24/12

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CP.146/90

LOW PRIORITY

BETWEEN JUST DESSERTS LIMITED

Plaintiff

AND MARK W THOMAS

Defendant

2651

Hearing: 5 October 1990

Counsel: Mr P Gorringe for Plaintiff
Mr J Cleary for Defendant

Judgment: 5 October 1990

ORAL JUDGMENT OF FISHER J

Facts

The plaintiff has for some years traded under the trademark "Blue Boy". It markets icecream and other confectionary. It does this by means of a chain of franchisees spread through various parts of New Zealand. The plaintiff's trading operation involved a commercial association with each franchisee by which it provided icecream and other confectionary to the franchisees. The franchisees would parade these products through the streets of their respective franchise territories, marketing them direct to members of the public. In some cases the sales were made from vehicles which periodically stopped in various parts of the town and countryside. In other cases the sales were effected also from the vehicles at various social and community gatherings.

One of the franchise territories occupied the southern area of the North Island including part of Palmerston North and the Manawatu. The defendant was an employee of that franchisee for a period of approximately 6 months. The defendant then took over the franchise from his employer from 1 November 1989. When negotiations and formalities had been completed with the plaintiff, the plaintiff and the defendant entered into a formal franchise agreement on 22 January 1990. Pursuant to this agreement, the defendant paid the plaintiff an initial capital sum of $10,000. Under the agreement, the defendant leased the appropriate van from the plaintiff. The van was marked with the appropriate colours and markings to advertise its role as a vehicle for distribution of Blue Boy products. The agreement contained a right of renewal on the part of the franchisee but involved an initial term of three years, expiring 31 October 1992.

The plaintiff and the defendant duly embarked upon their commercial relationship, the plaintiff supplying the product and the defendant selling it. Unfortunately, difficulties developed between them within a matter of months. In this judgment I find it unnecessary to arrive at any final factual conclusions but there are certainly strong indications that the van supplied by the plaintiff to the defendant had mechanical deficiencies. In addition, the defendant made various allegations of shortcomings on the part of the plaintiff. These included claims that the products were not cost-competitive and were of inferior quality. The projected turnover and profits were also said to be less than the defendant had been led to expect, at least on the basis that the defendant was required to work only a reasonable number of hours.

The difficulties between the two parties were not resolved and in April 1990, the defendant made plain his intention to start to purchase and sell icecream obtained from another source. This he began to do and, at least at this hearing, Mr Cleary does not contest the fact that this directly conflicted with clauses in the franchise agreement which precluded such purchases. Indeed, for the purposes of this hearing, Mr Cleary accepted that in the finish the defendant repudiated his obligations under the franchise agreement.

It is common ground that the plaintiff consistently opposed this attempt by the defendant to break away from their commercial relationship. As to the purchases from elsewhere, the plaintiff relies upon the following clause in the franchise agreement:

> "2.(a)(ii) Thereafter the Franchisee shall purchase from and only from the Franchisor or a supplier approved in writing by the Franchisor the products and accessory products such as Blue Boy Logo's and the like. The Franchisor warrants that all products supplied will be price competitive and quality competitive with suppliers of products similar in nature;"

The plaintiff further relies upon clause 2(c)(i) and (ii), which state:

> "(c) The Franchisee will conduct the Franchised operations and promote the sale of the products in the territory and the mutual business interests of the Franchisor and the Franchisee will not:
>
> (i) Sell products other than the Franchisor's from the Vending Vehicle unless approval from the Franchisor has been obtained;
>
> (ii) Engage in any manner whatsoever in the sale or production of any products which are in competition which the Franchisor's business;"

The defendant has made it plain that not only does he wish to part company from the plaintiff, but that he also wishes to commence employment with his father. His father will be operating a competing business distributing icecream and like products direct to the public from mobile vending vans. The plaintiff says that this would contravene a restraint of trade clause in the franchise agreement, namely clause 15(d), which states:

> "furthermore the Franchisee and the guarantors do and each of them doth jointly and severally covenant with

> the Franchisor that neither the Franchisee nor the guarantors nor anyone of them either jointly or severally will carry on or be engaged concerned or employed either directly or indirectly either alone or jointly with any other person or persons or company either as principal, partner, manager, agent, servant, assistant, employee, director, shareholder or member in a business similar to the Franchisor's business or dealing with or providing products or services similar to those of the Franchisor's for a period of years as set out in Clause 4 of the Schedule;"

The Proceedings

The plaintiff has brought proceedings against the defendant claiming damages and an injunction based upon alleged breach of the franchise agreement. As part of those proceedings, the plaintiff in the meantime seeks an interim injunction on a more restricted basis. The particular restraints now sought in this hearing are as follows:

