SUPREME COURT OF QUEENSLAND

CITATION:	*Tribal Health Pty Ltd v Flush Fitness Pty Ltd* [2016] QSC 103
PARTIES:	**TRIBAL HEALTH PTY LTD** (applicant) **v** **FLUSH FITNESS PTY LTD** (respondent)
FILE NO/S:	SC No 4299 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating application filed 29 April 2016
DELIVERED ON:	12 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2016; further written submissions of the applicant dated 9 May 2016; further written submissions of the respondent dated 10 May 2016
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **1. The application for interlocutory relief expressed in paragraphs 1 to 7 of the applicant's originating application filed 29 April 2016 is dismissed.** **2. The application for a confidentiality order in respect of the "confidential affidavit of Rebecca Jayne Trinder" sworn 9 May 2016 is refused.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – SERIOUS QUESTION TO BE TRIED – where applicant entered into an agreement with respondent whereby applicant agreed to supply products to respondent – where applicant and respondent entered into a separate agreement to terminate arrangement early – where applicant alleged a number of breaches of termination agreement – where grant of injunction will have effect of finally resolving certain rights between parties – whether applicant has shown a high degree of assurance as to the merits of its claim EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – UNDERTAKING AS TO DAMAGES – GENERALLY – where applicant, related entities of the applicant and the natural persons who stand behind the applicant offer undertakings as to damages –

	whether undertaking is valuable – whether applicant's undertaking sufficient to ameliorate relevant risks
	Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46, cited *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2011] QCA 334, cited *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; [1982] HCA 24, followed *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990; [2015] HCA 37, cited *Stacks Managed Investments Ltd v Tolteca Pty Ltd* [2015] QSC 234, cited
COUNSEL:	M H Hindman for the applicant J W Peden for the respondent
SOLICITORS:	Minter Ellison for the applicant K & L Gates for the respondent

Background

[1] The applicant is one of a group of 10 companies which together are referred to in the evidence as trading under the brand "Tribeca Health".

[2] The companies comprise:

(a) the applicant;

(b) Tribeca Pty Ltd;

(c) Tribeca Retail Pty Ltd;

(d) Tribeca Worldwide Pty Ltd;

(e) Tribeca Group Investments Pty Ltd;

(f) X50 The Can Pty Ltd;

(g) PP Nobby Beach Pty Ltd;

(h) PP Franchising Pty Ltd;

(i) Tribeca Group Pty Ltd; and

(j) Tribeca IP Pty Ltd.

[3] Ms Trinder for the applicant deposed that she and her husband Steven were the ultimate beneficial owners of the group and that Steven was the sole director of each company.

[4] Ms Trinder gave oral evidence that the business of the group is essentially carried on by Tribeca Pty Ltd, but it is the applicant which is the contracting party in the two agreements which will be discussed later.

[5] The business sells 7 different types of health supplement products, including a green tea product referred to as GTX50, which is the largest selling and flagship product. The applicant's sales of its products in the 2015 financial year exceeded $4.75m. Over 95% of the applicant's products sold comprised GTX50 and to a lesser extent a product known as X50 Skinny Protein. The applicant's products are sold in wide variety of retail stores nationwide.

[6] The applicant has taken and takes steps to increase and protect its brand and the reputation of its products as premium health products.

[7] In 2015 the applicant appointed the respondent as –

(a) its exclusive distributor in respect of GTX50 and the product known as X50 Skinny Protein;

(b) its non-exclusive distributor of two other products (one of which was then in development),

on the terms set out in a Distribution Agreement.

[8] The Distribution Agreement was to run until 15 September 2019 unless terminated earlier under the termination clause, namely clause 25.

[9] That clause provided a mechanism for termination of any breach which the party in breach failed to remedy within a timeframe after having received notice to remedy. The mechanism differentiated between breaches relating to payment of monies, where the timeframe was 14 days after notice and "any other breach" in which the timeframe was 30 days after receiving notice. The clause also provided for termination immediately upon notice in the event of breach which was incapable of being remedied or the occurrence of various other acts which are not material to summarise.

[10] Clause 26 provided for the consequences of termination. Relevantly, if the agreement was terminated for any reason:

(b) The Distributor must:

(i) immediately pay the Supplier any amounts due to it under this Agreement[;]

(ii) immediately cease using all of the Intellectual Property;

(iii) immediately cease to represent itself as a distributor of the Supplier or as being connected with the Supplier in any way;

(iv) within 21 days of Termination, remove all signs, logos and advertisements relating to the Supplier or the Products or containing the Supplier's Intellectual Property;

(v) if the Supplier directs the Distributor to return the Suppliers Inventory, the Supplier must deliver its Inventory at its cost to the Supplier in accordance with the directions of the Supplier; and

(c) the Supplier will within 21 days of the receipt of the Inventory from the Distributor, pay the Distributor for its Inventory. The amount payable by the Supplier is a percentage of the price per unit paid by the Distributor in accordance with the following table:

Age of Inventory	**Percentage of price paid per Product**
Less than 3 months	100%
3 months to 6 months	75%
6 months to 12 months	50%
More than 12 months	25%

[11] On 18 February 2016, and as a result of a relationship breakdown between the parties which involved the applicant having suspicions that the respondent might be planning to enter into competition against it, the parties entered into a Termination Deed by which they agreed that the Distribution Agreement would be brought to an orderly end on 30 June 2016.

