BETWEEN:

RHONE-POULENC S.A. .....PLAINTIFF;

AND

MICRO CHEMICALS LIMITED, GRYPHON LABORATORIES LIMITED, AND PAUL MANEY LABORATORIES CANADA LIMITED .....DEFENDANTS.

1963
Oct. 1, 2
1964
Jan. 6

Patents—Patent Act R S C. 1952, c. 203, s. 41(3)—Compulsory licence—Infringement—Whether compulsory licence may control sale of medicine as well as production

This is an action brought by the plaintiff, a French corporation, and the owner of Canadian Patent No. 519525, which relates, *inter alia,* to a process for producing chlorpromazine, a medical substance, against the three defendants which are Canadian companies sharing common offices and having officers and personnel in common, as a result of the alleged infringement of a compulsory licence granted by the plaintiff to the defendant, Micro Chemicals Limited

Micro Chemicals Limited makes chemicals used as a basis for pharmaceutical preparations; Gryphon Laboratories Limited makes up pharmaceutical preparations from chemicals it buys; and Paul Maney Laboratories Canada Limited is a supplier.

The compulsory licence issued by the Commissioner of Patents under s. 41(3) of the *Patent Act,* licensed the defendant, Micro, "to use the patented invention in Canada in its own establishment only for the purpose of the preparation or production of medicine but not otherwise and to sell the medicine so prepared or produced by it, to be used in Canada". The defendant, Micro, manufactured chlorpromazine in bulk, sold it to the defendant, Gryphon, which used it to make chlorpromazine hydrochloride tablets which it then sold to the defendant, Maney, which in turn sold the tablets to the New Zealand government.

The plaintiff alleged that the sale of the tablets to the New Zealand government infringed the terms of the licence. It was admitted at

1964

RHONE-POULENC S.A. v. MICRO CHEMICALS LTD. *et al.*

trial that all three defendants had knowledge of the terms of and the restrictions in the licence issued to Micro.

Held: That the words "but not otherwise" as used in the grant clause of the licence and in s. 41(3) of the *Patent Act* restrict the licensee to the preparation or production of medicine only and not of any other kind of product but if, as in this case, the process patent contains a claim to the product, these words do not exclude the sale of the product by the licensee, i.e. the words "but not otherwise" do not refer to the use of the patent but to the kind of product that may be produced under the licence.

2. That the natural and ordinary meaning of the words of the grant clause appear clearly to indicate that the licensee is authorized to sell the medicine prepared or produced by it to be used in Canada only and the ambit of the licence as set out in the grant clause and the restriction contained therein apply throughout the licence document without the necessity of repeating it in each paragraph.

3. That Micro cannot be said to have complied with the licence requirements because it knew before it sold the bulk chlorpromazine to Gryphon that the tablets to be made by Gryphon using the chlorpromazine were to be sold to Maney and that both Gryphon and Maney had taken the position that they were entitled to sell the tablets outside Canada despite the restrictions contained in the licence to Micro, and, indeed, Micro took the same position itself.

4 That the burden of establishing that Micro, the licensee, had no knowledge of the proposed sale of the tablets to the New Zealand government rested on Micro, and the evidence leaves this question in doubt.

5. That the evidence establishes that the sale and delivery of the tablets were made in Canada for use outside Canada and the infringement for all intents and purposes took place in Canada.

ACTION for infringement of a patent.

The action was tried before the Honourable Mr. Justice Noël at Ottawa.

Christopher Robinson, Q.C. and *R. S. Smart* for plaintiff.

David M. Rogers for defendants.

The facts and questions of law raised are stated in the reasons for judgment.

NOËL J. now (January 6, 1964) delivered the following judgment:

This is an action for damages and consequential relief in which the plaintiff claims that the defendants have infringed patent No. 519,525 issued to it on December 12, 1955, as the assignee of Paul Charpentier, the inventor of the invention covered by the said patent.

