER BROTHERS trade mark was in respect of “beer” and “gravy” products only during the relevant period. Beyond this, the evidence did not establish that the owner had used the trade mark during the relevant period: at [106], [123].

*Attributable use*

(vi) The evidence suggested that Mr Molloy was taking tangible steps to set up a FOKKER BROTHERS bar/restaurant prior to his removal as director of Fokker Brothers Ltd on 28 August 2015. Until 28 August 2015, Mr Molloy owed duties to Fokker Brothers Ltd. However, there was no indication that Mr Molloy was taking steps to enable Fokker Brothers Ltd to open a FOKKER BROTHERS restaurant. Rather, the evidence suggested that Mr Molloy was working to assist the applicant open a FOKKER BROS restaurant: at [112], [115], [116].

(vii) Accordingly, Mr Molloy’s actions prior to his removal as director of Fokker Brothers Ltd were not attributable to the owner. Therefore, the owner could not rely on Mr Molloy’s actions to defeat the application for non-use: at [118].

(viii) “Use” of a trade mark includes use by a person other than the owner if that use is authorised by the owner, and is subject to the control of the owner. The evidence was insufficient to establish that use of FOKKER BROS by the applicant was authorised by the owner and that the owner retained control over its use: at [119].

*Special circumstances*

(ix) Section 66(2) provides that even if a trade mark has not been used, it may not be revoked for non-use if the non-use was due to special circumstances outside the control of the owner of the trade mark: at [124].

*Cure Kids v National SIDS Council of Australia Ltd* [2015] 3 NZLR 90; (2014) 113 IPR 526; [2014] NZHC 3366; *Woolly Bull Enterprises Pty Ltd v Reynolds* (2001) 107 FCR 166; 51 IPR 149; [2001] FCA 261, referred to.

(x) Although “special circumstances” must relate to external forces, as distinct from voluntary acts of an owner, the external circumstances do not need to be trade-related.

*Manhaas Industries (2000) Ltd v Fresha Export Ltd* (2012) 96 IPR 560; [2012] NZHC 1815; *Cure Kids v National SIDS Council of Australia Ltd* [2015] 3 NZLR 90; (2014) 113 IPR 526; [2014] NZHC 3366, referred to.

(xi) The non-use of the trade mark FOKKER BROTHERS was due to special circumstances outside the control of the owner. The company’s actions were seriously

hampered by the relationship breakdown between its sole shareholder and its sole director, and the actions that Mr Molloy took after the relationship ended, including to assist the applicant to establish a FOKKER BROS restaurant which was precisely what the owner was incorporated to do: at [135], [136], [140], [141].

5 *C Elliott QC* for the owner.

*C Fleetwood-Smith* and *M Hayes* for the applicant.

**Assistant Commissioner J Glover.**

## 10 Introduction

[1] This decision is in respect of an application to revoke trade mark registration no 743062 FOKKER BROTHERS on the basis of non-use.

[2] The trade mark is registered in respect of the following goods and services:

15	Class	Goods/services
20	29	meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; potato chips; potato wedges; kumara chips; kumara wedges; salads; jellies, jams; compotes; eggs; milk and milk products; edible oils and fats; chicken; chicken extracts; seafood; seafood extracts; cheese, butter, dairy products; yoghurt; prepared meals made predominantly from goods in this class
25	30	coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; confectionery; ices; honey, treacle; salt, mustard; vinegar, sauces (condiments); salad dressings; spices and seasonings; ice, chocolate; chocolate beverages; pies; mousse; desserts; ice cream; cheesecake; dessert pizza; sorbet; pavlova; cake; biscuits; pastries; frozen yoghurt; pizza; pasta; prepared meals made predominantly from goods in this class
30	35	advertising and promotional services; business management; wholesale and retail of food and beverages; advisory and consultancy services relating to the foregoing
35	39	transport services, home delivery services; packaging and storage of goods; advisory and consultancy services relating to the foregoing
40	43	provision of food and drink, takeaway services, restaurant services; advisory and consultancy services relating to the foregoing; including provision of all of the above services via the Internet

45 [3] The owner of the trade mark is Fokker Brothers Limited.

[4] Until the end of August 2015, the sole director of Fokker Brothers Limited was Mr Leo Molloy, and the sole shareholder was his wife, Ms Ingrid Molloy.

50 [5] As is set out in more detail below, the marriage between Mr Molloy and Ms Molloy ended in 2014, and in 2015 Mr Molloy was removed as a director of Fokker Brothers Limited. Currently, the sole director and shareholder of Fokker Brothers Limited is Ms Ingrid Molloy.

[6] The party seeking to have the trade mark revoked on the basis of non-use is Fokker Brothers Inc Limited This company was incorporated in July 2015 Its sole director and shareholder is Ms Julie Christie, who is Mr Molloy's sister.

[7] The Trade Marks Act 2002 (Act), and the regulations made under that Act, apply to these proceedings.

#### Grounds of revocation

[8] The applicant relies on a single ground of revocation, namely that at no time during a continuous period of 3 years or more was the trade mark put to genuine use in the course of trade in New Zealand, by the owner for the time being, in relation to goods or services in respect of which it is registered.<sup>1</sup>

[9] For the purposes of this ground of revocation, "continuous period" means a period that commences from a date after the actual date of registration and continues uninterrupted up to the date one month before the application for revocation The application was filed on 24 July 2015 Accordingly, the relevant period is **24 June 2012 to 24 June 2015**.

#### Evidence

[10] The owner's evidence filed under reg 96(1)(b) of the Trade Marks Regulations 2003 is as follows:

<b>Name</b>	<b>Occupation</b>	<b>Date of evidence</b>
Ingrid Molloy	Director, Fokker Brothers Ltd	25 September 2015
Pauline Viggo	Student and former employee of "Harry's Place"	25 September 2015

[11] The applicant's evidence under reg 98 is as follows:

<b>Name</b>	<b>Occupation</b>	<b>Date of evidence</b>
Julie Christie	Director, Fokker Brothers Inc Ltd	30 November 2015

[12] The owner's evidence under reg 99 is as follows:

<b>Name</b>	<b>Occupation</b>	<b>Date of evidence</b>
Ingrid Molloy	Director, Fokker Brothers Ltd	29 January 2016

[13] On 6 November 2017 the owner applied to file the following evidence out of time:

<b>Name</b>	<b>Occupation</b>	<b>Date of evidence</b>
Ingrid Molloy	Director, Fokker Brothers Ltd	1 November 2017

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1. Section 66(1)(a) of the Trade Marks Act 2002.