[12] The relevant terms of the Termination Deed included ("Tribeca" being a reference to the applicant and "Flush" a reference to the respondent):

2. Termination

The parties agree that, notwithstanding anything to the contrary in the Distribution Agreements or any other arrangements between them:

2.1 the parties on 25 June 2016 must send a joint notice to all Retailers who have purchased Products from Flush in Australia and New Zealand (with the content of the notice to be approved by both parties or, failing agreement to be in the form of the notice set out in Annexure A to this deed) stating that Tribeca will resume the direct distribution of the Products to Retailers as of 1 July 2016 and that all enquiries with respect to the supply of the Products on and from that date should be directed to Tribeca;

2.2 on and from the End Date:

2.2.1 the Distribution Agreements are terminated and any continuing rights, entitlements, obligations or duties under the Distribution Agreements (other than any obligations of confidence or other obligations expressly preserved by this deed), including any rights, entitlements, obligations or duties that expressly arise on or as a consequence of termination of a Distribution Agreement, will have no further force or effect as between the parties and no party will seek to enforce any such rights, entitlements, obligations or duties under any of those documents against any other party to this deed;

2.2.2 all monies owing to Tribeca by Flush under the Distribution Agreements are immediately due and payable on or before 5.00pm on 7 July 2016;

2.2.3 all unfilled orders for Products or Non-Exclusive Products that Flush has given to Tribeca will be deemed to have been cancelled by agreement between the parties; and

2.3 Flush must, on and from the End Date:

2.3.1.1 immediately cease using all of the Intellectual property;

2.3.1.2 immediately cease to represent itself as being a distributor of Tribeca;

2.3.1.3 not take any new orders in respect of Products or Non-Exclusive Products;

2.3.1.4 not fill any current unfilled customer orders or backorders;

2.3.1.5 provide Tribeca with copies of all unfilled customer orders and backorders by emailing those to […] within 7 days; and

2.3.1.6 give to any person who makes and enquiry about Tribeca or any of the Products or Non-Exclusive Products a copy of the notice in Annexure A to this deed.

2.3.1.7 return all Inventory to Tribeca in accordance with the directions of Tribeca.

2.4 Notwithstanding the above a party may terminate the Distribution Agreeemnts [*sic*] by written notice effective immediately in the event that the other party commits a breach of this Deed or the Distribution Agreements.

3. Inventory, Reports and Payment

3.1 Flush must provide Tribeca with a written report by email to […] no later than 4.00pm on each Friday between the date of this deed and the End Date:

3.1.1 stating the Inventory it holds in Australia as at the date of the report; and

3.1.2 as required by Annexure B for New Zealand current at the date of the report.

3.2 Flush must provide Tribeca with a written report by no later than 3.00pm on 30 June 2016 stating the Inventory that it holds on that date in Australia and a separate report for New Zealand and including details of the pallets, weights and dimensions of that Inventory in order to allow Tribeca to organise the collection of that Inventory on 1 July 2016 in accordance with clause 3.3 below.

3.3 Flush must return all Inventory it holds as at 30 June 2016 to Tribeca by making the Inventory available for collection at its premises in Australia and New Zealand on that day by Tribeca or its representatives.

3.4 Within 7 days of receiving the Inventory from Flush and Flush notifying Tribeca in writing of the bank account into which such payments are to be made, Tribeca must pay Flush for that Inventory at the price paid by Flush, provided that Tribeca may set-off any amounts owing by Flush to Tribeca and which have not been paid in accordance with clause 2.3.2 above.

4. Dealings with Products

4.1 Flush must perform its obligations as a distributor under the Distribution Agreements in good faith, and treat the Products and the brands relating to the Products with respect and act at all times in the best interests of Tribeca, the Products and the brands relating to the Products.

4.2 Flush must only sell the Products in the ordinary course of business and, unless Tribeca has given its prior written consent, not make any sales via the 'Catch of the Day' website, or any similar or equivalent website, after 15 April 2016.

4.3 Flush must not sell the Products through itself or others to or via any discount or group buying websites.

…

4.5 Notwithstanding anything else in this deed or the Distribution Agreements, Flush must not disclose to any person that it is developing a tea product similar to one or more of the Products or promote or sell such a product or any similar product to any person before the Australia End Date.

…

9 Miscellaneous

9.1 Where there is any conflict between the terms of this deed and the Distribution Agreement the terms of this deed will prevail.

