ORIGINAL

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110301
Docket: S110764
Registry: Vancouver

Between:

Pro Line Nutrition Ltd.

Plaintiff

And:

Daniel Welter dba Albi Naturals,
Albi Naturals Ltd. and Albi Imports Limited

Defendants

Before: The Honourable Mr. Justice Greyell

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff	R. Fleming
Counsel for Defendants	T. Braithwaite
Place and Date of Hearing:	Vancouver, B.C. February 24-25, 2011
Place and Date of Judgment:	Vancouver, B.C. March 1, 2011

C 37

[1] **THE COURT**: On Saturday, February 5, 2011, the plaintiff appeared before Madam Justice Allan of this Court on an *ex parte* application seeking a Mareva injunction.

[2] The basis of the plaintiff's application was that the defendants were indebted to the plaintiff in the sum of $259,233.24 for goods sold and delivered, that the defendant Mr. Daniel Welter had made numerous promises such payment would be made, and that the plaintiff had discovered the evening before the application was brought that the defendants were moving the contents of their warehouse at 4508 Beedie Street, Burnaby, into two large trucks with the intention of moving those contents to Edmonton, Alberta. The plaintiff also advised the Court the defendant told it they had closed their local bank accounts.

[3] The motion was supported by two affidavits, one by Ms. Amarjeet Parmar, a director of the plaintiff, and one by a legal assistant employed in the plaintiff's counsel's office.

[4] After hearing the motion and the submissions of Mr. Fleming, Madam Justice Allan adjourned for a period of time to review the material provided to her and the legal authorities supplied by counsel. She then gave unreported oral reasons that afternoon granting the application.

[5] The order which was granted provides as follows:

> 1. the Defendants be enjoined from removing from British Columbia, selling, mortgaging, pledging, transferring, assigning, diminishing, or otherwise disposing of or dealing with any or all of their assets worldwide, including, without limiting the generality of the foregoing:
>
> a. all inventory, office equipment, furniture, supplies or stock of any kind whatsoever;
>
> b. any bank accounts at the Royal Bank of Canada at 4370 Kingsway, Burnaby, BC;
>
> (collectively referred to as the "Assets"), whether the same be held directly or indirectly by any of the defendants through any company, trust, partnership, or other entity beneficially owned or controlled by any of the defendants, whether the assets may be situate, until further order of this court except as is necessary for the payment of ordinary living expenses;

2. the defendants, within seven days of service of this order, each make and serve upon the plaintiff's solicitors an affidavit disclosing the full value of Assets and their exact location as of the date of this order and whether the same are held in the name of one or more of the defendants or jointly held or held by nominee(s), trustee(s), or otherwise on the defendants' behalf and, without prejudice to the generality of the foregoing, specifying:

   (a) the identity of all bank or other accounts, including trading or investment accounts, term deposits, investment certificates, savings bonds, or other money market instruments in the name of one or more of the defendants or jointly held or held by nominee(s), trustee(s), or otherwise on the defendants' behalf and the sum standing to the credit of such accounts, term deposits, investment certificates, savings bonds;

   (b) full details as to all real property or interest therein legally or beneficially owned by each of the defendants;

   (c) full details as to any personal property or interest therein legally or beneficially owned by each of the defendants; and

   (d) the name and address of any person or entity who has or may have possession, custody, or control of the Assets.

3. the Defendants may apply to set aside this order on 24 hours notice;

4. the Plaintiffs shall file their Notice of Civil Claim by Friday, February 11, 2011, and thereafter serve the Defendants as soon as practicable.

[6] The respondents were served with the order that evening. Their then counsel accepted service of the order on Monday, February 7, 2011. The defendants brought an application to set aside the injunction. That application was ultimately adjourned by consent upon defendants' counsel receiving the plaintiff's response materials. The application has now been renewed by the defendants' current counsel.