> "1. Restraining the defendant from acquiring any product other than from the plaintiff for sale by the defendant in the course of his business as a franchisee pursuant to the franchise agreement dated 22 January 1990 between the plaintiff as franchisor and the defendant as franchisee, unless the defendant has first obtained written approval from the plaintiff (paragraph (a)(i) of Statement of Claim).
>
> 2. Restraining the defendant from selling in the course of his business as franchisee pursuant to the franchise agreement dated 22 January 1990 between the plaintiff as franchisor and the defendant as franchisee, any product other than any product acquired from the plaintiff (paragraph (a)(ii) of Statement of Claim).
>
> 4. Restraining the defendant from either jointly or severally carrying on or being engaged concerned or employed either directly or indirectly either alone or jointly with any other person or

> persons or company either as principal, partner, manager, agent, servant, assistant, employee, director, shareholder or member in a business similar to the plaintiff's business or dealing with or providing products or services similar to those of the plaintiff's for a period of two years from the date of this order."

Of the three restraints sought by the plaintiff, I have heard no real opposition from Mr Cleary as to restraints 1 and 2. No doubt that is because the defendant does not propose to continue to operate his franchise with the plaintiff nor to enter into any competing business with himself as the principal. The real issue concerns restraint number 4. If granted, that would have the effect of stifling the defendant's plan to commence or continue employment with his father. The defendant says that is of special concern to him because he has no particular qualifications or skills and that in the current economic climate his plan to work for his father represents the only real possibility of employment. The defendant, through Mr Cleary, concedes for the purpose of this hearing, that there is a serious question to be tried. The principal focus lies upon the strength or weakness of the plaintiff's claim and the balance of convenience between the parties with associated discretionary matters. Although it is conceded that there is a serious question to be tried, it is still necessary to briefly consider the question of liability, because the other matters cannot be considered in isolation from it.

Question to be tried

Unquestionably, in this case there is a serious question to be tried in the sense that there is enough evidence to demonstrate an arguable case of breach of contract by the defendant. Equally, on the evidence before me there is arguably a case that there were some breaches of contract by the plaintiff. One of the questions which will no doubt need to be addressed at trial is whether if there were breaches by the plaintiff, they were breaches of terms which involved obligations that were interdependent with those of the defendant. One of the questions might well be whether any breaches on the part of the plaintiff were so significant that they effectively released the defendant from his obligations under the franchise agreement.

For understandable reasons, at an interim injunction stage counsel have not attempted to embark upon complications of that kind. At the very least, it must be arguable that any breaches on the part of the plaintiff were not so serious that they released the defendant from his own obligations under the franchise agreement. Assuming that to be the right approach at an interim injunction stage, it would follow that there is an arguable case of breach of contract by the defendant in failing to carry out his numerous obligations under the franchise agreement and in purchasing competing goods from elsewhere.

On the face of it, that would justify the serious question element for the purpose of restraints 1 and 2. The principal area of argument, however, concerns the restraint of trade provision referred to as restraint number 4 in the notice of application set out above. Here it seems to me the position is less obvious. Because it is intimately connected with the justification for an interim injunction, I need to deal with it in a little more detail.

On the face of it, for the defendant to commence employment with his father in a competing business would constitute a breach of clause 15(d) which I referred to earlier. On the other hand, it is trite law that the Courts will not enforce terms in restraint of trade of this nature unless such terms are reasonable. Pursuant to s 8 of the Illegal Contracts Act, it would be possible to enforce such a term in a modified form if the term were held to be too wide. It might well be the case, for example, that this particular clause might be regarded as too wide in its geographical scope, having regard to the more limited area of the franchise territory granted under the agreement to the defendant. All else being equal, it might also be thought that a remaining term of two years would not be excessive.

However, this brings me to the most critical question which is fundamental to the legitimacy of all of restraints of trade: the question is whether the plaintiff has a legitimate commercial interest to be protected at all. Obviously in determining the reasonableness of the scope of the restraint, the restraint should be no wider than necessary to protect the legitimate interest but in this case is there a legitimate interest to be protected?

In that respect, there are three potential interests which have been discussed by counsel. One is goodwill. I emphasise that I do not try to come to any final decisions on any of these matters in this case. However, it is far from clear that there was any significant goodwill in this case which needed to be protected or could be protected by a restraint of this kind. It was not a case where the franchise was associated with business connections with retailers or businessmen, at least to any substantial extent. Rather the principal operation of the franchise seems to have involved direct selling to the public, many of whom would be children. I take it that it would be mainly a case of attracting members of the public by virtue of physical presence of whatever icecream and confectionary vendor happened to come to the attention of the public present on a particular occasion. I doubt, therefore, whether goodwill is particularly strong as the interest to be protected in this case.