[13] It will be noted that cl 2.4 modified the mechanism for termination which had been provided for by the Distribution Agreement. There was no longer any distinction between types of breach that might found termination and no longer any notice to remedy requirement in respect of breaches which might be capable of remedy. Rather there was an immediate termination right in respect of any breach of the Termination Deed or the Distribution Agreement.

[14] On 27 April 2016 the applicant purported to terminate the Distribution Agreement effective immediately in reliance upon the following four types of alleged breaches of the Termination Deed by the respondent:

(a) first, breach of cl 3.1 of the Termination Deed by virtue of failure to supply reports of inventory held in Australia in the timeframe required;

(b) second, breach of cl 4.2 of the Termination Deed, in that the respondent had sold products other than in the course of ordinary business (including on the "Catch of the Day" website) after 15 April 2016;

(c) third, breach of cl 4.5 of the Termination Deed, in that the respondent had disclosed generally and to retailers that it was developing a similar product ("Vusion Tea") which would be available to purchase soon; and

(d) fourth, breach of cl 4.1 of the Termination Deed, in that the respondent had failed to perform its obligations in good faith, treat the products and the brands with respect and act at all times in the best interest of the applicant by virtue of the above

breaches together with the "apparent build up of stock" by the applicant since the execution of the deed.

[15] If the applicant has validly terminated then, relevantly, its rights would include the right to require the respondent to do the things mentioned in cl 26.1(b)(i) to (v), quoted above. In return the applicant would be obliged to pay for the inventory returned within 21 days of having directed its return as provided for in cl 26.1(c), quoted above.

[16] The respondent denies having breached the Termination Deed and, despite the applicant's purported termination of the Distribution Agreement, asserts that the Distribution Agreement remains on foot.

[17] The result is that if the applicant has not validly terminated, then the Distribution Agreement continues on foot until it expires by effluxion of time on 30 June 2016. That would mean that –

(a) the respondent would be entitled to continue its business as distributor of the applicant's product;

(b) the respondent would be entitled to continue to sell down its remaining stock of the products obtained pursuant to the Distribution Agreement and to make the profit associated with doing so; and

(c) as the end of 30 June 2016 the respondent would be required to do the things mentioned in cl 2.3 of the Termination Deed.

[18] The dispute between the parties primarily affects whether or not the respondent should be permitted to continue to act as the distributor of the applicant's products for the remaining 6 weeks or so until 30 June 2016.

The relief sought by the applicant

[19] Upon the usual undertaking as to damages by the 10 corporate members of Tribeca Health to which I have referred and also by Mr Trinder and Ms Trinder personally, the applicant sought interlocutory relief as follows:

1. Until trial or earlier order, the respondent, whether by itself or through any agent or sub-distributor, is prohibited from selling, distributing or disposing of any of the Products and Non-Exclusive Products (as defined in the Distribution Agreement between the applicant and the respondent dated 13 April 2015 (the Distribution Agreement)) in the respondent's possession or control as at 9 May 2016, except as set out in order 4.

2. Until trial or earlier order, the respondent is prohibited from representing itself as a distributor of the Products and Non-Exclusive Products.

3. On or before 11 May 2016 the respondent is to remove or cause to be removed from all websites, including but not limited to www.catchoftheday.com.au, any advertising it has placed or has caused to be placed for the Products and Non-Exclusive Products.

4. By 11 May 2016, the respondent is to make available for collection by the applicant thereafter all of the Products, Non-Exclusive Products and the applicant's product samples in the respondent's possession or control as at 9 May 2016.

5. The applicant is to pay the respondent for the collected Products and Non-Exclusive Products at the price paid by the respondent to the applicant for those products upon collection of those products.

[20] Alternatively, the applicant sought interlocutory relief requiring the respondent to do the things provided for in cl 26.1(b)(v) of the Distribution Agreement and offered to submit to an order that it do that which is provided for in cl 26.1(c). The applicant acknowledged that such an order would be less favourable to the respondent. Logically, that must be so

because, if directed to return the inventory, the respondent would have to deliver the inventory at its cost and would have to wait 21 days for payment and also be paid potentially at the lesser rates provided for in the table in cl 26.1(c).

[21] For its part, the respondent had offered on an open basis to settle the interlocutory dispute by agreeing on an interlocutory injunction in which, upon Mr Trinder and Ms Trinder giving the usual undertaking as to damages, the Court would order in the following terms:

