

IN THE HIGH COURT OF MIMOSA

**DESIGN-A-FLOWER LIMITED
PETITIONER**

V.

**FLORALMANIA LTD
RESPONDENT**

**ON SUBMISSION TO THE COURT
MEMORIAL FOR THE PETITIONER**

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STATEMENT OF JURISDICTION

The original jurisdiction of the High Court of Mimosa is invoked in accordance with the laws of the country of Mimosa.

THE STATEMENT OF FACTS

- Mr. Anther is a national of the island of Pollen. He is a reputed scientist.
- Mr. Anther has invented a biotechnological process by which flowers with designs can be created.
- He has applied for a patent in Pollen, as well as in other countries utilising Patent Cooperation Treaty.
- Mr. Anther sets up a company, 'Design a Flower Limited' (DAF).
- DAF gains tremendous publicity due to the unique nature of its product.
- DAF wins an international flower arrangement contest.
- Designer flowers become immensely popular.
- Under the laws of Mimosa, a patent application takes 6 years to be granted. Though damages can be claimed retrospectively from the date of publication, it can be claimed only after the patent is granted.
- Stigma, a national of Mimosa reverse engineers DAF's product. Utilising DAF's technology, FLO markets designer flowers.
- FLO gains tremendous market share, particularly marketing designs which appeal to prurient minds.
- DAF sues FLO in the High Court of Mimosa.

THE STATEMENT OF ISSUES

Issue No. 1 : Do FLO's acts constitute unfair competition?

Issue No. 2 : Is FLO liable for a violation of the principle of unjust enrichment?

Issue No. 3 : Is the grant of patent inevitable?

Issue No. 4 : Are the conditions for a grant of temporary injunction satisfied?

Issue No. 5 : Do FLO's acts involve an infringement of DAF's trade secrets?

THE SUMMARY OF ARGUMENTS

I

FLO's actions amount to unfair competition. FLO has misappropriated the technology that has been developed by DAF through enormous investment and years of research. Further it has utilized the goodwill painstakingly generated by DAF at DAF's own expense.

II

FLO's actions amount to unjust enrichment. FLO has copied DAF's technology and unjustly benefited at the expense of DAF.

III

The grant of patent is prima facie inevitable as the invention is novel, involves an inventive step and has industrial application. This involves the patenting of molecular manipulative technology which is not ethically or morally or any other grounds objectionable.

IV

DAF is entitled to temporary protection since the invention has been displayed at an international exhibition. The conditions necessary for grant of temporary injunction are satisfied.

V

DAF's molecular manipulative technology is a trade secret, which has been improperly acquired and used by FLO.

THE ARGUMENTS ADVANCED

Contention #1: FLO's acts constitute unfair competition.

Unfair Competition is “a term which may be applied generally to all dishonest or fraudulent rivalry in trade and commerce, but is particularly applied to the practices of endeavouring to substitute one's goods or products in the market for those of another, having an established reputation and extensive sale, by means of imitating or counterfeiting the name, title, size, shape or distinctive peculiarities of the article or the shape, colour, label, wrapper or general appearance of the package or such other simulations, the imitation being carried far enough to mislead the general public or deceive an unwary purchase....”¹

Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.² Further all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor are considered acts constituting unfair competition.³

FLO's actions constitute unfair competition on two counts –

1. FLO's action amounts to misappropriation of the technology developed by DAF
2. FLO is using the Goodwill generated by DAF at DAF's expense

1. It is intolerable that one manufacturer should be allowed to sponge on another by pirating without license or recompense and reap the fruits sown by another. In the present case DAF has spent enormous amounts of capital in developing a technology which is all set to alter the international distribution of sales in the ornamental plant and flower market.

¹Singer Mfg. Co. v. June Mfg. Co. 163 U.S. 169

²Art. 10bis(2), International Convention for the Protection of Industrial Property, 1883

³Article 10bis(3)(1), International Convention for the protection of Industrial Property, 1883

In the interest of fair trading and in interest of all who may wish to buy or to sell goods the law should recognize that certain limitations upon freedom of action are necessary and desirable. In some situations the law will have to resolve what might at first appear to be conflicts between competing rights. In solving the problems which may have arisen there has been no need to resort to any abstruse principles but rather to the straight forward principle that trading must not only be honest but must not even unintentionally be unfair.⁴

FLO's act is a calculated attempt at slavish imitation of the process developed by DAF in order to replicate the unique characteristic of DAF's products.

