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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. No. 299/88

BETWEEN HUNGRY HORSE RESTAURANTS (1986) LIMITED

Plaintiff

AND MICHAEL JOHN JESSON and RAEWYN SHERYL JESSON

Defendants

Hearing: 16 March, 1988

Counsel: Miss L. Lawton for plaintiff
P.J.K. Spring for defendants

Judgment: 16 March, 1988

(ORAL) JUDGMENT OF BARKER J

This is an application for an interim injunction. A number of items of relief were sought, some of them wildy optimistic; in the end the sole application was for an interim injunction restraining the defendants from conducting a similar business from premises at Browns Bay.

A plethora of affidavits was filed on both sides, more particularly by the plaintiff; much of the material filed was unnecessary for the consideration of an interim injunction application. It has been said many times that the Court is rarely assisted by affidavits which set out in extenso conflicting allegations and great detail about

the cases of the parties which would be more appropriate at a substantive hearing. Counsel should realise that the Court cannot decide disputed questions of fact on interim injunction applications and that cross-examination is not normally permitted. Accordingly, there is no need to set out the cases of the parties in such detail as was done in this case.

Mr Spring for the defendants acknowledges that there is a serious question to be tried; the Court therefore has only to determine whether an interim injunction should be granted on the balance of convenience.

The relevant facts are -

By agreement dated 30 April, 1985 the plaintiff and the defendants entered into a franchise arrangement. There was a document of no fewer than 37 pages plus schedules. In brief, the plaintiff had acquired the rights to the name of "Hungry Horse" in respect of what has been described as a chain of restaurants, designed primarily for families, with reasonable prices, quick service and a distinctive design and layout. The recitals to the Deed stated that the plaintiff had established a wide reputation for its speed of service, informality and reasonable prices.

The plaintiff set up a network of restraurants in the Auckland area to be known as "Hungry Horse Restaurants"

using distinctive advertising and aimed at a particular clientele; notably family groups.

This agreement gave the defendants right to operate the Hungry Horse Restaurant from named premises in Browns Bay. The franchise agreement contained numerous terms and obligations, particularly on the part of the franchisee. Mr Spring said there were no fewer than 30 obligations imposed on the franchisee. The franchisor was to provide assistance and advice (particularly in the area of staff training, information, know-how and bulk purchasing).There was a provision for the franchisor to monitor the standard of service, so as to maintain standards throughout the chain.

The plaintiff was to be remunerated by a percentage of the turnover at the defendant's restaurant for advertising and management fees. It is not possible or desirable in the confines of this judgment to summarise any further the detailed obligations entered into by each party, other than to note what is crucial for this case i.e. the restraint of trade clause which is in the following terms -

> "12. THE Franchisee hereby covenants with Hungry Horse that the Franchisee will not during the term of this Agreement or any extension or renewal thereof or during the period specified in Item 13 of the Schedule hereto after the termination or cessation of this Agreement or any renewal or extension thereof:
>
> (a) conduct on the Franchisee's own account or be concerned or interested in whether directly or indirectly as agent

representative trustee servant employee shareholder or director in any other person firm or corporation conducting a similar business from the premises or within the area specified in Item 13 of the Schedule hereto;

(b) compete directly or indirectly with Hungry Horse or any of Hungry Horse's franchisees within the said distance from the premises;

(c) disparage or do anything calculated to disparage or damage Hungry Horse's goodwill reputation or industrial property."

I note that the area in item 13 of the schedule is an area within a radius of 20 kilometres from the subject premises.

One item which might be called a "red herring" and one on which I cannot base any injunction consideration is a claim by the plaintiff that the defendants had agreed to assign the lease of the premises to the plaintiff and receive in exchange a sub-lease.

It is alleged that in June 1987, the defendants owed money to the plaintiff under the terms of the franchise agreement and also to their landlord; there is also an unspecific claim of money owed by them to others. There was exhibited a letter written on behalf of the plaintiff to the landlord of the premises asking whether he would indicate in writing his intention to allow the plaintiff to take the head lease over with a sub-lease back to the defendant, Mr Jesson; no mention was made of Mrs Jesson, who was a party to the original agreement. The landlord replied that he was "happy to oblige" and "work in with whatever was best" regarding the head lease; he asked for

repayment of moneys allegedly owed to him.

There was then exhibited a document signed but undated whereby the defendants purported to assign the lease of the premises to the plaintiff at their cost and upon request. No consideration was stated; there was no reference to the landlord's consent, which was clearly necessary; nor a reference to any sub-lease.

On that rather meagre evidence, I should not be prepared to base any interim injunction. I do not really regard this particular allegation as having much relevance to the present application.

The affidavits are replete with allegation and counter-allegation between the parties. On 10 February, 1988, the defendants' solicitors wrote to the plaintiff cancelling the franchise agreement upon the grounds that the plaintiff was in breach of various terms and conditions of the agreement. These allegations were denied both by the plaintiff and the plaintiff's solicitors who made demand for sums allegedly owing by the defendants under the contract of $64,000. It seems, however, now to have been accepted that, rightly or wrongly, the contract is cancelled; the plaintiff has claims against the defendants arising out of the purported cancellation.

