SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J [2004] QSC 093

No 3226 of 2004

SYNECTICO NOMINEES PTY LIMITED Applicant
ACN 103 503 199

and

HOTKEY INTERNET SERVICES PTY LIMITED Respondent
ACN 075 759 821

BRISBANE

..DATE 14/04/2004

ORDER

HIS HONOUR: This is an application for an interlocutory injunction to, in effect, restrain the respondent from interfering with the applicant's access to electronic systems used by the parties.

The respondent is a provider of internet services on a large scale throughout Australia. It is somewhat inaccurate to refer to it as a wholesaler of such services but it may in some respects be thought of that way. It provides as a franchisor certain intellectual property and rights and electronic services to frachisees throughout Australia to enable them to act as internet service providers to the public.

The dispute between the parties arises in relation to franchise agreements between them because the applicant is the franchisee under at least one such franchise agreement. The applicant at least was the franchisee under another agreement but there is a dispute between the parties as to whether that agreement has been terminated and if so, in relation to when it was terminated and on what basis. It is unnecessary to expand upon that aspect of the matter.

It is common ground between the parties that what they have called the Caboolture agreement is currently in force between them. Clause 1.1 of that agreement grants the franchisee the right to establish and operate what is called a "franchised operation" at what is called "the premises" and to identify the franchised operation with what is called "the marks" for the term of the agreement.

The marks are defined as the business name, logos and service marks and trademarks set out in the schedule to the agreement and any others which may become used in connection with the business.

The premises are defined as a specific address. The franchised operation is defined as the business specialising in the provision of "the services" and the sale of "the products" under the relevant business name and using the marks and industrial property owned by the franchisor.

The services in turn are defined as the internet service and some associated services and the products are defined as prepaid internet access cards and other related products.

The interesting aspect of that clause is that there is no territorial restriction on its operation. It is, however, made clear by clause 17.22 of the agreement that the franchisee must not canvass outside "the territory" for potential customers or operate the business outside the territory.

The territory is defined by reference to certain postcodes which I infer include the Caboolture area and do not include the Maroochydore area.

It is made clear by clause 1.3.1 that although the franchisee must not so canvass, it may provide the services and products to customers situated outside the territory. It is that proposition which is at the foundation of the applicant's case for the existence of an arguable case sufficient to support an interlocutory injunction.

The respondent has cut off the applicant's access to certain customers whose residences or places of business are in the Maroochydore area. Those customers are characterised by the respondent as being customers of the Maroochydore franchise.

The Maroochydore franchise is a reference to a second franchise agreement which, on the respondent's case is now terminated, the territorial area of which included Lismore, Maroochydore, Bundaberg and Maryborough. The respondent has prevented the applicant from having access to its facilities in relation to customers in the areas covered by that agreement.

It seems to me that the applicant has made out an arguable case that it is entitled under the clauses of the Caboolture agreement to which I have referred, to provide products and services to customers wheresoever situate. There is no suggestion that it has canvassed those customers. The mere fact that it also had franchise rights in relation to the areas where they lived at the time it acquired them (if it be the fact) does not, it seems to me, prevent their falling under the terms of the Caboolture agreement or more accurately, it is at least arguable that does not do so.

Mr Sheahan, on behalf of the respondent, submitted that when one read the two agreements together it became apparent that they made sense only if customers were territorially restricted and therefore that given the termination of the Maroochydore agreement, the Caboolture agreement should not be interpreted to include customers in respect of whom rights were formally granted under the terminated agreement. I do not think that that is correct but in any event it is certainly arguable that the contrary is the position.

Second, Mr Sheahan submitted that there had been a breach of clause 17.22 by the franchised operation outside the territory. That was achieved by, in his submission, the servicing of customers outside the territory, particularly the Maroochydore customers. However, when one has regard to the definition of business, it is apparent that the business was conducted at the place specified in the Caboolture agreement, not at the homes or business places of the customers within the meaning of the contract.

It is true that the specified place is in fact outside the territory but there is no doubt that given the explicit reference in the schedule to the place of business, the fact that it is outside the territory cannot constitute a breach of 17.22 and Mr Sheahan did not so submit.

Third, Mr Sheahan submitted that there had been a breach of clauses 17.2 and 17.3 by the conduct of the applicant in what Mr Sheahan described as transferring customers from one franchise to another. The franchise agreements do not seem to assign customers to one franchise or another, nor is there any evidence that anything amounting to such a transfer has taken place. What has happened is that perhaps a little belatedly it has been realised that there are over-lapping rights conferred by the two agreements. It does not seem to me that the exercise of those rights by the applicant constitutes any breach of 17.2 or 17.3 of the Caboolture agreement.