2. DAF has created a niche in the ornamental flower market as the source of flowers with designs on them. DAF and its designer flowers have gained tremendous publicity. Designer flowers due to the single-handed efforts of DAF have become the latest fashion statement. As inventors of the new technology and as winners of various international competitions, Design-A-Flower Ltd. Has come to be associated with designer flowers.

It is fundamental requisite of fair competition that "the consumer must not be misled into purchasing an article from one producer in belief that it was made by some one else or emanates from some other source."⁵ Here, customers are buying FLO's flowers under the mistaken impression that they originate from the same manufacturer who won the international competition and gained tremendous publicity as the inventor of "Space Age Flowers". "The test of unfair competition is not whether distinction between the two competing products can be recognised when placed alongside each other but whether when the two products are not viewed together, a purchaser of ordinary prudence would be induced by reason of the marked resemblance in general effect to mistake one for the other despite differences in matters of detail."⁶

Even if the defendant is innocent of any intent to deceive, his acts amount to unfair competition.⁷ In the present case, FLO has calculatedly imitated

⁴ Parker-Knoll v. Knoll International (1962) RPC 265 at 278(HL)

⁵ Norwich Pharmacol Co. v. Sterling Drug Inc., 271 F. 2d 571; see also Redday v. Banham, 1896 A.C. 199

⁶ Ralston Purina Co. v. Checker Food Products Co. ; Mo. App. 80 S.W. 2d 717

⁷ Bastitch v. McGarry, (1964) RPC 1173

the features of DAF's product which has won tremendous international publicity in the hope that the unwary consumer mistakes it for the famous "Space Age Flowers" and is thereby induced to buy it.

Unfair Competition "quarantines business conduct which is abhorrent to good conscience and the most elementary principles of law and equity."⁸ The calculatedly dishonest acts committed by FLO constitute unfair competition.

Contention #2: FLO's activity violates the principle of unjust enrichment

Unjust enrichment is a "general principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated where it is just and equitable that such restitution be made"⁹

The principle evolved from the maxim –

*Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiores*¹⁰

To establish a claim for unjust enrichment three requisites need to be satisfied¹¹

1. The receipt of a benefit has enriched the defendants
2. They have been so enriched at the plaintiff's expense
3. It would be unjust to allow them to retain the benefit

1. Design A Flower Ltd. Has spent enormous amount of money developing the technology to manufacture flowers with designs on them. Floralmania has conveniently reverse engineered and usurped this technology. Therefore, they have received the benefit of Mr. Anthers and Designer A Flower LTD's research and development effort.

⁸ DIOR, S.A.R.L v. Milton, App. Div. 2d 878

⁹ Tulalip Spheres Inc. v. Mortland, 9 Wash. App. 271

¹⁰ By the law of nature it is not just that anyone should be enriched by the detriment or injury of another

¹¹ Goff and Jones, the Law of Restitution, 3rd ed., 1986, at p 16 : Home Management Maintenance PTY. LTD. V. Matthew Peter Doyle and Naomi Roseanne Doyle, 107 FLR 225

2. Due to the benefit, FLO's business has picked up enormously. Since both FLO and DAF are catering to the same market, FLO's misappropriation of technology has caused DAF tremendous loss of business. Therefore FLO's theft of the technology has been at DAF's expense.

3. FLO has misappropriated the fruits of DAF's labour. Simultaneously DAF is being denied the right to fully exploit its own technology. One of the tenets of justice being that each one deserves to enjoy the fruits of ones own labour, such misappropriation is unjust.

Therefore, FLO's activities violate the principle of unjust enrichment

CONTENTION #3: The Grant of Patent is Inevitable

The molecular manipulative technology is patentable *prima facie* as it fulfills the following criteria for patentability¹²:

- (i) The invention must be novel
- (ii) It must involve an inventive step
- (iii) It must be capable of industrial application
- (iv) The invention must not fall under the categories of subject matter specifically excluded by the laws of the country.

