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Department of Justice and Attorney-General

# Transcript of Proceedings





SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 2766 of 2001

GAVIN BINGHAM and
MARGARET BINGHAM — Plaintiffs

and

7-ELEVEN STORES PTY LTD
(ACN 005 299 427) — Defendant

BRISBANE

..DATE 06/02/2003

JUDGMENT





4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HER HONOUR: The defendant has applied for leave further to amend the defence and for leave to file a counterclaim. The amendments to the defence relate to paragraphs 9 and 10. Those paragraphs are in similar terms, one relating to the Morayfield store agreement and the other to the Bray Park agreement. I will refer only to paragraph 9 but my decision on one paragraph will apply mutatis mutandis to the other.

The present form of paragraph 9 appears in the amended defence which was filed on 9 August 2002. Counsel for the defendant has put before me a proposed amended pleading which clearly sets out in paragraph 9 that part which is sought to be deleted, namely, paragraph (iv) and the new paragraph (iv) which he seeks to substitute.

9. (a) The defendant denies the allegations contained in paragraph 9 of the amended statement of claim for the reasons set out in paragraph 9(b) herein.

(b) The notice of termination was valid and based upon the plaintiffs' breach of the Morayfield Store Agreement by the fraudulent transfer of stock between the stores at Bray Park and Morayfield and actions of the plaintiffs calculated to reduce moneys payable to the defendant pursuant to the Bray Park Store Agreement and the Morayfield Store Agreement.

**Particulars**

(i) On or about 11 February 2002, Gavin Bingham notified the defendant's district manager, Michael McNamara, of a power failure which caused heat damage to confectionary at the

Bray Park store.

(ii) Mr Bingham was told that the stock loss would be an insurance claim by the defendant. The stock loss was audited.

(iii) The plaintiffs wrongly transferred heat damaged confectionary from the Bray Park store to the Morayfield store and sold and displayed that confectionary for sale.

(iv) ~~Further, the plaintiffs made additional claims for bad merchandise on daily charge off summary sheets submitted to the defendant for the Morayfield store which included some of the heat damaged stock wrongly transferred from Bray Park~~.

(iv) The plaintiffs made claims for the crediting of merchandise evidenced by daily charge off summary sheets which included some of the said heat damaged stock which was transferred to Morayfield for sale.

(a) Claims which the defendant credited:

| DCOS No. | Date of DCOS |
|---|---|
| 140610 | 11/02/02 |
| 140611 | 11/02/02 |
| 140612 | 11/02/02 |
| 117099 | 13/02/02 |
| 83937 | 15/02/02 |
| 141630 | 22/02/02 |
| 141631 | 22/02/02 |

(b) Claims which the defendant received but did not credit:

| DCOS No. | Date on DCOS |
|---|---|
| 117100 | 14/02/02 |
| 141615 | 14/02/02 |
| 141616 | 14/02/02 |
| 141617 | 14/02/02 |
| 141618 | 14/02/02 |
| 141619 | 14/02/02 |
| 141620 | 14/02/02 |
| 141621 | 14/02/02 |
| 141622 | 14/02/02 |

(v) In the circumstances, the plaintiffs attempted to receive a credit for damaged confectionery from the defendant on the insurance claim and bad stock claims and

to obtain value for the damaged stock by sale to customers from the Morayfield store.

(vi) Full particulars are set out in the affidavits filed by the defendant and relied upon at the interlocutory application on 24 June 2002."

The action relates to two franchise agreements for the operation of 7-Eleven stores, one at Bray Park and the other at Morayfield. On 8 February 2002, there was a power failure at Bray Park. This resulted in damage to chocolate products.

The franchise agreements are in similar terms. They provide in Article 25(e)(vi) as follows:

"(e) Notwithstanding anything else herein contained this Agreement may be terminated by 7-ELEVEN at any time by giving OWNERS not less than 72 hours prior notice of Termination upon the occurrence of any one or more of the following events (each of which events OWNERS hereby acknowledge constitutes good cause for Termination)-

(vi) OWNERS or if OWNER is a company a nominated director are fraudulent in connection with the operation of the franchised business."

Also relevant is the Franchising Code of Conduct. This is a mandatory industry code prescribed by regulation for the purposes of section 51AE of the Trade Practices Act:

"23. A franchisor does not have to comply with clause 21 or 22 if the franchisee:

(f) is fraudulent in connection with operation of the franchised business."

