

**TELEVISION NEW ZEALAND LTD and ANOTHER v GLOSS
COSMETIC SUPPLIES LTD**

5 HIGH COURT OF NEW ZEALAND

ROBERTSON J

10 27 April, 8 May 1989 – Auckland

Passing off – Television soap opera broadcast using the name “Gloss” – Licence granted to second plaintiff to produce cosmetics under this name but not yet on the market – Defendant producing cosmetics under trade mark GLOSS – Confusion and deception.

15 **Misleading and deceptive conduct – Interlocutory injunction – Fair Trading Act 1986 (NZ) s 9.**

The first plaintiff was the producer, owner and broadcaster of a television soap opera/drama called “Gloss” which was broadcast in New Zealand in 1987 and 1988. Two further series were planned for broadcast in 1989 and 1990. The second plaintiff was a cosmetic sales company which had entered into an agreement with the first plaintiff to license the use of the name “Gloss” on a range of toiletries and cosmetics manufactured by the second plaintiff and to market the range by reference to the characters and theme of the television program. At the time of this proceeding the second plaintiff had not yet launched its product onto the market.

20 There was ample evidence that, as a result of the television program and extensive advertising and associated promotions, the name, graphics and characters of the program had become well known to a substantial number of people in New Zealand.

The plaintiffs sought an interlocutory injunction to restrain the defendant from manufacturing, distributing, advertising and selling a range of cosmetics or personal care products under the trade mark GLOSS. The plaintiffs alleged the defendant’s use of this mark on its products amounted to misleading and deceptive conduct in breach of s 9 of the Fair Trading Act 1986 (NZ) as well as passing off.

30 The defendant contended that the mere use of the word “Gloss” did not infringe any of the plaintiffs’ rights, that the word was descriptive and that there was insufficient evidence of any secondary reputation such that confusion would be likely to lead to result.

35 **Held, granting the application:**

(i) There was a serious question to be tried on both the passing off and Fair Trading Act claims. There was strong evidence that members of the public would associate the Gloss range of cosmetics with the television program. The word “Gloss” was not descriptive or a word having a recognised relevance or meaning in relation to cosmetics. The word on its own was almost meaningless in descriptive or generic terms and there was no appropriate obviousness in the word.

Erven Warnink BV v J Townend & Sons (Hull) Ltd [1979] 2 All ER 927; *Taylor Bros Ltd v Taylors Textile Services Ltd* [1988] 2 NZLR 1; (1988) 14 IPR 353, applied.

45 *Pitstop Exhaust Ltd v Alan Jones Pitstop International Ltd* (1988) 2 NZBLC 102,968; *Theodorus Couwenberg & Son Ltd v Diesel Progress NZ Ltd* (1988) 2 NZBLC 102,976; *Shotover Gorge Jet Boats Ltd v Marine Enterprises Ltd* [1984] 2 NZLR 154; (1983) 4 IPR 516, referred to.

(ii) The balance of convenience favoured a grant of an interlocutory injunction.
50 (a) Damages would not be an adequate remedy. If the defendant was left free to continue use of the trade mark the first plaintiff’s ability to exploit the rights associated with its program would be markedly diminished.

- (b) The defendant would not be precluded from operating in the field of cosmetics and would only be restrained from using the particular word in its promotion.
- (c) The defendant's labels could be removed easily as they were printed on transparent adhesive material. Consequently any substantial interference with the defendant's marketing could be avoided.
- (d) There would be no difficulty in establishing the extent to which the defendant's business had been diminished by the effect of the injunction.
- (e) The defendant had only traded for a relatively short period and there was no evidence of a considerable goodwill or reputation having been created which was associated with the word "Gloss".
- (f) The grant of interim relief would not finally dispose of the matter as the defendant would be free to recommence use of the name "Gloss" in the event that the injunction were to be overturned at a substantive hearing.
- (g) Given the defendant's contention that the period during which the television program was due to be broadcast in 1989 was of no relevance and that the name was chosen coincidentally, a temporary restraint on the defendant should have minimal impact upon it.
- (h) It seemed unlikely that the defendant would be able to meet an award of damages if the interim relief was not granted.