1. Until trial or earlier Order, the respondent, whether by itself or through any agent or distributor is restrained from selling, distributing or disposing of any of the products and non-exclusive products (as those terms are defined in the distribution agreement dated 13 April 2015 and herafter [*sic*] defined as the "Products") in the respondent's possession or control as at 9 May 2016.
2. By 4pm on 11 May 2016, the applicant pay to the trust account of its solicitors, Minter Ellison Brisbane, the sum of $1,039,700 in cleared funds on account of the amount to be paid to the respondent pursuant to paragraph 4 of this Order, to be held in trust pending:
   a. payment out in accordance with paragraph 5 below; or
   b. agreement of the parties or pursuant to any order of the [C]ourt.
3. By midday on 12 May 2016, but not before confirmation by the solicitors for the applicant that the funds referred to in paragraph 2 of this Order have been received into their trust account, the respondent is to make available for inspection and collection by the applicant (by a representative other than Mr Steven Trinder or Mrs Rebecca Trinder) all stock of the Products held by the respondent (including at its Australian warehouse facility situated at [**insert address**] and its New Zealand warehouse facility situated at [**insert address**]).
4. Prior to removing any stock of the Products from the Australian warehouse facility and the New Zealand warehouse facility, the applicant, by its representative who inspected the Products, is to send to Minter Ellison Brisbane an irrevocable authority to pay from the trust account of Minter Ellison to the trust account of the respondent's solicitors a sum of money representing the value of the products, such value to be calculated by reference to the quantity of the Products to be collected from the respective warehouse multiplied by the price at which the Products were supplied by the applicant to the respondent.
5. Upon the solicitors for the respondent confirming in writing to the solicitors for the applicant that the funds have been transferred, the applicant, by its representative, may effect the removal of the Products from the Australian warehouse facility and New Zealand warehouse facility respectively.
6. On or before 12 May 2016, the respondent is to remove or cause to be removed from its website, all references to the Products.

Relevant legal principles

[22] The legal principles governing the disposition of an application for interlocutory relief were discussed by me in *Stacks Managed Investments Ltd v Tolteca Pty Ltd* [2015] QSC 234 at 3 to 5.

[23] From that discussion the following points are relevant:

(a) The law in Australia has long regarded it to be necessary to make two main inquiries:
   (i) whether the applicant has shown that it has a prima facie case; and
   (ii) whether the applicant has shown that the balance of convenience favours the granting of the relief claimed.

(b) The significance of the requirement that a prima facie case be shown is elaborated upon in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; [2006] HCA 46 and *Live Earth Resource Management Pty Ltd v Live Earth LLC* [2007] FCA 1034 at [11] to [13].

(c) The considerations brought to bear on the balance of convenience requirement were the subject of discussion in *Australian Broadcasting Corporation v O'Neill* and *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2011] QCA 334, the latter case clarifying that the adequacy of an award of damages and the question of the sufficiency of the usual undertaking were to be considered as part of the totality of the balance of convenience question.

(d) The progression of the two main inquiries is not a mechanical exercise. Whether the relief sought is prohibitory or mandatory, the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense of granting an injunction to a party who fails to establish his right at an ultimate trial, or in failing to grant an injunction to a party who succeeds at trial. In making that decision, the Court should weigh in the balance all relevant factors, including matters pertaining to the strength of the case to be tried and the balance of convenience.

(e) Where the effect of an injunction would be to alter the status quo and effectively finally to determine a respondent's legal rights against the respondent in advance of a trial, it would be appropriate to require an applicant to establish its case that the respondent should not be afforded those legal rights with a high degree of assurance.

[24] There was no dispute between the parties as to those principles.

[25] In particular, the applicant accepted that given –

(a) the relatively short time between the grant of any interlocutory injunction in its favour and the date on which the Termination Deed would operate, namely 30 June 2016; and

(b) the questions of fact and law raised by the claims advanced in the originating application could not be determined by trial before that time,

the grant of an interlocutory injunction would have the effect of finally resolving against the respondent the question of the continued existence of what would otherwise be the respondent's legal rights to continue dealing with the products between now and 30 June 2016 in accordance with the Distribution Agreement and the Termination Deed.

[26] The applicant accepted that it needed to persuade me that I could have a high degree of assurance as to the merits of its claim to the present existence of the rights which it seeks to protect by the interlocutory injunctions it seeks.

[27] The structure of the remaining parts of this judgment will be:

(a) first, to examine whether the applicant has established a prima facie case;

(b) second, to examine the issues which affect the balance of convenience;

(c) third, to express my view as to where the lower risk of injustice lies; and

(d) fourth, to formulate orders consistent with that expression of view.

Has the applicant established a prima facie case?

[28] I will examine this question in relation to each of the four types of breaches alleged by the applicant.

The stock report breaches

[29] I have quoted cl 3.1 of the Termination Deed already.

[30] The evidence reveals that during April 2016 the required reports in respect of Australian inventory had not been delivered. There had been some delivery of reports in respect of the New Zealand inventory but none at all for Australian inventory.

[31] That seems to establish the breach relied upon. I have the requisite high degree of assurance of the existence of the breach.

[32] Relevantly the respondent sought to argue that such a breach would not engage the entitlement to terminate pursuant to cl 2.4. But there is simply no reason to construe cl 2.4 in that way. In the context of the fact that the clause represented a change from a much more elaborate termination arrangement in the Distribution Agreement, it seems to me to be obvious that the clause meant what it said and would be engaged if there was any breach of the Termination Deed. I do not think that there is any ambiguity in that operation of cl 2.4.