The second possible interest to be protected would be confidential information. Commonly, for example, there might be scientific or technological techniques or customer lists which could be regarded as particular secrets. On a somewhat limited survey of the evidence in this case, I have not been persuaded that there is any significant confidential information here either.

The third class which has been discussed in the case is often referred to as "know-how". It seems clear that this defendant has received the benefit of quite detailed information and tuition in the techniques of marketing these products. However, there is considerable doubt as to whether the Courts will protect mere know-how falling short of confidential information or goodwill: see in particular Faccenda Chicken Ltd v Fowler [1987] Ch 117, 135, a decision followed in a number of New Zealand decisions which have been usefully collected in Brown and Grant: The Law of Intellectual Property in New Zealand para 8-14, n 1.

I have traversed these matters not in order to arrive at any final conclusions nor because there is any doubt over the presence of a serious question to be tried but in order to indicate that the plaintiff's case as to restraint of trade is far from conclusive.

Balance of Convenience and Other Discretionary Matters

Mr Gorringe has rightly drawn to my attention a number of factors which favour the grant of an interim injunction. I accept that the plaintiff has a strong case, that the defendant has breached the franchise agreement, that damages would be difficult to quantify, that there are strong indications that the defendant will be unable to pay damages and that the plaintiff will be in a strong position to pay damages.

However, I must weigh those considerations against the fact that apart from restraints 1 and 2 that I have referred to earlier, the real thrust of the plaintiff's claim to an injunction is to prevent the defendant from working as an employee for a competing employer. For the reasons discussed earlier, I have some reservations as to the extent to which at trial that particular aspect of the plaintiff's claim will succeed. At a discretionary level, the Courts have traditionally been tender towards the right of an individual to obtain employment. In that respect I have been particularly assisted by the judgment of Thorp J in Cemac Commercial Interiors Ltd v Tate (1987) 1 NZELC 95,629 at 95,630 and 631. I set out four factors which weighed with the Court in that case because I consider that they have much in common with the present one. Thorp J said this:

> "In considering that matter I am affected by four factors:

1. It is quite clear that the restrictive covenant is too wide, being unlimited in area, and the Court must surely be slow to enforce by interim relief a covenant which can only be enforceable if the covenantee persuades the Court that it is a proper case for variation.

2. The alternative cause of action for breach of confidence is at best a difficult case, particularly as to the third test in Coco v A N Clark Engineers (1969) RPC 41/47, proof of unauthorised use of confidential information to the detriment of the employer: Mr Colbert's reliance on Wilson Malt Extract v Wilson [1919] GLR 412 may provide the answer, but there is insufficient on the papers to determine whether or not that will be so:

3. The case has some similarities with Manchester Cleaning Company Limited v Ashby Cleaning Services Ltd & Anor (unrep, Auckland, CP 564/86, judgment of Sinclair J delivered 18 June 1986), during the course of which his Honour commented at p 9 that:

   > '... no person employed at the level of the Defendant ought to be placed in such a position that her freedom to sell her services is to be placed under any great constraint'.

   The defendant's position in the Cemac organisation, at least on the information presently before me, seems no higher than that of the defendant in the Manchester case in relation to her employer company, and the significance of this factor has certainly not been reduced by the enactment of the Commerce Act: and

4. Although Cemac has offered Mr Tate his job back, this seems to me a totally unrealistic option: his prospects of advancement in that organisation while he was busy prosecuting a defence of the action it has brought against him would be slight, and the whole idea savours too much of an injunction requiring a person to accept employment against his or her will."

I consider that the present case is broadly similar. The plaintiff is a commercial enterprise seeking to protect its commercial interests by inhibiting competition in the form of the opportunity for an individual to take employment with a competitor. The hardship which would be caused to the defendant by an injunction in this respect would be very much greater than the converse to the plaintiff and it is far from clear that at trial such an injunction would be vindicated.

Result

I uphold the plaintiff's application so far as paragraphs 1 and 2 of the amended notice of interlocutory application are concerned. An injunction will issue restraining the defendant in those two respects limited, however, to the remaining term of the franchise agreement, that is to say until 31 October 1992, or until trial or until any contrary order of this Court, whichever shall be the earlier.

The plaintiff's application for an interim injunction in terms of paragraph 4 of its application is declined.

Costs are reserved.

R L Fisher J