IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: SNE Corporation v. Kim, 2008 NSCC 48

Date: 20080128
Docket: 290112
Registry: Sydney

Between:

SNE CORPORATION, a body corporate under the laws of Korea; and **SNE SEA PRODUCTS INCORPORATED**; a body corporate under the laws of Nova Scotia

Plaintiffs

v.

YONG TAKE KIM, NAM-HWA LEE and **SHIN HAN F & P INC.**, a body corporate under the laws of Nova Scotia

Defendants

Judge: The Honourable Justice Walter R.E. Goodfellow

Heard: January 28, 2008 at Sydney, Nova Scotia

Written Decision: February 18, 2008 (*Oral decision rendered January 28, 2008)*

Counsel: Lee Anne MacLeod-Archer, Counsel for the Plaintiffs
Robert A. Sampson and Robert F. Risk, Counsel for Defendants
Steve McInnis, Reporter, on behalf of the Cape Breton Post

Goodfellow. J:

1. This is a decision in SNE Corporation, a body corporate under the laws of Korea; and SNE Sea Products Incorporated; a body corporate under the laws of Nova Scotia and Yong Take Kim, Nam-Hwa Lee and Shin Han F & P Inc.

2. **BACKGROUND**

On the 30th of December, 2007, the Plaintiffs filed an Originating Notice, Inter Parties, for a permanent injunction order seeking the removal of the Defendants from the premises said to be owned by the Plaintiff in Louisbourg, Nova Scotia and enjoining the Defendants from the operation of S.N.E. Products incorporated.

3. The written submission accompanying the Interlocutory Notice acknowledges a relationship between the parties. The Plaintiffs advance it was an owner, employee relationship and the Defendant Kim responds that he or his

holding company was a fifty percent owner of S.N.E. Products Incorporated the Nova Scotia operating company.

4. The hearing of the application was scheduled to commence at 9:30 a.m. on the 21st of January. After opening court it was clear that the issue of ownership was a trial issue that might not be properly addressed on an interim basis. As a result counsel, and they had already entered into a dialogue between themselves and their clients continued their settlement negotiations for several hours finally reaching an interim agreement that permits the plant to continue to operate on detailed, specific terms and conditions that hopefully will preclude any possible misunderstanding and lead to a final resolution of the outstanding issue of ownership.

5. The interim order consented to contains detailed and specific directions. Both counsel and their clients are commended for reaching an agreement in their mutual interest. Hopefully it will result in a successful operation of the Louisbourg plant.

6. Included in the interim order is a provision (j):

> "Both parties agree that the matters of dispute together with the agreement set forth therein shall remain confidential amongst them with the exception of any disclosure that may be required on behalf of S and E Corp. (Korea) to the Korean Financial Supervisory Service K.F.S.S."

7. Neither counsel brought this provision to the Court's attention and subsequently the Cape Breton Post sought access to the file and I responded by giving the Cape Breton Post standing and scheduled this hearing January the 28th, 2008 to determine if a publication ban was appropriate.

8. I heard counsel of both parties and Steve MacInnis on behalf of the Cape Breton Post and adjourned to this afternoon to reflect on their representations.

9. I want to make it clear that although counsel did not bring that provision to my attention, it's understandable that these things happen. They were in extremely intensive negotiations throughout almost the entire day and I accept that it was merely an oversight. Had I known of the

provision I would had scheduled what eventually I did schedule and that is this hearing today.

10. **THE LAW**

There is no dispute as to the law. The test for a publication ban, confidentially order was set out in **Dagenais v CBC, 1994 S.C.R. 835**.:

> "The Supreme Court of Canada has addressed the balance between the "open court principle" and the need to protect confidential information to prevent a serious risk to the proper administration of justice."

11. The final part of the DMS test was elaborated on by the Supreme Court of Candaa in Sierra Club of Canada v Canada (Minister of Finance) 2002 2 S.C.R. 522. The first three elements are subsumed in the first branch of the DMS Test

> "First the risk in question must be real and substantial, in that the risk is well grounded in the evidence and poses a serious threat to the commercial interest in question.
>
> Second in order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party

> requesting the order; the interest must be one which can be expressed in terms of public interest in confidentiality...(para 55)
>
> Finally the third was the reasonable alternative measures.

12. The lack of evidence to show the risk advanced here in my view is fatal. Counsel in their well organized presentation and arguments have used terminology such as, “could easily have lead to”, “might be somebody who would jump on the informants to determent”, “suppliers might be reluctant” etc.

13. In my view the fact that the information provided in a public domain and not as a necessary response or reasonable requirement as in the **Shannex** case which is in 2005 NSCA 158,, 238 N.S.R. 92d) 364 is significant. In addition, the court had to take into account s. 21.1 of *The Freedom of Information and Protection of Privacy Act*, S.N.S. 1993 Chapter 5.

14. In the case at the Bar the information here led to a settlement which put the operation of the plant back on the rails and, if anything, should give some comfort that everyone is on the same page in making the best efforts of the plant to be successful.

15. Some of the information disclosed by Kim in his lengthy affidavit has been long in the public domain. There is no formula, no pricing practice, no trade secrets, etcetera disclosed. What you have here are allegations that you would normally expect in the public domain in any civil dispute.

16. There is a interesting additional factor, namely the parent corporation has a statutory duty to publicly report the financial position of a subsidiary under Korean law.

17. The onus is upon the party seeking a publication ban to meet the test and I am satisfied that it has not been established that there is a risk that is real and substantial is

and well grounded in the evidence.

18. I can conclude also there is no important commercial interest established that goes beyond that specific to the parties even if there were confidential details relating to a formula pricing practice, trade secrets etc. it would be necessary to go the one step further. The interest was not just specific to the parties but a matter of public interest. It is true that as general proposition public interest may well exist to protect the disclosure of confidential competitive particulars, however, as I've stated no public interest has been established in this application.

19. In addition, I am not satisfied that the beneficial effort of a confidential order would outweigh it's adverse impact in the open court principle.

20. I want to thank counsel. The application is dismissed.

21. If counsel wishes the order can contain the usual provision that the file not be available to the media for a certain number of days in the event that you wish to file an appeal and then you would have to go to the Appeal Court. That provision does not extend to this decision because I have not disclosed anything of a confidential nature.

22. If you decide you're not going to appeal then perhaps you should let the media know as early as possible.

23. Thank you very much counsel.

J.