[33] The respondent sought to rely on observations made by its managing director, Mr Hines, in this regard as follows:

> [38] The Distribution Agreement did not expressly provide for weekly reporting. At around the time the Termination Deed was entered into, the applicant expressed a concern that the respondent would not hold sufficient stock in New Zealand to satisfy demand through to around June 2016. They therefore requested this requirement so that they could monitor the stock levels in New Zealand to ensure that adequate stock was going to be available in New Zealand to ensure adequate stock was going to be available by the respondent to meet demand in New Zealand.
>
> [39] In those circumstances, provided that the respondent was in fact maintaining adequate sales to meet demand, the inclusion of a term about weekly reporting was of lesser significance or importance and also of little significance whether the report was provided in a timely manner or within a reasonable time after the end of each week.

[34] I do not think that that material is admissible in the absence of ambiguity: see *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 per Mason J at 352; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990; [2015] HCA 37 per French CJ, Nettle and Gordon JJ at [48].

[35] But even if that is not the law, or I am wrong in my view that cl 2.4 is relevantly unambiguous, cl 3.1 and 3.2 of the Termination Deed relevantly impose reporting obligations separately with respect to Australia and New Zealand. Mr Hines' observations about the purpose of the New Zealand obligation, cannot, logically, say anything about the purpose of the Australian obligation. It cannot, logically, be contended that the material demonstrates that the parties thought the Australian obligation was of no moment, because Mr Hines' observations could not support that proposition and because the parties obviously thought the obligation was of some moment, choosing as they did to include it in the Termination Deed. His subjective opinion about the importance of the obligation is of no relevance.

[36] The result is that on the evidence before me the applicant seems to have a strong case that the respondent breached cl 3.1 of the Termination Deed, enlivening the applicant's right to terminate the Distribution Agreement pursuant to cl 2.4 of the Termination Deed.

[37] Given the fact that there is no dispute that the applicant purported to exercise that right, the conclusion carries with it the proposition that, as the evidence presently stands, the applicant seems to have a strong case that the respondent should be regarded as presently obliged to do the things which cl 26.1(b) of the Distribution Agreement requires it to do.

The "no competition" breach

[38] Clause 6(a) of the Distribution Agreement obliged the respondent not to manufacture or produce any goods "like to or similar to or which might otherwise compete or interfere with the sale of any of the Green Tea X50 branded products."

[39] Clause 4.5 of the Termination Deed requires the respondent –

(a) not to disclose to any person that it is developing a tea product similar to one or more of the applicant's products; and

(b) not to promote or sell such a product or any similar product to any person before 30 June 2016.

[40] Ms Trinder gave evidence that

> I was told by Tyler Morton of My Supplement Store in Charlestown, New South Wales (a retailer which sells Tribeca products) on or about 30 April 2016, and believe it to be true, that on or about 19 April 2016 Ryan Simpson (a representative of the Respondent) had presented the Respondent's new Vusion Tea product to him in a marketing booklet (that was retained by Mr Simpson), along with other brands owned by the Respondent. This matter was initially brought to my attention by a mutual contact of Mr Morton and me, who put us contact with each other.

[41] Although this hearsay evidence might well (because it is admissible on an interlocutory application) establish an arguable case that the respondent has disclosed that it is developing a tea product called "Vusion Tea", it does not demonstrate that Vusion Tea is to be regarded as a tea product similar to any of the applicant's products or that it would compete with the sale of the applicant's GTX50 products. The evidence suggests that the Vusion tea product is "a blend of Green tea, Macha Tea, Black Tea, White Tea and Rooibos" but whether that makes it similar to or competitive with the applicant's GTX50 is unclear.

[42] Obviously at a trial it would be necessary for there to be admissible evidence of the disclosure and also evidence addressing the question of similarity and the question of whether the products were in competition. Presently it seems to me that both propositions are arguable. However, in the absence of such evidence I do not possess the requisite high degree of assurance that the applicant will establish its case.

The "Catch of the Day" website breach

[43] Clause 4 of the Termination Deed provided for a related bundle of obligations relating to how the applicant's products were to be dealt with by the respondent during the period 18 February 2016 to 30 June 2016.

[44] Ms Trinder contended that she believed that the respondent continued offering Exclusive Products through the "Catch of the Day" website after 15 April 2016 because searches of that website revealed that the products continued to be available for purchase on the website after that date.

[45] For his part, Mr Hines deposed that the respondent did not itself make sales through the "Catch of the Day" website, but instead deposed that the website was a retailer to whom the respondent sold products (and therefore that it was the proprietor of the website who was selling via the website, not the respondent). Moreover the evidence was that the invoices which relate to the respondent's sale to that retailer were dated 14 April 2016.

