

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

NO. A.83/84

BETWEEN SUPERTREAT FOODS LIMITED
Plaintiff

A N D J. RATTRAY & SON LIMITED
Defendant

Hearing: 15 October 1984 (IN CHRISTCHURCH)
Counsel: C.S. Withnall for Plaintiff
 S.R. Maling & E. Wylie for Defendant
Judgment: 15 OCT 1984

JUDGMENT OF COOK J.

The plaintiff and the defendant are parties to an agreement whereby (according to the statement of claim which has been filed) the plaintiff was given the exclusive right to display and retail fresh and frozen meat and small-goods from refrigerated cabinets owned by the defendant and located in certain parts of three supermarket premises which that company owns and operates in Dunedin. It is claimed by the plaintiff that, by a letter dated 28th September 1984, the defendant, by its solicitors, wrongfully and in breach of its contract with the plaintiff, purported to cancel the contract and the lease or licence conferred by it, and requested the withdrawal of the plaintiff's staff from the supermarkets. In the statement of claim, the plaintiff seeks (inter alia) an injunction to restrain the defendant from breach of its contract with the plaintiff and from preventing the plaintiff from retailing its products from the refrigerated cabinets in the supermarkets.

The filing of the writ was accompanied by an

application for an interim injunction in similar terms. On the ex parte application (though counsel for the defendant had been informed and was present) an order was made, but only to hold the position until the defendant had an opportunity to file affidavits and the matter could be contested.

The defendant's affidavits are now filed. Also a form of application to rescind the injunction granted. The plaintiff has filed a fresh notice of motion still seeking an immediate injunction but in somewhat different terms; restraining the defendant:-

- "(a) From selling, permitting to be sold or displayed or offered for sale or otherwise dealing in fresh and frozen meats and smallgoods belonging to or on behalf of any person or persons, company or firm other than the abovenamed Plaintiff in from or through the meat departments of the Defendant's supermarkets at Mailer Street, Bank Street and Stafford Street heretofore operated by the Plaintiff;
- (b) From preventing, hindering or obstructing the Plaintiff from selling its products in from or through the said meat departments;
- (c) From any act which may or may be likely to be prejudicial to or render more difficult or reduce the volume of sales of the Plaintiff's said products;
- (d) From any unilateral change in or departure from the conditions of trade existing between the Plaintiff and Defendant as at the 28th day of September 1984;"

According to the affidavit of Mr Fisher, the managing director of the plaintiff company, there had been negotiations between the parties regarding the operation and control of the meat departments in the three supermarkets operated by the defendant in Dunedin. He said that it was immediately apparent from the size of the projected operation that it would be necessary to set up meat processing and packaging facilities and the final arrangement was that he would establish an independent plant specifically to serve the defendant's supermarkets. The general manager of that

company, Mr Veitch, while knowing that the plaintiff was setting up a packaging plant and accepting that what his company contemplated then was a relatively long-term arrangement, said in his affidavit that it had not requested the plaintiff to build any particular facility. Their concern was to obtain a supplier familiar with the meat business who would maintain for them a reliable supply of a quality product at a competitive price. Mr Fisher was known to him to have considerable experience in the meat trade.

Mr Fisher stressed that they had required security of tenure; discussions and correspondence continued and ultimately a document setting out the agreements reached was prepared and signed. This document is expressed to contain heads of agreement and states that the plaintiff is "to supply meat products and retail through J. Rattray & Son Limited's supermarkets ..." on certain terms. The first period of the agreement is for three years, from 1st March 1982 (or such other date as should be mutually agreed), with four three yearly rights of renewal at the plaintiff's option. There is a reservation in relation to the terms of the head lease for each of the supermarkets, but I do not understand that to have any bearing on the present question. Then follows a provision for the plaintiff to pay the defendant a commission by way of a percentage of the retail selling price of all products sold by the plaintiff through the meat departments and, as against that, the defendant is to pay for all overheads and outgoings in respect of the premises; the defendant is also to own and maintain all refrigeration cabinets, but the plaintiff is to pay all power charges in respect of them. As to the operation, the requirement upon the plaintiff is as follows:-

"Super Treat Foods Limited to stock and service cabinets and display with a standard of goods, that is traditionally associated with the name of Fishers AND AT ALL TIMES to keep the cabinets well stocked within normal trading practices. Products to be sold are to include only fresh and frozen meat and smallgoods. Retail selling prices to be competitive with similar meat outlets in the Dunedin area."