[7] The goods and merchandise that were subject to the order remain on the trailer of Action Movers. The trailer has been placed those goods in a secure location. Other merchandise remains in the warehouse of the defendants on Beedie Street in Burnaby.

[8] At the time the plaintiff appeared before Madam Justice Allan, it had not filed its notice of civil claim. It attached a copy of its proposed claim to the material it

filed. The order made by Justice Allan required the defendant file its claim by February 11, 2011.

[9] As the defendant complains the nature of the claim has changed from a claim in debt to a claim for rescission, I note it was made clear to Justice Allan that plaintiff's counsel required time to frame the claim more fully. He was given an opportunity to consider the nature of the claim and how it would be framed when the order was issued.

[10] The claim as filed on February 11, 2011, seeks in essence two forms of relief. First, a declaration that the defendant Mr. Welter holds the products in trust for the plaintiff and holds any money received on account of the products in trust for the plaintiff, for rescission of the contracts, and for an order that the defendant Welter deliver the products to the plaintiff. The plaintiff also seeks a declaration it is entitled to sell the product in its present form under s. 43 of the *Sale of Goods Act*, R.S.B.C. 1996, c. 410. In the alternative, the plaintiff seeks judgment in debt.

[11] The matter before me involves several applications:

1. an application by the defendants to set aside the order of Madam Justice Allan, that is, the Mareva injunction;

2. an application by the plaintiffs for orders of possession and sale of all of the natural health products manufactured by the plaintiff and delivered to the defendants but not paid for from April 2010 to the present date;

3. an order the defendants deliver their affidavits of assets, as had been required pursuant to Madam Justice Allan's order, within three days of any order that may be made in this case; and

4. both parties seek an order for special costs.

[12] I will deal with the applications in order. It is first necessary to review the background leading to the issuance of the order by Madam Justice Allan and to consider the evidence filed in support of the present motions.

[13] The plaintiff Pro Line Nutrition Ltd., who I will refer to as either the plaintiff or Pro Line, manufactures vitamins and health supplements at a facility in Port Moody. It has seven employees and annual sales of approximately $900,000.

[14] The defendants distribute the products manufactured by the plaintiffs and other products under the brand name Albi Naturals.

[15] The defendant Mr. Welter became involved with the Albi brand in 2007. The brand had existed in Canada since 1972. In 2007 Mr. Welter purchased the shares of Albi Imports Limited. In July 2008 he incorporated Albi Naturals Ltd. to establish a new brand and the trade name Albi Naturals. The shares of this company are evidently owned by his wife.

[16] According to Mr. Welter, Albi Imports is the corporate entity which employs personnel, pays suppliers, payroll, and processes sales orders. It is the company, he says, which does business with the plaintiff.

[17] The plaintiff has had a business relationship with Albi Naturals - and I do not use the name Albi Naturals in the corporate sense - since January of 2009. I use Albi Naturals - and I will discuss this further - in a broader sense. The principal of the plaintiff, Ms. Parmar, deposed she knew of the defendants only through her personal dealings with Mr. Welter or through the name Albi Naturals.

[18] Until February 4, 2011, Albi Naturals operated from leased office and warehouse space on Beedie Street in Burnaby, BC.

[19] The plaintiff manufactures products for the defendant utilizing at times bottles supplied by the defendant, and it places the defendants' labels on the bottles.

[20] The business relationship can be described in the following manner. The plaintiff receives individual purchase orders from the defendant setting out the

quantity of product ordered, a description of the product required, and the price. Albi Naturals invoices the plaintiff for bottles supplied and for some content to be placed in the product which Pro Line manufactures. Examples of such product invoiced by Albi Naturals includes cotton coil and rice flour powder. The product (being vitamins and health supplements) is then produced by the plaintiff and shipped to the defendant at its warehouse in Burnaby. The plaintiff invoices each purchase order. The invoice is sent to Albi Naturals.

