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IN THE HIGH COURT OF NEW ZEALAND

A. 305/79

WELLINGTON REGISTRY

499

BETWEEN:      LE CREUSET FONTE EMAILLEE

First Plaintiff

A N D:      HAUT FOURNEAU ET FONDERIES  
DE COUSANCES

Second Plaintiff

A N D:      K.J. REW & CO. LIMITED

Third Plaintiff

A N D:      PARAMOUNT TRADING CO.  
LIMITED

Defendant

Hearing:      15 April 1985

Counsel:      J.O. Upton for Plaintiffs  
J.G. Miles for Defendant

Judgment:      12 June 1985

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JUDGMENT OF JEFFRIES J.

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Before the court is a motion by defendant seeking an inquiry into damages which defendant claims it suffered by reason of an interim injunction granted on 30 October 1979 in favour of all three plaintiffs. This is the third time on an issue of substance this case has come before the court, and I

recount chronologically the background and history of the action.

The first and second plaintiffs are French companies and operate in that country. They are famous for their cookware, especially the cast iron enamelled variety marketed under the brand names "Le Creuset" and "Cousances". The third plaintiff has had the sole agency for the distribution of their products throughout New Zealand since 1966. In 1979 representatives of the third plaintiff learned that there were some products which had recently come onto the market and appeared so closely to resemble the first 2 plaintiffs' products, that it might amount to "passing off". The plaintiffs, therefore, sought an interim injunction designed to prevent the marketing of these products. The motion was heard before Quilliam J. on 30 October 1979, and in an oral judgment delivered on the same day (A. 305/79, Wellington Registry) he ordered that pending the trial of the action an interim injunction be issued restraining the defendant, its directors, servants and agents, from selling, offering for sale, displaying for sale, advertising or otherwise promoting goods so resembling in get-up the get-up of the goods of the first and second plaintiffs as to be likely to be passed off therefore, and then he specified in more detail precisely what those goods were.

After the injunction was obtained, there seemed to be no meaningful activity on the part of the plaintiffs. The defendant obtained in December 1980 an order for discovery against the first and second plaintiffs. On 30 March 1983 in an oral judgment, Eichelbaum J. discharged the interim injunction on the application of defendant. He could see no reason why the court should assist the plaintiffs to maintain an injunction in which they themselves seemed to have lost interest. Furthermore, it was deposed, and not controverted,

that the injunction was causing the defendant company significant harm.

The defendants then filed in July 1984 a notice of motion for an order dismissing the action of the plaintiffs. The matter was adjourned while an amended notice was filed on 28 September 1984, seeking an order dismissing the action and an inquiry into damages. Meantime, in early November 1984 the plaintiffs filed a notice of discontinuance. As a result there is no need for an order dismissing the action, and only the order seeking inquiry is before the court at the present time.

So as to better understand the exercise of the court's discretion, some general observations ought to be made about the events themselves, the main ones having been chronologically set out above. The impression the court obtains from reading the file, the original application for an interim injunction was pursued with vigour and determination. The motion was filed in July 1979 and the hearing on the motion took place over 3 1/2 months later in October 1979, when an injunction was granted by the court. Until that decision the plaintiffs had been very active. It must not be overlooked once an interim injunction is granted it is the defendant which is disabled. The plaintiffs filed an undertaking as to damages, but there also rests upon a plaintiff who obtains from a court a remedy which can have significant commercial implications, as in this case, to pursue the action upon which the interim relief was granted. Any litigant who goes to a court of law to commence a proceeding always retains an obligation to pursue the proceeding to disposal.

In November 1979 orders for discovery were exchanged requiring third plaintiff and defendant to file affidavits of documents. An order was obtained in chambers against the first and second plaintiffs in December 1980. Then for 2 years the

plaintiffs took no action resulting in an application by defendant to discharge injunction which was done by a sealed order in April 1983. In July 1984 defendant filed a motion to dismiss, and after the motion to be decided by this court had been filed in September 1984, in December 1984 plaintiffs, without prior warning, formally discontinued. Overall, after getting their remedy in October 1979 the plaintiffs have displayed very little interest in the substantive proceedings. Moreover, I am satisfied from the evidence the injunction, whilst it was in force, affected the defendant's commercial dealing, but I say no more.

In Hoffman-La Roche & Co. v Secretary of State for Trade and Industry [1975] A.C. 295, Lord Diplock identified the two key purposes of undertakings as to damages. See also Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd (1981) 146 C.L.R. 249, Gibbs J. at 311. I think the modern approach laid down in American Cyanamid Co. v Ethicon Ltd [1975] A.C. 396., relieving an applicant of establishing a strong prima facie promotes the importance of undertakings as to damages.

Whether to order an inquiry into damages is to be decided by the court as a discretionary issue. First, the injunction was issued following a defended hearing, and there are not revealed any circumstances which might require the court to examine the correctness of that act. The defendant adhered to the terms of the injunction and did not indulge in any discrediting conduct. As stated earlier, I am satisfied the injunction, whilst it was alive, affected the defendant's operations. The plaintiffs gave to the court an undertaking as to damages upon which a court usually places reliance for the original decision.

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The court therefore orders an inquiry into damages arising out of the interim injunction granted on 30 October 1979.

I reserve costs on this motion and on the action to be dealt with at the inquiry.

A handwritten signature in black ink, appearing to be 'C. B. i. J.', is written on the right side of the page.

Solicitors for Plaintiffs:

Rainey Collins Armour & Boock,  
Wellington

Solicitors for Defendant:

Bell Gully Buddle Weir,  
Wellington