On 15 March 2002, the defendant gave the plaintiffs notices purportedly under the agreements terminating the agreements on 72 hours' notice. Paragraph 4 of each notice was in the following terms:

> "The specifics of the fraudulent action relate to evidence 7-Eleven has in its possession regarding stock transfer between your stores and actions calculated at reducing the 7-Eleven charge."

On 25 March 2002, this proceeding was commenced by the plaintiffs filing a claim and statement of claim. They sought permanent injunctive relief in the same terms as they still seek it based upon there being no circumstances existing whereby the defendant could give them valid notices to terminate pursuant to Article 25 of the agreements.

They also filed an application for an interlocutory injunction. That application subsequently came before Holmes J. The defendant was represented by its present senior counsel and a junior barrister. The plaintiffs were represented by their present junior barrister.

On 25 June 2002, her Honour made an order in the following terms:

> **"THE ORDER OF THE COURT IS THAT:**
>
> 1. Application allowed.
>
> 2. Upon the applicants providing the usual undertaking as to damages, the trial of this action or further order of [sic] the Defendant be

restrained by itself or by its servants or agents from acting upon or implementing:

(a) A notice dated 15 March 2002 purporting to terminate the agreement entered into between the Plaintiffs as franchisees and the Defendant as franchisor on 13 June 2000 in respect of premises known as 7-Eleven Bray Park.

(b) Acting upon or implementing a notice dated 15 March 2002 purporting to terminate the agreement entered into between the Plaintiffs as franchisees and Defendant as franchisor on 13 June 2000 in respect of premises known as 7-Eleven Morayfield.

3. Costs be costs in the cause.

**THE COURT DIRECTS THAT:**

(A) The Defendant file and serve its defence within 14 days of today's date;

(B) The Plaintiff file and serve its reply within 14 days of service of the defence;

(C) Disclosure take place within 28 days of the close of pleadings;

(D) Request for trial be signed by all parties within 14 days of discovery."

On 8 July 2002, the defendant filed a notice of intention to defend and defence. On 9 August 2002, it filed an amended defence. In both defences, paragraph 9(b)(iv) appeared in the same form and it remained as such until the present application to amend.

On 7 October 2002, the proceeding came before Moynihan J who made the following order:

**"THE ORDER OF THE COURT IS THAT:**

1. the defendant, on or before 4.00 p.m., 11 October, 2002, file and serve further and better particulars of its defence in answer to the request made by the plaintiffs on 30 July, 2002;

2. the defendant pay the plaintiffs' costs of and incidental to this application to be assessed."

Particulars were supplied by letter from the defendant's solicitor to the plaintiffs' solicitor dated 11 October 2002.

On 21 November 2002, the matter came before the Chief Justice who made the following order:

**"THE ORDER OF THE COURT IS THAT:**

1. The matter be entered on the civil callover list notwithstanding the absence of a Request of Trial Date.

2. Any further request for disclosure is to be made by the Defendant by 5 December 2002.

3. The Plaintiff comply with para (2) of this order by 12 December 2002.

4. Costs reserved."

The matter was then entered on the callover list, and on 29 November 2002 it was set down for hearing commencing 3 February 2003.

On 13 January 2003, Mackenzie J dismissed an application by the defendant for adjournment of the trial.

Particulars of paragraph 9(b) of the defence were requested

first by letter of 30 July 2002. Request number 4 was for particulars sufficient to identify the nature and extent of the "additional claims" for bad merchandise, identifying the merchandise in respect of which the claims were made as alleged in paragraph 9(b)(iv). The response contained in the letter of 11 October 2002 was that the DCOS documents containing the claims made by the plaintiffs were exhibited to the affidavit of Warren Wilmot sworn 21 June 2002 as Exhibit WW6 and that a copy had been provided to the plaintiffs' solicitors:

They were as follows:

| | |
|---|---|
| 140610 | 11/02/02 |
| 140611 | 11/02/02 |
| 140612 | 11/02/02 |
| 117099 | 13/02/02 |
| 141628 | 20/02/02 |
| 141630 | 22/02/02 |
| 141631 | 22/02/02 |
| 141632 | 23/02/02 |
| 141633 | 24/02/02 |
| 141650 | 11/03/02 |
| 141653 | 13/03/02 |

The trial commenced on 4 February 2003. I allowed an amendment of the defence by the addition of paragraph 10A as set out in the document which is marked "J" for identification. The effect of it was that if the notices of termination were invalid or insufficient or defective, the plaintiffs had no entitlement, subject to provision of

reasonable notice, to restrain the defendant from taking possession. Further, that when the interlocutory injunction ceases to have effect, the defendant will be entitled on reasonable notice to take possession. Further, that the rights of the plaintiffs of any sound in damages only; and further, that accordingly, the relief sought in paragraphs 1(a),(b) and 2(a),(b) of the prayer for relief in the statement of claim, namely, the injunctions should not be granted.