[21] The facts pertinent to the present application I have covered briefly but will elaborate. By early February 2011, the accumulated amounts owing to the plaintiff under various invoices issued amounted to $258,762.96. That amount had grown steadily since about April 2010. There had been payments made by Albi, but, as stated, the account outstanding had been steadily rising.

[22] It is clear and not contested by Mr. Welter that the plaintiff's director, Ms. Parmar, had been pressing him for payment on a continuous basis prior to February of 2011. I am satisfied on the material before me there had been many requests for payment and many promises given that payment would be made, few of which came to fruition.

[23] In November 2010 the defendant, through Mr. Welter, advised Ms. Parmar the defendant Albi Naturals was being refinanced and that the defendant would pay the full amount outstanding on the account. Such promises continued through November, December of 2010 and into January 2011.

[24] On Thursday, January 27, 2011, Mr. Welter advised Ms. Parmar the funds had arrived but there was a five-day hold on them. He said he would give her a cheque the following Monday but she could not cash it until Wednesday.

[25] My review of the material before me establishes that there were a number of such promises for full or partial payment which were made but that they were not complied with.

[26] The increase in the amounts of the accounts receivable and the defendants' apparent avoidance or inability to pay the accounts progressed to the stage in late January/early February 2011 where Ms. Parmar put the defendants on notice the plaintiff would only process the defendants' orders on a COD basis.

[27] Mr. Welter did not give Ms. Parmar the cheque that he had promised he would provide to her on January 27. He advised her he required surgery that day. He did arrive at the plaintiff's offices on Thursday, February 3, with a bank draft for $7,800 representing a COD payment as a delivery. He promised her he would pay between $60,000 and $100,000 by wire when he returned to Edmonton, where he resided.

[28] On Friday morning, February 4, 2011, Mr. Welter e-mailed Ms. Parmar saying he needed two signatures on the cheque. Later that Friday and for the first time, Mr. Welter advised Ms. Parmar the defendants were moving their operations to Edmonton. He told her during that conversation he would phone her later to settle up the accounts.

[29] When she asked him why Albi was moving, he responded, according to Ms. Parmar, that Albi had to move or it would not survive. According to Ms. Parmar, he also advised her that the move would occur over the next couple of weeks. Significantly, it is likely that at this time Mr. Welter had already arranged for the moving trucks to attend at the defendants' premises that day.

[30] On the afternoon of February 4, as no one was answering the telephone at the defendants' office, Ms. Parmar deposed she and her daughter, Neera Parmar, paid a surprise visit to the defendants' warehouse. They deposed they saw Mr. Welter there and two large trucks and Albi's employees loading the contents of the warehouse onto the trucks. She deposed the first truck was a large unidentified semi-trailer and the second was a five-ton truck with the name Action Movers painted on the side. Mr. Welter again advised her at that time the defendants were moving to Edmonton and that they had closed their local bank accounts.

[31] The conversation between Ms. Parmar and Mr. Welter is described by the former in an e-mail of February 4, 2011, which in part reads:

> We got a little bit of information from him. We asked for some payments even today, and he indicated that he closed his accounts here in Vancouver when in fact he made a draft payment just yesterday to us from his account. He also phoned his partner Rod and put him on speakerphone in front of us and informed him that we are concerned and would like to receive our payments. Rod then reassured us that he will be meeting with Dan tomorrow to get us some money, but when asked, Rod had no idea what amount Dan was planning to pay us. Amar even talked to Rod, and she asked him directly how much money we will be receiving, and he did not know. Dan then stepped in, saying, "Rod doesn't have a clue how much money we are transferring tomorrow."

[32] Ms. Parmar returned to the Albi warehouse on Monday, February 7. They deposed they looked in the windows and the warehouse looked quite empty.

[33] I accept there is product in the warehouse as deposed to by those who filed affidavits on behalf of the defendant. The evidence is the warehouse does not have windows that permit one to see the entire inside.