The plaintiff is a French corporation having its head office and chief place of business at 22 Avenue Montaigne, Paris,

France. The defendant, Micro Chemicals Limited, a Canadian company (hereinafter sometimes referred to as Micro) is the non-exclusive licensee in Canada under the patent and has its head office and chief place of business at 20 Advance Road, Toronto 14, Ontario, where the other two defendants, Gryphon Laboratories Limited and Paul Maney Laboratories Canada Limited, both Canadian companies (sometimes hereinafter referred to as Gryphon and Maney) are also located.

The patent in question relates to new phenthiazine derivatives having valuable therapeutic properties and to processes for their preparation and is confined for the purpose of the present action to claim 5 which reads as follows:

> 5. A process according to claim 1, 2 or 3 wherein X is a chlorine atom in the 3-position, A is a $—CH_2—CH_2—CH_2—$ group and R_1 and R_2 are methyl groups.

This is a process for producing a chemical product called chlorpromazine and relates to a medical substance.

The present action is rather unusual in that as there is no dispute that what the licensee, Micro Chemicals Limited, one of the defendants, uses or sells is within the patent, its validity is not in question.

The only matter to be determined is whether the activities of the defendant companies are or not within the scope of a licence obtained from the patentee by Micro Chemicals Limited.

This licence is a compulsory one and was obtained from the Commissioner of Patents pursuant to s. 41(3) of the *Patent Act* following an application by Micro Chemicals Limited. It was issued and its form was determined by the Commissioner of Patents on May 31, 1962, following his decision of September 7, 1961, in which he held that in principle a licence should be granted and after a period of sixty days during which the parties were unable to agree on the terms of the licence.

The defendants submit that all of their acts come within the terms of the formal licence agreement issued by the Commissioner of Patents and that Gryphon Laboratories Limited and Paul Maney Laboratories Canada Limited have not, in any event, infringed. They admit that they have sold the product produced by the process claim but submit that the claim here is to a process and not to a prod-

1964

RHONE-POULENC S.A. v. MICRO CHEMICALS LTD. et al.

Noël J.

uct and that as the sale of a product does not infringe a process claim, the two defendants, Gryphon and Maney are not liable in any event for infringement. Finally, that there is no evidence that either Gryphon or Maney has carried out the process claimed. It therefore appears that the only question to be determined here is whether on the interpretation of the formal licence, and more particularly of the grant clause and clauses 1 and 8 of the said licence, the defendants have infringed this licence.

This grant clause, as well as clauses 1 and 8, read as follows:

> NOW THEREFORE be it known that pursuant to the powers vested in me by the Patent Act and particularly by sections 4 and 41 of the said Act, I do order the grant to the applicant, MICRO CHEMICALS LIMITED of a non-exclusive licence under Canadian Patent Number 519,525, for the unexpired term thereof, to use the patented invention in Canada in its own establishment only for the purpose of the preparation or production of medicine but not otherwise and to sell the medicine so prepared or produced by it, to be used in Canada the whole under the following terms and conditions:
>
> 1. MICRO CHEMICALS LIMITED shall pay to RHONE-POULENC a royalty of 15% (fifteen per cent) on its net selling price to others of the active product in its crude form prepared or produced pursuant to this licence and sold by it.
>
> . . .
>
> 8. This licence is not transferable and MICRO CHEMICALS LIMITED is precluded from granting any sub-licence thereunder, provided always that purchasers of medicine prepared or produced by MICRO CHEMICALS LIMITED pursuant to this licence may use the medicine and vend the medicine to others to be used.

The grant clause indicates that the compulsory licence imposed on the patentee and given to the licensee allows the latter to use the invention to prepare medicine in its own establishment and then to sell the medicine so prepared to be used in Canada.

The infringement alleged against the three companies consists in a sale of tablets to the Government of New Zealand made possible by means of defendants' joint action which, according to the plaintiff, infringes Micro Chemicals Limited's non-exclusive licence which, as we have seen, allows the sale of the product to be used in Canada only and not outside of the country.