5	Siekilini Mele Latu	Manager of Cowboys Queenstown and longstanding employee of the Molloys	6 November 2017
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[14] The applicant objected to the introduction of this further evidence out of time, but for the reasons set out below, I find that it is admissible.

10 [15] To protect its position, and without prejudice to its position that the above evidence is inadmissible, the applicant filed further evidence from Ms Julie Christie in reply:

Name	Occupation	Date of evidence	
15	Julie Christie	Director, Fokker Brothers Inc Ltd	22 February 2018

[16] The owner did not oppose that evidence being admitted, and I have taken Ms Christie's further declaration into account.

#### Background

20 [17] Ms Ingrid Molloy and Mr Leo Molloy were married on 20 May 2000 The couple operated a number of restaurant and bars over more than 15 years.

25 [18] The owner, Fokker Brothers Limited, was incorporated on 11 January 2006 as a vehicle to own the intellectual property rights associated with the "Fokker Brothers" concept, name, and brand, including the trade mark at issue The Molloys intended to develop a themed hospitality brand, and ultimately to franchise the use of that brand around the country.

30 [19] Ms Ingrid Molloy has been the sole shareholder of the owner since 2 March 2006, and is now also its sole director Mr Leo Molloy was the sole director of the owner from 17 July 2008 until his removal as director on 28 August 2015.

35 [20] Serious planning for the Fokker Brothers business began in early 2013 Some limited actual use of the mark was made in 2014 via an establishment operated by the Molloys in Parnell, Auckland, known as Harry's Place The trade mark at issue was used on gravy products, and beer Ms Molloy says that this use was "proof of concept" use to test consumer response prior to the establishment of a standalone restaurant and bar.

[21] Ms Ingrid Molloy and Mr Leo Molloy separated on 13 December 2014.

40 [22] Mr Molloy took steps towards the establishment of a Fokker Brothers restaurant in 2015, before the relevant period ended, although the capacity in which he was acting and for whose benefit is not entirely clear.

45 [23] In the period December 2014 to July 2015 Mr Molloy attempted to persuade the owner to sell the trade mark to Ms Christie The owner refused to do so On 14 July 2015 Ms Julie Christie, Mr Molloy's sister, incorporated a similarly-named company, Fokker Brothers Inc Limited.

50 [24] Ms Christie's company, Fokker Brothers Inc Limited, filed the present application for revocation of the trade mark for non-use on 24 July 2015, ten days after its incorporation At that time, Mr Molloy was still the sole director of the owner, Fokker Brothers Limited He indicated that he would take no steps on behalf of Fokker Brothers Limited to resist his sister's company's application for revocation.

[25] On 28 August 2015, Ms Molloy's solicitors wrote to Fokker Brothers Inc Limited notifying it that Fokker Brothers Limited intended to oppose the application for revocation. The letter said:

[O]n the basis of our client's information and belief you are about to open a restaurant or bar in early September. That is, in the viaduct area in Auckland and under the name Fokker Brothers or a name substantially similar thereto. Our client also understands that the restaurant or bar will trade under the name Fokker Brothers or the like and serve both food and alcoholic beverages under this name.

[26] Ms Molloy's solicitors sought undertakings that Fokker Brothers Inc Limited would cease making preparations for the use of the trade mark at issue.

[27] On 31 August 2015, Fokker Brothers Inc Limited's legal representatives, AJ Park, replied Fokker Brothers Inc Limited refused to provide the undertakings sought, and indicated that any injunction application would be defended. It observed that neither Fokker Brothers Limited nor Ms Molloy was in a financial position to provide the requisite undertaking as to damages. The letter said that Fokker Brothers Inc Limited would not hesitate to take action against Ms Molloy personally "*if there is any other attempt to interfere in its legitimate business operations*" (The letter, and a subsequent letter dated 2 September 2015, included detailed information relating to the FOKKER BROS beer sales at Harry's Place that was presumably supplied by Mr Molloy.)<sup>2</sup>

[28] Ms Christie now also says in her evidence that Mr Molloy, acting as sole director of Fokker Brothers Limited, granted permission for her to use the trade mark FOKKER BROTHERS, although no mention of this was made in the correspondence from AJ Park. The terms upon which permission was allegedly granted are not in evidence.

[29] On 28 August 2015, Ms Ingrid Molloy removed Mr Molloy as the director of Fokker Brothers Limited and appointed herself as director so that the application for revocation could be contested.

[30] In September 2015, Ms Christie's company, Fokker Brothers Inc Limited, opened a Fokker Brothers hamburger restaurant in Market Square, Auckland.

[31] Ms Molloy says that she gave serious consideration to proceeding with an application for an interim injunction against the applicant, but decided not to because of the owner's limited financial resources, her own limited financial resources, and the threat that legal action might be taken against her personally in response.

#### **Admissibility of evidence**

[32] The applicant objects to a number of aspects of the owner's evidence. It objects to all of the late-filed evidence, and it objects to individual paragraphs of those affidavits and others.

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2. Ms Molloy's solicitors alleged that the information came from Mr Molloy in their letter dated 1 September 2015. The applicant's solicitors ignored this issue in their letter of response.

[33] It is generally accepted that all evidence filed in IPONZ trade mark proceedings should comply with the civil rules of evidence, including the Evidence Act 2006. In revocation applications, where an aggrieved person may apply either to the Commissioner or to the court,<sup>3</sup> the Commissioner is bound by such rules.<sup>4</sup>

*Molloy affidavit dated 1 November 2017*

[34] Ms Molloy's attaches to this affidavit a bundle of documents that she found in the week before this further evidence was sworn. She says that the documents were located in the very back of a 40-foot container that was jammed with household furniture and files. She contacted her lawyer as soon as she found the files.

[35] I accept that this evidence could not have been filed sooner. Ms Molloy did not know of the existence of the documents.

[36] The applicant objects to paragraph [3] of this affidavit and the bundle of documents she annexes as exhibit A on the basis that these are dated at least four years prior to the relevant period.