[34] The defendant has engaged a real estate agent to sublet the office and warehouse space, and it is apparent that the product that is in the warehouse will ultimately be moved.

[35] The parties, as stated, have exchanged numerous affidavits on the present motion. Mr. Welter has deposed it has always been his intention to move Albi's business to Edmonton: he deposed that is where he resides and that it is not convenient to carry on the business in British Columbia.

[36] He deposed such a move had not been possible until he had entered into arrangements with a new business partner, Mr. Rod Peterson, to consolidate their businesses and a number of other what were referred to in argument as distressed businesses in the same industry into an integrated entity operating under the name of Albi Naturals 21 Century Inc. ("Albi 21"). That was a company incorporated by Mr. Peterson with the thought of consolidating the business of Albi with other businesses in the industry.

3. the sneakiness, as she described it, of the defendants' conduct; and

4. the type and value of the asset being removed from British Columbia.

I will deal with these points in order.

[42] I find the payment history was before Justice Allan and that she considered it. There is specific reference to the discussions about the payment history in the transcript of those proceedings at pages 10 to 11. Accordingly, I do not accept the argument the plaintiff misled the judge about the payment history.

[43] I also do not accept the defendants' argument the judge was misled as to the identity of the debtor. Again, there is a discussion in the transcript as to the identity of the defendants and whether Mr. Welter was properly joined as a defendant. That discussion is found at page 2 and again at page 10. Further, this issue was identified to Justice Allan as a potential issue the defendants might raise. That was an obligation that was on plaintiff's counsel given the application before the judge was an *ex parte* application. Having said that, this application is a new hearing, and I now have response affidavits from the defendants. In my view there is nothing in the response affidavits which is materially different from the information placed before Madam Justice Allan.

[44] Ms. Braithwaite argued the product belongs to Albi Imports and that this action does not lie against the defendants, Mr. Welter or Albi Naturals Ltd. On my review of the materials, this defence is not sustainable. The e-mail exchanges between the plaintiff and the defendants, the purchase orders and invoicing records all establish Mr. Welter is the voice of the entity Albi Naturals. The invoices to the plaintiff are in the name of Albi Naturals, the purchase orders to the plaintiff are from Albi Naturals, and the e-mail exchanges reference Albi Naturals. Albi Imports Limited appears only in small print on some of the labels provided by the defendants to the plaintiff. As far as the plaintiff was concerned, the party with whom they

contracted for their purchase orders and with whom they were doing business were Mr. Welter and Albi Naturals. They are both properly, in my view, parties to this action.

[45] Ms. Braithwaite argues the plaintiffs were wrong in their conclusion there was product being loaded into two trucks. She says it was only one truck which was being loaded. The fact of the matter is the material shows there were three trucks present that evening: there was the large tractor-trailer; the five-ton truck which delivered the Action Moving company employees to the site; and there was a further truck into which employees were moving product allegedly destined to a Korean customer. It is understandable the plaintiff may have been mistaken about the number of trucks being loaded with its merchandise.

[46] I will consider the balance of the defendants' arguments after reviewing the applicable legal principles. As stated, the defendants' application requires me to make a determination on all the evidence now before me. This is a rehearing based on that evidence.

[47] The test for issuing a Mareva injunction is set out by Justice Huddart in *Mooney v. Orr*, [1994] B.C.J. No. 2652 (S.C.) at paras. 43 through 52:

