

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hart, Jones and Chipman, JJ.A.

BETWEEN:

NATURAL BEAUTY PRODUCTS	)	P. Bryson
LIMITED, a body corporate	)	for the appellant
(in receivership)	)	
	)	J.C. MacPherson
Appellant	)	F.M. Greening
	)	for the respondents
	)	
- and -	)	Appeal Heard:
	)	April 4, 1990
	)	
BODY REFORM CANADA LIMITED,	)	Judgment Delivered:
a body corporate, RONALD F.	)	April 6, 1990
CARSON, DOUGLAS MacDONALD	)	
and ARTHUR PELLICCIONE	)	
	)	
Respondents	)	

THE COURT: Appeal allowed in part, the decision of the trial judge awarding costs varied to award costs in the cause and that the principal appeal herein be dismissed with costs in the cause per reasons for judgment of Hart, J.A.; Jones and Chipman, JJ. A. concurring

HART, J.A.:

This is an appeal from the judgment of Davison, J. rendered in chambers on February 27, 1990, whereby he refused to grant an interlocutory injunction to prevent the respondent from manufacturing certain products and requiring the return to the appellant of certain secret formulae for the manufacture of those products. The appellant, a British company involved in the manufacture and sale of beauty products had entered into a business agreement with the respondent, a Canadian company, for the manufacture and sale of those products in Canada and some of the States of the United States. Under the terms of this business arrangement the parties had agreed to place in escrow certain secret formulae and business know-how utilized in the production of the beauty products. If the British company was unable to supply the product consistently to its Canadian licensee the information held in escrow was to be passed to the Canadian company so that it could manufacture and produce its own supply.

The British company went into receivership under a debenture and the Canadian company obtained from the escrow agent the information being held in escrow. The receivers of the appellant wished to dispose of the assets and business of the appellant as a going concern but experienced some difficulty when the Canadian distributor, who was their largest account, was in a position to

manufacture the product and would have no further need for supplies from the British principal. They claimed that the Canadian company was in breach of the agreement as the appellant was at all times ready and willing to supply the product to the respondent and it was only upon failure of the source of supply that the Canadian company could start to manufacture its own product. The receivers applied to the Supreme Court of this Province for an injunction preventing the respondent from manufacturing the product and demanding a return of the information and formulae transferred to the respondent.

Mr. Justice Davison after three hours of evidence and argument in chambers said in his oral decision:

"This is an application for an interim injunction restraining disclosure of confidential information said to be the property of the plaintiff. The plaintiff is a United Kingdom corporation engaged in the manufacture of cosmetic products. On February 2, 1990 the plaintiff was placed in receivership. The plaintiff's products are manufactured according to confidential formulae.

On December 14, 1988 the plaintiff entered into a licensing agreement with the non-corporate defendants. The corporate defendant was incorporated in early 1989. Basically the agreement was a license to distribute the plaintiff's products in Canada and several eastern states of the United States of America. The agreement also contained the following clauses:

'The Licensee will also have the exclusive rights in the Market to manufacture Products (including either direct manufacture or through one or more sub licenses). However, the Licensee may not exercise the manufacturing rights without the prior consent of the Licensor (not to be unreasonably withheld), unless the Licensee can reasonably demonstrate that the Licensor's

facilities are no longer able to supply the Product requirements of the Market on an ongoing and continuing basis.'

In Paragraph 8 of the said agreement, the following is set out:

'The parties acknowledge that circumstances may arise which are beyond the control of the Licensor, which may prevent it from properly supplying Product to the Market. Accordingly, to protect the Licensee in such event, the Licensor has agreed to escrow all Product formulae and other confidential essential know-how of the Body Reform system with the Canadian agency of a major U.K. bank reasonably acceptable to both parties.

The escrow agent is to release the formulae and know-how to the Licensee (which agrees to maintain the confidentiality thereof) only if the Licensor is unable to supply the Product requirements of the Market on an ongoing and continuous basis.'"

The chambers judge then concluded:

"The evidence from the receiver was clear that the plaintiff does not intend to carry on and the main purpose the plaintiff wishes the return of the formulae was to enhance the value of the assets for the purpose of sale. The assets, not the company, will be sold.

The plaintiff says it is in fact carrying on at this moment and there is no breach of the agreement. The plaintiff says it has established a **prima facie** case. A literal interpretation of the agreement supports the plaintiff's argument but the receiver stated that the plaintiff company will not be able to continue to supply the product. Indeed, the evidence of the receiver convinces me that the defendants cannot expect a supply of the product for any significant period of time or on a continuing basis."

The chambers judge thereupon exercised his discretion in favour of refusing to grant the injunction

requested and as I am satisfied that there was evidence upon which he could have reached the finding of fact that he did I find no error in the manner in which he exercised his discretion. This being an interlocutory matter it would therefore be improper for this Court to interfere with the decision of the trial judge.

The appellant has also argued that the trial judge should not have awarded costs to the respondent in the court below and with this ground of appeal I am inclined to agree. Costs on interlocutory matters are usually "in the cause" so that if after full trial it becomes apparent that a different view should have been taken of the interlocutory application the party applying should not be penalized with costs. No explanation was advanced by the trial judge to justify his order for costs and as I can see no reason for departing from the ordinary rule in this case I would hold that his award of costs to the respondent was in error.

In the result I would allow the appeal in part and vary the award of the trial judge to costs in the cause and dismiss the principal appeal with costs in the cause.



J.A.

Concurred in:

Jones, J.A. *Meg.*

Chipman, J.A. *J.A.C.*