The plaintiff is to provide the necessary staff to supervise the displays, to check meat in and out, and other incidental matters; in practice, I think there has been some variation in this. Trading hours are fixed, the method of payment is covered, any disputes are to be referred to arbitration, and then there is a clause to which it is difficult to give any effective meaning:-

"Any Arrangement must be acceptable to both parties on a continuing basis and Super Treat Foods Limited reserves the right to review any agreement after a period of twelve months so that it is not inhibited from altering the method of operation should the parties both agree that this would be desirable."

Finally, the document provides that a formal agreement was to be executed to include such additional terms and conditions as the parties mutually agree upon; but that has not been done.

As I understand the position, in each supermarket, the defendant was to provide the refrigeration cabinets which would remain their property. The plaintiff was entitled and required to stock these cabinets with packaged meat which remained its property. Persons wishing to purchase the meat removed it from the refrigerated cabinet and made the necessary payment at the check-out counter. The defendant accounted to the plaintiff for the money thus received deducting its commission.

The document containing the heads of agreement is not dated but, after signing by the defendant, it was sent by the defendant to the plaintiff's accountants under cover of a letter dated 22nd December 1981. Presumably it was signed by the plaintiff shortly after that. So far as the agreement between the parties is concerned, the only other matter that requires noting, is that problems arose in handling the cash collected by the defendant. There must have been discussion and possibly experimentation until, on 2nd August 1983, the retail operations manager for the defendant's supermarkets

wrote to Mr Fisher setting out a procedure for handling the matter and that was accepted by the plaintiff.

Mr Fisher says that, following execution of the agreement, he set up a plant to process meat for the supermarket; that this has a present-day value of approximately \$100,000 and he has six staff employed full-time in the plant. He said, further, that the three supermarkets together handle approximately 5,500 individual packages of meat per week and the weekly turnover of meat sales through these outlets is in the region of \$13,000. He finds this turnover essential to enable him to maintain payments in respect of the debts incurred to set up the plant and to pay wages and salary.

Whether there were breaches of contract or not, it is clear that within a short time problems developed between the companies which I do not propose to go into in detail. What the rights and wrongs of the matter are will have to be determined at the substantive hearing. The defendant complained of the extent of the sales, the range of meat available, under-weight packaging, the quality of the meat and pricing. The plaintiff's affidavits seek to refute the complaints, to give the impression that the matters raised were minor ones or unjustified. In September 1984 some meat in one of the supermarkets was found by the defendant's representatives to be bad and this was confirmed by the Health Department; on the other hand, the plaintiff claims the refrigeration must have been inadequate.

The defendant stresses the need for the stocking of quality products at the most competitive price. Mr Veitch says that it was the plaintiff's failure to perform which led directly to his company's decision to install a meat department of their own at the Mailer Street store; Mr Fisher insinuates that that decision was made first and that efforts to dislodge the plaintiff, and to find reasons for doing so, followed. Following an exchange of letters in May 1984, in which each side expressed views at length, matters seemed to have come to

a head in August and a basis of terminating the agreement was sought. On 12th September, the defendant's solicitors wrote to the solicitors for the plaintiff with proposals; at that time (but I note that it was before the date when the inspection was made and the bad meat had been found) there was no intention of displacing the plaintiff from other than the Mailer Street premises. It was contended that the agreement did not confer exclusive rights. A long list of complaints followed and finally a proposal for settlement. A reply was sent on 19th September generally rejecting the defendant's interpretation of the agreement and its allegations and putting forward a different basis for settlement. On 28th September 1984, however, the defendant's solicitors wrote to the plaintiff company. The main paragraph of their letter is as follows:-

"We act for J. Rattray & Son Ltd and have been requested by them to formally write to you advising that the contract between that company and Supertreat Foods Limited is hereby cancelled. The reasons for the cancellation are the failure by your company to supply meat of a quality sufficient to meet the terms of the agreement, failure to price meat at a competitive price as agreed between the parties, and failure to provide the necessary staff to supervise the displays and to check meat in and out and other incidental matters as required by the agreement."

There is no doubt that there are serious questions to be determined. First, it must be decided how the heads of agreement are to be interpreted; in particular, what are the respective rights and obligations of the parties under it and whether the rights of the plaintiff are exclusive to it. If the defendant is justified in cancelling the contract, then it can only be upon the grounds provided in Section 7 of the Contractual Remedies Act 1979. When the proper meaning of the agreement has been arrived at, the Court will have to decide whether there have been breaches by the plaintiff and, if so, whether they are such as to justify cancellation. No opinion can be expressed at this stage as to the likely outcome.

