N2LR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CP 40/93

BETWEEN KA & SR HANSEN

Plaintiffs

AND FASTWAY EXPRESS PARCELS (NZ) LIMITED

Defendant

Hearing: 18 October 1996

Counsel: M Hardy-Jones for Plaintiffs
J M von Dadelszen & Ms Blake for Defendant

Judgment: 13 MAR 1997

JUDGMENT OF MASTER J.C.A. THOMSON

Solicitors:
Radich Dwyer Hardy-Jones Clark, Blenheim
Bannister & von Dadelszen, Hastings

The plaintiffs sue the defendant pursuant to an agreement dated 2 September 1989. They allege they agreed to purchase a franchise from the defendant allowing the plaintiffs to operate what was known as the Fastway Courier Business in and around Dunedin. The plaintiffs plead that the method of operation used by the plaintiffs and other franchisees was to transport parcels between main centres by large trucks. It was known as "Line Haul". The Line Haul operation was paid for by franchisees, as a percentage of gross sales. When the plaintiffs took over the Dunedin franchise they and the defendant agreed that the plaintiffs would pay 7 percent of gross sales to the defendant for the cost of the Line Haul operation.

The plaintiffs as a first cause of action plead that the agreement concerning payment of 7 percent of total gross sales for the Line Haul was discussed at the time the Dunedin franchise was purchased and the written contract was agreed, and formed part thereof; further that after the initial agreement was reached the defendant initiated a change in the Line Haul operation whereby each franchisee would have to pay a larger percentage for the cost of the Line Haul. The plaintiffs plead that since the new method of running the Line Haul operation would cause extra cost to the plaintiffs (because of the larger distances to be travelled) it was agreed that the defendant would subsidise such cost to ensure that the plaintiffs paid no more than 10 percent of gross sales for the Line Haul operation; (10 percent being the national average cost). The plaintiffs claim they accepted the subsidy and with it the business was profitable and could be continued. It is pleaded however that in July 1991 the defendant unilaterally terminated the subsidy with the result that instead of paying 10 percent of total

sales as a Line Haul cost the plaintiff thereafter had to pay 23 percent of total sales of Line Haul costs and that the additional cost of the Line Haul operation meant that the plaintiffs business was no longer profitable. The plaintiffs plead that they managed to sell their business in September 1992 but as they had not received the subsidy since July 1991 that over a period of 13 months they lost the sum of $118,300. Because the subsidy was withdrawn the plaintiffs allege they had to sell their business to prevent total financial collapse. The sale was effected by the purchaser taking over the indebtedness of the plaintiffs. As a result of the sale the plaintiffs plead they suffered financial loss in the sum of $100,000 being the difference between what the business would have been able to have been sold for had the subsidy been in place, and the sum it was actually sold for. The plaintiffs claim damages of $218,300 and $50,000 for loss and damage to reputation, and for stress and inconvenience.

As a second cause of action the plaintiffs plead that there was a meeting held in Auckland on 2 and 3 August 1991 whereby the plaintiffs, other franchisees, and the defendant agreed that the franchisees would be entitled to a 15 percent rebate on the costs of ferry transport across Cook Strait and that such rebate would be held in a fund by the defendant; that the fund would be applied for the benefit of the franchisees in the way pleaded in the statement of claim; that the defendant has not paid out the moneys in terms of the arrangement and the defendant owes the plaintiffs the sum of $6,825. The plaintiffs also claim damages for the sum of $5,000 for breach of trust.

For a third and final cause of action the plaintiffs plead that they were dependent on the subsidy and that the plaintiffs and defendant in respect thereof were in a fiduciary relationship; that the defendant's unilateral termination of the franchise arrangements was a breach of such fiduciary duty and that damages are payable as pleaded in the first cause of action.

The defendant applies to strike out the whole of the plaintiffs' statement of claim upon the grounds that:

a The first cause of action is based on contract.

b The second cause of action is one of breach of trust but also based on contract.

c The third cause of action is one of alleged breach of fiduciary duty but the defendant says has to be based on the contractual arrangement as pleaded by the plaintiffs.