[37] The documents relate to the Molloy's plans in 2006-2008 to establish a Fokker Brothers business. Apparently, at that time, the Molloy's envisaged that the brand would be used in respect of a pizza restaurant. The first document in the bundle is an email from Mr Molloy in April 2006 that reads as follows:

Steve, thanks for coming to meet me the other day.

...

I wonder if you had time to ascertain if the site near Kelston Girls was allowed another pizza shop? A summary of my proposal follows.

Fokker Brothers has been registered and patented throughout NZ and we have 6 months grace to do the same in OZZ.

The patent work is being done by Baldwins.

Fokker Brothers is 100% owned by my wife currently.

The model we propose is based on my observations of the Hell franchise and endeavours to exploit that franchise's weaknesses by mimicking [sic] its strengths, ie the appeal to the young adolescent sector. Fokker pizzas will be 'big Fokkers', or 'little Fokkers'. A thick base will be a 'fat Fokker' and a thin base a 'skinny Fokker', thus when you order you'll get a 'big fat Fokker', or a little skinny Fokker' etc...the biggest pizza you can make yourself and it'll be the Mother Fokker, we'll do a wee jockey Fokker and a 12" lucky Fokker too.

I think this is very marketable, it's naughty and all the kids I've tried it on love the naughty element of it. We will be focusing on memorabilia, rotisserie chickens to go, good juices and shakes, and of course the staples like ribs and a couple of salads, all will complement the pizza range.

[Name], now Mad Butcher ex Pizza Hut has been advising me, he says the franchise model should be retail only but I'd like, in the long term to own our buildings as part of the operation.

First things first though, we need to get a good site and get the prototype underway and that is where you come in.

You would need to put up the [sum] for the first fitout. I may get some funds from other sources to help a little if required.

In return for the [sum] advance/loan to the company you will get 50% of the first and all remaining Fokker businesses in Australasia.

3. Section 65(1) of the Trade Marks Act.

4. *Royal New Zealand Yacht Squadron v Daks Simpson Group Plc* [2002] NZAR 187 at [29].

Please consider this Steve and let me know if you agree in principle so I can then put together a more detailed proposal.

Thanks

Leo

[38] A later email exchange dated March to December 2008 between Mr Molloy and various potential business partners shows that the Molloyes were still working hard to establish a Fokker Brothers business, although by this time, it seems that the plan had evolved into a Fokker Brothers steakhouse and sports bar Mr Molloy entered into a Heads of Agreement with a company called BFS Auckland Limited and two individuals, but many details were still to be worked through.

[39] The Heads of Agreement, dated 22 April 2008, records that a new company was to have been established to run a bar and restaurant at the Blowfish Sushi premises in Parnell, Auckland The document refers to a “Fokker Brothers Steakhouse and Sports Bar” Mr Molloy was to have been a manager of the new company His sister, Ms Christie, owned the lease to the building in question.

[40] Invoices from this period, which are also set out in exhibit A, are as follows:

- 40.1. architectural services relating to the Blowfish Sushi premises in Parnell, Auckland for a restaurant floor plan, discussions of bar layout, sourcing the property file from Auckland Council, and so on;
- 40.2. services provided by an engineering consultant in May 2008 in relation to the same property, for inspecting the premises with the architect and client and reviewing council records;
- 40.3. an invoice from a design company for “work done on Blowfish Parnell” in April/May 2008; and
- 40.4. an invoice from a building management company for preparing a fire design report for the Blowfish bar and restaurant.

[41] The documents from this period also include a letter dated 17 May 2008 from Lion Nathan to Mr Leo Molloy, trading as The Fokkers Smokehouse and Sports Bar at 144 Parnell Road, Auckland The letter records that New Zealand Breweries Limited was prepared to advance a significant, zero-interest loan and other incentives to The Fokkers Smokehouse and Sports Bar on the basis that it stocked certain alcoholic products provided by New Zealand Breweries and related entities.

[42] I find that this evidence is admissible Even though it is well outside the relevant period, which did not start until 2012, it is useful background that shows the Molloyes’ original plans for the use of the mark Those plans were fairly well advanced by 2008, and were communicated to a number of third parties, even though the business did not come to fruition at that stage.

***Latu affidavit dated 6 November 2017***

[43] Ms Latu is a former staff member of the Molloyes She has known them both for over 12 years.

[44] Ms Latu was formerly the manager of the Cowboys Bar in Auckland, where the Molloyes held their meetings to discuss the Fokker Bros restaurant brand She is now the general manager of Cowboys Bar in Queenstown.

[45] When the Molloyes separated, Mr Molloy told Ms Molloy that she was not to have any contact with any of the staff at the Cowboys bar, particularly Mele Latu and Selina Penney Mr Molloy sent Ms Molloy a number of texts warning



her not to speak to the staff He sent an email dated 13 December 2014 saying that Ms Molloy “cannot and must not issue any directives or instructions to any company, or staff thereof, that I am the director of or have given personal guarantees to or on behalf of” He sent a text message dated 23 April 2016 warning Ms Molloy that “you need to accept that you must NOT contact the staff at Cowboys again please”.

[46] Ms Molloy said that for a long time she did not discuss this trade mark dispute with Ms Latu The breakup of her marriage was extremely difficult and Ms Molloy was aware that Ms Latu was stuck in the middle.

[47] For her part, Ms Latu says that Mr Molloy instructed her in very clear terms not to talk to Ms Molloy Accordingly, she had no knowledge of this dispute:

I only found out about Ingrid’s hearing to do with Fokker Bros in the last week or so when we were planning dates to do with the business and Ingrid mentioned it. Before that it was extremely difficult, and we had both avoided discussing Leo and Ingrid and Leo’s marriage breakup. Given the repeated warnings I had been given to not speak to Ingrid and both Ingrid and me knowing that it was a very sensitive area we just did not go there, until things had settled down.

[48] Matters finally appear to have moved on, however As Ms Latu confirms in the passage set out above, shortly before this hearing was originally scheduled to be heard, Ms Molloy mentioned it to Ms Latu Ms Latu said that she was prepared to provide an affidavit in support.

[49] I accept that this evidence could not have been filed earlier Ms Molloy did not know that Ms Latu had information relevant to the issues in dispute, and Ms Latu did not know of the existence of the dispute In broad terms, therefore, her evidence is admissible.

[50] The applicant also objects to many specific aspects of Ms Latu’s affidavit.