The three defendant companies have the same offices and they have officers and personnel in common. Mr. Miller and Mr. John M. Cook are common officers to all the

defendants. A Mr. I. D. Heintzman is vice-president of both Micro and Gryphon and Micro's purchasing agent acts as such for all three defendant companies. As explained by Mr. Cook, who is president and general manager of Micro and secretary-treasurer of Gryphon and Maney and is active in the three companies, day to day co-operation between the latter would be a very close one. His position as secretary-treasurer of Gryphon and Maney is more of a financial type of administration and covers office routine, and in the case of Gryphon, he did sign some documents as manager of the company.

Micro is a company that makes chemicals used in many cases as the basis for pharmaceutical preparations. Gryphon is a company which makes up pharmaceutical preparations from chemicals it buys, sometimes from Micro and sometimes from elsewhere. In the present case, Gryphon made up into tablets the substance called Chlorpromazine with other ingredients and only a small part of its weight is chlorpromazine.

Mr. Cook admits that in the case of a product marketed by Maney originally manufactured by Micro and made up into tablets by Gryphon, the information required by the Food and Drugs administrator for approval purposes would have come from all three companies.

When Gryphon sells its finished products it can be in the form of tablets such as we have here, or in liquids and suppositories packed in bottles or containers with sometimes the customers' label on, but normally its products are shipped in bulk containers in accordance with whatever packaging instructions the customer has given.

The third company, Paul Maney Laboratories Canada Limited, is a supplier. It markets pharmaceutical preparations which it gets either from Gryphon or elsewhere.

Exhibit 1 is documentation covering the alleged infringement, i.e., a transaction which took place on December 4, 1962 and involving the sale to the New Zealand Government of a quantity of 450,000 tablets of chlorpromazine hydrochloride which bulk substance Mr. Cook admitted had been manufactured by Micro and then sold to Gryphon and held in stock by the latter until the need to make the order arose. He also admitted that these 450,000 tablets

1964

RHONE-POULENC S.A. v. MICRO CHEMICALS LTD. et al.

Noël J.

were manufactured by Gryphon and packaged to the specification of Maney after which they were delivered to Maney and delivered by Maney to the appropriate agents of the New Zealand Government.

Exhibit 2 is a bottle of Chlor-Promanyl "100" which is the generic name of the drug put up for the New Zealand Government by Gryphon and sold by Maney and Ex. 4 is a bottle of the same drug put up, however, for Canadian consumers; the technical information on the labels is slightly different.

Mr. Cook also admitted that any of the three defendants had knowledge of the restrictions in the licence because of his position in them and that no notice of any restriction was required to be given here to any of the defendant companies because he knew the contents of the licence.

He finally admitted at p. 73 of the transcript "that all the defendants take the position that material manufactured pursuant to this registered licence No. 560,089 can be sold by them free of any restriction as to the place at which it can be used" and that they, therefore, would be entitled to sell without Canada.

Indeed, counsel for the defendants submits that the licence gives to the defendant Micro the licensee, the right to manufacture the medicine chlorpromazine hydrochloride, and sell it freely and refers to the grant clause (*supra*) and to a comma which is before the phrase "to be used in Canada" and not after it and from this concludes that the above quoted words do not refer to the words "to sell the medicine so prepared or produced by it" but to the larger phrase of the said grant clause, i.e., "a non-exclusive licence under Canadian patent No. 519,525."

In other words, the larger phrase does not refer to medicine but would refer back to the patented invention to which he suggests alone the restriction "to be used in Canada" applies. He admits that the grant clause of the licence (*supra*) is hard to interpret but with the assistance of s. 41(3) of the *Patent Act* which is the clause under which the Commissioner issued the compulsory licence, its meaning can be clarified and that his interpretation is in

accordance with the powers of the Commissioner under this section which reads as follows:

41. . . .

(3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

Counsel for the defendants argues that as the plaintiff relies here on the process only and the licence issued under the above section cannot go beyond purposes "of the preparation or production of food or medicine" (because there is no patent on the product per se, but only on the process), once the licence for the process is given out, the licensee can use the product as he wishes, as the right to use the product is not given by any power of the Commissioner but flows from the right to use the process.

