

# SUPREME COURT OF QUEENSLAND

CITATION: *Barbizon v Euro Automotive Group* [2008] QSC 92

PARTIES: **BARBIZON PTY LTD ACN 062 850 819 AS TRUSTEE  
FOR THE WILLIMS MOTOR TRUST**  
(applicant)

v

**EURO AUTOMOTIVE GROUP PTY LTD ACN 094 603  
068**  
(respondent)

FILE NO: BS 1951 of 2008

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 14 May 2008

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 9 May 2008

JUDGE: Wilson J

ORDER: **On the undertakings of the respondent:**

**(a) to keep an account of its servicing of Lamborghini motor vehicles in Queensland in competition with the applicant;**

**(b) to keep an account of the sale of Lamborghini motor parts in Queensland in competition with the applicant; and**

**(c) in the event that this matter proceeds to trial and the applicant is successful in obtaining a declaration that it is entitled to be the exclusive Lamborghini repairer for Queensland and the exclusive Lamborghini motor vehicle part vendor in Queensland, to pay the applicant the profit that it has made from the servicing and selling activities referred to at paragraphs (a) and (b) above, which activities occur from the date of this undertaking to and including the date of the said declaration;**

**this application is dismissed.**

**The costs of and incidental to this application are reserved.**

CATCHWORDS: EQUITY – EQUITABLE REMEDIES – INTERLOCUTORY INJUNCTIONS – Where applicant

franchisee from respondent for sale of Lamborghini motor vehicles in Queensland – Where applicant claims to have exclusive right to sell Lamborghinis in Queensland – Where applicant claims exclusive rights to service and supply parts for Lamborghinis in Queensland – Where respondent carries on business in servicing Lamborghinis - Whether applicant will suffer loss of goodwill if injunction not granted

#### ESTOPPEL – ESTOPPEL BY CONVENTION

COUNSEL: R Derrington SC and S Cooper for the applicant  
K Fleming QC and T P O'Brien for the respondent

SOLICITORS: Holding Redlich Lawyers for the applicant  
Shand Taylor Lawyers for the respondent

- [1] **Wilson J:** This is an application by Barbizon Pty Ltd for interlocutory injunction to restrain respondent Euro Automotive Group Pty Ltd from –
- (a) servicing or attempting to service or cause others to service Lamborghini motor vehicles in Queensland in competition with the applicant;
  - (b) selling or attempting to sell or causing others to sell parts for Lamborghini motor vehicles in Queensland in competition with the applicant.

The applicant and its director Mr Willims have proffered the usual undertaking as to damages.

- [2] The respondent is the Australian importer and “master franchisee dealer” for Lamborghini vehicles. The applicant asserts an exclusive dealership agreement between it and the respondent giving it the right to sell Lamborghini vehicles in Queensland. On 7 March 2008 the Chief Justice granted an interlocutory injunction:
- (a) restraining respondent from terminating the agreement between the parties concerning the sale of such vehicles in Queensland; and
  - (b) restraining the respondent from selling or attempting to sell such vehicles in Queensland in competition with the applicant.
- [3] The applicant contends that exclusive service right was an integral part of the exclusive dealership, and that it is only since the injunction granted by the Chief Justice that it has become aware that the respondent has sought to establish a servicing business in competition with it.
- [4] In his reasons for granting the earlier injunction the Chief Justice said he was satisfied there was an agreement between the parties and that it was sufficiently arguable that it conferred an exclusive dealership to warrant his going further. I did not understand either party to seek to revisit that question on the hearing before me. But there was clear dispute whether the exclusivity extended to the provision of servicing and parts.
- [5] The applicant contends that it was part of the agreement between the parties -

