

Federal Court of Canada
Trial Division



Section de première instance de
la Cour fédérale du Canada
Date: 1997/12/30

Docket: T-2621-97

FEB 05 1998

98 036 015

BETWEEN:

LANIFICIO E. ZENGA & FIGLI SPA ET AL

Plaintiffs,

AND:

ERMENEGILDO ZENGA, ET AL

Defendant

Let the attached certified transcript of my Reasons for Order delivered orally from the Bench at Toronto, Ontario, December 15th, 1997 be filed to comply with section 51 of the *Federal Court Act*.

FREDERICK E. GIBSON
Judge

Ottawa, Ontario
December 30, 1997

5 THE COURT. Gentlemen, you have taken me
6 to a lot of case authority on the test for interim and
7 interlocutory injunctions. I am going to refer to only
8 two authorities to indicate to you where I have taken my
9 guidance, both of which are binding on me, so I don't
10 have much alternative but to give weight to them.

11 The first is R.J.R. McDonald which is at
12 tab 2 of the Plaintiff applicant's authority, and it is
13 the passage at page 135 to which Mr. Naiberg referred
14 me. That passage reads: "Irreparable" refers to the
15 nature of the harm suffered rather than to its
16 magnitude. ~~And~~ ^{It} is harm which either cannot be
17 quantified in monetary terms or which cannot be cured,
18 usually because one party cannot collect damages from
19 the other.

20 Examples of the former ^λ include instances
21 where one party will be put out of business by the
22 court's decision ^λ [and the latter - I think this should
23 read] - ⁷ where one party will suffer ^{permanent} market loss or
24 irrevocable damage to its business reputation".
25

26 The second authority is Ely Lilly and
27 Novopharm in the Court of Appeal, the Federal Court of
28 Appeal, and Mr. Naiberg was counsel. Once again, the
29 passage to which I have been referred is at page 457, at

1 the marginal note C: "It is trite law in our Court that
2 a plaintiff seeking an interlocutory judgment must
3 establish with clear evidence that it, as opposed to
4 another person or party, will suffer irrevocable harm.
5 That burden is not an easy one, but the remedy is an
6 extraordinary one that will not be granted unless the
7 applicant convinces the Court, ^e inter ^(italia) alia, that damages of
8 common law would not provide an adequate remedy if the
9 court refused to grant the injunction".

10 A couple of comments on the material before
11 me. First, this is not a quia timet application. Mr.
12 Naiberg described it as close, and I agree. It is not
13 an application for an injunction brought two years after
14 the event or even a year after the event. That being
15 said, I am tempted to comment on the pattern of conduct
16 of the defendants, who, I infer from the evidence,
17 whether properly or not, sought to take advantage of a
18 unique situation, in a particular market, the Vancouver
19 market for high quality men's suits, both tailor made
20 and ready to wear.

21 It is evident from the material before me that
22 under pressure, the defendants knew that the course of
23 conduct that they adopted was wrong, and they withdrew
24 from it. Not as far as the plaintiffs would have liked,
25 and that is the only reason we are here today.

We are talking about the margin, we are not
talking about the total course of conduct. We are also
not talking about an unsophisticated market.

1 I think the Court can reasonably take notice,
 2 if it is not apparent from the evidence on its face,
 3 that those who purchase Zenga suits, whether tailor made
 4 or ready to wear, are a relatively discrete minority. I
 5 think they could fairly be described as a niche market.
 6 And as such, although the evidence doesn't, I think,
 7 fully support this, a market that is terribly vulnerable
 8 to abuse. In economic terms, if I remember correctly,
 9 it is what could be described as an elastic market, not
 10 an inelastic market; and one that responds to high
 11 quality marketing outlets, well furnished, well
 12 appointed, well staffed, and a market that is quick to
 13 move when it isn't satisfied with the service it gets.
 14 The service for the product.

14 Working from that, and from those assumptions
 15 and extractions from the evidence, and from the
 16 authorities that I cited, I note that first, the
 17 evidence of harm that has been provided on behalf of the
 18 plaintiffs comes ~~in~~^{from}, virtually entirely, if not
 19 absolutely entirely, from internal sources to the
 20 plaintiff. It does not reflect the views of others
 21 active in the same market, nor of marketing consultants,
 22 who, I would assume, are consulted on a regular basis by
 23 those in this kind of a market.