According to the defendants, s. 41(3) would allow the Commissioner to regulate the use only of the process, but not the use or sale of the product and, therefore, the licence here should be interpreted in a manner consistent with the power of the Commissioner.

This interpretation would also, they suggest, be in conformity with a proper construction of the words "but not otherwise" in s. 41(3) which would refer to the "use of the invention for the preparation or production of food or medicine."

This construction, however, cannot be accepted if one goes to the French text which translates the words, "but not otherwise" by "mais pas pour d'autre fins" which, in that context, clearly means, "but not for purposes other than food or medicine" and this, of course, establishes that the restriction does not apply to the use of the invention, but to the food or medicine.

Furthermore, such a narrow interpretation, as that suggested by the defendants, was attempted in the *Parke*

1964

RHONE-POULENC S.A. v. MICRO CHEMICALS LTD. *et al.*

Noël J.

Davis v. Fine Chemicals case[1] but was rejected by Martland J. as follows:

> . . . Emphasis was placed on the following words of the subsection: "a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise." It was urged that such a licence could not permit the sale of the product, but only the use of the process. If the invention relates only to the process, then a sale of the product would not infringe the patent, but, if the product also is patented, then the sale would involve an infringement and the licence cannot, under the wording of the subsection, authorize such a sale.
>
> In my opinion subs (3) is not to be interpreted in this narrow manner. In terms it applies to "any patent" if such patent is for "an invention intended for or capable of being used for the preparation or production of food or medicine".

And at p. 133 he added:

> . . . The subsection relates to the use of any invention intended for or capable of being used for the preparation of food or medicine and the provisions as to royalty clearly contemplate the sale of the product produced by such use, for they refer to the making of the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for his search.

The Supreme Court in the above decision was merely following a former decision of the same Court in the *Hoffman-Laroche* case[2] that the sale of a product made in accordance with a patented process infringes the process patent, even though the patent contained no claim to the product.

Now although there might have been some discussion as to the dictum of the Court in this latter case where the patent contained no claim to the product, there surely can be no doubt in the present one where although the plaintiff stated he relied on the process patent only, the latter contains also a claim to the product and, therefore, the sale of the product outside of the licence document would be here an infringement of the patent.

There is, however, a further reason to deny such a narrow interpretation in that it might in some cases prevent the Commissioner from dealing with the whole purpose of s. 41(3) of the Act which, in addition to regulating the use, comprises also the royalty aspect which, as pointed out by Martland J. in the *Parke Davis* case (*supra*) in clear terms contemplates also the sale of the product "produced

[1] 18 Fox Pat. Cas. 125 at 132. [2] [1955] S C.R. 414.

by such use" for it refers to the making of the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for his research.

Paragraph 1, the royalty clause, which states that Micro shall pay 15 per cent on its net selling price to others, would not, in my opinion, assist the defendants and would not when the words "to be used in Canada" are applied to the medicine produced by the process, cause Micro to pay royalties on sales not authorized under the licence agreement. Indeed, the sales on which the royalties shall be paid are those covered by the licence document and if they are not so covered, they would constitute infringement.

Nor would para. 8 of the licence document which, as we have seen, deals with its non-transferability and contains a provision that the purchasers of the medicine prepared or produced by Micro pursuant to the licence, may always use the medicine and vend it to others to be used. On the basis that the words "in Canada" do not appear here, counsel for the defendants suggests that this clause means that purchasers are free to sell the product as they please. I am afraid I cannot agree with this interpretation. Indeed, the ambit of the licence is contained in the grant clause which, as we have seen, states that Micro has a licence to sell the medicine prepared or produced by it, to be used in Canada. Now, as this restriction, in my opinion, applies throughout the licence document, it is not necessary to repeat it in each paragraph and in any event its absence in one paragraph could not have the effect of eliminating it from the grant clause.