The defendant submits that clause 9 of the franchise agreement referred to in paragraph 1 of the amended statement of claim provides for the defendant to be relieved and discharged of all liability, claims and demands whatsoever arising at the suit of the plaintiffs under the agreement on its (the defendant's) written approval of the transfer of the franchise. I set out Clause 9.

> "9. The Franchisee will not sell, sub-franchise or transfer, assign, mortgage or encumber, relinquish, part with, share the possession of or

hold himself as the trustee of the franchise or any rights conferred on the Franchisee without first obtaining the written consent of the Company PROVIDED THAT such consent shall not be arbitrarily or unreasonably withheld in the case of the assignment of the franchise to a respectable, financial and responsible proposed assignee who will contemporaneously enter into a Deed of Covenant with the Company where the proposed assignee shall covenant to perform, observe and keep all of the covenants, provisions, conditions and agreements herein contained or implied and on the part of the Franchisee to be observed or performed and if the proposed assignee is a Company then the Company may at its option require such covenant to extend to and include the shareholders and/or directors or principal officers of such company, (any such Deed of Covenant to be prepared by the) Solicitors for the Company at the expense in all things of the Franchisee AND IT IS HEREBY AGREED AND DECLARED for the purposes of this clause that where the Franchisee is a Company any sale, transfer, dispossession or transmission of shares as stock or any new issue of shares or stock which has the effect of transferring the effective control of the Company to any person or Company not being a shareholder or stockholder of the first mentioned company at the time of its becoming a franchise holder hereunder shall be deemed to be an assignment by the franchise holder and shall likewise require the consent of the Company. No amount of money or other consideration (except a nominal consideration of one (1) dollar shall be paid by a proposed assignee to the Company for goodwill or otherwise on the assignee to the Company for goodwill or otherwise on the assignment of the franchise or on any deed of Covenant between the Company and the proposed assignee or any of its shareholders directors or principal officers. Upon compliance with the aforesaid conditions and obtaining Fastway Express Parcels (N.Z.) Limited's approval the Franchisee shall be relieved and discharged of further obligations under the terms hereof except that the Franchisee shall be bound by the secrecy undertaking contained in clause 7 hereof and the covenant not to compete contained in clause 12 hereof Fastway Express Parcels (N.Z) Limited shall be its written approval of the transfer be relieved and discharged of all liability claims and demands whatsoever arising hereunder to the Franchisee and the Franchisee will, if required by Fastway Express Parcels (N.Z) Limited, execute a general release of Fastway Express Parcels (N.Z) Limited."

An affidavit filed in support of the strike out applications made by Mr McGowan of the defendant company exhibits copies of the minutes of the directors of 1 October 1992 confirming that consent was given to the sale of the plaintiffs' business. A copy of the new franchise agreement between the defendant and the plaintiffs' successor dated 1 October 1993 is also exhibited. The defendant

however in order to rely on the release in clause 9 of the agreement in this proceeding apparently thought it necessary to arrange the execution of a deed of confirmation dated 28 August 1996 which is exhibited to the affidavit of Mr Williams filed on behalf of the defendant. He says that the deed of confirmation was executed because no written consent (required by clause 9) was formally given at the time the defendant approved the transfer of the franchise from the plaintiffs to the new purchaser, one, Gilmoss.

The strike out application is opposed by the plaintiffs on the grounds that:

1 The plaintiffs have a reasonable cause of action.

2 The issues are better resolved at trial not at the interlocutory stage.

3 The application will require extensive argument.

The defendant acknowledges that pursuant to R.186 the strike out jurisdiction is to be used sparingly and only in the clear case where the Court has the requisite information before it. Mr von Dadelszen also accepts that the Courts will not usually allow a strike out application under R.186 unless it will dispose of the whole case. He submitted that in construing an exclusion clause the modern approach is that the Court does not have to be overly protective of a plaintiff. Such provisions are to be given their natural and plain meaning read in the light of the contract as a whole. Only in that way will the reasonable expectations of the parties as expressed in their contract be fulfilled. Where as here a contract

is signed it will normally be impossible to deny its contractual character whether the plaintiffs have read its contents or not. The defendant relies on ***Livingstone v. Roskilly*** (1992) 3 NZLR 230, ***DHL International (NZ) Limited v. Richmond*** (1993) 3 NZLR 10 (CA), Cheshire & Fifoot's Law of Contract 8th New Zealand Edition 1992 pp 176 to 189. Mr von Dadelszen submits the plain and natural meaning of clause 9 is that it operates as an exclusion clause to bar all the plaintiffs causes of action.