In any event, breach of such an agreement would at most confer upon the respondent a right to terminate the agreement. The respondent has not, in fact, terminated the agreement. It has not even purported to terminate the Caboolture agreement. It is doubtful whether it has a right to do so without compliance with clause 22.2 of the agreement which requires continuation of a breach for 14 days after service of a notice requiring the breach to be remedied. I see little prospect of that argument ever succeeding.

Fourth, it was submitted that damages are an adequate remedy. In my view they are not. The damage which would be suffered by the applicant in the absence of an injunction would be extremely difficult to calculate. It would be difficult to prove for example how many lost customers were attributable to the cutting off of the services provided by the respondent.

The applicant is heavily dependant on the respondent for the whole of its operation, for billing, for accounting and charging, for electronic access to assist in answering inquiries telephoned to its help desk and for various other operational matters described in the affidavit material.

In my view, damages would not provide an adequate remedy and consequently, if it is otherwise a case for an injunction, then an injunction should go.

Finally, the parties joined issue on the question of balance of convenience. Mr Marsh, in his affidavit, demonstrates the inconvenience which would flow from the withdrawal of the services provided to the applicant. There is the inertia factor in relation to customers which would lead them to not return if lost to the applicant. There are cash flow problems which would inevitably result from the applicant's inability to invoice its customers and its inability to charge their credit cards. There would be the loss of customer contact. There would also be a third party inconvenience to the customers themselves, since they would be unable to get their services from the person with whom they have made a contract and would likely go to other service provides, rather than to two parties squabbling with each other.

Mr Sheahan submitted that the respondent would be able to take over the billing functions and other matters such as the help desk. But that overlooks the point that the respondent does not have contracts with any of the customers and the customers would be perfectly entitled to throw any bill from the respondent into the bin. In my view, the balance of convenience strongly favours the grant of the interlocutory injunction.

There is a procedural difficulty in that the originating process sought only interlocutory relief. It was prepared in great haste the day before Easter - the Thursday before Easter - and it shows the signs of some lack of attention to detail. There is nothing, however, which is not curable by amendment and provided the appropriate amendments are made, I would be prepared to grant an interlocutory injunction. I am prepared to restrain matters for 24 hours to permit the appropriate amendments to be made. They have been substantially indicated to the respondent and apparently no point arises out of them.

The final question is whether, despite all of these matters, there ought to be a refusal of the injunction because on 8th April last week when the matter came before the Court ex parte for an interim injunction, the Court was mislead. On that occasion, the transcript records counsel for the applicant as having responded to a question from Justice Mackenzie, who heard the matter, "Have you given the material to the other side?" by saying, "It's been faxed down to them, I'm instructed, when it was finished over lunch time."

I have listened to the tape-recording of the submissions and it seems to me that the counsel's comment is correctly recorded. The true position seems to be that the solicitors for the applicant began to send the material, which was very extensive, to the respondent by fax at about 2.38 or perhaps

2.36 p.m. on 8th April. The process of sending continued over nearly two hours.

When the accumulated amount of the material reached 200 pages, an e-mail message was sent by the carrier to the respondent advising that a 50 page fax was received by the carrier for the respondent which could be opened in a particular way. That does not seem to me to bear out the assertion by Mr Siddle of behalf of the respondent that the material was received between 4.45 and 5.00 p.m. It seems to me that the probability is that it was sent at the times shown in Exhibit 2.

The statement made by counsel, therefore, which was made some time after 3.00 p.m. was inaccurate to some degree, that is, to the extent that the transmission was still happening. It was not of such gravity as to lead me to withhold the injunction which otherwise I would grant. In saying that, however, I would not want to let it be thought that the duty owed by legal practitioners and parties to the Court on an ex parte application, is one which can be taken lightly.

I have seriously considered withholding the injunction despite the strong case made for it because of the misleading of the Court. What was said by counsel was not completely accurate, and while I accept that it may have been the result of a misunderstanding between him and his instructing solicitor, nonetheless, the solicitor was present in Court and ought to have been paying attention. It is vitally important that nothing misleading be said to the Court on such occasions. If the Court is misled in this way, it can result in a completely worthwhile application otherwise being lost.

In the circumstances, as I have said, I am prepared to, in the exercise of my discretion, to grant the injunction, notwithstanding. For the present, I order:

1. That the order of Justice Mackenzie made on 8th April, 2004 be extended to 5 p.m. tomorrow.

2. That the applicant file and serve an amended application substantially in the terms read out into the record today by 1 p.m. tomorrow.

3. That the parties confer regarding further directions and bring in a draft set of directions when the matter is called on tomorrow.

4. That the further hearing of the application be adjourned to tomorrow, 15th April.

I intimate that at the time of that hearing - provided those directions have been complied with - it would be my intention to grant an interlocutory injunction substantially in the terms granted by Mr Justice Mackenzie. Unless otherwise persuaded by the parties, I would propose that the costs of this application be costs in the cause.

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