What has now happened is that the defendants have changed

all the signs on the exterior of the premises which they now call "Jessie's Restaurant & Bar". They are now running a Mexican style restaurant on the premises; they assert that this restaurant is aimed at a different market from the family style Hungry Horse restaurant. There is evidence that the defendants had advertised the new venture identifying the premise as "those on the old Hungry Horse site".

Mr Spring acknowledges that the defendants should not have done this; I record an undertaking given to the Court by counsel on behalf of the defendants that they will not in any way refer to the Hungry Horse chain or to the Hungry Horse site in any of their advertising material or signs.

The defendants have refused to make any payment to the plaintiff by virtue of the alleged cancellation; the plaintiff claims that it is entitled to an ongoing percentage of the defendants' turnover in terms of the franchise agreement. The defendants deny that they have any such responsibility.

Since Mr Spring has acknowledged that there is a serious question to be tried I say no more about that, other than to note that there could be argument as to whether the defendants' present business is "a similar business" or whether the restraint of trade clause is too wide; it in theory would prevent anyone from working as even a kitchenhand in the restaurant by virtue of its reference

to servant or employee.

The plaintiff seeks an injunction on the basis that the defendants are using the benefit of their association with the plaintiff whereby they received know-how as to the running of a restaurant. The defendants say in reply that they are not running a Hungry Horse style operation; they are aiming at a different market.

The plaintiff says that there are other Hungry Horse licensees or franchisees in the Auckland area who are most concerned that the defendants, to use a colloquial term, have been allowed "to get away" with taking the benefit of the Hungry Horse programme and then turning the restaurant into another style of restaurant.

The plaintiff refers to customers possibly going to the restaurant site expecting a Hungry Horse restaurant but not going away.

These matters are largely peripheral on the application for injunction, based on the restraint of trade clause. The question I have to consider is whether the balance of convenience requires the issue of an injunction. In my view it does not.

It is not one of those cases where damages are difficult to assess. The defendants have undertaken to the Court and I record their undertaking that they will keep

adequate books and that an independent chartered accountant, appointed by the plaintiff, may inspect those books at reasonable times. I reserve liberty to apply in case there is no agreement as to inspection.

Damages are an adequate remedy; in terms of the agreement the plaintiff is entitled to its loss of management and advertising fees calculated on turnover.

This is not a passing off case. If the defendants were seeking in any way to utilise the Hungry Horse logo or know-how then there would be little argument as to an injunction. However, on the basis that the defendants are carrying out a different style of restaurant, it is difficult to see that damages are not an adequate remedy.

There is also the further submissions made by Mr Spring which have merit; the defendants have taken the stand that they are not obliged to continue the contract with the plaintiff; they should therefore be entitled to operate their business and provide themselves with a livelihood.

I note in this context that there is some uncertainty as to the defendants' ability to pay damages; they have fairly heavy liabilities but they claim, however, that the restaurant is doing well and they may well be in a better position by the time of trial to pay damages than they are now.

I note also that the plaintiff is a subsidiary of a publicly listed company; had the plaintiff succeeded in the interim injunction application it would have had to provide an undertaking to damages from its parent company; I assume that would not have presented a problem.

I also record in acceptance of Mr Spring's submission, that interim injunctive relief under S.9 of the Contractural Remedies Act 1979 is not possible. I adopt with respect the reasoning in the unreported decision of Eichelbaum J in Wairau Natural Stone (East Coast) Limited and Another v Hales and Another (Napier Registry, 16 February, 1987).

I distinguish the English Court of Appeal case Office Overload Ltd v Gunn (1977) FSR 39. That was a case with no conflict of evidence. The plaintiff was a specialist employment agency seeking to restrain the defendant from soliciting customers and competing with its business. The restrictive covenant was for a period of a year. The defendant was using information and connections gained in the course of his association with the plaintiff.

There is no suggestion in this case that the defendant is using information as to either trade secrets or customers gained in the course of its association with the plaintiff. In any event the Gunn case is different; it was a master and servant type of restrictive covenant as distinct from the rather special one under consideration

which is not even a vendor/purchaser restraint but a franchisor/franchisee restraint.

In the exercise of my discretion, therefore, I decline to order an interim injunction. The application is accordingly dismissed.

However, I consider that the substantive proceedings should come to Court as soon as possible. One advantage of having such extensive affidavits, is that they can be used as evidence in chief, subject to cross-examination, at the final hearing.

The plaintiff has filed an amended statement of claim which raised for the first time S.8 of the Illegal Contracts Act 1970. I direct -

1. The defendants file a statement of defence to this amended statement of claim within 14 days.

2. Both parties are to file verified lists of documents within a further 28 days.

3. Any further interlocutory applications are to be filed within a similar period, namely 42 days from now.

4. A praecipe to set down is to be filed within 42 days from now.

If there is any ground for urgency then appropriate application can be made under R.436.

I also direct that once the action has been set down for hearing there is to be a conference under R.438 at a time to be fixed by the Registrar. At this conference I expect that counsel would agree that the affidavits already filed be used as evidence in chief, subject to supplementation and cross-examination by oral evidence.

All questions of costs are reserved.

R. D. Barker J.

Solicitors: Simpson Grierson Butler White, Auckland, for plaintiff
Keegan Alexander Tedcastle & Friedlander, Auckland, for defendants