

Case Name:

Bath Creations Inc. v. Richardson

**RE: Bath Creations Inc. and Creative Bath Products Inc.,
Plaintiffs, and
Elston Richardson, Robert Jordan and Mosaic Home Fashions
Ltd., Defendants**

[2010] O.J. No. 2462

2010 ONSC 3345

Court File No. CV-10-401478

Ontario Superior Court of Justice

E.P. Belobaba J.

Heard: June 2, 2010.

Judgment: June 10, 2010.

(32 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Circumstances when not granted -- Interlocutory or interim injunctions -- Application by the plaintiffs for an interlocutory injunction dismissed -- The plaintiffs sought to restrain the defendants from competing with Bath Creations -- The plaintiff's alleged Elston Richardson, who was the only defendant that had executed the non-competition agreement, was the driving force behind the defendant Mosaic Home Fashions Ltd. arranging sales to Home Outfitters and Winners -- Elston Richardson consented to an interlocutory injunction -- The proposed injunction was too broad, there was no credible evidence Mosaic would be unable to pay a damages award and there was insufficient evidence that continued competition would be unlawful.

Statutes, Regulations and Rules Cited:

Counsel:

John J. Adair and Alexa Sulzenko, for Moving parties/Plaintiffs.

Frederick W. Chenoweth and Robert A. **Betts**, for Responding parties/Defendants.

ENDORSEMENT

1 E.P. BELOBABA J.:-- The plaintiffs ask for an interlocutory injunction to restrain the three

defendants from competing with Bath Creations ("BC") until the trial of the action. In order to release my decision on this motion as quickly as possible, I have dispensed with the usual recitation of facts and law. These reasons are brief and to the point but will be fully understood by the parties and their counsel.

2 The requested injunction would prohibit the defendants from selling any product that competes with products offered by BC to any customer that BC was selling products to on or before November 13, 2009 (the day Elston Richardson sold his shares in BC to the U.S. parent, Creative Bath, and signed the non-compete agreement.)

3 Only Elston Richardson executed the non-competition agreement. However, his friend Robert Jordan and Jordan's company Mosaic Homes Fashions are also being sued because the plaintiffs are certain that Richardson is behind Mosaic - that Mosaic could never have achieved its almost instantaneous success and could never have arranged sales of BC's two most popular products to BC's two most important customers, Home Outfitters and Winners, without Richardson's direct involvement, action and advice.

4 The plaintiffs say the circumstantial evidence is so overwhelming (the close friendship between Richardson and Jordan, the latter's utter inexperience in the bath products business, the timing of Mosaic's incorporation, the hiring of Julia Favrin, Richardson's long-time assistant, the hiring of Richardson's wife for the Mosaic design team and Richardson himself sub-letting an office in the Mosaic premises ostensibly to continue his management advisory business) that this court should readily infer the obvious: that Richardson is really the driving force behind Mosaic. Added to this is the plaintiff's evidence that if Richardson continues to breach his non-compete obligations, albeit surreptitiously, he and Mosaic will drive Bath Creations out of business. Hence, this motion for an interlocutory injunction.

5 The defendants adamantly deny any wrong-doing. Both Richardson and Jordan swear in their affidavit evidence that Richardson had absolutely nothing to do with Mosaic and no involvement in its business operations or sale efforts. His infrequent visits to the Mosaic premises had nothing to do with Mosaic; he was sub-letting some office space and was there to meet with his staff about matters relating solely to his management advisory business.

6 Jordan's evidence is that he became interested in the bath products business several years ago after talking with Richardson's brother-in-law Peter Lain; that he first met Julia Favrin through Lain and they became friends; that he and Favrin began to discuss the idea of setting up their own bath accessories company; that Richardson had nothing to do with Favrin being hired; and that it was Favrin who contacted Taipro, the Chinese manufacturer of the "shower caddy" and arranged the sale to Home Outfitters and it was Favrin who knew the key buyer at Winners and landed the Winners contract for the "towel butler."