[51] It objects to paragraphs [5] and [6] on the basis that this evidence relates to matters that occurred outside the relevant period In these paragraphs, Ms Latu says that she was aware that sometime in 2008 the Molloys were in the process of taking over the Blowfish Sushi Restaurant in Parnell and making it a Fokker Brothers Steakhouse She understood that they were going into partnership with the owners of Blowfish Sushi and a person called Mr Hall, who was a regular customer at Cowboys Ms Latu says that she remembers this well, as when the deal collapsed Mr Molloy was furious with Mr Hall; the Molloys had already racked up large bills.

[52] I find that this evidence is admissible, despite the fact that it is outside the period of alleged non-use and the deal ultimately collapsed This evidence is consistent with Ms Molloy’s evidence, discussed above It is not unusual in non-use cases for evidence from outside the period of alleged non-use to be admitted and considered as part of the overall context, particularly where – as here – the owner relies on special circumstances.<sup>5</sup>

[53] The applicant objects to the following passage from Ms Latu’s evidence on the basis that it is hearsay:

5. See, for example, *Cure Kids v National SIDS Council of Australia Ltd* [2015] 3 NZLR 90; (2014) 113 IPR 526; [2014] NZHC 3366 (*Cure Kids*), in which the period of alleged non-use was 2007-2010 but Moore J considered evidence of matters back as far as 1989, as well as material that post-dated this period.

I was also present when Leo had his meetings with [chef] Darren Lim in Cowboys Queenstown [in 2015] discussing the menu for Fokker Bros up in Auckland. This included the play on the name and the possibilities it threw up relating to food. I remember the example of a Big Fokker Steak and a Mother Fokker burger. The Fokker Bros brand was talked about on and off over the years by Ingrid and Leo and then they decided to put it in a restaurant Bar they had opened called

Harry's Place. I came up for a couple of weeks to help set up and open Harry's Place and was closely involved in that process.

[54] I find that this evidence is admissible Ms Latu is giving direct and undisputed evidence of what she saw, heard, and did The evidence of conversations between Mr Molloy and the chef of Ms Christie's restaurant, Mr Lim, is relevant not for the truth of what was said, but the fact that they were discussing the proposed Fokker Bros restaurant.

[55] The applicant objects to the following paragraphs from Ms Latu's evidence on the basis that they are irrelevant:

During the time that Leo was solely running Cowboys he instructed all of us in very clear terms not to talk to Ingrid. On many occasions he would quiz us as to whether we had talked to her. I found this really stressful.

In approximately November 2015 Leo heard a rumour that Ingrid was in Queenstown. He rang me a number of times asking if I had heard from her. He reminded me that she was not allowed into Cowboys and I was to serve her with a trespass order if she turned up.

[56] In my view, this evidence is relevant It demonstrates the difficulties that the owner, Fokker Brothers Limited, would have experienced around this time in terms of using the mark The Molloys separated in December 2014 (well within the relevant period) and this evidence shows that by November 2015 (5 months after the relevant period had ended) matters were still heated.

[57] The applicant objects to the following passage from Ms Latu's evidence on the basis that it is hearsay:

I know that Leo was involved in doing the design, project managing of the fit out, staff etc and planning the menu with Darren Lim (chef) for the new restaurant Fokker Bros in Auckland. He met up with Darren on several occasions in Queenstown where Darren was working at Jervois Steakhouse until he took the role as executive chef at Fokker Bros in the Viaduct when it opened.

[58] Ms Latu goes on to say that she was aware of these matters because Mr Molloy spoke openly to her as to what he was doing I accept that this evidence is inadmissible hearsay I note, though, that Ms Christie confirms that Mr Molloy helped (on a voluntary basis) with the interior design and menu for the Fokker Bros restaurant, and also that Mr Darren Lim worked on the menus for the Fokker Bros restaurant.

[59] The applicant objects to the following statement from Ms Latu on the basis that it is hearsay:

One of those meetings [between Mr Leo Molloy and Mr Darren Lim] was in Cowboys, early June 2015 as [Mr Molloy] had asked for hamburger pictures to be printed off prior to his meeting with Darren Lim that [Mr Molloy] had emailed to Selina Penney (another employee of Cowboys).

[60] I find that insofar as this evidence relates to the fact of a meeting in early June 2015 it is admissible Ms Latu worked at Cowboys and on its face this evidence appears to be within her direct knowledge There is no evidence from either Mr Molloy or Mr Lim contradicting her statements.

[61] The position vis-à-vis the hamburger pictures is less clear Ms Latu does not say whether she had direct knowledge of what occurred, or whether she discovered this subsequently as a result of obtaining access to the emails, or being told by Ms Penney On balance, I find that the evidence relating to the hamburger pictures is inadmissible.

[62] The applicant objects to the following statement on the basis that it is irrelevant:

Also, around about this time, Leo called me on one occasion to get me to go to Fergburger in Queenstown and send him the dimensions of the paper that the burgers were wrapped in. I did this for him.

[63] The applicant submits that there is no way of knowing why Mr Molloy wanted to know the dimensions of a hamburger wrapper It says there might have been any number of reasons for this, which were unconnected with him setting up a Fokker Brothers hamburger restaurant.

[64] In my view, this evidence is relevant, particularly when taken in context It is a part of the overall picture of the events taking place during this period I note, too, that Mr Molloy could have filed evidence explaining why he asked Ms Latu to obtain the dimensions of a hamburger wrapper, but he did not do so.

[65] The applicant objects to the following paragraph on the basis that it is irrelevant (because it is outside the relevant period), and hearsay:

One time when Leo was in Queenstown we were renewing our lighted signage. I can recall it was mid June 2016. Leo made a call, in front of me, to the electrician fitting Fokker Bros and told him he was going to send him some photos of Cowboys signage showing him how he wanted the Fokker Bros signage to be done.

[66] I consider that this evidence is relevant Although it is one year after the relevant period ended, it is part of an ongoing course of conduct.

[67] Nor do I do accept that this evidence is hearsay It is direct evidence of what Ms Latu heard It is not introduced as to the truth of what was said, but rather the topic that Ms Latu heard being discussed, namely fit-out for the Fokker Bros restaurant in Auckland In any event, this evidence is consistent with the evidence from Ms Christie that Mr Molloy helped her with the interior design of the Fokker Bros restaurant.