Application

This was an application for an interlocutory injunction. The facts appear sufficiently from the judgment.

J G Miles and C L Elliott for both plaintiffs.

D K Wilson for the defendant.

Cur. adv. vult.

Robertson J. The plaintiffs, Television New Zealand Ltd, hereinafter called TVNZ and Gloss Cosmetic Sales Co Ltd, hereinafter called Cosmetic Sales, seek an interlocutory injunction against the defendant company, Gloss Cosmetic Supplies Ltd, "that pending trial of the substantive action herein the defendant, its servants, agents, contractors or otherwise howsoever, be restrained from manufacturing, distributing, advertising, offering to sell, or selling any cosmetic or personal care products or providing any related services under the name or mark GLOSS or a name or mark substantially similar to GLOSS".

The application was filed on 17 April 1989. At a first call on 18 April 1989, Mr Miles of counsel for the two plaintiffs outlined the urgency in having this application brought before the court. Mr Wilson for the defendant concurred. On 18 April by consent I made timetable orders in respect of the filing of affidavits. An application was made to the executive judge and a priority fixture was granted. The matter was argued before me throughout the day of 27 April. Unfortunately it was after 5 pm before the matter concluded and the decision has been delayed as I have been sitting out of Auckland and regrettably there are not adequate transcription facilities available to an associate in some provincial centres.

The background is not long and there was little dispute between counsel as to the applicable legal principles. On this interim hearing argument centred upon the true factual position and its effect in law.

The substantive proceedings allege that the first plaintiff which operates a television network is the producer, owner and broadcaster of a television program, "Gloss". This was broadcast in New Zealand in 1987 and 1988. TVNZ is to broadcast a further 12 episodes beginning in late July or early August of 1989. There is planning for a further series in 1990. There is ample uncontradicted evidence that as a result of this program and the extensive advertising and associated promotions, its name, graphics, characters and their lifestyles have become well known to a substantial number of people in New Zealand. The evidence is that the series has enjoyed very high ratings and is the first New Zealand produced television program which has provided a subculture or ambience which is clearly manifest within the wider society. The evidence is that such phenomenon is not unique. This has occurred in other countries with other soap opera/drama like "Dynasty", "Dallas" and "Falcon Crest". There is a consistency in the expert evidence that a flow on is part of television production and advancement today. In the competitive, cost efficient and self reliant economic market prevailing in New Zealand TVNZ must stand on its own feet and be entrepreneurial. One way that it can do this is to exploit the commercial potential of such programs.

The extensive way in which this can be achieved is demonstrated by the Wombles phenomena in the 70s. (That was not New Zealand produced but TVNZ acquired the rights in this country.) TVNZ does this on a continuing basis with its "TV Kiwi" character. It is central to the plaintiff's claim that TVNZ has acquired property in the form of reputation or good will in the name mark or get-up related to "Gloss".

In written submissions such proprietary right was totally denied by the defendant, but Mr Wilson, responsibly in my view, at the hearing accepted that on the basis of the evidence there was established a proprietary interest. Notwithstanding he contended that the activities of the defendant did not impinge upon that or infringe the rights which exist.

The strength of this proprietary interest is demonstrated by the fact that Cosmetic Sales, the second plaintiff, has entered into an arrangement whereby it will produce and market a "Gloss" range of toiletries and cosmetics. It is to pay TVNZ a 10 per cent royalty on the wholesale value of toiletries and cosmetics sold thereunder. The range will be not only called "Gloss" but will involve in its advertising and promotion characters from the television series and the environment will be a reflection of the program and what it stands for and projects. The second plaintiff has budgeted for a turnover in this year of \$1,000,000 in this range and consequently a royalty payment to TVNZ of \$100,000. From the point of view of Mr Bernard, the director and principal shareholder of the second plaintiff, the inter-relationship between his "Gloss" range and the television program is such that the main thrust of his company's marketing campaign will be during the three months in which the 1989 series of "Gloss" is being screened.