It is instructive to consider how the question of the amendment of paragraphs 9 and 10 of the defence arose. I refer to the opening of senior counsel for the defendant at pages 41 and 42 of the transcript. He tendered a document entitled "DCOS Processing Details" which he said would be sworn to by Mr Wilmot. "DCOS" stands for "Daily Charge Off Summary" and those documents led to the crediting of stock which had been charged off. Mr Wilmot was at the time the defendant's national operations manager.

The document which was tendered during the opening has, for the purposes of this argument, been marked "B" for identification. It deals with losses not covered by the audit report at Morayfield and Bray Park which are listed by DCOS numbers and also with losses covered by the audit

report. Under this heading, it is said that the plaintiffs were credited with $4,686.75 exclusive of GST and that there was a relevant DCOS prepared by the female plaintiff dated 15 February 2002.

The first witness called was Mr McNamara, who at the time was the defendant's district manager for the district which included Bray Park and Morayfield. He commenced to give evidence of his dealings with the plaintiffs about the damaged stock. There was an attempt to put into evidence through him various DCOS documents. An objection was taken on the grounds of relevance. It emerged that there was little if any relationship between the documents in the first version of Exhibit 3, that is, the document marked "B" for identification, and those in the particulars previously given, that is, those in Exhibit WW6.

In due course, Mr Griffin acknowledged that his client's particulars were incomplete and said that he needed to amend paragraph 9(b)(iv) to make it clear that the defendant's case was that stock had been damaged at Bray Park, that stock had been the subject of claims for bad merchandise, but nevertheless some of that damaged stock had been transferred to Morayfield and sold there. I understood him to say that it was not the defendant's case that the plaintiffs claimed any stock was damaged at Morayfield.

Mr Griffin withdrew the tender of the first version of Exhibit 3 saying another document would be substituted. The next day during argument two further versions were produced and they have been marked "C" and "D" for identification.

The allegations made by the defendant against the plaintiffs are allegations of fraud. These are very serious allegations which have to be pleaded carefully and with particularity. See Banque Commerciale SA v. Akhil Holdings Ltd (1990) 169 CLR 279 at 285.

At page 79 of the transcript, Mr Griffin indicated that his client could not and never would be able to particularise exactly all of the damaged stock sold at Morayfield.

I note that in the proposed paragraph 9(b)(iv) one of the DCOS documents relied on is number 83937 dated 15 February 2002. That was not in the particulars contained in Exhibit WW6. The claims which were credited amount to $6,704.18 including $4,686.75, the subject of DCOS number 83937. The claims not credited amount to $1,144.01 plus the amount of one of the DCOS documents, 11710, which is not in evidence yet.

During argument, the question arose whether DCOS 83937 was a claim made by the plaintiffs. It bears the signature of

Mr McNamara, not that of either plaintiff. Exhibit 3 version 3, that which I take to be going to be sworn to by Mr Wilmot, covers "Losses covered by the audit report." In earlier versions there was a reference to a claim prepared by Mrs Bingham, but that claim has been removed.

Mr Perry, senior counsel for the plaintiffs, made a number of points. First, he said it would be necessary to show where DCOS 83937 fitted into the change of proof and that this had not been done. Then he referred to the date of processing, ie, date of crediting which is shown in Exhibit 3, and submitted that there had not been adequate disclosure by the defendant: he said there had been an absence of documents leading up to the processing or crediting process; he would have expected a documentary trail establishing the payment of money.

The plaintiffs had delivered a request for particulars of the proposed amendment asking for particulars of each item of heat damaged stock alleged and of each item of heat damaged stock alleged to have been transferred to Morayfield for sale. The response of the defendant was that all of the stock listed was alleged to have been heat damaged and that it did not allege that all of the stock in the particulars was transferred to Morayfield. The response continued that

the defendant's case was that a large portion of the stock referred to in the DCOS claims, which it was unable to specify, was transferred to Morayfield for sale and display for sale.

