Neutral Citation Number: [2009] IEHC 410

THE HIGH COURT

2009 4045 P

BETWEEN

TEJO VENTURES INTERNATIONAL LIMITED

PLAINTIFF

AND

MARTIN O'CALLAGHAN

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 31st day of July, 2009.

This is an application for an interlocutory injunction in which the plaintiff seeks to enforce, pending the trial of the action, the "non-compete" post termination provisions of a franchise agreement dated the 28th September, 2007 made between the plaintiff of the one part and the defendant of the other part (the Franchise Agreement). The business the subject of the franchise agreement is floor sanding of wooden floors, re-finishing of wooden floors with stains, wax, oils, polish, varnish, etc., and maintenance of re-finished wooden floors finish and retail supply of wooden floor maintenance products. Clause 19.2 of the Franchise Agreement provides for restrictions on the activity of the defendant franchisee following the termination of the franchise agreement otherwise than by virtue of the default of the plaintiff franchisor. There are two types of restriction. First, there is a restriction on the defendant engaging in, being employed by or being concerned or interested, directly or indirectly, in any business which, broadly speaking, competes with the franchise business or in any business similar to the franchise business. As regards this restraint, there are three distinct periods of restriction provided for in relation to three distinct geographical areas. There is a restriction for a period of six months in relation to the Republic of Ireland. There is a restriction for a period of twelve months in relation to the territory to which the Franchise Agreement relates, in this case, West Cork and Kerry, as defined on the plaintiff's territory definition map. There is a restriction for a period of nine months in relation to territory in which another franchisee of the plaintiff operates. The second type of restriction relates to soliciting. There is a twelve month restriction on soliciting customers who have been customers of the defendant at any time within the twelve month period prior to termination. There is also a restriction for twelve months on soliciting any employee of the plaintiff or of any of the plaintiff's franchisees, or any employee who in the period of six months before the termination was an employee of the defendant. In clause 19.3 the defendant expressly agreed that each of the foregoing restrictions was reasonable.

The Franchise Agreement terminated with effect from 27th February, 2009 by agreement. The plaintiff contends that following such termination the defendant established a rival business called "Munster Floor Sanding Services", of which he is sole trader, and which provides and sells wooden floor services and products similar or identical to the products of the plaintiff and has done so in contravention of the provisions of clause 19.2 of the Franchise Agreement.

The defendant contested the plaintiff's application for an interlocutory injunction on the following grounds:

(a) that the terms on which the franchise agreement was terminated effectively absolved him from the provisions of clause 19.2;

(b) that the restrictions contained in clause 19.2 constitute an unlawful restraint of trade at common law or, alternatively, are in contravention of the Competition Act 2002 (the Act of 2002) and, in particular, s. 4 thereof;

(c) alternatively, that the non-compete provisions, as distinct from the non-solicit provisions, are unlawful;

(d) that in an open letter of 23rd July, 2009 the defendant has agreed to abide by the non-solicit provisions for a period of twelve months in respect of all of Ireland; and

(e) that, in any event, the defendant has not "poached" any customer of the plaintiff and that by reason of the nature of the business, floor sanding, which at its most frequent requires to be repeated every two years, it is unlikely that the defendant would solicit a former customer and, accordingly, the restriction on soliciting customers is unreasonable.

Additionally, the defendant's position was that damages would be an adequate remedy for the plaintiff and that the balance of convenience lies against granting the injunction.

On the legal issues raised, counsel for the defendant relied on the decision of the Supreme Court delivered by O'Higgins C.J. in *Macken v. O'Reilly* [1979] ILRM 79, the decision of the High Court (Costello J.) in *John Orr Limited & Vescom B. V. v. John Orr* [1987] ILRM 702, and a decision of the Chancery Division of the High Court of Justice in Northern Ireland delivered by Girvan J. on 14th January, 2002 in *Vendo Plc. v. Adams*.

As I frequently reiterate on this type of application, as O'Higgins C.J. pointed out in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 (at p. 105), interlocutory relief is granted for the purpose of keeping matters *in statu quo* until the hearing of an action. I also frequently reiterate what Lord Diplock stated in *American Cyanamid v. Ethicon* [1975] 1 All ER 504 (at p. 510): that it is no part of the Court's function at the stage of considering whether an interlocutory injunction should be granted to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and

mature consideration.

The issues of law raised on behalf of the defendant are undoubtedly difficult. However, all the plaintiff has to establish at this juncture is that there is a fair issue to be tried that the defendant's activity is in contravention of clause 19.2.

As regards the passage from the judgment of Costello J. in the *John Orr Limited* case on which counsel for the defendant relied, accepting that it is a correct statement of the law, as I do, there is, in my view, a fair issue to be tried that the provisions of clause 19.2 are valid at common law and that the defendant is acting in contravention thereof. In the passage in question, Costello J. stated the common law position as follows:

> "The principles of law to be applied in the issue are not in controversy and can be briefly stated. All restraints of trade in the absence of special justifying circumstances are contrary to public policy and are therefore void. A restraint may be justified if it is reasonable in the interests of the contracting parties and in the interests of the public. The onus of showing that a restraint is reasonable between the parties rests on the person alleging that it is so. Greater freedom of contract is allowable in a covenant entered into between a seller and the buyer of a business than in the case of one entered into between an employer and an employee. A covenant against competition entered into by the seller of a business which is reasonably necessary to protect the business sold is valid and enforceable. A covenant by an employee not to compete may also be valid and enforceable if it is reasonably necessary to protect some proprietary interest of the covenantee such as may exist in a trade connection or trade secrets. The courts may in certain circumstances enforce a covenant in restraint of trade even though taken as a whole the covenant exceeds what is reasonable, by severance of the void parts from the valid parts."

I note from the judgment of Girvan J. in the *Vendo* case that, in that case, an interlocutory injunction had been refused. However, I would point out that the period of restraint in that case was eighteen months, which was ultimately held to be an unreasonable period of restraint.

As regards the defendant's contention that clause 19.2 contravenes s. 4 of the Act of 2002, it seems to me that it is certainly open to the plaintiff to argue in due course that the clause is not anti-competitive within the meaning of, or prohibited by, subs. (1) of s. 4, or, alternatively, that it is in compliance with a declaration for the time being in force under subs. (3) of s. 4 and, thus, is not prohibited by virtue of subs. (2) of s. 4, or that it meets the requirements of subs. (5) of s. 4.

In my view, in determining whether there is a fair issue to be tried, the most compelling argument was the argument made on behalf of the plaintiff that it would be a worthless exercise for a company or a businessman to grant a franchise, if the franchisee was entitled to terminate the franchise and immediately embark on business activity in competition with the franchisor. Having said that, the issue in every case is whether the restraint imposed by the franchisor is reasonable both as regards temporal limitation and geographical limitation.

Having regard to the nature of the plaintiff's complaint, that its business, goodwill and reputation is being damaged, I consider that damages would not be an adequate remedy for the plaintiff if an interlocutory injunction was not granted and it ultimately succeeded at the trial. I also consider that the balance of convenience lies in favour of granting the interlocutory injunction.

Accordingly, there will be orders in the terms sought by the plaintiff in paragraph 5 of the notice of motion. The plaintiff is not entitled to the declaratory relief set out at paragraphs 1 to 4 in the notice of motion.