A substantial portion of Mr Miles' submissions were directed to the fact that exploitation of character and product merchandising was recognised in law. In light of the concession properly made by Mr Wilson the existence of the right does not require analysis by me in this application for interim relief. Suffice to say that following an outlay of several million dollars on "Gloss" TVNZ now has a program of its own which has commercial

exploitation potential. It has entered into a relationship arising therefrom with the second plaintiff. There are negotiations in train in other associated areas to permit merchandising which will take advantage of the heavy exposure of the program. It is asserted there will be a public identification between such products and the television program and the lifestyle which it portrays and spawns.

All counsel were agreed that the base test is to be found in the principles enunciated by Lord Diplock in *Erven Warnink BV v J Townend and Sons (Hull) Ltd* [1979] 2 All ER 927. Those may conveniently be summarised as: (1) A misrepresentation; (2) Made by a trader in the course of trade; (3) To prospective customers of his or ultimate customers of goods or services supplied by him; (4) Calculated to injure the business or goodwill of another trader in the sense that it is a reasonably foreseeable consequence; (5) Causes actual damage to the business or goodwill of the trader by whom the action is brought.

Mr Elliot developed carefully the divergence between more recent Australian cases such as *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414; 56 ALR 193 and the more traditional approach found particularly in English cases, where there was substantial emphasis on the common field of activity.

I am satisfied that the position is as summarised by McGechan J in *Taylor Bros Ltd v Taylors Textile Service Ltd* [1988] 2 NZLR 1 at 20; (1988) 14 IPR 353 at 374: "The question to be determined is whether an activity on the part of the defendant may mislead potential customers into thinking the activity is that of the plaintiff. If the business of the plaintiff and the business of the defendant are in totally unrelated fields, the risk of such confusion is diminished. If, conversely, the fields of activity of the plaintiff and defendant are closely related, the risk is increased. And, of course, there are gradations in between. The important point is this: the existence or otherwise of a common field of activity is merely one pointer towards the probable presence or absence of confusion. It is no more." In the Court of Appeal this assessment of the learned judge was not challenged.

The potency of legal rights attaching to matters such as this are demonstrated in the two recent *Crocodile Dundee* cases in Australia. *Hogan v Koala Dundee Pty Ltd* (1988) 12 IPR 508; ATPR 40-902 and *Hogan v Pacific Dunlop Ltd* (1988) 14 IPR 398; ATPR 40-914. In each of those cases Mr Hogan, the leading character in the highly successful *Crocodile Dundee* films, was granted relief to restrain persons from trading in a way which suggested that there was actual association with Mr Hogan and his role in the "Crocodile Dundee" films. In the first case the defendant had shops called "Dundee Country" which used images which clearly took their basis and form from the film "Crocodile Dundee". The court had no difficulty in finding an implied representation that there was association between the two.

In the second case no part of the name was used but the well known "knife scene" from a "Crocodile Dundee" film was exploited albeit in what the defendants said was a spoof. Again the court found that the association was so overwhelming as to entitle the plaintiffs to relief.

In this case the defendant contends that whatever proprietary interest the plaintiffs may have in their name, mark or get-up it, the defendant, is not infringing that simply by using a word alone. The defendant relies

heavily on the recent decision of Wylie J in *Pitstop Exhaust Ltd v Alan Jones Pitstop International Ltd* (1988) 2 NZBLC at 102,968. There his Honour held that the word "pitstop" used in the name was evocative and thus indirectly descriptive of the type of service being offered by the plaintiff. His Honour did note that because the words were descriptive was not an absolute bar to the acquisition of proprietary rights capable of protection. But in the case before him the plaintiff had not established an arguable case that it had acquired a special reputation or goodwill in the name.

