IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-005464

BETWEEN	CHRIS ALEXANDER SANSON Plaintiff
AND	ENERGY PRODUCTS LIMITED AND DEMON DRINKS LIMITED Defendant

Hearing: 1 December 2009

Appearances: M Colthart for the Plaintiff
W Akel and N Alley for the Defendants

Judgment: 4 December 2009 at 4:30pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 4 December 2009 at 4:30pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors/Counsel:

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[1] The plaintiff, Mr Sanson, seeks an interim injunction against the defendants – Demon Drinks Limited and Energy Products Limited.

[2] This is the second occasion on which Mr Sanson has sought an interim injunction in the course of these proceedings. On the first occasion, Mr Sanson's application was declined by Allan J – see HC AK CIV 2009-404-5464 15 September 2009. Mr Sanson asserts that the position has materially changed since Allan J declined relief.

[3] On 22 October 2009 Mr Sanson filed a notice of interlocutory application seeking further injunctive relief. An amended notice of interlocutory application was filed on 25 November 2009. Mr Sanson now seeks:

a) An interim injunction prohibiting the defendants and their distributors, contract packers, wholesalers, agents, assigns and associated companies from manufacturing, distributing, selling or dealing in any "NOS" branded beverage product, over 100 ml single serve size.

b) In the alternative, an interim injunction prohibiting the defendants and their distributors, contract packers, wholesalers, agents, assigns and associated companies from manufacturing, distributing, selling or dealing in any NOS beverage product, over 100 ml single serve size, that contains more than 320 mg of caffeine per litre of beverage.

c) A further injunction prohibiting the defendants and their agents, assigns and associated companies from using any NOS cans or bottles that contain the statement that the beverage as "50% more kick".

d) A further injunction directing that the defendants take immediate steps to remove advertising and point of sale material advertising any NOS product as having 240 mg of caffeine and/or "50% more kick than any energy drink".

e) A further injunction directing that the defendants:

i) take immediate steps to secure, within five working days, the recall into their possession and custody of all "NOS" branded 500 ml cans and 330 ml bottles currently stocked by the defendants' distributors and wholesalers, or currently on sale in retail outlets supplied by the defendants or the defendants' distributors and wholesalers; and

ii) store and retain all recalled stock, together with all other "NOS" branded stock, in their possession and custody pending the hearing of the plaintiff's substantive claim; and

iii) to file and serve, within seven working days, an affidavit reporting to the Court what steps the defendants have taken to give effect to the orders in i) and ii) above, what quantities of stock have been taken into its possession and custody, and where such stock is stored.

[4] Because Mr Sanson failed in his earlier application for interim relief, he requires leave to make this second application. A Judge may grant leave only in "special circumstances" – see r 7.52.

Factual background

[5] The factual background to this matter is set out in Allan J's judgment.

[6] Mr Sanson and the defendants are competitors in the New Zealand market for energy drinks. Mr Sanson has been in the market for some eight years. He owns and operates his own energy drinks business. Demon Drinks Limited manufactures energy drinks, carbonated soft drinks, and liquid dietary supplements. The company has been operating in the New Zealand market for some two years. Energy Products Limited owns the intellectual property, including the trade marks, relevant to the business carried on by Demon Drinks Limited.

[7] Mr Sanson asserts that certain of the defendants' products, which are sold under the "NOS" label, are energy drinks and that they come within a product category known as "formulated caffeinated beverages". Mr Shaw, a director of the defendants, denies that claim. He says that the NOS products are not energy drinks; rather they are dietary supplements.

[8] The NOS product, until recently, contained 480 mg/L of caffeine. It was initially sold in 500 ml cans. The label noted the amount of caffeine in the product. It asserted that the product gave "50% more kick than any energy drink". More recently it has been sold in 330 ml bottles which also set out the same information. Both products assert on their labels that they are dietary supplements.

[9] Mr Sanson says that because the products are energy drinks, they must comply with Standard 2.6.4 of the Australia and New Zealand Food Standards Code. The standard requires that formulated caffeinated beverages contain no less than 145 mg/L and no more than 320 mg/L of caffeine.