- (a) that the applicant would fit out and operate a service facility for Lamborghini motor vehicles in Queensland and the respondent would not operate a service facility for such vehicles in Queensland; and
  - (b) that where the applicant was required to undertake repair work covered by a warranty on a Lamborghini, the respondent would supply spare parts without charge and pay the applicant for the cost of the repair work.
- [6] The applicant relies on the following –
- (a) that during the course of the admitted relationship it was only the applicant which engaged in providing servicing for Lamborghinis in Queensland;
  - (b) that the respondent did not assert any entitlement to conduct a service centre in Queensland before the present dispute arose;
  - (c) that the provision of servicing, including providing warranty servicing, was conducted by the applicant with knowledge and involvement of the respondent;
  - (d) that the letter from the respondent to the applicant of 27 August 2003 demonstrates that it was part of the proposed dealership arrangements that the applicant was to construct a workshop;
  - (e) that the provision of servicing and parts is an integral part of a vehicle dealership;
  - (f) the importance to the brand name of the provision of timely and comprehensive servicing and supply of parts.
- [7] The respondent contends that even if the applicant is an authorised dealer, its rights do not extend to exclusive rights to service the vehicles and to provide parts. Those companies which are authorised dealers in other parts of Australia do not enjoy such rights. Mr Smith contradicts Mr Willims’ assertion that it is the industry norm for exclusivity to extend to servicing and spare parts where there is an exclusive dealership. There is no suggestion in any of the material before the Court that such exclusivity was ever considered by either of the parties until after the application before the Chief Justice (2 months ago).
- [8] In *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622 the High Court set out the 2 questions to be addressed on an application for an interlocutory injunction –
- “The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief: .. How strong the probability needs to be depends, no doubt, upon the nature of the rights he asserts and the practical consequences likely to flow from the order he seeks.”

The second question is that of the balance of convenience.

- [9] In so far as it is the applicant's case that as a matter of contract it has exclusive rights to servicing and the supply of parts, it is weak, and I am not persuaded that it is probable that, if the evidence remained as it is, the applicant would succeed at trial.
- [10] Apparently recognising this, senior counsel for the applicant invoked estoppel by convention. Parties may be bound by the "conventional basis" on which they have conducted their affairs – that is, one of them may be estopped from asserting the actual state of affairs: *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84; *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1938) 59 CLR 641. As Brandon LJ said in *Texas Bank* at 131-132, while a party cannot found a cause of action on estoppel, he may, because of an estoppel, succeed on a cause of action on which he would otherwise have failed.
- [11] Did they parties conduct their affairs on the basis that the applicant has exclusive rights to service and supply parts for Lamborghini vehicles in Queensland? While they conducted themselves on the basis that the applicant had a right to service and supply parts, the evidence that they did so on the basis that it had exclusive rights to do so is weak. I am not persuaded that if the evidence remained as it is, the applicant would succeed in setting up an estoppel by convention at trial.
- [12] Moreover, the balance of convenience does not favour the grant of an interlocutory injunction.
- [13] The applicant has submitted that unless the injunction is granted it will suffer loss of goodwill in two aspects – loss of goodwill attaching directly to its servicing and parts business, and loss of goodwill attaching to its sales business.
- [14] The applicant's business extends beyond Lamborghinis to other luxury cars. The turnover from servicing Lamborghinis has averaged \$100,000 pa over the last 3 years and the profit has averaged \$50,000 pa over the same period. The profit from the sale of parts has also averaged \$50,000 pa over the last 3 years. These amounts are modest, and damages would be an adequate remedy for any loss of profits. Further, I am not persuaded that if the interlocutory injunction were refused the applicant would suffer a significant loss of goodwill for which it could not be compensated in damages.
- [15] As for the loss of goodwill in the sales business, the applicant contends that present owners of Lamborghinis who have hitherto been going to it for servicing and parts are a source of potential sales in that they may wish to replace their vehicles with new Lamborghinis; and that if it loses their custom for servicing and parts, it may well lose them as potential purchasers, because they may purchase from interstate dealers to whom the respondent may refer them. On the evidence before me the extent to which there may be a loss of goodwill in the sales business is speculative.
- [16] The respondent submits that the applicant has been providing a poor quality of service with potentially adverse effect on the brand name and so on its business. I cannot resolve disputes as to the quality of service provided by the applicant on this application. The extent of any loss of goodwill in the respondent's distributor business if the injunction is granted is speculative.

- [17] The respondent has proffered undertakings
- (a) to keep an account of its servicing of Lamborghini motor vehicles in Queensland in competition with the applicant;
  - (b) to keep an account of the sale of Lamborghini motor parts in Queensland in competition with the applicant; and
  - (c) in the event that this matter proceeds to trial and the applicant is successful in obtaining a declaration that it is entitled to be the exclusive Lamborghini repairer for Queensland and the exclusive Lamborghini motor vehicle part vendor in Queensland, to pay the applicant the profit that it has made from the servicing and selling activities referred to at paragraphs (a) and (b) above, which activities occur from the date of this undertaking to and including the date of the said declaration.

In my view those undertakings are adequate to preserve the applicant's rights pending trial.

- [18] In all the circumstances, on these undertakings of the respondent, I dismiss the application.