5 The defendant also relied on the decision of Wallace J in *Theodorus Couwenberg & Son Ltd v Diesel Progress NZ Ltd* (1988) 2 NZBLC 102,976. That case too was decided on the basis that there was insufficient evidence to indicate that the words, "diesel" and "turbo", had acquired a technical or secondary or different meaning which would be likely to lead to confusion or that there was a distinctiveness which had arisen. Both cases of course depend on their own particular facts.

10 The decision of Hardie Boys J in *Shotover Gorge Jet Boats Ltd v Marine Enterprises Ltd* [1984] 2 NZLR 154; (1983) 4 IPR 516, on the other hand demonstrates how even the use of words which in their ordinary meaning are merely descriptive can lead to the possibility of confusion and misapprehension in the public arena and relief may therefore be required.

20 What the defendant says in this case is that "Gloss" has created an ambience related to the world of glamour and glitter. The defendant produces and markets cosmetic products which are not part of that trendy upmarket scene. All that they have in common is the simple word "gloss". The logo and art work are different. It does not market by using the typescript, flavour, or environment associated with the television series and that, as a matter of fact, no question of association could possibly arise.

25 The fundamental question on this application is whether the plaintiffs have established that there is a serious question to be tried. The law in New Zealand with regard to passing off and breach of s 9 of the Fair Trading Act 1986 (NZ) has been recently considered by the Court of Appeal in *Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd* [1987] 2 NZLR 395; (1987) 9 IPR 367; *Taylor's Textile Services Auckland Ltd v Taylor Bros Ltd* [1988] 2 NZLR 33; (1988) 14 IPR 353 and *Trust Bank Auckland Ltd v ASB Bank Ltd* (1989) 15 IPR 222. Although with a breach of the Fair Trading Act there is no need to prove actual damage, that legislation being directed towards the protection of the public, I distill from those cases that the plaintiffs must establish that: (1) they have a proprietary right, (2) that another is trading on or making use of by representing that there is a commercial association or arrangement, and (3) that it is interfering with the plaintiff's rights.

40 This is said by the plaintiffs to arise in three ways. First there is a diversion in the appropriation of the good name and reputation of the program "Gloss" and TVNZ's right to licence the name. Secondly there is a damage to the reputation by the poisoning of the goodwill and by the undermining of the commercial integrity of TVNZ being able to exploit the goodwill in this and other programs. Thirdly, there is a dilution of the goodwill by the inference that the defendant is either associated with or approved or licensed by TVNZ. The fact that the second plaintiff is not yet in the market place is not critical: see *Keg Restaurants Ltd v Brandy's Restaurant Ltd* [1983] 1 NZIPR 453.

The courts must adopt a robust attitude towards claims of this sort. To the extent that the plaintiffs are suggesting that anything which has the name "Gloss" attached to it would be actionable is in my view unsustainable. Mr Miles, on the basis that the first plaintiff's "Gloss" is concerned with glamorous superficiality and what might be typified as "the beautiful people", the word "Gloss" attaching to gumboots or bulldozers would possibly not create misperceptions in the public mind.

The difficulties inherent in accurately applying the legal principle are well demonstrated by the English decisions in *Stringfellow v McCain Foods (GB) Ltd* (1984) 3 IPR 71 where litigation arose over the word, "Stringfellows". The plaintiffs, who ran an upmarket nightclub/discotheque of that name, objected to a brand of ovenready chips being marketed under the same name. The plaintiffs in seeking injunctive relief restraining the defendants were unsuccessful on the application for interlocutory relief, successful on the substantive hearings, and then unsuccessful in the Court of Appeal.

The defendant contends in this case that it is simply in the business of marketing preparations for and related to the care of fingernails and various forms of cosmetics. They claim to have simply adopted a word which is descriptive and appropriate. As they are not trading on or projecting an image of glitter and brittle sophistication which is the hallmark of the television program then none could be misled.

