

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY
Palmerston

1108
Set 2
CP.32/86

BETWEEN

EXPAND TRADERS LIMITED
a duly incorporated
company having its
registered office at
Wellington, Product
Designer and Distributor
Plaintiff

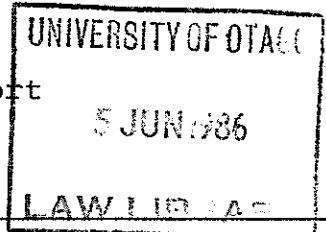
AND

QUADRAFLEX PLASTICS LIMITED
a duly incorporated
company having its
registered office at
117 Grey Street,
Palmerston North,
Plastics Manufacturer
First Defendant

AND

MARK ALEXANDER JENKINS
of Pine Road, Feilding,
Company Director
Second Defendant

Hearing 19 March 1986
Counsel R D Guy for Plaintiff in support
Judgment 19 March 1986



(ORAL) JUDGMENT OF DAVISON, C.J.

This is an application made by the plaintiff for an interlocutory mandatory injunction requiring the defendants, or either of them, to deliver up to the plaintiff all unused materials and packing materials supplied by the plaintiff to the first defendant for the production and packaging of the Multi Mincer.

The circumstances giving rise to the claim are these. On or about 6 November 1985 it was agreed between the plaintiff and the first defendant that the first defendant would commence manufacture of an initial run of 5000 of the product known as the Multi Mincer within one week of that agreement.

That arrangement was not met by the defendant and in subsequent weeks there were numerous endeavours made on behalf of the plaintiff to obtain from the defendant the supply of 5000 units of the product as originally agreed to be manufactured by the defendant. Attempts to obtain supplies from the defendant continued throughout November and December 1985 and January 1986 until on or about 4 February 1986 the second defendant advised the plaintiff that the first defendant was unable to fulfil the terms of the agreement.

The plaintiff thereupon requested the first defendant to return the dies so that he could get further advice upon them and also asked the first defendant to return such materials relating to manufacture and such packaging materials as had been supplied by the plaintiff and were in the possession of the first defendant.

The first defendant has declined to deliver up to the plaintiff any of those materials or the packaging materials and as far as the plaintiff is aware they are presently in the possession of the first defendant. The plaintiff claims that it has advertised the new product to the stage where it is required urgently to produce the product on the market and it has obtained the services of another manufacturer to carry out the manufacturing process.

The plaintiff claims, however, that it is prevented from acting promptly to obtain the manufacture of the product because of delays which will occur in obtaining materials of the type which are at present in the possession of the first defendant and it claims further that even greater delays will occur if it is required to obtain new packaging for the product.

The plaintiff has issued proceedings in this court seeking an injunction requiring the first defendant to return to the plaintiff all materials and packaging supplied, and further claims damages as set out in the statement of claim.

On the motion for an interim mandatory injunction I am required to satisfy myself in accordance with the usual principles established in American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 that there is a serious question to be tried and that the balance of convenience in this case falls in favour of granting the injunction as sought by the plaintiff.

There appears to me to be little doubt that the plaintiff has a strong case against the defendants for breach of contract and, in the event of such breach being established, it appears to me it is entitled to claim a return of the materials and packaging supplied to the first defendant.

In looking at the question of balance of convenience I am in no doubt that damages would not be an adequate remedy in the present case because the effect of the first defendant obtaining the plaintiff's materials and packaging is to prevent the plaintiff from supplying a market which has already been prepared for the product. The plaintiff's losses may be difficult to assess in a case where it is placing a new product on a market, the extent of which is unknown at this particular stage, and which can only be ascertained by launching the product and finding its acceptability on the market.

So far as balance of convenience is concerned, I have looked at the situation as it now exists whereby the first defendant, having not only detained the plaintiff's materials and packaging, has also submitted to the plaintiff accounts totalling \$3,741.94 for work which the first defendant apparently claims to have been done on improvements or alterations to the dies. The dies, however, have been returned to the plaintiff. I have considered whether or not the first defendant has any claim for lien either under the provisions of the Wages Protection and Contractors Liens Act 1939 or at common law upon the materials and packaging in his possession. It seems to

me, however, that no grounds for claiming such lien are available to the first defendant as no work has been done upon the materials in the first defendant's possession.

I am satisfied this is a clear case where the balance of convenience lies in favour of restoring the materials and packaging in the first defendant's possession to the plaintiff as soon as possible.

Turning now to the power of the Court to issue a mandatory interlocutory injunction in circumstances such as this, I note that in 24 Halsbury (4th ed) at para 948 the authors state:

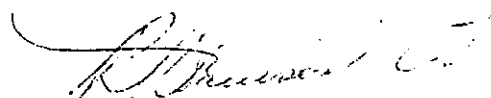
" A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application. "

In Luganda v Service Hotels Ltd [1969] 2 All ER 692 the Court of Appeal held that interlocutory mandatory injunctions were properly made to restore a tenant to occupation of part of a dwellinghouse. More recently in Parker v Camden London Borough Council [1985] 2 All ER 141 the Court of Appeal held that although a mandatory injunction in the form of an order for specific performance was an appropriate remedy, in that case for a breach of a landlord's repairing covenant, it was only in very rare circumstances that the court would issue such an injunction at the interlocutory stage of the proceedings. However, in exceptional circumstances the court was empowered to do so.

I am satisfied that the present case is one where there are such circumstances as will justify this court in making the orders sought. Those circumstances are:

1. that the plaintiff is the owner of the materials and packaging which are sought to be restored to it by injunction;
2. the first defendant appears to have no valid claim for lien upon those materials;
3. that the first defendant appears to be in breach of its contract with the plaintiff and is withholding the materials apparently against a claim for work done on dies which have already been returned to the plaintiff so that there can be no lien at all attaching to the materials and packaging.

The plaintiff is in the position that unless it recovers the materials and packaging immediately, it cannot get another contractor to make the product at once so as to meet the demands of the market. In those circumstances, I think the making of a mandatory interlocutory injunction is justified. I will make an order in terms of the motion filed on 14 March 1986. Costs will be reserved.



Solicitors for the plaintiff

Perry Wylie (Wellington)

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