[68] The applicant objects to the following paragraph on the basis that it is opinion evidence:

Soon after Fokker Bros opened in September 2015 [only weeks after he was removed as a director of the owner], my partner and I were in Auckland visiting family and Leo insisted we have lunch with him at Fokker Bros in the Viaduct. I remember thinking at the time that he was very much in charge, instructing staff, shifting furniture, greeting customers and walking in and out of the kitchen and behind the bar.

He also gave me a tour of the kitchen and back of house.

[69] Most of these statements, for example that Mr Molloy instructed staff, shifted furniture, greeted customers, walked in and out of the kitchen, walked behind the bar, and gave Ms Latu a tour of the kitchen and back of house, are purely factual The only statement that could be characterised as opinion evidence is the statement that Mr Molloy seemed very much in charge In my view, even this statement is admissible under s 24 of the Evidence Act, which provides that a witness may state an opinion if it is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

*Affidavit of Ms Molloy dated 25 September 2015*

[70] The applicant objects to paragraph [24] of Ms Molloy's first affidavit on the basis that it is opinion evidence and/or submission. This paragraph comprises a single sentence, setting out Ms Molloy's view that Speights Dark beer sold better when branded as "Fokker Brothers" beer. This evidence is largely irrelevant to the issues I must decide: the important point, which is that the mark was used in relation to beer, is undisputed. For completeness, though, I find that this evidence is admissible under s 24 of the Evidence Act 2006.

[71] The applicant objects to paragraph [28], in which Ms Molloy expresses her view that the mark has been put to genuine use. I accept that this evidence is submission and is inadmissible on that basis, but it is of very minor significance.

[72] The applicant objects to the following sentence [31] on the basis that it is opinion evidence and submission:

The applicant, through its solicitors, has stated that Mr Molloy does not have any involvement in the applicant company and its operations, but I do not believe that.

[73] Ms Molloy sets out her reasons for this belief, including the following:

73.1. Mr Molloy asked her on a number of occasions whether she would agree to the owner selling its rights in the trade mark to Ms Christie. At one point, an offer of \$2,500 was made. Ms Molloy refused to agree and explained to Mr Molloy that she wanted the company's assets, including the trade mark, to be dealt with as part of an overall settlement of all of their relationship property matters.

73.2. Mr Molloy indicated that he would take no steps on behalf of the owner to resist the application for revocation by his sister's company.

[74] I find that sentence objected to in paragraph [31] is admissible under s 24 of the Evidence Act: it is "compendious" evidence, and the experiences upon which the statement is based are described.<sup>6</sup>

[75] Finally, the applicant objects to the following sentence in paragraph [33] on the basis that it is opinion evidence, submission, and hearsay:

I believe that [the reason for not resisting the application for revocation] is that Mr Molloy sees considerable value in the Registered Mark and desires to remove that asset from the pool of our relationship property.

[76] In my view, this evidence is irrelevant in any event. It is undisputed that, for whatever reason, when he was the sole director of the owner Mr Molloy elected not to take any steps to prevent the removal of the owner's trade mark by his sister's company. For present purposes, his reasons for taking that position do not matter, only its effect on the owner.

*Viggo affidavit*

[77] Ms Viggo is a former employee of "Harry's Place", which was a restaurant/bar operated by the Molloys. The Molloys made some limited use of the mark at issue at Harry's Place, notably in respect of beer and gravy products.

[78] The applicant objects to a sentence in which Ms Viggo says that the name "Fokker" when used in relation to beer seemed popular and was very well received by customers. Ms Viggo bases her statement on the fact that customers

6. See the commentary in Richard Mahoney and others *The Evidence Act 2006: Act and Analysis*, 3rd ed, Thomson Reuters, 2014, at [EV24.01]–[EV24.02].

would sometimes ask her questions about the “Fokker Bros” name and she would explain that it was the owner’s own brand and go on to describe the product, which would often lead to a sale. Also, she says that the mark promoted friendly banter between staff and customers about the name.

5 [79] In my view, this evidence is admissible pursuant to s 24 of the Evidence Act 2006. In any case, this evidence is not very significant.<sup>7</sup>

[80] The applicant also objects to the following sentence in paragraph [13]:

10 It [ie the Fokker Bros brand of beer] was dealt with and product ordered in just the same way as other brands such as Speights and Guinness and even though sales of product were not in the same league as with Speights and Guinness it was nevertheless a niche brand in its own right.

15 [81] This statement is said to comprise opinion evidence and submission. I cannot see why. Self-evidently, the Fokker Brothers beer was sold as a brand in its own right (despite the fact that, unbeknownst to customers, it was simply Speights Dark sold under a different label). It was not sold under any other branding or marks. There was no other way for customers to refer to it.

*Affidavit of Ms Molloy dated 29 January 2016*

20 [82] The applicant objects to the following passage at paragraphs [6] and [7], primarily on the basis that it is not evidence in reply:

At paragraph 32 of my first affidavit...I stated that on one occasion an offer of \$2,500 was made for the sale of the Owner’s Registered Mark to Ms Christie. Attached as Exhibit “A” is an e-mail from Mr Molloy to me dated 1 October 2015 confirming that an offer was made by Ms Christie for the Registered Mark. ...

25 In addition to the one offer that Ms Christie made in relation to the sale of the Registered Mark, Mr Molloy asked me several times if Ms Christie could use the Registered Mark. In response, I told Mr Molloy that I did not agree to a sale of the Registered Mark to Ms Christie and the Registered Mark was part of our matrimonial property and therefore needed to be treated as part of any overall matrimonial property settlement. That remains my position.

30 [83] Most of this evidence already appears in Ms Molloy’s first affidavit, and so the applicant has already had an opportunity to respond to it. It makes no difference that it is repeated here. In addition, I find that this evidence is in reply to evidence from Ms Christie, which implies that Mr Molloy was not involved in Ms Christie’s business:

Leo Molloy is not an employee of or contractor to my company

40 [84] As set out above, one of the reasons Ms Molloy believes that Mr Molloy is involved with Ms Christie’s restaurant in some way, even if he is not an employee or contractor, is that on a number of occasions he tried to persuade Ms Molloy to sell the trade mark to his sister.

**Aggrieved person**

45 [85] Section 65(1) of the Act provides that an “aggrieved person” may apply to the Commissioner or the Court for the revocation of the registration of a trade mark. The owner acknowledges that the applicant is an aggrieved person.