The defendant contends that it has no intention to obtain any spin-off from the television series. The responsible officers of the first plaintiff allege it is an orchestrated and deliberate campaign. It might be possible to form an adverse view of the defendant's position by reference to some of the correspondence where it threatens much but apparently has done nothing and also its silence on reasonable enquiries made of it by the first plaintiff. But the conflict need not be resolved for it is effect and not intention which is important.

It is not without significance that the presentation of the word "Gloss" by the defendants is not in the script or form which is used by the plaintiff in its television program. That underlines the defendants submission that this is simply a descriptive word and therefore it can genuinely be used by more than one person in the marketplace. The defendant argues that no secondary meaning has grown up or become attached to it.

I confess to a degree of personal cynicism as to the notion of a cult or secondary meaning having developed. Perhaps that reflects an unwillingness to accept the potency of the mass media in fashioning and influencing everyday occurrences. However I am no expert in the field and I cannot overlook the quality or quantity of evidence which the plaintiff has placed before me. Dale Walsh Wrightson, the managing director of Calypso Communications is of the view that, on the basis of his experience, any cosmetic manufacturer selling a range of cosmetics in New Zealand in July 1988 onwards under the name of "Gloss", would benefit from the television show's extensive reputation and reap a commercial advantage. Catherine Saunders, described as one of the leading communicators in the country, asserts that there is an obvious and irrefutable association of Gloss the cosmetic vis-à-vis "Gloss" the television series and expresses surprise that it could be otherwise viewed. Kevin Blight, the proprietor of Media Consultancy, who has 20 years' experience in the industry, believes that a Gloss range of cosmetics or fashion gear would inevitably be associated with

the TV program by the public. Terrence Christopher King, the joint chief executive of Saachi and Saachi Advertising Ltd is also persuaded of the nexus between any product in the cosmetic world and the show itself. Robert Anster Harvey, the chairman of MacHarman Ayer Advertising Ltd, a leader in advertising for 25 years, expresses surprise that the subject of "passing off" could be in dispute as the connection is obvious and beyond question. And there were others.

The defendant introduced evidence from a number of persons with a history of hands-on involvement in the cosmetic industry and technical expertise in design who take a contrary view indicating that the word "Gloss" is merely descriptive and would not necessarily conjure up the alleged association in the public mind. I respect their assessment but those who are qualified and experienced in the world of communication are unanimous in the view that an association is inevitable. When the evidence is as strong on that point I am forced to the conclusion that there is a serious question to be argued in respect of the public perception of the use of the word "Gloss", despite my own scepticism. The reality that the public does not make fine distinctions was recognised by the Court of Appeal in *Prudential Building and Investment Society of Canterbury v Prudential Assurance Co of New Zealand Ltd* (1988) 13 IPR 353; (1988) NZBLC 103,351.

There is an additional factor. Leonard William Self, who is managing director of New Zealand Cosmetic Laboratories, gives evidence of a conversation between himself and John Mayes, the managing director of the defendant; he says that in May 1988 there had been a discussion between the two about changing the defendant's name from Fancy Fingers to Gloss Cosmetic Supplies. Mr Self swears that in the course of the conversation Mr Mayes said he was going to call the product "Gloss" to which Mr Self asked, "After the TV program?" and Mr Mayes replied, "Yes, it's a name which is very compatible with cosmetics". Mr Mayes denies that the conversation took place at all and by surrounding circumstances challenges Mr Self's credibility.

Mr Miles reminds me that the timing of the change of name and the commencement of the promotion as deposed to by Mr Mayes is remarkably coincident with the "Gloss" television series in 1988. I simply see this allegation as another factor which must satisfy me that there is a serious question to be argued in this matter.