There is no question that the comma at the end of the grant clause immediately preceding the words "to be used in Canada" is placed in a peculiar spot but, notwithstanding this, from the context it would appear to me that the words "to be used in Canada" must of necessity apply to "the medicine so prepared or produced by it" immediately preceding and not as suggested by the defendants, to the large phrase and to the patented invention. My reason for saying this is that at the beginning of the grant clause, the use of the patented invention is already restricted to Canada by the words "to use the patented invention in Canada" and should the words "to be used in Canada" at

1964

RHONE-POULENC S.A. v. MICRO CHEMICALS LTD. et al.

Noël J.

the end of the said clause also apply to the patented invention, as suggested by the defendants, there would be an unnecessary and senseless repetition. Under these circumstances, such an interpretation as that advanced by the defendants cannot be accepted on the basis of a comma which, in my opinion, was misplaced and should have been inserted after instead of before the words "to be used in Canada" and this also drives me to the conclusion that the natural and ordinary meaning of the words of the grant clause appear clearly to indicate that the licensee is authorized to sell the medicine prepared or produced by it to be used in Canada only.

This, however, does not end the matter as defendants submit that even assuming the words "to be used in Canada" refer to medicine, they would still not be liable under any of the three possible interpretations that can apply to the situation created by the restriction of the licence "to sell the medicine so prepared or produced by it, to be used in Canada."

The first interpretation is that Micro must not sell unless it knows that the medicine is going to be used in Canada and defendants suggest that Micro has complied with this requirement as all the bulk medicine produced by it has been sold to Gryphon only. Now although the evidence discloses that Micro knew that Gryphon was going to make tablets with the bulk chlorpromazine and that the operation would take place in Canada as the defendants are all located in the same building, Micro also knew that Gryphon had taken the position that it was wholly entitled to sell to all comers and was prepared to do this and that Gryphon was going to sell some of these tablets to Maney who in turn also took the position it could sell to anybody even outside the country. Under these circumstances, it can hardly be said that Micro has complied with the above requirement.

Defendants' second interpretation that Micro should not sell when it knew the product was going to be used outside Canada and their suggestion that Micro had complied with it on the basis that when the bulk chlorpromazine was delivered to Gryphon, the New Zealand sale was not in contemplation, might be true if the evidence so establishes.

However, as we have seen, the evidence does not indicate what the state of knowledge as to the New Zealand sale was at the time Micro delivered to Gryphon the particular chlorpromazine which ultimately went into the New Zealand tablets because it is not shown from what particular delivery of Micro to Gryphon the amount of chlorpromazine that went into the New Zealand tablets was taken.

Mr. John M. Cook, president and general manager of Micro and secretary-treasurer of both Gryphon and Maney states, as we have seen, that he believes that when the time came to make up the New Zealand tablets, Gryphon did not have to order more chlorpromazine from Micro, but took it from its bulk inventory and there is no evidence as to when knowledge of the New Zealand transaction became known by anyone before it actually occurred. In other words, the evidence does not make it clear that the New Zealand sale was or was not in contemplation when the bulk chlorpromazine was delivered to Gryphon and as the defendant Micro had (as part of its duty to show that it was selling within the scope of its licence) the burden of establishing that the deal was not in contemplation, it has failed in this respect.

Defendants' third interpretation that Micro, at the time of the sale, should notify the purchaser that the product is to be used in Canada only and that Micro had complied with this as the evidence indicates the three defendants had knowledge of the restriction of the licence before any relevant time, cannot either be entertained here because Micro not only knew that Gryphon and Maney had no intention of abiding by the restriction in the licence on the basis that no such restriction existed, but also took the same position itself.

Indeed, at p. 73 of the transcript Mr. Cook made it clear that all the defendants took the position that the restriction of the licence was not binding on them.

Now, once again, defendants raise here the argument that although Gryphon and Maney knew the licence terms, they were allowed as purchasers, because of the absence of the words "in Canada" in para. 8 of the licence document, to use the medicine and vend it to others to be used anywhere.