7 The bulk of the parties' written material and time spent at the hearing of the motion was understandably focussed on the nature and quality of the evidence for and against, the applicable injunction law and burdens of proof, the credibility of the affiants, particularly Richardson and Jordan, the import of Favrin's misdirection to the process server, the role of the motion judge and the extent to which credibility contests should be best left for trial and, of course, whether the injunctions requested on this motion should be granted.

8 What was destined to be a fairly complicated legal analysis was dramatically simplified by a concession made by counsel for the defendants in the final minutes of the oral hearing.

Consent injunction against Richardson

9 At the conclusion of the hearing of this motion, Mr. Chenoweth advised the court that Elston Richardson would consent on a "without prejudice" basis to an interlocutory injunction restraining him until trial from breaching the non-compete provisions (and, I assume, the confidentiality provisions.) The "without prejudice" proviso was added to ensure that Richardson will not be precluded from proving at trial that he was never in breach of these provisions.

10 The defendants also agreed to an order that would require Mosaic to maintain complete and accurate financial and sales records and preserve all communications with customer, whether in written or electronic form.

11 This was a significant development. Given the consent injunction against Richardson and the fact that he was now being taken out of the picture, I sent an email to Mr. Adair and asked him what relief was being sought against Jordan and Mosaic: the same as in the original motion or a more nuanced order?

12 Mr. Adair advised that the relief being sought against Jordan and Mosaic remained unchanged. As Mr. Adair explained: "Although Bath Creations will be happy to have a court order restraining Richardson, my clients have no comfort that a court order restraining Richardson will put an end to his improper involvement with Jordan and Mosaic."

13 Mr. Chenoweth responded by confirming his consent to the "without prejudice" injunction against Richardson and opposing any order that would restrain Jordan or Mosaic pending an expedited trial.

No injunction against Jordan and Mosaic

14 Richardson has consented to an interlocutory injunction restraining him from breaching the non-compete and confidentiality provisions set out in ss. 2 and 4 of the agreement. He has thus agreed to comply with a court order that he will not do anything to help Mosaic as it continues to build its bath products business and customer base. He will not be involved in any way with these efforts; nor will he provide Mosaic with any confidential information acquired while working at BC. As I noted in my email to counsel, Richardson has been taken out of the equation.

15 What then remains of the balance of the motion? On what basis can I make the orders requested by the plaintiffs enjoining Jordan and Mosaic (hereafter "Mosaic") from also breaching the non-compete provision?

16 It is important to note the scope and content of the Richardson non-compete provision. If Mosaic is enjoined as requested by the plaintiffs, Mosaic will be restrained from not only doing any more business with Home Outfitters and Winners (and for some reason Sears) they will also be prohibited, until trial, from trying to do business with any of BC's more than two hundred customers.

17 In my view, such a broad ranging injunction against Mosaic and its owner is not justified on the evidence before me.

18 I say this for the following reasons.

19 Mosaic was not a party to the non-compete agreement. The only reason this company was sued was because the plaintiffs believe Richardson is Mosaic or at least is the major force behind Mosaic. The plaintiffs allege that Richardson was instrumental in helping Mosaic access Home Outfitters and Winners and obtain purchase orders for two of BC's most popular bath accessories. However, there is no evidence that any other BC customers were approached and secured. Thus the proposed injunction

prohibiting Mosaic from trying to do business with any of BC's more than 200 customers, not just Home Outfitters and Winners, is much too broad and has no basis on the evidence before me.

20 Even if the motion was amended to narrow the focus to only Home Outfitters and Winners, I would still not be satisfied that an injunction would be justified. Assuming without finding that Richardson was the force behind Mosaic and the reason for its almost instantaneous success, he is now prohibited by court order from doing anything further to help develop and grow Mosaic's business or customer base. Given his removal from the equation, what is the basis for enjoining Mosaic from having any further business dealings with Home Outfitters and Winners?