On this application it is not necessary for me to determine the exact metes and bounds of TVNZ's rights. I simply find that although the first plaintiff does not have an absolute monopoly on the word "Gloss" in any or all circumstances, and although the defendant is not using the ambience of the television program as was the case in the *Crocodile Dundee* cases, there is a serious question as to whether, in the way in which the defendant is using this name, there are infringements under both heads alleged. I do not find persuasive on the available evidence the defendant's argument that the word "Gloss" is only descriptive and an appropriate word with a recognised relevance or meaning in relation to cosmetics. I have considered the evidence given which supports that submission but this is not a case of the word "Gloss" (which may well have a meaning in the cosmetics industry) being used in association with another word. William Norman Kittelty gave evidence of "Lip Gloss" having been marketed for 25 years. Stephen John

Richmond deposed to items in the Helena Rubinstein range which included derivatives of the word "gloss" in their names, and Hugh Ngaru Nielsen the editor of *Headway*, a hairdressing and beauty magazine, told of a number of cases where products in this area had the name "Gloss" attached to or included in their name.

Notwithstanding, I have concluded that on its own the word is almost meaningless in descriptive or generic terms and is not in a category with words like "pitstop". The various dictionary definitions of "gloss" referred to on behalf of the defendant leave me unpersuaded that there is any appropriate obviousness in the word.

Even if I were to be persuaded on the question of common field of activity that the traditional English approach should prevail, having seen a video of the opening of the television program, I find there is a sufficient area of overlap of "superficial lustre" to lead to the real likelihood of confusion arising in the public mind.

I turn to the second limb of *Klisser's Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140, namely balance of convenience. In what is purely a commercial dispute the courts in my judgment should always be vigilant to ensure that interlocutory relief is actually necessary inasmuch that damages could not be an adequate remedy. The first plaintiff in its evidence establishes that the broadcasting of the series in 1989 (that is the third consecutive year) will have untold spin-off and association projected into the community. If interim relief is not granted the ability of the first plaintiff to exploit and capitalise in financial terms on that will be gone for ever. I have already referred to the figures which are mentioned in the arrangements between the first and second plaintiffs. The case of TVNZ is that this is only one of a number of arrangements which can be put in place but all of which will fail if the defendant is left free to operate in what is alleged to be an unlawful way in the field. I suspect a degree of overstatement in the submission but there is no doubt a substantial degree to which exploitation would be markedly diminished. I am impressed by the argument that to assess damages for the loss sustained by the interference would be virtually impossible.

On the other hand the defendant would not be precluded from continuing to operate in the field of cosmetics. It would be restrained until the substantive action can be determined, only from using this particular word in its promotion. I had made available to me examples of the defendant's complete range. I cannot overlook that in respect of a large number of the items for nail care and associated cosmetics the word "Gloss" was type print on a transparent adhesive material which was affixed to the canister or packaging. A number of these had in fact become partially or fully detached from the exhibits before me. I have no doubt such labelling could be removed and replaced with another strip of tape with a different word with minimal effort. Consequently any substantial interference with the defendant's marketing could be avoided. Further the relief sought is limited to New Zealand. One part of the range was presented with a map of the Australian continent overprinted with the word "Gloss". I cannot imagine that with the distribution which is already going on across the Tasman there would be difficulty in marketing this part of the range over there where the defendant has an established record at trading although this logo is recent. There would be no difficulty in establishing the extent to

which the defendant's business had been diminished by an inhibition on the use of the word "Gloss" until hearing if ultimately the defendant is held to be entitled to trade using the name "Gloss".

5 One is conscious always in a case such as this of a large and strong commercial entity endeavouring to smother a smaller operation. I have been particularly conscious of such considerations in this matter. The defendant does not have a long established tradition trading in this way. It was only incorporated under its present name at the end of last year; although there is some evidence to suggest that it traded using that name 10 perhaps a few months before incorporation. In any event it is a relatively short period and there is no evidence of a considerable goodwill or reputation having been created which is associated with the word "Gloss": cf *Tavener Rutledge Ltd v Trexapalm Ltd* [1975] FSR 479.