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50 7. For completeness, I record that the applicant ran a line of argument that the FOKKER BROTHERS beer was unpopular and that, as a result, the owner concluded that a FOKKER BROTHERS themed bar or restaurant was not a viable concept. However, this argument is highly speculative and there is no real evidence to support it. The only evidence filed by the applicant is from Ms Christie, and she had no knowledge of these matters.

**Application for revocation for non-use**

[86] I now turn to consider the substantive application.

[87] Section 66(1)(a) of the Act reads as follows:

66 *Grounds for revoking registration of trade mark*

(1) The registration of a trade mark may be revoked on any of the following grounds:

- (a) that at no time during a continuous period of 3 years or more was the trade mark put to genuine use in the course of trade in New Zealand, by the owner for the time being, in relation to goods or services in respect of which it is registered

[88] As noted above, the alleged period of non-use is **24 June 2012 to 24 June 2015**. The owner must establish that during this period it put the mark to genuine use, in the course of trade in New Zealand, in relation to the relevant goods and services.

[89] Section 7(1)(a) of the Act provides that use in relation to a trade mark includes use in a form differing in elements that do not alter the distinctive character in the form in which it was registered I consider that the use of the mark FOKKER BROS amounts to use of the mark FOKKER BROTHERS The slight differences between FOKKER BROS and FOKKER BROTHERS do not alter the distinctive character of the mark as registered “Bros” is a common abbreviation of “Brothers”, and both marks share the more distinctive element, “Fokker”.

**Principles to be applied: Non-use**

[90] There is no *de minimis* rule regarding the amount of use of a trade mark in the context of revocation proceedings as long as the use is genuine.<sup>8</sup>

[91] Genuine use does not include internal use by the undertaking concerned, however Use of the mark must relate to goods or services which have already been, or are about to be, marketed and for which preparations to secure customers are underway (for example, in the form of advertising campaigns).<sup>9</sup> Although it is not necessary for actual sales to have taken place, the owner will not have used its mark unless it has acted to show that it has gone beyond the stage where it can be seen objectively to have committed itself to using the mark, i.e to carrying its intention to use the mark into effect.<sup>10</sup>

**Evidence of use**

[92] There are five categories of potential “use” to be considered in this case:

- 92.1. preparatory use by the Molloys in 2013;
- 92.2. use at Harry’s Place in 2014;
- 92.3. preparatory use by Ms Molloy in 2015;
- 92.4. preparatory use by Mr Molloy in 2015;
- 92.5. use by Ms Christie and the applicant (to the extent that this use was authorised by the owner under s 7 of the Act).

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8. *Kerly’s Law of Trade Marks and Trade Names*, 14th ed, London, Sweet & Maxwell, 2005, at 288–94; *Ansul BV v Ajax Brandbeveiliging BV* [2003] IP & T 970; [2005] Ch 97; [2003] RPC 717; [2003] ECR I-2439 (*Ansul BV*); *Laboratoire de la Mer Trade Mark (No 2)* [2005] FSR 29; *Laboratoires Goemar SA v La Mer Technology Inc* [2005] EWCA Civ 978.

9. *Ansul BV*.

10. *Woolly Bull Enterprises Pty Ltd v Reynolds* (2001) 107 FCR 166; 51 IPR 149; [2001] FCA 261 (*Woolly Bull*).

[93] I will consider each of these in turn.

***Preparatory use by the Molloyes in 2013***

5 [94] Ms Molloy says that serious planning for a Fokker Brothers-themed hospitality brand began in early 2013 with the development of a menu, a restaurant and bar operation, and merchandising ideas Three emails sent by Mr Molloy in April 2013 confirm this For example, an email dated 24 April 2013 refers to the following:

10 Squid ink bun = big black Fokker  
400gm = mother Fokker  
Sliders = little Fokkers

15 [95] She says that from 2013, the Molloyes began looking for suitable premises for a standalone burger bar They intended to use the mark FOKKER BROTHERS as the “headline brand”, and also to use the mark in relation to various food and beverage items The establishment of the standalone operation was to be the next major step in their plan to franchise a burger bar concept throughout New Zealand.

20 [96] In September 2013, Mr Molloy engaged a graphic designer to design some logos using the registered mark Those logos included the following mark/slogan:

FOKKER BROS  
Beer. Bourbon. Burgers. Bikes.

25 [97] The invoice from the graphic designer, dated December 2013, includes the following narration:

Design & Layout — as briefed, work through initial concept designs for  
‘Fokker Bros’ restaurant brand  
-Project put on hold at request of client

30 [98] I find that none of these steps, either individually or collectively, is sufficient to establish “use” They show a subjective intention to use the mark, and various preparatory steps taken toward that end, but no objective commitment.

***Use at Harry’s Place in 2014***

35 [99] The Molloyes operated a bar called Harry’s Place in Parnell from early 2014 to early 2015.

[100] The trade mark FOKKER BROTHERS was used on gravy products and beer at Harry’s Place Ms Molloy says that this use was “proof of concept” use to test consumer response to the mark.

40 [101] One of the beer taps at the bar bore the following mark and slogan:

FOKKER BROS  
GOOD BLACK BEER FOR REAL GOOD MEN SINCE 1956

45 [102] The beer tap design was made in February 2014 by the same graphic designer who made the earlier logos, and is in a similar style This beer was sold on tap until around November 2014 when the menus were changed for the upcoming summer season.

[103] The menu at Harry’s Place featured the following items:

- 50
- Roast of day — roast beef w duck-fat potatoes, Yorkshire pudding, roasted baby vegetables, horseradish & Fokker Bros gravy
  - Hand cut duck fat chips w Fokker Bros gravy

[104] The beer menu also referred to “Fokker Bros Dark”.

[105] The mark FOKKER BROTHERS was used from time to time on blackboards advertising happy hour beer specials, and meal/drink combination specials. The mark was also used as part of a cycle of visual advertisements shown on three television screens in Harry’s Place from February 2014 to at least May 2014.

[106] The owner submits that the mark was in respect of a wide range of goods and services, including, for example, restaurant services. I disagree. I find that this use of the mark was in respect of “beer” and “gravy” products only.

***Preparatory use by Ms Molloy in 2015***

[107] Before the Molloys could find suitable premises and procure finance for their proposed standalone Fokker Brothers business, in December 2014 their marriage ended.

