

Competition Tribunal



Tribunal de la Concurrence

Reference: *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 20
File no.: CT2004009
Registry document no.: 0023b

IN THE MATTER OF a motion for leave to file a supplementary affidavit of Jim Quinlan dated September 8, 2004.

B E T W E E N :

Quinlan's of Huntsville Inc.
(applicant)

and

Fred Deeley Imports Ltd.
(respondent)



Member: Simpson J. (Chairperson)
Date of Reasons: September 10, 2004
Reasons signed by: Simpson J.

**REASONS ON MOTION FOR LEAVE TO FILE SUPPLEMENTARY AFFIDAVIT OF
JIM QUINLAN DATED SEPTEMBER 8, 2004**

[1] In this motion, the Applicant (Quinlan's of Huntsville Inc.) seeks leave, pursuant to Federal Court Rule 84(2), to file, after cross-examination, an affidavit sworn by Jim Quinlan on September 8, 2004 (the "Supplementary Affidavit"). It exhibits pages from Quinlan's of Huntsville Inc. ("Quinlan's") general ledger which contain financial information (the "Information"). This information is of significant importance to Quinlan's application for an interim order which is the application that was originally scheduled to be heard today. However, the parties agreed that I should hear and decide the motion for leave first and deal with the interim order on another day.

A. THE PARTIES

[2] Quinlan's is a dealership in Huntsville, Ontario which is principally engaged in the sale and service of Harley-Davidson ("H-D") and Honda motorcycles. Fred Deeley Imports ("FDI") is the sole supplier of H-D motorcycles and related products to H-D dealers in Canada.

[3] Quinlan's has been a H-D dealer for seventeen years. However, by letter dated December 9, 2003, FDI terminated Quinlan's dealership agreement as of July 31, 2004.

B. THE PROCEEDINGS TO DATE

[4] On July 5, 2004, Quinlan's filed two applications with the Competition Tribunal (the "Tribunal"). The first was an application for leave to bring an application under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 for an order requiring FDI to supply it with H-D motorcycles and related products. Leave was granted by order dated August 4, 2004 and FDI's appeal of that order is pending before the Federal Court of Appeal.

[5] Quinlan's second application was for an interim order requiring FDI to supply H-D motorcycles and related products until the hearing of the section 75 application (the "Interim Order"). Quinlan's is anxious to ensure continued supply of H-D products and services. The motorcycles for the 2005 product year became available approximately one month ago.

[6] The chronology is as follows:

| | |
|-------------------|---|
| June 26, 2004 | Jim Quinlan's first affidavit in support of the applications for leave and the Interim Order (the "First Affidavit"). |
| July 21, 2004 | FDI's responding affidavit sworn by Bremmer Green. |
| August 20, 2004 | Jim Quinlan's reply affidavit (the "Reply Affidavit"). |
| August 30, 2004 | Quinlan's counsel cross-examined Bremmer Green on his affidavit of July 21 st . |
| August 31, 2004 | FDI's counsel cross-examined Jim Quinlan on his First and Reply Affidavits. |
| September 1, 2004 | Quinlan's counsel sent the Information to FDI's counsel with an |

offer to produce Jim Quinlan for further cross-examination.

September 2, 2004 Counsel for FDI refused to accept the Information, indicated that he will oppose its filing and declined to cross-examine on unsworn material.

September 8, 2004 Counsel for Quinlan's prepared the Supplementary Affidavit.