Mr Perry submitted that the defendant could not particularise the heat damaged stock which was transferred to Morayfield and sold, and that it could not particularise the heat damaged stock in respect of which credits were given which were sold at Morayfield.

In dollar terms, the largest fraud is that alleged with respect to the claim in DCOS 83937, namely, $4,686.75. The evidence which I understood was to be given by Mr Wilmot contained in version 1 of Exhibit 3, was that the female plaintiff completed that DCOS, but that does not accord with the document, and from version 3 of Exhibit 3, it seems that that will not be Mr Wilmot's evidence after all.

Paragraph 9(b) refers inter alia to "Actions of the plaintiffs calculated to reduce moneys payable to the defendant." No particulars of that part of the paragraph have been supplied, but none were sought and this does not really add anything to the argument in the opposition to the amendment.

Mr Perry's summary was that this was a case of fraud being manufactured on the run sufficient to justify the termination of his clients' franchise agreement.

In considering questions of leave to amend, it is necessary to consider the decision of the High Court in State of Queensland v. JL Holdings Pty Ltd (1996-1997) 189 CLR 146. There, the case was the subject of case management. The primary judge disallowed an amendment six months before trial. That decision was overturned. The Court took the view that a party should be permitted to raise an arguable defence provided any prejudice to other parties could be compensated by costs. It discussed at length the discretion to allow amendments. There is no rigid rule how that discretion ought to be exercised. It is a discretion.

At page 172, the Court noted that, in that case, the significant features were: the nature of the proceedings; the substantial interval before the hearing date; the significant time set aside for trial; the commercial interests at stake; and the means open to the judge by costs orders and the imposition of conditions to ensure substantial justice to all of the parties.

In my opinion, it would not be good enough for the defendant

to allege the fraudulent transfer and sale of stock and then say it could not particularise that which was transferred and sold. In the present case, the best it can do is to say: "a large portion of the stock referred to in the DCOS claims."

It is significant that the stock in question consisted of chocolate bars. The total value of the DCOS claims was less than $7,000, including the $4,686.75 credited in relation to 83937 completed and signed by Mr McNamara. On the other hand, any fraud, if proved, would be a matter for grave concern, and it would be a valid basis for notice to terminate.

The value of the franchises is not yet in evidence. They were for 15 years each, and I take it not to be in dispute that substantial capital sums are involved.

In all of the circumstances, I think the particulars of transferred stock in themselves are adequate. Whether the defendant can come up to proof is another matter not for present determination.

But that does not resolve the question whether the defendant should be given leave to amend. The application was made after the commencement of trial. It relates to an

allegation of fraud. It is fair comment that the defendant's case has been a shifting one. The plaintiffs ought not to be expected to respond to changing allegations of fraud in the course of a trial. They are entitled to know the case against them. To allow the amendment and to allow the trial to proceed would, in all of the circumstances, deny them that right.

The plaintiffs have evinced a desire to have their claim resolved. They made a successful application to have the proceedings set down for trial in the absence of a request for trial date signed by the defendant and they successfully resisted the defendant's application for an adjournment. That bears witness to their desire to have the matter resolved. They are small business people. Unresolved allegations of fraud in relation to those businesses can hardly be deemed to have a neutral impact on the businesses themselves.

In all of the circumstances, I do not think that an order for costs or an order for an adjournment and an order for costs would be adequate compensation to them. I consider that it would be to do an injustice to the plaintiffs to allow the amendments, and I refuse the application for leave to amend.

I turn now to the application with respect to the counterclaim. The proposed counterclaim is set out in paragraphs 13-15 of the document which is Exhibit "A" for identification:

"**COUNTERCLAIM -**

13. By way of counterclaim the defendant says:-

14. The defendant repeats and relies on the matters referred to in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the Statement of Claim, which are admitted in the Defence.

15. The defendant says that if the Notices of Termination are invalid or insufficient or defective, then the plaintiffs nevertheless have no entitlement to restrain the defendant from taking possession of the Morayfield premises and the Bray Park premises as:-

(a) the plaintiffs have no proprietary or other relevant interest in the premises;

(b) the plaintiffs have only contractual rights of which specific performance would not be granted;

(c) there is not appropriate negative covenant capable of supporting injunctive relief; and

(d) damages are an adequate remedy.