> This relaxed approach to applications for Mareva injunctions may be seen as fitting well with the established approach for granting interim injunctions in British Columbia. While there is a longstanding two-pronged test for the granting of an interim injunction, the Court of Appeal cautioned in *B.C. (A.G.) v. Wale*, (1986), 9 B.C.L.R. (2d) 333 (C.A.) at 346, that "... the judge must not allow himself to become the prisoner of a formula. The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case." The Court of Appeal affirmed the traditional test in *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, (1992), 64 B.C.L.R. (2d) 96 (C.A.) and added (at 102) that:
>
> > Resort to the decided cases in which the test has been applied will provide the necessary limits to that flexibility, not so much through what those cases say, but more through what they decide about whether an interim injunction should be granted on each set of particular facts.
>
> The comparable approach to a Mareva injunction would be to require a strong *prima facie* (which seems to have been favoured in *Aetna*, *supra*) or a good arguable case (as expounded in *Ninemia*, *supra*,) to cross the threshold, and then to balance the interests of the two parties, having regard

to all the relevant factors in each case, to reach a just and convenient result. Included in such factors will be evidence that establishes the existence of assets within British Columbia (for a domestic injunction) or outside (for a national or international injunction) and a real risk of their disposal or dissipation so as to render nugatory any judgment.

But also included will be whatever other factors counsel consider relevant in the particular circumstances. A non-exhaustive list of such factors drawn from the authorities includes: the nature of the transaction (local, national, international) giving rise to the cause of action, the risks inherent in that transaction, the residency of the respondent, enforcement rights for judgment creditors in the jurisdiction where the respondent's assets are located, the amount of the claim, the history of the respondent's conduct.

In my view this approach reflects the practical approach this court has been taking on contested applications and permits the flexibility needed to take account of the wide variety of circumstances that give rise to applications such as the one before me, both in deciding whether to make an order, and in deciding the appropriate terms and conditions. It will be rare that a Mareva order is unconditional.

Madam Justice Newbury demonstrated this approach when she collapsed her analysis of the evidence relevant to proof of assets within and/or outside the jurisdiction with that relevant to the requirement to establish a real risk of removal or dissipation before concluding (at 22) that the evidence was:

> ... sufficient to show a relative deficiency of assets held by Mr. Mooney in the province and that there is a 'real risk' of his transferring or concealing significant assets elsewhere.
>
> ...
>
> ... there is a significant chance that any judgment the applicants might obtain in these proceedings would be frustrated by Mr. Mooney's transfer or concealment of assets *ex juris*.

This approach permits factors taken into account on applications for ordinary injunctions to be considered on these extraordinary applications as well: the relative strength of the parties' cases, evidence of irreparable harm one way or the other, potential effects on third parties, factors affecting the public interest. It also permits the balancing of the convenience of the parties and the tailoring of the remedy to fit the circumstances.

In other words, it prevents the judge from becoming a prisoner of a fixed formula and places the emphasis where it belongs, on the justice and fairness of the order *inter partes*. It is fair to both sides, because, while maintaining the burden on the plaintiff to establish grounds for the application, it justifies calling upon the defendant to meet the case brought by the plaintiff, by putting forth evidence to support his position.

By this approach, the ultimate question becomes, is it fair and just that the applicant should have the right to monitor the movement or expenditure of capital assets by the respondent during the course of the proceedings between them?

> Along the route to an answer, the court must consider whether and to what extent the justification put forth in a particular case permits that right. This question directs attention to the value underlying the court's examination of whether there is real risk of dissipation of domestic assets and/or foreign assets, whether that analysis is performed as part of the three-pronged test that predominates at the *ex parte* stage or of the underlying "fit and just" test likely to be given flesh only at the *inter partes* continuation hearing.
>
> Implicit in the framing of this question is the view that Mareva injunctions are available not only to restrain the active dissipation of assets, but also as a form of security. In my view it is only fair to state directly what courts are doing in fact.

[48] Justice Huddart refers to the approach to be followed by the courts as being a practical one and a flexible one, taking into account a wide variety of circumstances. It requires an assessment of the relative strength of each party's case, an assessment of evidence of irreparable harm one way or the other, an assessment of the potential effects on third parties, and a balancing of convenience of the parties.

[49] As she states at para. 50, the ultimate question becomes is it fair and just that the applicant should have the right to monitor the movement or expenditure of capital assets by the respondent during the course of the proceedings.