[10] Mr Shaw says that because the products are dietary supplements, they are governed by the Dietary Supplements Regulations 1985 (SR 1985/208), and not by Standard 2.6.4. He says that the product complies with these regulations.

[11] There are a number of other competitors in the energy drinks market. Both the defendants' products, and those of the plaintiff and other competitors, are widely sold by retailers such as dairies and service stations.

Allan J's decision

[12] In a reserved decision, Allan J considered the arguments advanced by the parties, and in particular the contention being made on Mr Sanson's behalf that the defendants were in breach of the statutory obligation created by s 11O of the Food Act 1981. He discussed the standard and the regulations, and their provenance, and concluded that the regulations applied to the defendants' product, but that it did not follow that the standard also applied. He concluded that there was a serious question

to be tried, but that it was by no means as clear as was contended on Mr Sanson's behalf.

[13] Allan J then went on to consider the balance of convenience. He concluded that the defendants' conduct was not plainly illegal, and that while there was a tenable argument that the defendants were infringing the standard, there was also a respectable argument to the contrary. His Honour noted a number of factors which militated against the grant of interim relief. *Inter alia*, he noted that Mr Sanson had failed to provide the Court with the usual evidence as to his ability to meet any award of damages the Court might make in the event that the interim injunction was granted, that the defendants ultimately succeed at trial. His Honour observed that this was "a grave omission".

[14] Considering the overall justice of the case, Allan J concluded that it was not appropriate to grant an interim injunction. He noted that there was a serious question, but not one of such strength as to override balance of convenience considerations. He noted that Mr Sanson had not satisfied him that the defendants' actions were plainly illegal, and that the balance of convenience factors favoured the defendants.

[15] He declined Mr Sanson's application for interim injunction.

Application for leave

[16] Since Allan J's decision of 15 September 2009, the New Zealand Food Safety Authority ("NZFSA") has taken a position on the matter. In a letter dated 2 October 2009 to Mr Sanson, it advised that it considers that liquid food or products that are presented in rip top cans of large volumes (such as 500 mls) containing caffeine at levels greater than 320mg/l (for example NOS 500ml), do not fall within the definition of dietary supplements under the Dietary Supplements Regulations 1985. Rather it considers that products which contain caffeine in excess of that level are non compliant formulated caffeine beverages. The NZFSA advised that it considered that products containing caffeine marketed as liquid energy shots in very

small volumes (around 60 mls) do appear to meet the criteria for categorisation as dietary supplements.

[17] On 1 October 2009, the NZFSA wrote to Mr Shaw advising that it considered that one of the defendants' products – the 500 ml NOS can – was a non compliant formulated caffeine beverage. The NZFSA advised that it considered that the sale of the 500 ml can was an offence under ss 11O and 11Q of the Food Act 1981. It requested Mr Shaw's advice as to how he intended to rectify the situation, and advised him that failure to take reasonable steps might result in enforcement action by the NZFSA.

[18] On 6 October 2009, Demon Drinks Limited replied to NZFSA. It expressed the view that the NZFSA had misinterpreted the regulation and set out its reasons for that contention. It then advised that it would prefer to work with the NZFSA, and not engage in what would inevitably be a lengthy and costly process to clarify the Dietary Supplement regulations. It proposed, on a without prejudice basis and without any admission of liability, that it would sell through its existing inventories of ingredients, packaging and finished product without intervention from the NZFSA, and would then voluntarily reduce the caffeine levels to 320 mg/1000 ml for products manufactured thereafter. It estimated that its current NOS stocks would be sold through the market over a course of some two to three months. It requested that the NZFSA should confirm that it was comfortable with this proposal.

[19] The NZFSA replied on 12 October 2009. It recorded Mr Shaw's proposal, and then stated that it expected, and would be taking action to ensure, that all existing stock would be off the shelves and not for sale by 12 December 2009. It also requested confirmation that all new product packaging and composition would comply with the requirements of the Standards. It advised that it would continue to monitor the situation closely, and that failure to adhere to the process might result in further action.