[46] If the character of the transaction with the retailer as described by Mr Hines is accurate, then the applicant accepts cl 4.2 would not apply because it contemplates sales being made by the respondent via the "Catch of the Day" website. However it then contends

that cl 4.3 would apply. I have doubts as to whether cl 4.3 would apply when the specific clause addressing the retailer concerned seems to contemplate the legitimacy of sales to that retailer before 15 April 2016.

[47] In any event, the applicant invited me to doubt the legitimacy of the 14 April sale and the proposition that the sale could be regarded as a sale in the ordinary course of business (as cl 4.2 requires), in light of the fact that the sale occurred the day before the cl 4.2 prohibition took effect and the two invoices concerned reveal –

(a) 2,000 of the same products (invoices totalling over $60,000) but split over two invoices;

(b) the first invoice providing for payment terms of 7 days; and

(c) the second invoice providing for payment terms of 30 days and for delivery not until 13 May.

[48] I conclude that the applicant has an arguable case of breach. It is not one, however, about which I possess the requisite high degree of assurance.

The failure to act in good faith breaches

[49] Clause 24 of the Distribution Agreement and cl 4.1 of the Termination Deed impose obligations on the respondent to act in good faith in relation to the Distribution Agreement.

[50] Ms Trinder suggests there had been three breaches of cl 4.1 of the Termination Deed –

(a) lack of promotion of the applicant's products since the Termination Deed was signed;

(b) the respondent's initial refusal to supply the applicant's GTX50 product to a gym that had requested it, wherein instead the respondent offered the gym products from its own "Victory Labs" brand; and

(c) the building up of the applicant's stock by the respondent in circumstances of decreasing sales, leading to a concern that the stock could only be wanted for an improper purpose (given none of the stock could be sold by the respondent after 30 June 2016).

[51] Whilst the applicant marshalled evidence to explain why Ms Trinder made those contentions, the case did not rise any higher than suggesting a case that might be worthy of exploration at a trial. The first breach was debatable and contested by Mr Hines. The second was founded on a double hearsay report. And the third relied strongly on the drawing of highly contestable inferences. The case did not approach a case in which I could presently conclude that I had the requisite high degree of assurance.

Conclusion

[52] Based on the current evidence it seems to me that the applicant has a strong case that the respondent breached the reporting requirement in cl 3.1 of the Termination Deed. Although the other alleged breaches are arguable, I do not have a high degree of assurance as to the strength of the applicant's case.

What issues affect the balance of convenience?

[53] What would be the impact on the respondent if I made orders as sought by the applicant, but at the trial it turned out that the applicant did not validly terminate the Distribution

Agreement and that the respondent should have been permitted to trade without interference until the end date provided for in the Termination Deed?

[54] First, it must be accepted that the respondent would have lost the profits which it could have earned if it had been permitted to continue to trade in the applicant's products. As to this:

(a) Mr Hines deposed that exhibit SRH-28 to his affidavit was a "true and correct copy of the applicant's stock that the respondent has on hand" as at the date of the affidavit. The exhibit identified stock with a current value of $1,039,700.87. His evidence was that stock was sold with a standard gross margin of 40%. It was not clear whether the "current value" was at cost or included the margin.

(b) He also deposed that sales of the applicant's GTX50 product in May and June 2015 equated to $1,477,374.63. He hypothesised from that figure (obviously assuming that sales would continue in 2016 at the same rate as 2015) that lost profits for being prevented from selling during May and June 2016 would be at least $590,945.85.

(c) The justification for the "at least" proposition was the sensible proposition that the respondent sold other products of the applicant than just the GTX50 product. I observe, however, that Mr Hines calculation is 40% of $1,477,374.63, so it seems that he must have applied the gross margin of 40% to the $1,477,374.63 sales figure from the previous year. If so, that would seem to be wrong as sales figures would have included the mark up, so that the amount of profit on an assumed gross sales of $1,477,374.63 would instead be $422,107.04.

(d) For its part, the applicant says that the assumption that the likely sales in May and June 2016 would be the same as sales achieved in May and June 2015 is, having regard to the respondent's own sales records, overly optimistic. It is true that those sales records show the respondent's sales of the applicant's products being in steady decline over the last 12 months. The applicant suggest that if lost profits were assessed by reference to the April 2016 level of performance, the possible losses would be approximately $246,885.

(e) It seems to be to be appropriate to assume for the sake of analysis that the losses would be somewhere in the range of $246,885 to $590,945.85.

[55] The applicant contends that the applicant would be protected against any such losses by virtue of the undertaking as to damages from the corporate members of the Tribeca Health group and from Mr Trinder and Ms Trinder personally. The respondent submits that the undertaking should not be regarded as valuable. I make the following observations as to the value of that undertaking:

(a) Ms Trinder deposed to net profit figures after tax increasing from $435,614 to $795,326 over the last two financial years and expressed strong optimism as to the prospects of continued successful trading. Although she was cross-examined on her affidavit, that aspect of her evidence was unchallenged.

