

**THE HIGH COURT**

**[2012 No. 1389P]**

**BETWEEN**

**IRISH SCHOOL OF YOGA LIMITED**

**PLAINTIFF**

**AND**

**NICOLE HENKEL MURPHY**

**DEFENDANT**

**Judgment of Ms. Justice Laffoy delivered on 28th day of May, 2012.**

**1. The applications**

1.1 There are two applications before the Court in these proceedings, which were initiated by plenary summons which issued on 13th February, 2012.

1.2 The first in time is the application of the plaintiff for various forms of injunctive relief against the defendant, which was initiated by a notice of motion dated 13th February, 2012, which was returnable for 17th February, 2012. Because of various undertakings which the defendant has given through her solicitors, Kenny Stephenson Chapman, in correspondence and through her counsel at the hearing of the interlocutory application, and the manner in which the Court has indicated it will deal with the undertakings, in reality the interlocutory injunctive relief which the plaintiff now seeks and which is the subject of this judgment has been whittled down to one issue as to whether the plaintiff is entitled to a specific order against the defendant in terms which I will outline later on an interlocutory basis.

1.3 The proceedings arise out of a franchise agreement dated 28th March, 2008 (the Franchise Agreement) made between Marie Quail, the predecessor of the plaintiff, of the one part and the defendant of the other part. The "Business" which is the subject of the Franchise Agreement is therein defined as the franchise business of "Yttc's 1st Level Teacher Training Course". In essence, the business in respect of which the plaintiffs predecessor, as franchisor, granted the defendant, as franchisee, the right and licence to operate is the training of student customers to become Yoga Teachers to 1st Level in accordance with a course system developed and owned by the franchisor, using manuals, products and services provided by YTTC, and its "Proprietary Marks" defined as meaning trademarks, insignias and logos owned and used by YTTC, and trading under the name YTTC. "YTTC" is an abbreviation of "Yoga Therapy and Teaching Centre".

1.4 In order to understand the undertakings given by the defendant and the remaining relief claimed by the plaintiff on an interlocutory basis, the following provisions of the Franchise Agreement are pertinent:

(a) Clause 3, wherein the franchisor granted the defendant, as franchisee, the right and licence to operate the "Business" anywhere within Co. Cork and Munster or within a fifty mile radius of Co. Cork and Munster on the terms and conditions of the agreement.

(b) Clause 4, which provided that the Franchise Agreement should remain in force unless terminated by either party under the terms of the agreement, so that it was not for a fixed term.

(c) Clause 15.1, which provided that the franchisor might terminate the agreement forthwith by giving notice in writing to the franchisee, if the franchisee failed to comply with any obligations under the agreement and the failure, if capable of being remedied, remained unremedied for ten days after being called to the attention of the franchisee by written notice from the franchisor.

(d) Clause 16.1, which was headed "Consequences of Termination" and provided that, upon termination or expiration of the Franchise Agreement for any reason, the franchisee should, *inter alia*-

(i) immediately cease to operate "the Business",

(ii) not hold herself out as franchisee of the franchisor,

(iii) immediately cease to use the trademarks and suchlike of the franchisor, and

(iv) return to the franchisor or otherwise dispose of or destroy, as the franchisor should direct, all signs, advertising materials, records, data and suchlike concerning "the Business" or bearing its Proprietary Marks.

(e) Clause 8.2, which was in the following terms:

"The Franchisee shall not during the continuance of this agreement for whatever reason directly or indirectly carry on alone or in partnership or as agent or servant of any other person within a fifty mile radius of the Premises any business competitive with or similar to the Business."

(f) Clause 8.3, which was in the following terms:

"The Franchisee shall both during this agreement and after its termination keep confidential and not (except as authorised or required for the purposes of this agreement) use or disclose or attempt to disclose any confidential information."

1.5 Certain features of the Franchise Agreement, which have been pointed to by counsel for the defendant as being of significance for present purposes, are that -

(i) it did not contain an express provision whereby the franchisee could terminate the agreement on notice, although it contained a provision (Clause 15.2) which provides for automatic termination on the death or insolvency of the franchisee, which has no application on the facts of this case,

(ii) the "non-compete" provision in Clause 8.2 was expressed to apply "during the continuance of" the agreement, not post-termination, whereas the restriction on disclosure of confidential information was expressed to apply both during and after the termination of the agreement, and

(iii) while it contained a definitions clause (Clause 1), which defined various expressions used therein, it contained no definition of the term "Confidential Information".