THE DEFENDANT CLAIMS:-

(a) A declaration that it is entitled, on giving 30 days notice, to possession of the store premises;
(b) Further and in the alternative, a declaration that, subject to the defendant having given 30 days notice of its intention so to do, the plaintiffs are not entitled to restrain the defendant from taking possession of the store premises."

Paragraph 14 refers to paragraphs 1-8 of the statement of claim, which are admitted in the defence. Those paragraphs

relate to: the making of the franchise agreements; their term; that they can be terminated on 72 hours' notice in certain events; that the plaintiffs commence to operate stores pursuant to the agreements in June 2000; that on 15 March 2002 the defendant purported to give notices to terminate pursuant to Article 25.

By paragraph 15 of the proposed counterclaim, the defendant asserts that if the notices to terminate were invalid, the plaintiffs nevertheless have no entitlement to restrain it from taking possession. In its prayer for relief, it claims a declaration that it is entitled to possession on 30 days' notice and a further or alternative declaration that subject to its giving 30 days' notice, the plaintiffs are not entitled to restrain it from taking possession.

Declaratory relief is a discretionary remedy. In Forster v. Jododex Australia Pty Ltd 1972, 127 CLR at 437-438, Gibbs J considered that certain rules should, in general, be satisfied before the discretion is exercised in favour of making of a declaration: a) that the question is real and not theoretical; b) that the person raising it has a real interest to raise, and; c) that he must be able to secure a proper contradictor. His Honour approved Scottish rules summarised by Lord Dunedin in Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Limited,

[1921] 2 AC, 438 at 448.

Here, the entitlement to terminate in the absence of a valid notice to terminate, or indeed of any other of the grounds justifying termination which are expressed in the agreements and in the Franchising Code of Conduct, is hypothetical. There has been no attempt to do so. Not even has there been the giving of 30 days' notice, the apparent need which is acknowledged in the prayer for relief.

Senior counsel for the defendant submitted that this question had always been in issue and he asked the Court to consider submissions placed before Justice Holmes, the transcript of argument before her Honour and outlines of submissions filed in the Court of Appeal. I do not consider it proper that I should consider that material. I have read her Honour's reasons for judgment, which canvassed matters of general principle including injunctive relief in respect of a licence, an injunction to restrain negative contractual stipulations in contracts of licence, and injunctions where specific performance would not be granted.

Whatever the scope of submissions of counsel for the defendant in the argument before her Honour, the issues for determination at trial are those defined by the pleadings.

The first version of the defence was filed after her Honour's decision and it was subsequently amended a few weeks later. Neither version raised this issue. The proceeding was actively prosecuted in the second half of last year and the first few weeks of this year. There were three interlocutory applications over that period. At no time did the defendant seek to amend the defence to raise this case or to raise a counterclaim. It is simply not correct to say that it has always been in issue between the parties.

Senior counsel for the defendant submitted that the proposed counterclaim was effectively in the same terms as the amendment of the defence which I had already allowed. However, in my view, it goes further. It seeks a positive declaration of entitlement to take possession. It seeks a declaration of entitlement to do so on the giving of 30 days' notice. It seeks a declaration that the plaintiffs are not entitled to restrain it from taking possession provided 30 days' notice is given.

There is no plea that 30 days, as opposed to some other period, would be reasonable notice. It is said that that is to be inferred from the reference to 30 days in the prayer for relief. I do not accept that. The proper place for such an allegation is in the body of the pleading.

What is reasonable is a question of fact in all the circumstances of a particular case. What would be reasonable at one point of time in the course of a 15-year contract may not be reasonable at some other time.

It was submitted that damages would be an adequate remedy. Again, the question is one to be considered in a particular factual context. The nature of the agreement, while very important, is not determinative. There is a difference between saying that under this agreement, damages would be an adequate remedy for termination in a particular case and saying that under this agreement damages would be an adequate remedy for termination in any case.

The matters sought to be raised by counterclaim have not always been in issue. It would be unfair to the plaintiffs to expect them to meet a different case now that the trial has begun. That is enough to cause me to refuse leave to file the counterclaim. Further, the counterclaim is based on a hypothetical dispute and not a real one, and for that reason ought not be allowed to be pressed. Finally, it contains insufficient factual allegations to support the prayer for relief. I dismiss the applications for leave to file a further defence and to file a counterclaim.

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