(b) Ms Trinder exhibited an up-to-date balance sheet for the Tribeca Health group of companies (except Tribeca IP Pty Ltd, which is the company which holds the intellectual property associated with the business and its products). She gave evidence that the balance sheet had been prepared by KPMG, the group's accountants, based on remote access which KPMG had been given to the group's MYOB accounts, which accounts had been prepared (I infer) in the usual course

by the group's bookkeeper and kept on computer. No suggestion to the contrary was made in cross-examination. Nor was it suggested that the MYOB figures might have been altered to suggest a more favourable position than might be the truth.

(c) Ms Trinder was cross-examined about the figures in the KPMG balance sheet, but was not able to provide any significant elaboration on what might be the details which underlay the figures. It was evident that she relied on the accuracy of the group's MYOB accounts and of the collation exercise carried out by KPMG. In one respect her speculation (that the "liabilities" figure might be a reference to loans between group companies *inter se*) was obviously wrong.

(d) Of greater apparent concern was the terms of KPMG's disclaimer. Under the heading "responsibility", KPMG explained that the consolidated statement of financial position had been compiled by information provided by management, but had not been verified or validated by KPMG. The report then expressed the disclaimer:

> The Report was prepared exclusively for the benefit of the Management of The Group. We do not accept any responsibility to any other person for the contents of The Report. To the extent permitted by law, we do not accept liability for any loss or damage that any person, other than the Group, may suffer arising from any negligence on our part. No person should rely on The Report without having an audit or review conducted.

(e) The respondent invited me to act in the way instructed by the last sentence of that disclaimer and, accordingly, to give no weight to the statement of financial position.

(f) However I think that overstates the matter. The statement comes as part of a disclaimer by professional accountants. That they might make it as a self-protection step does not mean that I should conclude that there is anything wrong with the material on which they have relied. It merely means that they seek not to be legally liable if it turns out that there is.

(g) It seems to me that I should regard the document as something prepared by accounting experts giving a picture of the financial position of the group, based on unaudited and unverified information coming from the group's own internal accounts. I think I should attribute some weight to the information in the document. Obviously the evidence is less reliable than consolidated information based on audited and verified figures, so there is an unquantifiable risk that the information might be inaccurate.

(h) The report reveals:

  (i) Companies within the group have cash and cash equivalents of $640,000.

  (ii) Companies within the group have trade and other receivables of $701,000.

  (iii) The group's net equity position was about $1.661million.

(i) The fact that the group seems to be trading profitably and that an analysis of its internal records arrives at the figures I have just mentioned suggests to me that the undertakings proffered are valuable. However, I remain uncertain as to the quantum of the value, and this means that I am not sure whether the value is sufficient in relation to the range of the profits which the respondent might lose. I accept that the fact that Tribeca IP Pty Ltd and Mr Trinder and Ms Trinder

personally offer the undertaking provides additional comfort. However there was no evidence of the additional worth of their undertaking.

[56] Moreover, that is not the only relevant consideration.

[57] The injunction would mean that the respondent would be exposed to the risk that the applicant might not pay for stock currently held by the respondent. Instead of being able to sell down its stock on hand and only needing to be paid for whatever was left at 30 June 2016, the respondent would be obliged to accept that it could not itself sell the current amount of stock on hand (valued at $1,039,700.87) and would be put in a position of having to trust it would be paid for that full amount by the applicant. Notably, however, the form of order proposed by the applicant would not actually put a timetable on the payment because payment would only occur if and when the applicant actually collected the goods (it only being payable "upon collection"). And if I formulated an order in the terms of cl 26.1(c) of the Distribution Agreement (which was the alternative relief sought by the applicant), the obligation to pay would only arise "if [the applicant] directs [the respondent] to return the inventory" and then only 21 days after the return. It is at least ambiguous whether there is an entitlement to be paid if the applicant never directs the return of the inventory.

[58] Would the undertaking be sufficient to cover the respondent for any loss which it might suffer in the event that the applicant did not pay (whether because it chose not to pay or because it did not have the resources to pay)? As to this, I observe:

(a) The return of stock to the applicant would increase the group's inventories, but would be associated with an equal additional liability back to the respondent. Logically, it would have no effect on the net asset position of the group.

(b) The addition of the upper limit of the posited damage which the respondents might suffer and the value of the stock on hand would only just be exceeded by the net asset position disclosed on the KPMG report. The uncertainty which I have as to the value of the undertaking would become even more significant.

(c) The evidence suggests that the group presently would not have sufficient liquid funds to pay the requisite amount immediately and would need to borrow monies to do so. That is so on the face of the KPMG report but also may be inferred from the fact that the applicant does not commit to any particular timetable for payment on the face of its proposed draft order.