[108] In April 2015, Ms Molloy travelled to the United States. During her travels, and immediately after returning home in May 2015, she made a number of handwritten notes recording her ideas for the further development and use of the mark FOKKER BROTHERS.

[109] In August 2015, Ms Molloy used those notes to prepare a business plan as part of a proposed application to the ANZ bank for finance for a FOKKER BROTHERS burger bar. A copy of that draft business plan is in evidence. However, as Ms Molloy did not manage to find suitable premises, that plan was never presented to the bank.

[110] The draft plan makes numerous references to the importance of the name Fokker Brothers:

Fokker Brothers is a Burger bar brand in hospitality that we have been passionate about for a long time and will endeavour to franchise around the country.

The concept of this brand will be the play on the word Fokker.

We are well experienced in the hospitality industry.

We have trialled the brand in Harry’s Place, a pub that has now been sold. We put the branding Fokkers on tap in 2014.

...

Fokker Brothers Menu

Mother Fokker	Steak burger with the works
Poly Fokker	Fish Burger
Mori Fokker	Lamb Burger
Palagi Fokker	Chicken Burger
Little Fokker	Hamburger
Fokker Pizzas	Choice of ten toppings

Sides

Girly Caesar Fokker Chicken and Bacon

Little or Large Fokker Fries

Spicy Fokker Chicken Wings

...

Fun banter between staff and customers playing on the word Fokker.

...

Point of difference with the Fokker name

...



We want the staff to have fun with our brand name and interact between each other and the customers and let them have fun too.

...

5 [111] In my view, Ms Molloy's actions were merely exploratory in nature They did not demonstrate a commitment to the use of the mark sufficient to establish "use" for present purposes.

*Use by Mr Molloy in 2015*

10 [112] It appears that Mr Molloy was taking tangible steps to set up a FOKKER BROTHERS bar/restaurant prior to his removal as a director of the owner on 28 August 2015 Because he has not filed evidence, however, it is difficult to know precisely what he was doing, when he was doing it, or in what capacity.

15 [113] As noted, Ms Christie's FOKKER BROS hamburger restaurant/bar opened in September 2015, shortly after Mr Molloy was removed as a director of the owner In the period December 2014 to July 2015, Mr Molloy made a number of requests that Fokker Brothers Limited sell the trade mark to Ms Christie.

20 [114] The executive chef at the FOKKER BROS restaurant is Mr Darren Lim.<sup>11</sup> Ms Latu says that Mr Molloy and Mr Lim had regular meetings in Queenstown in 2015 to plan the menu for a FOKKER BROTHERS restaurant She recalls, for example, that one such meeting between Mr Molloy and Mr Lim took place at Cowboys in early June 2015 (within the alleged period of non-use) Also around this time, Mr Molloy asked Ms Latu to go to Fergburger in Queenstown and send him the dimensions of the paper in which the burgers were wrapped.

25 [115] The question is to whom Mr Molloy's actions should be attributed Until the end of August 2015, Mr Molloy was the director of Fokker Bros Limited and owed duties to that company Ms Christie's company, Fokker Brothers Inc Limited, did not exist until July 2015.

30 [116] In normal circumstances, it would be taken as read that any steps taken by a company director, in accordance with the express purposes for which the company was incorporated, should be attributed to that company In this case, however, there is no indication that Mr Molloy was taking steps to enable Fokker Brothers Limited to open a FOKKER BROTHERS restaurant.

35 [117] The most logical explanation of all of the evidence is that Mr Molloy was working to assist his sister (in her personal capacity, since she had not yet incorporated a company) to open a FOKKER BROS restaurant.

40 [118] Accordingly, I find that Mr Molloy's actions during this period are not attributable to Fokker Brothers Limited As a result, unusual as it may be, the company cannot rely on the actions of its director during 2015 to defeat this application for non-use.

*Use of the mark made by the applicant/Ms Christie*

45 [119] "Use" of a trade mark includes use by a person other than the owner if that use is authorised by the owner, and is subject to the control of the owner.

50 11. Ms Molloy says that Mr Lim was also someone whom the Molloyes had employed in earlier restaurant and bar businesses. She says that two other people involved with Ms Christie's company's restaurant were people with whom the Molloyes had worked previously, namely Mr Paul McIntosh from Macintosh Harris Design, and Ms Corrine Rogers who was engaged to do the CCTV, point of sale and till systems.

[120] Ms Christie says that Mr Molloy, in his capacity as a director of the owner, granted her permission to use the trade mark at issue.<sup>12</sup> Accordingly, it is possible that the use of the trade mark by Ms Christie and the applicant should be attributed to the owner, on the basis that such use falls within the scope of s 7 of the Act.

[121] Because of the complete lack of evidence from Mr Molloy and the paucity of evidence from Ms Christie, however, it is difficult to establish precisely what use was authorised, and whether or not the owner exercised any control over it Ms Molloy bears the onus of establishing use, and yet, on the unusual facts of this case, the former director of the company, who has direct knowledge of the matters at issue, shows no desire to ensure that the trade mark is retained by his former company — in fact, quite the contrary. Accordingly, the company is not able to access evidence of matters that are solely within his knowledge.

[122] I find that the evidence is insufficient for me to find that use of the mark by Ms Christie and/or the applicant should be attributed to the owner pursuant to s 7 of the Act.

#### *Findings in relation to use*

[123] I find that during the relevant period the owner used the trade mark in relation to beer and gravy products. Beyond this, the evidence does not establish that the owner used the mark during the relevant period.

#### **Special circumstances**

[124] Even if a trade mark has not been used, however, it may not be revoked for non-use if the non-use was due to special circumstances outside the control of the owner of the trade mark.<sup>13</sup>

[125] In *Cure Kids*, Moore J set out three criteria that are relevant for determining whether there are special circumstances:<sup>14</sup>

- 125.1. For circumstances to be special they must be “peculiar or abnormal” and arise through “external forces as distinct from the voluntary acts of [the registered owner of the trade mark in question]”;
- 125.2. It is not necessary to show that the special circumstances made use of the trade mark impossible. It is enough to show that those circumstances made it impracticable, in a business sense, to use the trade mark;
- 125.3. There must be a causal link between any special circumstances and the non-use of the trade mark.

#### ***Must special circumstances be trade-related circumstances?***

[126] The applicant submits that “special circumstances” must also be trade-related and not circumstances that are personal to the owner.