[50] Madam Justice Huddart's decision was considered by a five-member panel of this Province's Court of Appeal in *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481. In that decision, the court reviewed and adopted Madam Justice Huddart's approach, but at para. 46 said:

> In all cases, great caution is to be shown to avoid the mischief of litigious blackmail or bullying, and due regard must be paid to the basic premise that a claim is not established until the matter is tried. Great unfairness may be occasioned, and the administration of justice brought into disrepute, by an order which impounds assets before the merits of the claim are decided. It is useful to recall the words of Huddart J.A. in *Grenzservice Speditions Ges.m.b.H. et al. v. Jans et al.*, (1995), 129 D.L.R. (4th) 733, 15 B.C.L.R. (3d) 370 (S.C.) at 755-756 at p. 23:
>
> > [Mareva and Anton Pillar orders] represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue.

[51] Having regard to the principles of law which are applicable, I am satisfied that, after a consideration of all the factors present in this case, the balance of

convenience favours the issuing of the injunction. In my view the defendant has established a strong *prima facie* case for its claim in both debt and for rescission. As stated, the contracts were individual contracts for the manufacture of product. They were ordered and invoiced separately. The fact that payment on certain invoices was applied against other invoices does not alter this fact.

[52] The defendant admits the debt. While the bottles, or some of them, and labels may have been supplied by the defendants, the plaintiff was issued an invoice by the defendant Albi Naturals at least for the bottles. There is some evidence on the material there is at least one account owed by the defendant to the plaintiff in the amount of approximately $2,000. To the extent that account does remain outstanding, the amount can be offset against the amount owing to the plaintiff. In any event, such amount is insignificant in comparison to the amount of the plaintiff's claim.

[53] The plaintiff's claim is significant. It represents one-quarter to one-third of the plaintiff's annual sales.

[54] The evidence submitted by the defendants subsequent to the *ex parte* hearing confirms the defendants' precarious financial position both before and subsequent to the planned consolidation or reorganization plan deposed to by Mr. Welter and Mr. Peterson.

[55] The material filed, in my view, makes it clear the chances of the plaintiff recovering on its outstanding account is slim should the injunction not be issued. The e-mail attached as Exhibit H to the affidavit of Ms. Tiefenbach makes this clear.

[56] It is also clear and admitted by Mr. Welter that when he was pressed by the plaintiff for payment, he made many promises payment would be made. He also acknowledges he made many excuses for not making these payments over a number of months preceding February 4, 2011. Mr. Welter also acknowledged in his affidavit he avoided the plaintiff when she pressed for payment.

[57] One of the main points in contention between the parties was whether the move to Edmonton was a move in the ordinary course of business, that is, in furtherance of their business consolidation plan, or whether it was a sneaky move to take assets out of the jurisdiction and beyond the reach of the plaintiff. In my view the evidence strongly suggests the latter. I reach this conclusion for the following reasons:

1. The general backdrop of the size of the plaintiff's claim and the general financial state of the defendant.

2. The fact the plaintiff through its director, Ms. Parmar, had become more pressing in her requests for payment, with the defendant Mr. Welter making promises of refinancing with a significant amount to be paid on account. Obviously the company did not have the means to carry through or make good on these promises.

3. The reorganization of the company is a fact. It is also a fact that Albi was being relocated into the premises of a distressed manufacturing competitor.

4. I have also taken into account the fact the employees of Albi were advised of the move February 1, some three days before the move was to occur. The mover was organized within days of the move, if not the day before the move, and significantly, Ms. Parmar was only advised on the day of the move that Albi was moving, notwithstanding that she had been in contact with Mr. Welter on numerous occasions in the days and weeks immediately preceding February 4, 2011.

[58] In my view the move, while also likely in furtherance of the general scheme to reorganize Albi 21 and the defendants, was intended in the main and as its prime purpose, to move assets out of the province and beyond the reach of the plaintiff.

