

COURT FILE NO.:05-CV-289300PD1

DATE: 20050624

**SUPERIOR COURT OF JUSTICE - ONTARIO****RE:** iSKIN INC. (Applicant)**A N D:** SHUANG SA (also known as SEAN SA), SA GROUP LTD., DAVE MCFARLAND, and ZCOVER INC. (Respondents)**BEFORE:** KARAKATSANIS J.**COUNSEL** *Eric Fournie, Caroline Jimdar, for the Applicants*  
*Tim Gilbert, Peng Fu, for the Respondents***ENDORSEMENT on COSTS**

[1] Shuang Sa and the SA Group Ltd. and zCover Inc was entirely successful in defending a motion for an interim interlocutory injunction that had the potential to put them out of business.

[2] The respondents seek a total of \$54,560.38 in costs. The applicant submits that I should reserve the issue of costs to the trial judge because it was partially successful and on the basis that it is unfair to award costs given the strong prima facie evidence of breach of confidence.

[3] At the appearance for the interim injunction the respondents had agreed not to mention iSkin in any marketing materials; the respondents agreed prior to this motion to continue their undertaking to trial. In these circumstances the respondents were entirely successful in the motion before me; it is inaccurate to characterize the result as divided success.

[4] I agree, however, that the respondents should not receive their costs in relation to the interim appearance before Campbell J; given that the undertaking related to only part of the relief sought, neither party should receive its costs for that appearance.

[5] In the normal course the successful party is entitled to costs fixed and payable after the motion. In my view there is no reason in this case to depart from the general rule. Establishing a prima facie case is but one of three elements of the test for injunctive relief. I specifically found that the applicant did not have a strong prima facie case for injunctive relief. Finally, a Statement of Claim has not even been issued. In my view, justice does not require that I reserve costs to the trial judge. The respondents are therefore entitled to their costs on this motion on a partial indemnity basis.

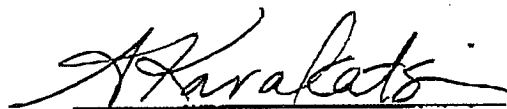
[6] With respect to quantum, I have no doubt that counsel for the respondents spent at least the amount of time set out in their Bill of Costs. The rates are not unreasonable given the relative

shortness of the notice and the importance of the matter. However, as the Court of Appeal has stated i in *Boucher v Public Accountants Council* (2004), CarswellOnt 2521 (C.A.):

Costs awards should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

[7] The case cited to me by the respondents in their submission was for a cost award of \$32,000 for fees for a full day motion involving three parties and special disbursements of \$39,000.

[8] Given the importance of the issue and complexity and range of issues, and the relatively short notice, I accept that the parties reasonably expected that the motion would be vigorously contested and that the quantum of costs may be significant. Bearing in mind that this was a half-day motion and that the consequences went to the ability of the parties to carry on business, I fix costs in the amount of \$25,000 plus disbursements of \$6177.12, both inclusive of GST for a total of \$31,177.12. Costs are payable in 30 days.



A. KARAKATSANIS J.

Released: June 24, 2005