[20] On 16 October 2009, NZFSA sent a further letter to Mr Shaw advising that Demon Drinks Limited was able to continue to sell already manufactured and packaged non compliant NOS 500 ml cans and 330 ml bottles, but that all existing

product had to be off the shelves and not sold past 12 December 2009. The letter advised that Demon Drinks Limited should not manufacture more non complying product, and that it could not use packaging for non compliant product for new stock.

[21] Mr Sanson says that the "decision" of the NZFSA is "fresh evidence", and that it constitutes special circumstances entitling him to bring a second interlocutory application seeking an interim injunction. He argues that the NZFSA "decision" was not known at the time Allan J dealt with the matter and that had it been, it is arguable that His Honour would not have declined the interim injunction application.

[22] In this regard Mr Colthart appearing for Mr Sanson noted that Allan J recorded at [30] that Mr Sanson had complained to both the Commerce Commission and the NZFSA, and that the NZFSA had not responded. His Honour noted as follows:

> There seems nothing to suggest that these Authorities are concerned at the defendants' activities.

It was argued that the relevance of the NZFSA "decision" is that it reinforces Mr Sanson's claims. It was pointed out that His Honour observed that while there was a serious question to be tried in this regard, the "matter [was] by no means as clear as [counsel for Mr Sanson] claim[ed]". It was submitted that Allan J tempered his conclusion and, on the materials before him, concluded that the defendants' conduct was not "plainly illegal" and that there was a "respectable argument" that the defendants were not infringing the standard. It was Mr Colthart's argument that Allan J's finding on the alleged illegality influenced the overall balancing exercise undertaken by him. He asserted that if the NZFSA's stance had been known at the time, Allan J may well have reached a different conclusion regarding the strength of the plaintiff's case.

[23] There was one additional factor said to constitute special circumstances. As at the date of Allan J's decision, the defendants were selling the NOS product in 500 ml cans. After the decision, the defendants introduced 330 ml glass bottles containing the NOS product into the market. It was asserted for Mr Sanson that the 330 ml product is also clearly in breach of the relevant standard.

[24] Mr Akel appearing for the defendants argued that the NZFSA's letter did not alter the situation. He submitted that it simply expresses the opinion of the NZFSA, and that it does not amount to a formal or binding decision. In his argument, all the letter does is provide some support for the argument that there is a serious question to be tried. He noted that Allan J had already found that there was a serious question to be tried, and that the position had not changed. He submitted that there was no new evidence that would have materially affected the outcome of the first injunction application.

[25] In relation to the sale of NOS in 330 ml glass bottles, Mr Akel accepted that that product had been offered for sale as from 16 October 2009. He noted that the amount of caffeine in the glass bottles is the same as that in the can, and that the sale of the product in 330 ml glass bottles is not fresh evidence. He of course denied that the contents of the glass bottles are in breach of the standard.

Special circumstances

[26] The High Court Rules do not define what is meant by the words special circumstances.

[27] As is observed in *Sim's Court Practice*, HCR 7.52.3, the rule is not intended to provide a disgruntled litigant with a second opportunity to re-argue an earlier unsuccessful application and it is clearly wrong in principle that a litigant should be able to re-argue or reinforce his or her case with evidence that was available but which was not called at the first hearing – see *Kiwi Co-operative Dairies Ltd v Capital Dairy Products Ltd* (1989) 1 PRNZ 622 at 627 – 628.

[28] The words "special circumstances" are used in other rules – see, e.g. r 7.51 – and in other contexts it has been noted that they are wide, comprehensive and flexible words, indicating something abnormal, uncommon, or out of the ordinary, with something less than extraordinary or unique – see *Kidd v Van Heeren* (1997) 11 PRNZ 422 at 424.

[29] Here the view of the NZFSA was not known to either party when the matter was before Allan J. It is in that sense fresh evidence. The more important question is whether the evidence would have had any significant bearing on the outcome of Mr Sanson's initial application.