The first requirement for patent grant – 'novelty' means new or that which is not known before. The condition lays down that there must have been no public knowledge or public use of the invention.¹³ Novelty is often determined by ensuring that

¹²Art. 27(1), Agreement on Trade Related Aspects of Intellectual Property Rights; Arts. 52-57 The European Patents Convention; ss. 1-4, The Patents Act 1977(UK), s.64(1)(e),(f),(g), The Patent Act 1970(Ind)

¹³Monsanto v. Coramandel, AIR 1986 SC 717 at 717

the invention in question does not form a part of the state of art.¹⁴ To establish novelty an idea “need not reflect the ‘flash of genius’ but it must show genuine novelty and invention and not a merely clever and useful adaptation of existing knowledge”.¹⁵ The motive behind the grant of patent rights is to ensure that the first and true inventor gets some returns for the heavy investment and research that goes into making an invention. Hence the requirement of novelty is significant to ensure that the purpose of patent law is not defeated.¹⁶

In the instant case, the technology has never been known before and is viewed as a breakthrough with tremendous potential. There has been no prior use, or knowledge that could invalidate the patent grant. The only public disclosure of the technology at an international contest for flower arrangement and the marketing of the product was after the date of priority.¹⁷ It could be safely said that Anther being the first and true inventor is *prima facie* entitled to the grant of a valid patent.

The second essential of non-obviousness is to be understood as “not ‘plain’ or ‘evident’”.¹⁸ A trader cannot be prevented from adopting a product, process or design, which is an obvious modification of existing ‘state of art’. An inventive step is considered to be present if according to a notional un inventive person skilled in the art, the invention is not obvious. To satisfy the condition of non-obviousness the Court must¹⁹ –

- (i) identify the inventive capacity embodied in the patent.
- (ii) Assume the mantle of a person normally skilled (but unimaginative) in the art at priority date and impute to him what was at that date common general knowledge in the art in question.
- (iii) It must identify what, if any differences exist between the matter cited as being ‘known or used’ and the alleged invention.

¹⁴State of art refers to all matters available to the public before the priority date of the invention by written or oral description, by use or in any other way. See generally Sec. 2, The Patents Act, 1977; *Merrell Dow v. Norton* (1994) RPC 1

¹⁵*Educational Sales Programme Inc. v. Dreyfuss Corp.*, 317 N.Y.S. 2d 840

¹⁶*Windsurfing v. Tabur*, (1985) RPC 59

¹⁷Date of priority is the date at which a patent application has been duly filed. It gives rise to the right of priority for a period of twelve months for patents. Any application filed subsequently in any other country will not invalidate the patent application or affect its novelty.

¹⁸*Olin Mathieson Chemical Corporation v. Biorex Labs Ltd.*, (1970) RPC 157; General ¹⁹*Tyre Company v. Firestone Tyre and Rubber*, (1971) RPC 173

Supra n.6

(iv) It must ask itself whether viewed without any knowledge of the alleged invention, these differences constituted steps which would have been obvious to the skilled man or whether they required any degree of invention.

The invention involves a manipulation of the molecular make-up of flowering plants enabling the creation of designer flowers. The creation embodies an inventive step and is a clearly distinct achievement. Further the technology is non-obvious to a normally skilled unimaginative technician of the field. The patent must be granted not only to provide for the large investment for research but also as incentive and acknowledges of his inventive capacity.

Finally, the invention must be capable of industrial application. It mainly requires that the invention must give the promised result. The practical usefulness or commercial utility of the invention is beneficial to the public or particularly suitable for purposes suggested are also not relevant. It is only the failure to produce the results promised that will invalidate the patent.²⁰ An invention primarily means something that is new and useful, so the ground of usefulness or utility is essential for grant of patent.

The technology mentioned produces designer flowers promised in the specifications. He can create not only a spotted, striped and checked rose but also cartoon figures on tulips. Hence, the utility of the invention or its industrial application cannot be challenged. Apart from having satisfactorily fulfilled the above conditions the patent application has been filed as per the required procedure with complete specification clear and concise claims including an abstract.