[127] This is the position taken in Australia, under a differently-worded provision. The Australian legislation requires the owner to prove the existence of “*circumstances (whether affecting traders generally or only the owner of the trade mark) that were an obstacle to the use of the trade mark*”.<sup>15</sup> The Federal

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12. Presumably, that permission also extended to her company once it was incorporated, but this is not clear.

13. Section 66(2) of the Trade Marks Act 2002.

14. At [136] (applying *Woolly Bull*).

15. Section 100(3)(c) of the Trade Marks Act 1995 (Cth).

Court of Australia in *Woolly Bull* held that illness on the part of the owner could never suffice to meet this test. It found that special circumstances will exist only when events arise that are capable of disrupting trade in the area of commercial activity in which the goods bearing the registered owner's mark are traded.<sup>16</sup>

5 [128] The New Zealand courts have taken a different view. In *Manhaas*, the appellant argued that the Assistant Commissioner misdirected herself when she said that “*special circumstances must be of a trade nature*.” It submitted that the legislature's decision to no longer employ the words “*in trade*” in the Act meant that special circumstances no longer needed to be linked directly to trade  
10 circumstances.<sup>17</sup> Collins J appeared to accept this submission, noting that New Zealand has ceased to require proof of a direct link between the special circumstances relied upon and the trade in which the owner engages.<sup>18</sup> Earlier New Zealand legislation referred to “*special circumstances in the trade*”.<sup>19</sup> Our current legislation no longer includes the reference to trade: it provides simply that a trade mark may not be revoked for non-use if the non-use is due to special  
15 circumstances that are “*outside the control of the owner of the trade mark*”.<sup>20</sup>

[129] Accordingly, I find that although “special circumstances” must relate to external forces, as distinct from the voluntary acts of an owner,<sup>21</sup> those external  
20 circumstances do not need to be trade-related.

[130] The next question, then, is whether the actions of a company director can be considered to be external forces as distinct from the voluntary acts of an owner. In the circumstances of this case, I believe they can.

25 [131] Counsel for Fokker Brothers Limited submits that Mr Molloy's actions in 2015 deliberately undermined the value and validity of the company's key asset, namely the trade mark FOKKER BROTHERS. He says that this amounts to a breach of Mr Molloy's duties to Fokker Brothers Limited (and its sole shareholder).

30 [132] Earlier in this decision I found that the actions of Mr Molloy in 2015 could not be attributed to the company, despite the fact that he was a director of the company, and that the company could not rely upon his actions in order to defeat the application for non-use.

[133] Logically, therefore, his actions must be external to the company, and not  
35 attributable to it, for the purposes of considering special circumstances also.

#### *Were there special circumstances?*

40 [134] Despite many attempts made over a significant period of time, Fokker Brothers Limited did not manage to use its mark other than in relation to beer and gravy products.

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16. *Woolly Bull* at [55].

17. *Manhaas Industries (2000) Ltd v Fresha Export Ltd* (2012) 96 IPR 560; [2012] NZHC 1815 (*Manhaas*) at [13(5)].

45 18. *Manhaas* at [27]. Similarly, in *Cure Kids*, Moore J accepted that the existence of a well-known activist, Dr Sprott, who was seeking to destroy the Cure Kids organisation and disrupt its fundraising, amounted to special circumstances. Arguably, the actions of an activist seeking to undermine Cure Kids (and no other fundraising organisation in this country) was a matter that was personal to Cure Kids rather than being of a general trade character. The issue was not addressed directly, however.

50 19. Section 35(3) of the Trade Marks Act 1953.

20. Section 66(2) of the Trade Marks Act 2002.

21. *Cure Kids* at [136].

[135] From December 2014 onwards, however, the company's actions were seriously hampered by the relationship breakdown between its sole shareholder and its sole director, and the actions that Mr Molloy took after the relationship ended.

[136] It is acknowledged that during this time, the director of Fokker Brothers Limited, Mr Molloy, assisted a third party to establish a FOKKER BROS restaurant, which is precisely what Fokker Brothers Limited had been incorporated to do.<sup>22</sup>

[137] In 2015, the sole shareholder of the company, Ms Molloy, was still making plans for the company to open a FOKKER BROTHERS restaurant (as evidenced by her draft proposal to the ANZ bank, and her refusal to sell the trade mark) At the same time, however, the company director, Mr Molloy, was helping a third party competitor get there first.

[138] Further, the ability of Fokker Brothers Limited to access funds and other resources from December 2014 onwards was seriously restricted Following the marriage break-up, Ms Molloy assumed responsibility for the couple's five children, with an attendant burden in terms of time and finances The correspondence from AJ Park observes that the neither Ms Molloy nor the owner was in a financial position to provide the undertaking as to damages that would be required if the owner sought injunctive relief against Ms Christie's company.

[139] Also, Mr Molloy banned Ms Molloy from contacting staff at the couple's other ventures, and banned those same staff from contacting her In December 2014, Mr Molloy sent Ms Molloy an email saying:

You are not allowed to access the bank accounts of any company that I'm a director of [ie including the owner]

...

You cannot and must not issue any directive or any instructions to any company, or staff thereof, that I am the director of or have given personal guarantees to, or on behalf of [ie again including the owner]

[140] It is unusual for a company director to not only fail to advance the purposes for which a company was incorporated and to act contrary to the ambitions of the sole shareholder in that regard, but also to actively assist a third party to achieve those same aims.

[141] I am satisfied that the non-use of the trade mark FOKKER BROTHERS was due to special circumstances outside the control of the owner.

#### **Directions and costs**

[142] The application to remove trade mark registration no 743062 FOKKER BROTHERS is unsuccessful, and the mark must remain on the register.

[143] I award scale costs to the owner in the sum of \$3190, calculated as follows:

<b>Item in IPONZ scale of costs</b>	<b>Amount</b>
Preparing and filing counterstatement	300
Preparing and filing reg 96 evidence	400

22. Ms Christie says that Mr Molloy helped her, on a voluntary basis, with the interior design and menu for her FOKKER BROS restaurant.

	Receiving and perusing opponent's evidence	400
	Preparing and filing evidence in reply	200
5	Preparation of case for hearing	500
	Attendance at hearing (3 hours at \$180/hour)	540
	Hearing fee	850
10	<b>TOTAL:</b>	<b>\$3190 to the owner</b>

VICTORIA ARGYLE  
BARRISTER

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