The question must be whether, with such points requiring to be determined, an interim injunction should be ordered to preserve the position of the plaintiff until the answers can be supplied.

Mr Maling submitted that, having regard to the history of the matter, even if the plaintiff succeeded at a subsequent hearing, it is not a case where the relief granted would be by way of injunction. He referred to Spry's *Equitable Remedies*, 7th Ed. pages 439 to 442, where the balance of convenience and hardship are considered. Also to Leys and Northey's *Commercial Law in New Zealand*, 7th Ed. page 196, which was cited for the general propositions that an injunction will not issue if its effect is to oblige the defendant, where the contract is for personal services, specifically to perform the contract and that, in general, the courts will refuse to issue an injunction if the effect of granting the injunction would be to require performance of a contract in respect of which specific performance would not be decreed.

While this is certainly not the type of case - such as Lumley v. Wagner [1852] 1 de G.M. & G. 604 - which reference to performing personal services immediately calls to mind, but there is the element of personal service in that the defendant receives on behalf of the plaintiff the proceeds of the sale of meat, has an obligation to provide and maintain the refrigeration cabinets and, of necessity, must deal with customers' queries and complaints. If, ultimately, an injunction were to issue in some form or another to entitle the plaintiff to go on exercising its rights under the agreement, it seems to me that it would have the effect of requiring the defendant specifically to perform its part of the bargain.

Mr Withnall, however, argued that the agreement must be regarded as a lease, or at least a contractual licence, that gives the plaintiff the exclusive right to use and occupy the refrigeration cabinets and the portion of the premises upon which they stand. He submitted that, as there is no provision

in the agreement for termination by the defendant, it is not revocable except by breach sufficient to satisfy the requirements of Section 7.

He cited Winter Garden Theatre (London) Ltd v. Millennium Productions Ltd [1948] A.C. 678 as authority to show that an injunction will issue to restrain an attempted revocation of a contractual licence. At 202, from the speech of Lord Uthwatt:-

"I merely confess my present inability to see any answer to the propositions of law stated by the Master of the Rolls in his judgment in the case under appeal. The settled practice of the courts of equity is to do what they can by an injunction to preserve the sanctity of a bargain. To my mind, as at present advised, a licensee who has refused to accept the wrongful repudiation of the bargain which is involved in an unauthorized revocation of the licence is as much entitled to the protection of an injunction as a licensee who has not received any notice of revocation; and, if the remedy of injunction is properly available in the latter case against unauthorized interference by the licensor, it is also available in the former case. In a court of equity, wrongful acts are no passport to favour."

One would not disagree with that principle but while the present agreement may include some form of licence to occupy (I cannot accept "lease") that is part only of the arrangement which is basically one requiring a joint effort by and co-operation between both parties.

He referred also to Evans Marshall & Co. Ltd v Bertola SA & another [1973] 1 All E.R. 992 and the criticism there expressed of the dictum in the judgment under appeal where Kerr J. had stated:-

"... if the court is not satisfied, as I am not, that the plaintiffs have at least a reasonable, if not a strong, prospect of obtaining a permanent injunction at the trial, then the court ... has no choice [but to refuse an interlocutory injunction]."

As for the grounds for refusing an injunction in that case, they were expressed by Sachs LJ to be as follows:-

" The main grounds on which he considered that an injunction might well be refused at trial would appear to have been these. First, the length of the period sought being 14 years, no case having been cited where an injunction had been granted for a comparable time. Secondly, that the agreement between the parties was in the nature of a joint venture requiring co-operation and confidence between the parties. Thirdly, that, particularly having regard to certain negotiations between the parties in the middle of October, the plaintiffs had failed to show that damages were not an adequate remedy: as regards their recoverability he stated his concern had been allayed by an undertaking offered by Rumasa SA to execute a deed to which I will refer later."

The judgment then continued:-

" It is clear from what the learned judge said that he considered there was in effect some strict rule of law which precluded the grant of an interlocutory injunction unless there was sufficient prospect of a permanent injunction being obtained at trial. With all respect, he fell into the error of considering that a factor which may normally weight heavily against granting an interlocutory injunction was a factor which, as a matter of law, precluded its grant."