[30] The letters express the opinion of the NZFSA. That opinion does not bind the defendants. It does not have the status of a ruling by a Court. Rather the NZFSA has taken a view and expressed it. The interpretation taken by the NZFSA has been challenged by the defendants, although in a pragmatic response, they have agreed to work with the NZFSA and over time withdraw the product and change their product to bring it within the standard.

[31] I accept that the NZFSA's stance provides support for the arguments advanced by Mr Sanson. However, Allan J specifically found that there was a serious question to be tried in this regard. His Honour considered on the materials before him that it could not be said that the defendants' conduct was "plainly illegal". In my judgment the position has not changed. It cannot be said that, because NZFSA has now expressed its opinion, the defendants' conduct is plainly illegal.

[32] I now turn to Mr Sanson's assertion that the defendants are now manufacturing and selling NOS in 330 ml glass bottles.

[33] The evidence discloses that those bottles were manufactured and filled on 16 October 2009. The product was not available in glass bottles at the time of Allan J's decision. The evidence however makes it quite clear that the launch of the 330 ml bottle had been planned by the defendants since August 2009, and that the purchase order for the manufacture of the glass bottles was placed on 17 September 2009.

[34] Following Allan J's decision, there was nothing to stop the defendants from continuing to manufacture their product and from selling it in whatever containers they considered were appropriate. The ratio of caffeine to beverage – 480 mg/ 1000 ml – in the glass bottle is the same as that in the NOS 500 ml can which was the

subject of the first injunction application, and the existence of the bottle is not fresh evidence which could have had any bearing on the outcome of the first hearing.

[35] In summary, in my view there are no special circumstances which justify the grant of leave to Mr Sanson. As a consequence he is not entitled to bring a further interlocutory application for interim injunction.

Balance of convenience

[36] In the event that I am wrong in this conclusion, I record that I would have declined an interim injunction on the balance of convenience in any event. Allan J was ultimately persuaded to decline relief on balance of convenience considerations. In my view the balance of convenience has now shifted even more strongly in the defendants' favour.

[37] First, the defendants have reached a voluntary agreement with the NZFSA. That agreement requires that the NOS product with a caffeine level in excess of 320 ml/1000 mg not be sold after, and be withdrawn from sale by, 12 December 2009. The product will be off the market as from that date. Even if Mr Sanson's assertions prove to be correct, an injunction will no longer be required.

[38] Secondly, one of the factors taken into account by Allan J at the first hearing was a failure by Mr Sanson to provide the Court with any proper evidence as to his ability to meet an award of damages in the event that the defendants ultimately succeed at trial.

[39] Mr Sanson has maintained his stance – indeed he has reinforced it. In an affidavit filed in support, he states as follows:

> I choose not to disclose precise financial details about my business or my overall financial position.

Rather he states that if the defendants can cogently show him or the Court how much of their profit is going to be lost if the NOS product is withdrawn from sale, then he will put up a cash bond on the basis that the matter proceeds promptly to trial.

[40] An undertaking as to damages is required when an applicant seeks an interim injunction – r 7.54. It is a mandatory requirement and when there is a likelihood of financial detriment to a respondent, an applicant has an obligation to provide the Court with sufficient information to enable the Court to assess the worth of the undertaking – *Jireh Holdings Ltd v Porchester Ltd* HC AK M 1466/02 18 December 2002 Paterson J. If there is no information to support an undertaking, then this is likely to be an important factor in assessing the balance of convenience – *Eide v Huxford Holdings Ltd* HC DN CIV 2003-412-677 1 October 2003 Chisholm J.

[41] Mr Sanson's refusal to provide the Court with sufficient information to enable it to assess the worth of his undertaking is a powerful factor which would have counted against him had leave been granted.

Conclusion

[42] Leave for Mr Sanson to bring a second application seeking an interim injunction is declined.

[43] The defendants are entitled to costs. Mr Akel has already signalled the defendants' view that the application was an abuse of process, and that they will be seeking increased costs. In the circumstances, I direct as follows:

a) the defendants are to file an application for costs within 10 working days from the date of this judgment; and

b) the plaintiff is to file any response within a further 10 working days.

[44] I will then deal with the application for costs on the papers, unless I require the assistance of counsel.

Wylie J