

Date: 200902112

Docket: T-1847-08

Citation: 2009 FC 148

Toronto, Ontario, February 12, 2009

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

TRUDEAU CORPORATION 1889 INC.

Plaintiff

and

PRODUCT SPECIALTIES INC.

Defendant

REASONS FOR ORDER AND ORDER

[1] The Defendant has brought a motion for production of documents referred to in the Statement of Claim and for particulars of certain allegations made therein. As a result of an exchange of motion records by the parties the Defendant has reduced its request to the following as set out in paragraphs 70(1)(a) through (e) of its Reply motion record:

a) With respect to paragraphs 4 and 5 of the Statement of Claim which state:

“4. The Plaintiff is the owner of Design 95,727 issued 22 October 2002. A copy of this design is attached to this declaration as Appendix A.

5. Design 95,727 covers the shape of a corkscrew. Figures 2 and 6 of Design 95,727 are reproduced below:”

[Figures not reproduced]

The Plaintiff is (requested) to provide particulars of:

- i. The specific right to which the Plaintiff claims to be entitled by virtue of its ownership of Design 95,727; and
- ii. The specific rights in the design 95,727 which the Plaintiff alleges the Defendant has violated.

b) With respect to paragraphs 6 and 7 of the Statement of Claim which state:

“6. The Plaintiff is the owner of Design 96,073 issued 22 October 2002. A copy of this design is attached to this declaration as Appendix B.

7. Design 96,073 covers the shape of a corkscrew. Figures 1 and 4 of Design 96,073 are reproduced on the next page:”

[figures not reproduced]

The Plaintiff is (requested) to provide particulars of:

- i. The specific right to which the Plaintiff claims to be entitled by virtue of its ownership of Design 96,073; and
- ii. The specific rights in the Design 96,073 which the Plaintiff alleges that the Defendant has violated.

(c) with respect to paragraph 12 of the Statement of Claim, which states:

“12. The design of the FINAL TOUCH corkscrew is substantially identical to that protected by Design 95,727 and by Design 96,073 and the making, sale and offer for sale of this corkscrew in Canada constitutes an infringement of Design 95,727 and Design 96,073.”

The Plaintiff is (requested) to provide particulars of:

- i. Each of the features in the FINAL TOUCH corkscrew which the Plaintiff alleges is identical or substantially identical to the design allegedly protected by Design 95,727 by providing a written description, or, by marking these features on a photograph of the FINAL TOUCH corkscrew; and
- ii. Each of the features of the FINAL TOUCH corkscrew which the Plaintiff alleges is identical or substantially identical to the design allegedly protected by Design 96,073 by providing a written description, or, by marking these features on a photograph of the FINAL TOUCH corkscrew.

(d) With respect to paragraph 13 of the Statement of Claim, which states:

“13. The Defendant began to market the FINAL TOUCH corkscrew in Canada, knowing full well that the Plaintiff was already marketing the TRULEVER corkscrew which was very popular with consumers. It should also be noted that the Defendant identifies the FINAL TOUCH corkscrew is the only corkscrew marketed by the Defendant with a lever on the side. Thus the Defendant knowingly intended to imitate the visual appearance of the TRULEVER corkscrew.”

The Plaintiff is (requested) to provide particulars of:

- i. Whether or not the Defendant is alleging that the substantially identical feature of the Design 95,727 and the Design 96,073 is the single lever on the side; and
- ii. If the Defendant is alleging that the features of the Designs 95,727 and 96,073 that the Defendant has violated is something other than “a single lever on the side”, particulars of what these features are.

(e) With respect to paragraph 9 of the Statement of Claim which states:

“9. The Plaintiff sells in Canada a corkscrew under the trademark TRULEVER to which the design protected by Design 95,727 is applied (hereinafter referred to as the “TRULEVER corkscrew”). The TRULEVER corkscrew is marketed in more than twenty (20) countries and is one of the best known products of the Plaintiff around the world, the appearance of which is also protected in the United States, France, Great Britain, Germany, Spain, and Italy, and the originality and style of which have been the subject of a number

of articles in publications that specialize in tableware or wine stewardship.”

The Plaintiff is (requested) to provide copies of all the articles and publications referred to in this paragraph.

[2] In support of this motion the Defendant has filed only an affidavit of a secretary in the law firm of its solicitors which simply exhibits correspondence between solicitors respecting the request for particulars and a copy of a European Patent Application. That affidavit does not state that particulars are required or why they are needed to enable the Defendant to plead to the Statement of Claim. No other affidavit addressing such matters has been provided by the Defendant.

[3] The action is a simple one alleging that the Defendant has infringed two registered Industrial Designs which were registered in the name of the Plaintiff as proprietor. Copies of these designs as registered were attached to the Statement of Claim and clearly identified in the Claim. They relate to a corkscrew. The allegedly infringing corkscrew of the Defendant is clearly identified in the Statement of Claim by its name, FINAL TOUCH and by photographs. There is nothing self-evident in reviewing the Statement of Claim that would require particulars. As previously indicated, there is no affidavit from the Defendant or a representative stating that it cannot plead over unless the requested particulars are provided.

[4] The Defendant’s solicitors have made heavy weather of this matter, citing all kinds of law, some which may well become relevant at trial. At present we are the pleading stage, there is no reason why the Defendant cannot plead over in the matter as it now stands. Motions of this kind without a strong evidentiary basis to persuade the Court that the Defendant cannot plead over are to

be discouraged. The parties are better advised to go to discovery and seek information relevant and necessary for trial. Too much of any party's resources and the Court's time and resources has, in the past, been expended on unnecessary motions of this kind. I am fully satisfied that there is no reason why a proper Defence cannot be filed in this matter.

[5] The Plaintiff is entitled to costs of this motion which I fix in the sum of \$1,500.00 payable forthwith.

ORDER

For the Reasons provided:

THIS COURT ORDERS that:

1. The motion is dismissed.
2. Costs are awarded to the Plaintiff fixed in the sum \$1,500.00 payable forthwith.

“Roger T. Hughes”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1847-08

STYLE OF CAUSE: TRUDEAU CORPORATION 1889 INC. v.
PRODUCT SPECIALTIES INC.

CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369

**REASONS FOR ORDER
AND ORDER BY:** HUGHES J.

DATED: FEBRUARY 11, 2009

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