15 The evidence is unclear as to whether it also trades using other names, logo and insignia but certainly there is no evidence of an established clientele which depends on the "Gloss" label.

It is also clear that the major thrust of the defendant's business is to outlets where the retail marketing of the product is secondary to the 20 provision of a glamour or health care service. By that I mean that the products of the defendant appear to be largely marketed through nail bars and cosmetic salons rather than through general pharmacies and departmental stores. In those circumstances when dealing with a specialised clientele who are essentially in the trade it is the actual product and its 25 properties which will be more important than the "hype" of a particular name.

I have also considered whether to grant interim relief would have the effect of finally disposing of the matter. In my view there is no reason why that should be the case. If the defendant is inhibited from marketing in the 30 short term using the words "Gloss", and if its activity is totally unassociated with the television program as it contends, then it will have lost little in the intervening period. The plaintiffs, on the other hand, contend that the defendants marketing is purely a "coat tail" activity and that unless there is restraint now TVNZ's recognised and conceded rights will be gone for ever.

35 Each counsel referred me to the possibility of concurrent rights in a name as was adverted to by the Court of Appeal in *Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd*, *supra*. There is nothing in the evidence before me which suggests that such could arise here. In the *Budget* cases the court was confronted with a word which had obvious descriptive application to the operations of each of the competitors. That is one end of 40 the spectrum where an "eloquently descriptive" trade name may tend not to make it truly distinctive of any particular business. "Lego", as demonstrated by *Lego Systems A/S v Lego M Lemelstrich* [1983] FSR 155, is a word which conjures up one image and one image alone, is at the other. I find that although "Gloss" may be a phenomenon in New Zealand, and in that 45 regard the forerunner of similar occurrences, it falls in middle ground.

On an interim basis I am persuaded that there are serious questions to be argued and that after considering various aspects of the balance of 50 convenience, and more particularly overall justice, the court should intervene to hold the position while the matter is determined, bearing in mind the crucial aspect of timing in this case.

The plaintiffs assert that the period August to October 1989 is critical. The defendants say that it is of no relevance as the fact that their name is Gloss is purely coincidental and bears no association to the TV series. For the defendant to be temporarily restrained should in those circumstances have minimal impact upon it.

There is in all this the commercial reality that the first plaintiff is in a position where it could properly meet any award of damages which arose under its undertaking. I have little information about the defendant apart from sketchy information about turnover and advice that its capital is 1000, \$1 shares. In light of the evidence as to the financial potency of the marketing spin-off I suspect that if the defendant was not now restrained and the proceedings were to be resolved against it after the 1989 broadcast of the series, the defendant would be in no position to meet an award of damages in the plaintiff's favour. That is underlined by the synergistic nature of TVNZ's promotional thrust. It is not merely the relationship between the second plaintiff and TVNZ, but the royalty potential from similar contracts with other parties involved in glamour, sophistication and trend setting which would be lost.

In some cases in this category time has been granted to a defendant to enable it to dispose of existing stock or make other arrangements. Because the defendant deposes to the fact that it has a substantial market in Australia and because of the manner by which the word "Gloss" is adhered to its products there appears no need for an indulgence of that sort.

Accordingly, an injunction will issue, pending the trial of this action, against the defendant, its servant, agents, contractors or otherwise however, restraining them from manufacturing, distributing, advertising, offering to sell or selling any cosmetic or personal care products or providing any related services under the name or mark GLOSS or any name or mark substantially similar to GLOSS as from 12 May 1989.

Leave is reserved to either party to apply for further or other orders with regard to the exact terms of this interim injunction should that be necessary.

The question of costs is reserved.

Solicitors for the plaintiffs: *Dengate-Thrush.*

Solicitors for the defendant: *Raymond S Walker.*

SANDRA GRIMSHAW
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