C. THE FIRST AFFIDAVIT

[7] The First Affidavit includes a schedule in paragraph 9 (the "Schedule") which, in its third column, shows the total value of Quinlan's sales of H-D products in each year from 1999 to 2003. The fourth column indicates that, in each year, those sales represented 65% of Quinlan's total sales. Quinlan's alleges in its application for the Interim Order that H-D's refusal to supply will cause it irreparable harm in that it will be forced to close its dealership. The Schedule reads as follows:

| Fiscal Year | Total Sales (\$) | H-D Product Sales (\$) | H-D Product Sales/Total Sales (approximate %) |
|--------------------|-----------------------------|-----------------------------------|--|
| 1999 | \$3,615,271.00 | \$2,349,926.00 | 65% |
| 2000 | \$4,162,678.00 | \$2,705,740.00 | 65% |
| 2001 | \$5,017,867.00 | \$3,261,613.00 | 65% |
| 2002 | \$5,705,332.00 | \$3,708,465.00 | 65% |
| 2003 | \$5,212,223.00 | \$3,387,944.00 | 65% |

The cross-examination of Jim Quinlan on the Schedule included the following exchange in which Mr. Rueter represented Jim Quinlan and Mr. Woods cross-examined Mr. Quinlan on behalf of FDI:

Q. And in terms of the number on page 6, paragraph 9, for Harley-Davidson product sales, is that number there a number that we would be able to find in the general ledger accounts?

A. We should be able, yes.

Q. And which ones would that number consist of then?

Mr. Rueter: Well, do you know here and now today?

The Deponent: I really don't know here and now today.

Mr. Rueter: I think this information was obtained from the bookkeeper. We can provide you, if you like, with the line item entries and the amounts that constitute those numbers.

Mr. Woods: Let me think about that.

By Mr. Woods:

Q. So in terms of that number, the number comes from the bookkeeper, correct?

A. That number that's on column three - -

Q. Yes.

A. - - is a percentage of column two.

Q. Okay. So is it from the bookkeeper or not?

A. Well, if you take 65 percent of 52, 5.2.

Mr. Rueter: I may have misunderstood there. I may have wrong information.

The Deponent: I would have to check with the bookkeeper to find out exactly what the sales were.

By Mr. Woods:

Q. Where did the number come from that's in your affidavit, sir?

A. I got that number from the bookkeeper.

Q. Okay. So the bookkeeper gave it to you.

A. Yes.

Q. That's not your number, that's his number?

A. That's correct.

Q. And you don't know as you sit here today how he came up with that number?

A. He did not show me on hard copy, no.

Q. He just gave you the number?

A. Yes.

Q. And that's true also of the years 1999 through 2002 for that same column, Harley-Davidson product sales?

A. I'd have to go back and ask him to show me the exact copies.

Q. Again, that number came from the bookkeeper?

A. Yes.

Q. And you didn't get the back-up for the number?

A. No, I did not.

[8] Based on this portion of the cross-examination, counsel for FDI submits that the First Affidavit is defective because, contrary to Federal Court Rule 81(1), it does not disclose the fact that data on the Schedule were not facts within Mr. Quinlan's personal knowledge. He, therefore, says that the data in the Schedule must be disregarded. FDI's counsel also says that

the Supplementary Affidavit should not be accepted for filing because it is an effort to repair a faulty affidavit and inadequate answers on cross-examination when the Information was readily available and could have been provided in a proper manner.

D. CONCLUSIONS

[9] I agree with counsel for FDI that the First Affidavit should have shown that the Schedule was prepared based on data provided by Quinlan's bookkeeper. I also agree that the Supplementary Affidavit is an effort to place evidence about irreparable harm on the record after it was discredited on cross-examination.

[10] However, it is my conclusion that, because of the importance of the Information appended to the Supplementary Affidavit, it would not serve the interests of justice to deny leave. I say this because, unless leave is granted, the Applicant will be required to argue its motion for an Interim Order without evidence of irreparable harm. Since any prejudice to FDI can be eliminated by giving counsel the right to cross-examine on the Supplementary Affidavit, an order will be made granting the motion with costs to FDI fixed at \$1,500. and payable forthwith to cover both its costs of this motion and of its cross-examination of Mr. Quinlan on the Supplementary Affidavit.

DATED at Ottawa, this 10th day of September, 2004.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

REPRESENTATIVES

For the applicant:

Quinlan's of Huntsville Inc.

Robert Rueter
Andy Chan

For the respondent:

Fred Deeley Imports Ltd.

R. Seumas M. Woods
Christopher Hersh
Matthew Horner