21 The plaintiffs say "irreparable harm." However, I am not persuaded that Mosaic's continuing its relationship with either or both of these two retailers will cause irreparable injury to the plaintiffs. BC is still doing business with these two large retailers. It has not lost them as customers. Mosaic may be making inroads and selling more product to these two retailers, but Mosaic has agreed to maintain sales and financial records that would track every sale until trial and, if found liable, to pay whatever damages are deemed appropriate.

22 There is no credible evidence that Mosaic would not be able to pay the damage award. Mr. Jordan conceded on cross-examination that he would never be able to pay a "two or three million dollar" damage award, but it is inconceivable that the profits that BC could lose on Mosaic's continued sales to the two retailers would be this high. Over the last six months, since its incorporation, Mosaic has made about \$500,000 in sales netting about \$50,000 in profit. Over the next six to eight months before the expedited trial, it is not unreasonable to suggest that there may be a further \$100,000, perhaps even \$200,000 in lost net profits, for an overall total of \$250,000. Hardly a two or three million dollar damage claim. I may be wrong in these prognostications, but likewise there is no basis for the plaintiffs' prediction. No evidence has been presented by the plaintiffs to support the suggestion of a two or three million dollar damage award.

23 There is simply not enough evidence that, absent Richardson, Mosaic's continued business dealings with Home Outfitters and Winners would force BC to shut down its business and thus cause irreparable harm. The strongest evidence favouring the plaintiffs on this point was presented by BC's former president and current general manager, Ginette Arsenault. It was her opinion that "*if Richardson is allowed to continue competing, Bath Creations will fail.*" But with the consent injunction, Richardson will not be allowed do so. Ms. Arsenault's evidence is thus of limited value.

24 In any event, the plaintiffs' evidence about BC's imminent failure was not consistent. John McLaughlin, the CFO for the privately-held American parent company, Creative Bath Products, stated that although Creative Bath was not prepared to "bank roll" BC indefinitely, both he and the owner Matt Meinzinger were of the view "that the business could be successful" if it can continue to generate orders from the large retailers that are its customers.¹ There is no evidence that in the foreseeable future BC will not be able to generate these orders.

25 Put simply, if Richardson is removed from Mosaic, and Mosaic continues to compete with BC, there is an insufficient evidentiary basis for me to conclude that this competition would be unlawful, would cause irreparable injury and should be restrained.

26 Finally, it is not enough for the plaintiffs to suggest that an interlocutory injunction should issue as against Mosaic because in their view Richardson will not comply with the court order and will continue to breach the non-compete agreement. The appropriate remedy, should this happen, is a contempt of court proceeding against the non-complying defendant and not an automatic injunction against defendants who were not party to the non-compete agreement and are not otherwise engaging in unlawful activity causing irreparable harm.

Disposition

27 On consent, an interlocutory injunction is granted as against Elston Richardson. Order to go as per paragraph 1 in the plaintiffs' proposed draft order.

28 On consent, Mosaic is ordered to maintain complete financial and sales records until trial and preserve all communications with customers. Order to go as per paragraph 2 in the plaintiffs' proposed draft order.

29 The motion for an interlocutory injunction as against Robert Jordan and Mosaic Home Fashion Ltd. is dismissed.

30 The trial of this action shall be expedited, if possible, for the fall of 2010.

31 I recognize that the costs incurred on this motion on both sides were substantial. Given the disposition above, however, I am inclined to conclude that success was divided and that no costs should be awarded. If either side disagrees with this proposal, please forward a brief costs submission to my attention within the next ten days. The usual reply and rejoinder will follow.

32 I am obliged to counsel for their assistance and the quality of their advocacy.

E.P. BELOBABA J.

cp/e/qlafr/qlmxj

¹ According to Richardson, about 70% of BC's gross revenues come from sales to large national retailers. There are about seven to ten such retailers in Canada.