I note the following, also, which immediately follows:-

" The line of approach to the exercise of the court's discretion whether or not an interlocutory injunction should be granted is that stated by Lord Denning MR in Hubbard v Vosper [1972] 1 All ER 1023 at 1029, [1972] 2 QB 84 at 96:-

'In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint on the defendant but leave him free to go ahead ... The

remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.'

It is true that this statement of Lord Denning MR was obiter, but it expresses in felicitous language the view applied nine days earlier in his considered judgment and in mine in Hill v C A Parsons & Co Ltd [1971] 3 All ER 1345 at 1349, 1350, 1354, 1355, [1972] Ch 305 at 314, 320. There, too, when joining in rejecting a submission that a much-followed practice had become a rule of law, I held that flexibility was an essential feature of the court's jurisdiction."

In the present case, for various reasons, I see great difficulty in the way of the Court granting ultimate relief by way of injunction as sought in the statement of claim, even should the plaintiff demonstrate that the defendant had no proper grounds for cancelling the contract. To do so would be to require the defendant specifically to perform its side of the joint arrangement; further, the heads of agreement are uncertain in their terms. The obligations on the plaintiff, for substantial breach of which the defendant might well be entitled to cancel, are by no means precise nor, I imagine, readily capable of ascertainment by reference to custom in the particular trade. Loose, imprecise expressions are used. It would be necessary for the Court virtually to re-write portions of the agreement so that its terms were sufficiently certain for the party enjoined to know what its rights and obligations might be. This is not the fault of one party or the other, but of both in documenting such an important agreement in such a haphazard way.

While possibly there may not be matters which preclude a grant, in the present case, when it comes to the exercise of the discretion, whether to order an interim injunction or not, I consider that they certainly weigh heavily against an order being made.

I turn to the balance of convenience and, in

particular, whether damages would be an adequate remedy should the plaintiff ultimately succeed in proving that the cancellation was not justified.

Mr Withnall submits that they would not; that the status quo should be preserved. He points to the evidence of the affect upon the plaintiff company, loss of good-will, problems of finance and the need to declare employees redundant. It seems to me, however, that damages could be a very substantial remedy for the plaintiff, recompensing him for loss of income, future profits and expenditure incurred, all reasonably capable of quantification. It is not readily apparent from the plaintiff's affidavit how extensive its business is, but there are a number of references to other outlets and it is clear from the heads of agreement themselves that Mr Fisher had an established business prior to the arrangement being entered into with the defendant. Looking at it from a different point of view, there would appear to be no reason why the defendant should not be capable of paying any sum which might be awarded against it.

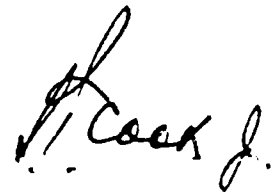
On the other hand, the damage which might be suffered by the defendant in the interim, should it prove to have been justified in cancelling the contract, would be much more difficult to assess. Primarily they would relate to loss of custom and good-will resulting from dissatisfaction on the part of its customers with the meat offered for sale and the consequential effect that might have on the business of the supermarket generally.

In summary, I do not consider that this is a case where the ultimate relief to the plaintiff, should he succeed in establishing that the defendant is at fault, would be by way of an injunction to restrain the defendant from refusing to let the plaintiff sell meat through the supermarkets and I do consider that damages would provide a proper remedy for the plaintiff. In these circumstances, it is not a case where the status quo should be preserved and the plaintiff is not

entitled to the injunction sought.

Mr Withnall submitted, however, that, should I not be prepared to grant an order in the terms sought, or similar terms, until the substantive matter could be determined, an injunction for a limited time should issue. Mr Maling pointed out that the defendant was acting under Section 7 of the Contractual Remedies Act and that no notice is thereby required. While that is no doubt correct, I think it is reasonable to grant a short time so that, if the defendant adheres to its cancellation of the contract, the plaintiff will have some opportunity to re-arrange its affairs. In lieu of the existing injunction, there is an order prohibiting the defendant, its servants or agents from preventing, hindering or obstructing the plaintiff from selling, in accordance with the heads of agreement (as subsequently varied in respect of the accounting procedures), its meat products in the three supermarkets of the defendant at Dunedin until the 12th November 1984.

Leave is reserved to apply for any variation of the precise wording of the order as opposed to its general effect. Costs are reserved.



Solicitors:

Milne, Whyte & Co., Dunedin, for Plaintiff
Lane, Neave, Ronaldson, Christchurch, for Defendant.