Yet, another criteria to be fulfilled for patentability is that the invention must not fall under the categories of subject matter specifically excluded by the laws of the country. The laws of Mimosa lay down that patents cannot be granted on live forms or biological material, although they can be granted for micro or molecular technology. It thus draws an important distinction between biological material and

²⁰Edison and Swan Electric Light v. Holland, (1889) 6 RPC 243

micro-biological process. However there has been no clear definition of the two terms under any of the national or international laws except for the Directive on the Legal Protection of Biotechnological Inventions.²¹ It states that

- (i) 'biological material' means any material containing genetic information and capable of reproducing itself or being reproduced in a biological system.
- (ii) 'Micro-biological process' means any process involving or performed upon or resulting in micro-biological material.

The patent application is for a microbiological process and not for biological material. The designing of flowers has been achieved by genetic manipulation such as introduction of a new genome or a change in the gene sequence. Genetic engineering clearly involves microbiological processes, and the process is clearly patentable. A process for the production of plant or animals is deemed to be essentially biological only if it consists entirely of natural phenomenon such as crossing or selection. The newly invented technology sought to be patented involves sufficient human intervention and technical alterations of natural occurrences that carry it beyond the definition of 'biological'.

Further, even though countries do not allow patenting of subject matter that is contrary to ordre public or morality. It cannot be invoked to bar patents on molecular manipulative technology.

According to the TRIPS agreement 'Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not merely because the exploitation is prohibited by their law.'²²

The said invention poses no threat to the environment as the technology does not result in a pathogenic plant and has been checked for environmental safety. Only in limited cases where there is an overwhelming consensus that exploitation of a

²¹ Article 2, EC Directive on the Legal Protection of Biotechnological Inventions.

²² Art. 27(2), Agreement on Trade Related aspects of Intellectual Property Rights, 1994.

patent is immoral will it be refused on that ground. The exclusion of plant and animal varieties from patenting, does not apply to the biotechnological process of manipulating molecules.²³

Therefore all the conditions for grant of patent are satisfied. There is no ground for opposition on ethical, moral or environmental basis. The grant of the patent is inevitable.

Contention #4: The conditions for grant of a temporary injunction are satisfied.

The technology developed by DAF is entitled to temporary protection

The Paris Convention for the Protection of Industrial Property (1883) expressly states that member countries are obliged to grant in conformity with domestic laws, temporary protection to patentable inventions exhibited at official or officially recognised international exhibitions conducted in the territory of any member countries.²⁴

Mr. Anther, a national and reputed scientist of the island of Pollen, has invented a technology by which designs can be created on flowers. He has set up the company Designer A Flower Ltd. This invention was exhibited under the title 'Space Age Flowers' in an international flower arrangement contest where it was declared as the winning entry. As such DAF, is entitled to the temporary protection of its invention guaranteed under the Paris Convention.²⁵

Conditions for grant of injunction is satisfied.

To be granted a temporary injunction, the plaintiff must establish²⁶

1. A serious issue to be decided²⁷

²³ Nature of Biotechnology, Feb. 2000, Vol. 18, No:2, p. 131

²⁴ Art. 11, The Paris Convention for the Protection of Industrial Property, 1967.

²⁵ Supra n. 14

²⁶ Turbo Resources Ltd. V. Petro Canada Inc., (1989) 24 CPR (3d) 1 FCA; Australian National Airlines Commission v. Commonwealth (1986) 66 ALR 545; State of Queensland v. Australian Telecommunications Commission (1985) 59 ALR 243; Cutter Ltd. V. Baxter Travenol Laboratories of Canada Ltd., (1980) 47 CPR(2d) 53 (FCA); Syntex Inc. v. Novopharm Ltd. (1991) 36 CPR (3d) 129 (FCA); American Cyanamide Co. v. Ethicon Ltd., 1975 AC 396; Martin Engineering Co. & Anor v. Tristen Holdings Pty. Ltd., (1988) 81 ALR 534; Kollback Securities Ltd. V. Epoc Mining NL, (1987) 8 NSWLR 533;

2. Irreparable harm if the injunction is not granted
3. The balance of convenience favors the grant of patent²⁸

1. The issue here deals with a matter of enormous economic significance – one that will be settled only on grant or refusal of patent for the newly invented process. This could prove to be of tremendous significance as this invention is set to revolutionise the flower arrangement market.