1.6 At the hearing of these applications, counsel for the defendant confirmed that the defendant would give to the Court the following undertakings pending the hearing of the substantive action, namely:

(a) the undertakings proffered in a letter dated 1st February, 2012 from Kenny Stephenson Chapman to the plaintiffs solicitors, Fitzgibbon & Co., "on a strictly 'without prejudice basis' (and without any admission whatsoever of liability)" that is to say-

(i) that the defendant will not in any manner whatsoever represent or hold herself out as being, in any way, connected with the plaintiff or his business,

(ii) that the defendant will not make any use of any intellectual property rights being asserted by the plaintiff, and

(iii) that the defendant will not make any positive use of any data base or customer records which the plaintiff claims as his property;

(b) subject to the exception outlined later, an undertaking to deliver to the plaintiff all materials in the possession of the defendant in relation to the franchised business by dispatching the same to the plaintiff on that day; and

(c) to extend the undertaking in terms set out at (a)(iii) above to nineteen former students of the YTTC course, who had already been contacted by the defendant in October 2001, whom the defendant understood required further teaching sessions to achieve accreditation from the Yoga Alliance although they had completed their course, but only to the extent that the defendant will not personally make contact with any of the said persons in relation to providing services to them, and provided, however, that the defendant does not undertake not to provide services to a person in that category who may "turn up" unsolicited seeking such services.

As regards the exception to the undertaking referred to at para. (b) above, the defendant, because of her concern in relation to the implications of the provisions of the Data Protection Acts 1988 to 2003 if she were to give such an undertaking, was not prepared to give an undertaking to deliver the completed application forms of the students of the defendant, which it was contended contain personal data, to the plaintiff. However, it was made clear that the defendant would be prepared to deliver the material in question to the plaintiff under the protection of a Court order. I propose making an order to that effect, because I am satisfied that it was implicit in the application form that the information supplied by a student customer on the application form would be furnished to YTTC, in that the form required the applicant to be a member of YTTC and to enclose €45 in respect of membership.

1.7 It was acknowledged on behalf of the plaintiff that, provided the undertakings and the order outlined in the next preceding paragraph are in place pending the trial of the substantive proceedings, the only issue which remains is whether the plaintiff is entitled to an interlocutory injunction in the following terms:

"An injunction prohibiting the defendant its servants and/or agents from operating yoga teacher training courses in respect of students enrolled by the defendant during the operation of the Franchise Agreement when they were enrolled in the level 1 teacher training course as students of the 'YTTC' or 'Yoga Therapy and Training Centre' in (1) [the] 2010-2012 group and (2) [the] 2011-2013 group."

While that formulation is a slight variation of the wording in the notice of motion, as I understand the position, both sides agreed that the issue which the Court has to determine on the interlocutory application is whether an order in those terms should be granted.

1.8 The second application before the Court is the defendant's application on foot of a notice of motion dated 5th March, 2012 for an order pursuant to the provisions of Order 56A of the Rules of the Superior Courts 1986 (the Rules) adjourning the plaintiffs application for an interlocutory injunction and inviting the parties to use an ADR process, namely, mediation, to settle or determine the plaintiffs application for an interlocutory injunction and the entirety of the issues in dispute between the parties and, if necessary, inviting the parties to attend such information session on the use of mediation as the Court might specify.

## **2. The application for an interlocutory injunction**

2.1 The application for the interlocutory injunction has generated an enormous amount of documentation and has absorbed a lot of court time. Leaving aside the affidavits sworn by allies of the litigant on each side and by the solicitors on each side, the following affidavits are before the Court:

(a) the affidavit of Roy Griffin, a director of the plaintiff, which was sworn on 13th February, 2012 and which runs to forty paragraphs;

(b) a replying affidavit of the defendant, which was sworn on 24th February, 2012 and runs to forty nine paragraphs;

(c) a further affidavit of Mr. Griffin sworn on 6th March, 2012, which runs to forty paragraphs;

(d) a further affidavit of the defendant sworn on 29th March, 2012 which runs to fifty three paragraphs; and

(e) a final affidavit sworn by Mr. Griffin on 5th April, 2012 which runs to twenty one paragraphs.

As one would expect, those affidavits give rise to serious factual conflicts and, indeed, some highly controversial material, which the parties, on reflection, may consider should have been omitted. The factual conflicts cannot be resolved on this application. However, the factual matrix within which the remaining element of the injunctive relief originally sought falls to be determined, as set out at paragraph 1.7 above, is fairly compact.