1964

RHONE-POULENC S.A. v. MICRO CHEMICALS LTD. et al.

Noël J.

I have already dealt with this paragraph (*supra*) and for the same reasons the above proposition cannot be entertained. Indeed, para. 8 is subject to the restriction contained in the grant clause of the licence and, as I said before, it does not appear to be necessary to repeat this restriction in all the paragraphs of the licence document.

Having dealt with Micro, it is now necessary to deal with the situation of Gryphon and Maney who, according to the defendants, used the product "in Canada" only as the sale by Maney took place in Canada and the sale by Gryphon to Maney of the tablets ultimately sold by Maney to the Government of New Zealand also took place in Canada and, therefore, they would not have violated the licence document.

This proposition, however, cannot be accepted either as this sale by Gryphon was with the knowledge not only of the restriction of the licence, but also of what Maney was to do with the product, i.e., ship it to New Zealand, and furthermore the evidence discloses that the containers had special labels placed on them by Gryphon upon instruction from Maney which were somewhat different from those used for Canadian sales and, of course, Maney would also be in the same situation as it had knowledge of the restriction and ordered the special labels to be affixed on the containers for export.

Defendants have therefore failed to establish that the sale of tablets to New Zealand by Gryphon to Maney was a sale of chlorpromazine "to be used in Canada" and the sale of Maney to the New Zealand Government having been made outside of Canada, this constitutes a sale outside of this licence as the licence permits sale in Canada only.

Defendants' final and last argument is of a general nature and deals with the proposition that if Gryphon and Maney have done something outside of Canada, the patentee would have no claim against them in this matter as a Canadian patent cannot be extended to any other country and that anything that infringes a Canadian patent must be done in Canada.

In *Auer Incandescent Light v. O'Brien*[1] Mr. Justice Burbidge dealt with a similar submission as follows:

> Before leaving this question of infringement I ought, perhaps, to refer to the contention made on behalf of the defendant that under any

[1] (1897) 5 Can. Ex. C R 243 at 292

circumstances he would at least be entitled to import for use or sale illuminant appliances made in a foreign country in accordance with the process protected by the plaintiff's patent. With that view, however, I cannot agree. I think that the law is well settled to the contrary, and I need only refer for this purpose to the cases cited by Mr. Hellmuth . . .

This decision was later referred to and accepted by the Chief Justice of the Supreme Court in the *Hoffman-Laroche* (*supra*) case at p. 415:

> According to the decision of the Court of Appeal in England in *Van Heyden v. Newstadt* following previous decisions of single judges, the applicant would have a monopoly in respect of aldehyde (which was the product) when prepared according to his process In Canada it was decided in the same sense by Mr. Justice Burbidge in the Exchequer Court in *Auer Incandescent Light Manufacturing Company and O'Brien* and by a divisional court in Ontario, in *Toronto Auer Light Company Limited v. Colling*. There seems to be no reason to doubt the correctness of these decisions.

That there is infringement of a Canadian process patent by the sale in Canada of a product made abroad by that process would now appear to be accepted by our courts and defendants' submission that the act infringing a Canadian patent must necessarily be done in Canada, cannot, therefore, be accepted.

On that basis it may well be also that the situation we have here of a sale of the product outside of the country would also infringe a Canadian process patent limited by a licence to sell and use within the country only.

However, in my opinion, it is not necessary to examine this situation as the evidence establishes that the sale and delivery of the product here were made in Canada for use outside of the country and the infringement for all intents and purposes took place here.

I might also add that I can see nothing in the restriction contained in the licence document, i.e., "to sell the medicine so prepared or produced by it, to be used in Canada" that goes against the legislative policy as set down by Rand J. in *Parke Davis v. Fine Chemicals* (*supra*) which underlies the economy of the whole s. 41 and particularly s-s. (3) and which is that all new substances intended for food or medicine, apart and as distinguished from processes, are in the public interest to be free from legalized monopoly and subject to a compulsory licence granted by the Commissioner upon request and upon terms and conditions commensurate with making the food or medicine available to the public at the lowest possible price consistent with giving

1964

RHONE-POULENC S.A. v. MICRO CHEMICALS LTD. et al.