He argues clause 9 affords the defendant an absolute defence on the first cause of action. As to the second cause of action the defendant says the claim is clearly one of breach of trust, but also based on contract. The plain meaning to be taken from paragraph 19(c) of the amended statement of claim is that the plaintiffs do not allege that they are personally entitled to the moneys. Further he submits there is no foundation laid for the claim for damages in terms of paragraph 25 of the amended statement of claim and in any event the amounts sought to be recovered are not significant.

As to the third cause of action he submits that although the claim is framed in terms of a fiduciary relationship, or duty, it is clear that the fiduciary relationship, or duty, is entirely dependant upon the contractual arrangements between the parties . He submits that where a relationship is such that by appropriate contractual provisions, or other legal means, the parties could adequately have protected themselves, but have failed to do so, there is no basis without more for the imposition of fiduciary obligations in order to overcome the shortcomings in the arrangements between them.

Mr von Dadelszen says that while some exclusion clauses are merely defences others can be regarded as defining the obligation. In the present case if the defendant has no continuing obligation following approval to transfer the franchise, the pleaded causes of action cannot succeed. He says following points deserve attention:

a Both the plaintiffs and defendant entered into a business contract relating to a commercial franchise.

b this is not a case of a consumer transaction where the contract contains an exclusion clause. Rather this was a transaction between two parties in the business world contracting and negotiating "at arms length".

c the Agreement was executed by both parties, an indication that it had been considered and read through by both parties.

Arguing for the plaintiffs to the contrary Mr Hardie-Jones refers to clause 34 of the Franchise Agreement which says:

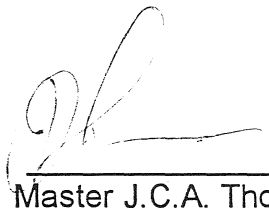
> "34. This Agreement sets forth the entire agreement and understanding between the parties as to the subject matter of this agreement and merges all prior discussions between them and neither of the parties shall be bound by any conditions definitions warranties or representations with respect to the subject matter of this agreement other than as expressly provided in this agreement or duly set forth or subsequent to the date hereof in writing and signed by a proper and duly authorised representative of the party to be bound thereby."

The clause he submits means that the exclusion provided in clause 9 can only operate in respect of matters agreed upon in the contract itself. He argues that clause 9 would not encompass the oral variation of the terms of the agreement which is pleaded in paragraphs 6 and 7 of the amended statement of claim. It would certainly not apply he submits to the second cause of action which relies on an alleged agreement claimed to be made on 2 and 3 August 1991 some two years after the original written agreement was signed; nor to the claim for breach of fiduciary trust of the agreement pleaded in paragraphs 27 of the amended statement of claim.

Mr Hardy-Jones acknowledges that there are deficiencies in the pleading of the second cause of action but says they can be rectified by an amended pleading.

I conclude that while the defendant may have a good argument that at least the first cause of action is caught by the exclusion clause relied on I think the plaintiffs have an equally good argument that the subsequent agreed variations of the contract mean that the first cause of action is not so caught. Also whether the second and third causes of action are referable to the original written contract will I think have to be the subject of evidence. For strike out purposes I do not think all the necessary material is before the Court to determine the extent to which clause 9 applies to all three causes of action. Indeed counsel even in argument disagreed as to some of the factual issues which arise from the plaintiffs claim and that fortifies the Master in his view that the case must proceed to trial.

The defendant has not demonstrated to me that the exclusion clause debars the plaintiffs from proceeding on all or any of their causes of action. It has not been able to convince me that the plaintiffs claim is so untenable that it cannot possibly succeed. The strike out application is refused. Costs reserved.



Master J.C.A. Thomson