2. DAF's products are tremendously popular right now. It has enormous market potential. In this lies an opportunity to create goodwill in the flower arrangement business. The product appeals to people of all ages. However, by applying of this technology to create designs of an objectionable nature, FLO is destroying the reputation, which DAF has generated. FLO's acts have brought disrepute to the concept of designs on flowers and have cut off a major chunk of the market and promises to inflict irreparable harm if the injunction is not granted.

3. Balance of convenience considerations would be satisfied if damages would not provide the plaintiff an adequate remedy but damages would provide the defendant with such a remedy for the restriction of his activities. DAF has developed this technology and popularized it. This technology is identified with DAF. DAF's goodwill is intertwined with the goodwill of its maiden product. It has an interest in the reputation of designer flowers, a concept introduced by DAF. However, the imitators FLO have no such claim. Their interest is purely economic. Therefore, they can be compensated for loss, in case the patent applications is rejected.²⁹ In case FLO is permitted to continue its activities unabated, then the tremendous chunk of the market will be destroyed. No amount of monetary compensation can make up such a loss of DAF.

Therefore, all the conditions for grant of temporary injunction are satisfied.

²⁷ Castlemaine Tooheys Ltd. V. State of South Australia, (1986) 67 ALR 553

²⁸ See Generally Films Rover International Ltd., (1987) 1 WLR 670; R v. Secretary of State for Transport ex p Factortame Ltd., (1991) 1 AC 603; Beecham Group Ltd. V. Bristol Laboratories Ltd., (1968) 118 CLR 618

²⁹ Assuming but not conceding that there is a possibility of a refusal of patent application.

Contention #5: FLO's action of copying DAF's technology amounts to infringement of DAF's trade secret.

Trade Secrets comprise important intellectual resources that are often a company's most valuable assets. The law regarding trade secrets as two primary objectives –

1. To encourage research and innovation
2. To maintain standards of commercial ethics

To be considered a trade secret information must fulfill the following requirements³⁰ –

1. It must confer a competitive advantage
2. It must be secret
3. It must be protected by reasonable secrecy precautions.

1. The molecular manipulative technology is a trade secret. The invention is a new technological process that enables the creation of designs on flowers. Such designer flowers have become the latest fashion statement. DAF being the sole possessor of such technology, it confers a competitive advantage to it.

2. The process has not been disclosed to public. Therefore it is a secret.

3. DAF has taken all precautions to maintain secrecy of the process.

In order to establish trade secret misappropriation, one has to prove that the trade secret was improperly acquired, used or disclosed to third parties by the defendant. "The law...protects the holder of trade secrets against disclosure or use when the knowledge is gained not by the owners volition but by some improper means..."³¹ FLO has obtained DAF's trade secret by reverse engineering and copying the technology. This amounts to an improper means of obtaining trade secret.

Trade secrets may be viewed as property whose value depends on its secret and informational character and its non consensual taking imposes liability on the defendant. "A secret is a property right with power in the owner thereof to make use of it to the exclusion of the world or to deal with it as he pleases."³² This right of DAF's has been infringed and FLO is liable for such infringement.

³⁰Roger M. Milgrin, Milgrin on Trade Secrets, ss. 1.03-1.04

³¹Keewanee Oil Co. v. Bicren Corp., 416 U.S. 470, at 475-76.

³²Envirotech Corp. v. Callahan 872 P 2d 487, 494

The Prayer

It is humbly prayed that in order to subserve the interest of justice, equity and good conscience and in the light of the arguments advanced, the Hon'ble High Court may be pleased to grant relief, both in the form of monetary damages and injunctive remedies or any such remedy as the Court deems fit and proper.

All of which is respectfully submitted,

Counsel for Design a Flower Ltd.