Noël J

to the inventor due reward for the research leading to the invention.

I might go further and state that in my opinion it is permissible for a patentee and a person who entered into a licence with him or for that matter for the Commissioner under s. 41(3) to arrange for a licence subject to a number of restrictions as long as the latter do not go against the legislative policy mentioned above and these restrictions would be effective against any transferee provided, however, proven notice of the limited licence was given or could be considered or taken to have been given to any subsequent handler and those persons would be infringers if they were not operating within the licence.

Indeed, in *National Phonograph v. Menck*[1] it was decided that restrictions can follow patented chattels:

> In their Lordships' opinion, it is thus demonstrated by a clear course of authority, first, that it is open to the Patentee, by virtue of his statutory monopoly, to make a sale *sub modo,* or accompanied by restrictive conditions which would not apply in the case of ordinary chattels; secondly, that the imposition of these conditions in the case of a sale is not presumed, but, on the contrary, a sale having occurred, the presumption is that the full right of ownership was meant to be vested in the purchaser; while, thirdly, the owner's rights in a patented chattel will be limited, if there is brought home to him the knowledge of conditions imposed, by the Patentee or those representing the Patentee, upon him at the time of sale. It will be observed that these propositions do not support the principles relied upon in their absolute sense by any of the Judges of the Court below. On the one hand the patented goods are not, simply because of their nature as chattels, sold free from restriction. Whether that restriction affects the purchaser is in most cases assumed in the negative from the fact of sale, but depends upon whether it entered into the conditions upon which the owner acquired the goods. On the other hand, restrictive conditions do not, in the extreme sense put, run with the goods, because the goods are patented.

I am satisfied here that the restriction "To sell the medicine so prepared or produced by it to be used in Canada" not only does not go against the policy underlying the whole of s. 41 and in particular s-s. (3), but that such a restriction may well have been necessary to enable the attainment of the section's expressed objects, i.e., the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving the inventor due reward for the research leading to the invention.

Defendants' argument that by limiting the sale to Canada, the licensee, in order to sell to countries where there

[1] 28 R.P.C. 229 at 248.

is no patent would have to set up a manufacturing plant there and this would not be conducive to a reduction of the cost of producing this particular medicine to the public, which is one of the purposes of this section, may well be, but it certainly is not the only way the foreign market in such a case can be supplied as the Commissioner could have given the licensee the right to export which would also have solved the problem, with no damage to the Canadian public.

Indeed, if the Commissioner had felt on the evidence before him that the licensee should have the right to sell outside the country in order to meet the requirements of s. 41(3) of the Act, it would have been an easy matter to so express it in the licence document by giving it the right to export, which he did not do, and may I add that on the appeal from the terms of this licence which is before me and on which judgment has been rendered this day under No. A-826 of the files of this Court, I would not be prepared on the evidence before me to substitute my finding on this for his.

The evidence in my opinion clearly establishes that the three defendants, with full knowledge of the restrictions in the licence document, did not operate within the ambit of the licence and hence they are infringing.

Maney has infringed by the sale to the Government of New Zealand because it made that sale with knowledge of the licence restriction. Gryphon has infringed by the sale to Maney of what it knew was for use outside Canada, and Micro has infringed by the sale to Gryphon of what it knew Gryphon was going to sell with no restrictions on the place of use and all three of the defendants threatened to infringe by asserting their right to sell without restrictions.

There will therefore be judgment for the plaintiff for the relief sought by it except as to damages. If the parties are unable to agree on the amount of the damages or the amount of profits, if the plaintiff elects the latter, there will be a reference to the Registrar or a Deputy Registrar and judgment for such amount of damages or profits if any as found in the reference. If there are any difficulties in settling the minutes of judgment, the matter may be spoken to. The plaintiff is entitled to its costs to be taxed in the usual manner.

Judgment accordingly.