(d) In this regard, Ms Trinder gave evidence that the group's bank had been approached for the provision of a loan facility for the purpose of making the requisite payment. However, she did not provide any documentation in relation to that course or any material which would permit me to form a view as to the likelihood that the bank would be willing to provide the requisite accommodation or, if it was, when that might occur.

(e) The result is that I form the view that –

(i) the effect of an injunction would be to force the respondent into accepting a higher level of risk that it might not be paid for its current inventory of the applicant's products;

(ii) in the event that risk came to pass, the undertaking as to damages would have to cover the unpaid amount; and

(iii) it is uncertain whether the undertaking proffered is sufficient to cover any unpaid amount.

[59] For completeness I should note that Mr Hines did contend that the respondent had been caused reputational damage by the applicant representing that it was now the exclusive distributor of GTX50. I would not give any weight to this contention. There was no evidence which could persuade me that the effect on the respondent's business was anything other than would flow anyway from the termination which it had, in any event, agreed would occur on 30 June 2016. Moreover I note that the Termination Deed required notices to be given to existing customers (and any enquirers) that the applicant would be resuming direct distribution: see cll 2.1 and 2.3.1.6.

[60] I turn now to consider what would be the impact on the applicant if I refused orders as sought by the applicant, but at the trial it turned out that the applicant had validly terminated the Distribution Agreement and that the applicant should have been permitted to stop the respondent trading in its products in the way it sought. As to this:

(a) It can be assumed that the respondent will proceed to hold itself out as a distributor of the applicant's products (and exclusive distributor of some of those products) and will, at the least, sell and distribute those products for the next 6 weeks or so. It will be strongly motivated so to do to avoid exposing itself to the risk of non-payment to which I have adverted.

(b) Ms Trinder has deposed to concerns that in that event the respondent might take action which could significantly impact on the reputation and future value of the applicant's products and affect the applicant's relationships with retailers. For example, the respondent might be motivated to "dump" its current inventory of the applicant's products at a heavily discounted price (which would be a breach of its promise that it would only sell in the normal course of business). It might even re-badge the applicant's products as its own products.

(c) The risk of dumping seems to me to be real. And if it came to pass, the loss which the applicant would suffer would be difficult to quantify. On the other hand, the risk of the re-badging of the applicant's products and passing them off as the respondent's own products seems to me to be speculative. The applicant relied on allegations made of such behaviour against the respondent in Canada, but there is no evidence which suggests any intention to behave in that way in the present circumstances.

(d) No such risk would exist if an injunction was granted.

Where does the lower risk of injustice lie?

[61] It was up to the applicant to persuade me that the course which carried the lower risk of injustice in the sense I have earlier described was to grant the injunctions sought.

[62] Although the current evidence suggests that the applicant has a strong case based on breach of the reporting requirement, I cannot be certain that that conclusion will prevail at trial.

[63] And whilst I have concluded that the undertaking as to damages should be regarded as having some value, I am uncertain as to the quantum of that value and as to whether it provides the respondent with adequate protection for the lost profits which might be recoverable if it transpired that it should not have been restrained from selling the products.

[64] At the moment the respondent is in charge of its own destiny in relation to ensuring that it can sell the inventory and not be left in the position it would be left in under cl 26.1(b)(v). The relief claimed by the applicant would stymie that course, but without providing security for payment. In those circumstances the quantum of the value of the undertaking becomes even more important and, accordingly, the uncertainty which I have as to that value, all the more problematic for the applicant.

[65] After carrying out the balancing exercise which the authorities suggest I should do, I am not persuaded that making the orders sought is the course which carries with it the lower risk of injustice.

Conclusion

[66] I dismiss the application for an interlocutory injunction.

[67] It remains to deal with the applicant's application for an order that the second affidavit of Ms Trinder be placed in a sealed envelope on the Court file not to be opened except by order of the Court.

[68] The basis on which that order was sought was that the affidavit and the report it exhibited contained confidential and commercially sensitive information. In particular Ms Trinder deposed to her concern that competitors not become aware of sales and current inventory levels of the applicant because they might be able to use that information to base decisions in relation to competing products and to implement marketing and selling strategies to the detriment of the applicant.

[69] There is no doubt that I have jurisdiction to make the order sought. The question is whether I should do so in the circumstances of this case. It seems to me that I should not. First, Ms Trinder was cross-examined in open court on the quantum of the matters about which she expressed concern. And, second, although the group is a group of private companies which is not required to make its financial details public, I am not persuaded that nature of the information is such that as would outweigh the normal requirement that evidence employed in legal proceedings is employed openly.

[70] Accordingly, I decline to make the confidentiality order sought.

Orders

[71] The orders I make are:

(a) The application for interlocutory relief expressed in paragraphs 1 to 7 of the applicant's originating application filed 29 April 2016 is dismissed.

(b) The application for a confidentiality order in respect of the "confidential affidavit of Rebecca Jayne Trinder" sworn 9 May 2016 is refused.

[72] I will hear the parties on costs.