23 The evidence as to the irreparability of the
 24 harm that the plaintiff alleges is also entirely
 25 internal. I would characterize the evidence of
 irreparability as speculative. While Mr. Rose^N has_^

1 extensive experience in marketing, I note it is limited
2 to one firm. And it doesn't draw on equivalent
3 experience that he has directly encountered in the
4 course of his business career.

5 The evidence, I conclude, does not establish
6 that the harm cannot be quantified, or could not be
7 collected. One could speculate on the basis of
8 photographs of storefronts, but I am not prepared to do
9 that. Thirty-two years in business or thirty years in
10 business, regardless of the storefront, as compared with
11 the storefront of the Zenga store, is not an
12 insubstantial track record.

13 The evidence does not establish that the
14 market loss will be permanent. I am perhaps expanding
15 the realm of judicial notice and, indeed I am, when I
16 say that this is an elastic market. It is also a
17 sophisticated market. And I hope that I am not far off
18 the mark in both of those estimations, and in my
19 estimation that this market, if not entirely satisfied,
20 will move. I think indeed, that can be drawn from the
21 evidence of Mr. Rosen himself. It flows from the
22 evidence that he gave of the care and determination put
23 into the planning and opening of the Zenga store in the
24 Pacific Centre Mall.

25 Similarly, I am not satisfied that the
evidence demonstrates irrevocable damage to business
reputation. The Zenga reputation, according to all of
the evidence, is well established. There is no

1 indication that the Zenga reputation was endangered by
 2 the practices of the defendants over a period of,
 3 however many years. Thirty years in operation. I'm not
 4 sure the evidence goes so far as to say that they made
 5 suits of Zenga cloth for the full length of that period,
 6 but I am prepared to derive from the evidence that they
 7 have been using Zenga cloth in their business over a
 8 significant number of years.

JUDGMENT:

9 In the result, my decision will be to reject
 10 the application for an interim injunction. I don't
 11 reach that decision easily, I might say. Because I know
 12 of no case to which I have been referred, where the
 13 immediate period of time prior to the application for
 14 the injunction demonstrates the kind of course of
 15 conduct that the defendants here engaged in. I know of
 16 no case that has said that actions equivalent to ^{those of} a
 17 defendant such as this, from which there has been a
 18 withdrawal, reduced the burden on the plaintiff in
 19 demonstrating irreparable harm.

20 If it weren't for my decision on the basis of
 21 irreparable harm, I would have taken that conduct into
 22 consideration in the determination of balance of
 23 convenience, quite frankly. And I can indicate to you
 24 for what it is worth at this stage, that I would have
 25 concluded that a serious issue to be tried has been
 demonstrated.

Counsel, I do not propose to add to the reams

1 of writing by this Court in recent years on the subject
2 of the tests for interim or interlocutory injunctions.
3 In my view there isn't much more to be said, except
4 about facts.

5 I will meet my obligation under Section 51.
6 Under the Federal Court Act I will have transcribed the
7 notes that have been taken of what I have said since
8 returning from the recess. I will put that portion of
9 the transcript on file, ^{ditto} ~~and~~ modified, to correct
10 egregious errors of expression or grammar. Otherwise, I
will not attempt to edit it.

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THE REGISTRAR: This special sitting of the
Federal Court of Canada is now concluded.

---Whereupon proceedings were concluded at 5:20 p.m.

I hereby CERTIFY the foregoing Reasons to
be a true and accurate transcription of
my shorthand notes, to the best of my
skill and ability.

as per: A.F. Galloway
A.F. GALLOWAY, Court Reporter
Tel.: (416)482-3277
Dated at Toronto, Ontario
December 23, 1997.

Quality Control
Dept.: J. Dwyer



FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE No.: T-2621-97

STYLE OF CAUSE: Lanificio Ermenegildo Zegna & Figli S.p.A. and
Harry Rosen Inc. v. Ermenegildo Zegna Fashions Ltd.,
Paul Minichiello carrying on business as Paul's of
North Shore and Dino Minichiello Designs Ltd.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 15, 1997

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE GIBSON

DELIVERED ORALLY AT THE CLOSE OF PROCEEDINGS

ON DECEMBER 15, 1997

APPEARANCES:

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