[59] Accordingly, I grant the order for the Mareva injunction. I dismiss the defendants' application to set aside the order made by Madam Justice Allan on February 5.

[60] I turn to the terms of that order, which is found at schedule A to the plaintiff's notice of application.

[61] I do not intend to make any order as to costs in this matter at this time.

[62] The terms of the order are modified from the terms that are set out in schedule A, so I would ask counsel to make a note and to provide me with their submissions on what I am about to say:

1. Action Movers will permit the plaintiff or its designee to inspect the contents of any trailer, truck or warehouse containing any material or goods removed from the defendants' warehouse on Friday, February 4, 2011.

2. Action Movers will deliver to the plaintiff, or permit the plaintiff to take delivery of, any product, as that term is described in the existing order, for delivery at the plaintiff's place of business at 2619 Clarke Street in Port Moody, such delivery to be at a time prearranged with the plaintiff.

3. The plaintiff shall pay Action Movers' account for removal of product from the warehouse and storage of that product. Such account will be part of the plaintiff's disbursements in this action and will be recoverable depending upon the ultimate disposition of costs.

4. The scope of this order is not intended to include office equipment, files, computers or business records of the defendants. The defendant shall be at liberty to retrieve that equipment and/or files and records from Action.

[63] Paragraph 2 of the draft order stands, with the exception of para. (a), which I think I have already covered. Paragraph (b) will stand. Paragraph 2(c) will stand.

[64] Paragraph 3 of the draft order will be granted, and that has to do with the plaintiff conducting a detailed inventory of the product and providing a copy of that inventory to the defendants.

[65] I am then going to order the parties to return to court for directions. At that stage both parties will have a handle on the rough value of the product and the court will be able to make a determination as to the amount of product that is necessary to be, in essence, held back to satisfy the plaintiff's outstanding debt and what product can be released to the defendants.

[66] I consider that the provision in the order of Madam Justice Allan requiring the defendants to deliver their affidavit of assets has not been fully complied with. It had been partially complied with.

[67] It is not without hesitation that I make this order, because orders of this court are to be complied with. I am prepared to make an order giving the defendant five days from today's date to fully comply with the order of Madam Justice Allan.

[68] Counsel, your submissions.

[69] MR. FLEMING: My Lord, I don't have anything to add. The only remaining piece, loose end in my mind, is the question of costs. You already made a general comment that you weren't going to deal with costs in these applications. I wondered, though, if you would cast your mind to the issue of costs with respect to the order that the order be complied with, because that's of course the kind of thing that one shouldn't have to come back to court in respect of.

[70] THE COURT: Well, it is difficult to hive out that particular aspect without making a judgment call really as to what the plaintiff may be entitled to. I do not think it is appropriate at this time to do that.

[71] MR. FLEMING: Thank you, My Lord.

[72] THE COURT: Ms. Braithwaite.

[73] MS. BRAITHWAITE: I'm just wondering if I could have a minute. There is a representative of the defendant available.

[74] THE COURT: Yes. Please. We will stand down for five minutes then.

[CHAMBERS STOOD DOWN]

[CHAMBERS RECONVENED]

[75] MS. BRAITHWAITE: My Lord, a couple of requests and a point of clarification. Could there be an addition to the order that the inspection occur quickly, tomorrow, for example, so that the rest of the items can go on their way?

[76] THE COURT: Yes. The idea is to enable there to be minimum disruption with your client carrying on its business, so whatever can be arranged, as soon as possible would certainly be in the context of my intent. Does anybody know where these goods are? Are you talking about at the warehouse or in the truck?

[77] MS. BRAITHWAITE: In the truck.

[78] THE COURT: Yes. Well, as soon as can be arranged with the mover.

[79] MS. BRAITHWAITE: Okay.

[80] MR. FLEMING: My client will also be keen to move as quickly as possible, My Lord. It is a small company. I don't know if they can do it tomorrow, but I know they will be keen to move as quickly as possible. I'm sure they can manage it in two days. I would be reluctant to say that they must do it in one day. I don't even know –

[81] THE COURT: This needs to be moved to the top of their priority list.

[82] MR. FLEMING: Agreed, My Lord. My only other concern then, My Lord, is it's a trailer, 40 foot long trailer, as far as we know, full of stuff. It may not be very

easy to even get inside from one end of the trailer to the other as a practical matter. It may be that in fact what will have to happen is the trailer will have to be unloaded so you can inspect the contents, but I will tell my clients to move as quickly as they can.

[83] MS. BRAITHWAITE: The second item is the defendants would like to be present or have a representative present for the inspection.

[84] THE COURT: Yes, that is appropriate.

[85] MS. BRAITHWAITE: And the third point I think is just clarification. Is it that the plaintiff receives the product that coincides with the purchase orders listed in the notice of civil claim?

[86] THE COURT: That is how product had been described, yes.

[87] MS. BRAITHWAITE: Okay.

[88] THE COURT: Is that correct?

[89] MR. FLEMING: It is how product has been described, My Lord, but it does pose – now that it's put that way, I realize that does pose a practical difficulty, because, while it will be easy to identify which bottles were the ones manufactured by my client, my client needs to be able to conduct a detailed inventory to match those bottles up to specific invoices, and that can't be done in a day or two. My client said in her affidavit that she needed five days to do that. So we can go into the truck and we can easily, I think, separate out all the office equipment, of course, and we can separate out our work product, if I can use that phrase, from someone else's work product, another manufacturer, but we can't in a matter of a day match up bottles to work orders.

[90] THE COURT: I understand that. Given that there is roughly $900,000 involved, I imagine there is a fair bit of product that requires being looked at to identify, but nonetheless the product you have described would still fall within the definition of product as you have defined it.

[91] MR. FLEMING: I think the way I defined product in the order was the product that corresponded to the individual invoices, because those invoices are scheduled to the draft order.

[92] THE COURT: Yes.

[93] MR. FLEMING: So I think the solution should be that what should be delivered to my client is all of the products manufactured by my client, because that we can separate out very quickly, in a couple of days, and then thereafter when we come back for directions we're going to have an inventory that separates out all our work product from the products that can be matched to invoices. So what should happen, I think, is that all of the –

[94] THE COURT: Yes. You are not looking to include anybody else's manufactured product in the scope of the order?

[95] MR. FLEMING: Precisely. Everything that my client manufactured should come back to my client and then we sort out an inventory.

[96] THE COURT: And I appreciate it is going to take a matter of days for that to occur.

[97] MR. FLEMING: Thank you, My Lord.

[98] THE COURT: That would be my intention.

[99] MR. FLEMING: Thank you.

[100] THE COURT: Ms. Braithwaite.

[101] MS. BRAITHWAITE: I mean, I guess I agree. It's likely going to take more than a few hours to sort through which product was produced, and so I agree. It may be more practical to come back for directions if there is additional product produced by the plaintiffs that's not produce in accordance with specific work numbers that they say money is owing under.

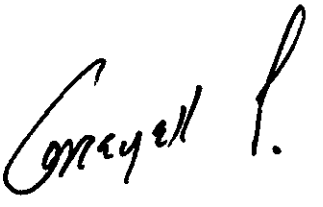
[102] THE COURT: And I think it will take a while, a number of days, to identify that given the volume of product that is apparently there.

[103] MR. FLEMING: My Lord, just one more point. I'm sorry. I wonder when we come back for directions whether we should come back before you. That of course has enormous appeal because of the simplicity of appearing before someone who already knows the issues, but I am mindful of the problem scheduling these things.

[104] THE COURT: Let me put it this way to counsel: I am not seized of the matter. If I am available I will be happy to hear it as a matter of convenience to both counsel.

[105] MR. FLEMING: Thank you, My Lord.

[106] THE COURT: Thank you.



GREYELL J.