2.2 Prior to October 2011, there was dissatisfaction on each side in relation to the implementation of their contractual relationship and there are allegations of wrongdoing on each side. Mr. Griffin, on behalf of the plaintiff, has averred that the defendant was in breach of her obligations under the Franchise Agreement. The defendant, on the other hand, has averred that the plaintiff was not fulfilling its obligations under the Franchise Agreement and was in serious breach of contract and intends to counterclaim in these proceedings against the plaintiff. No view can be formed on this application as to whether either side was in breach of the Franchise Agreement.

2.3 The course of events which led to these proceedings was as follows:

(a) The defendant by e-mail dated 20th October, 2011 to Mr. Griffin, informed him that she had no longer faith in his directorship of the YTTC. The purpose of the e-mail was to notify him that she was terminating the Franchise Agreement and would no longer be operating as a YTTC franchisee. She stated that, if Mr. Griffin wished to reply, he should contact a nominated solicitor, who is not the solicitor on record for the defendant in these proceedings.

(b) By letter dated 10th November, 2011, the plaintiffs solicitors wrote to the nominated solicitor. In that letter it was alleged that the defendant was in breach of the Franchise Agreement. It was stated that the plaintiff accepted that the defendant was no longer a franchisee in respect of the YTTC business for Cork and Munster. The plaintiff has alleged that the defendant's termination was in breach of the Franchise Agreement. On the other hand, the defendant complains that the letter of 10th November, 2011 does not indicate from what date acceptance of the termination took effect. For present purposes, what is of significance is that from the perspective of both parties the Franchise Agreement was at an end by 10th November, 2011.

(c) In the letter of 10th November, 2011 the plaintiff made certain demands in respect of the defendant's course which commenced in Autumn 2010 and also the defendant's course which commenced in Autumn 2011, the thrust of which was that the plaintiff intended taking over the remainder of those courses. There was demanded on behalf of the plaintiff that the defendant remit to the plaintiff a combination of franchise fees in respect of the students who had commenced in Autumn 2010 (which under the Franchise Agreement represented 10% of the fees paid to the franchisee), membership fees and the cost of extra training which those students would require. In the case of the students who enrolled in Autumn 2011, there was a request for details of the students, and remission of all the membership fees paid, and the deposits and instalments of course fees already paid by them. Whether the plaintiff was entitled to the sums demanded cannot be determined on this application. In any event, the defendant did not comply with the requests.

2.4 However, as appears from the evidence put before the Court by the defendant, on 15th October, 2011 she advised the students who had commenced the course in Autumn 2011 that she had "left the YTCC". On that occasion she refunded to them their membership deposits on the basis that there was no other option open to her having regard to the nature of the course being offered. There were eighteen students enrolled in that course. Later, the defendant averred that there were, in fact, twenty two students enrolled for that course, but four were repeat students in respect of whom no course fee was payable and there were four more students who were "pro bono" students, who were enrolled for free for "altruistic" reasons. Accordingly, only fourteen students had paid deposits of €600 each in respect of course fees. The membership deposits she collected in respect of that class amounted to €720 and she returned those deposits. However, the position appears to be that she has been in receipt of, whether by way of refund by her to them coupled with repayment to her by the students, of the deposits in respect of the course fees paid by the students and, presumably, the instalments of the fees which became due thereafter.

2.5 In relation to the class which enrolled in Autumn 2010 the position is somewhat different. Of the fifteen students in that class, eight of the fifteen students remained with the defendant and seven students transferred to the plaintiff.

2.6 Accordingly, the remaining relief sought by the plaintiff relates to the entitlement of the defendant to operate yoga teacher training courses for the eight students from the Autumn 2010 class, who remained with the defendant, and who are due to complete their course around now, and sixteen of the eighteen students in the Autumn 2011 class who remained with the defendant, two students in that class having left "for personal reasons". The plaintiff has acknowledged that on the acceptance by it of the termination of the Franchise Agreement, the defendant was at liberty to set up her own business, even in competition to the plaintiff. The plaintiff's case is that, in contravention of Clause 8.3 of the Franchise Agreement, the defendant retained confidential information, such as the student lists and used that information to "springboard" her new business.

2.7 The Court has been furnished with comprehensive legal submissions by counsel for the plaintiff and counsel for the defendant. As was pointed out by counsel for the defendant, the legal context of many of the authorities relied on by counsel for the plaintiff was an employer/employee contractual relationship. That was the case in the two most recent Irish cases relied on by the plaintiff: *Allied Irish Banks Plc & Ors. v. Diamond & Ors.* [2011] IEHC 505, in which Clarke J. explained the underlying rationale for the grant of a so-called "springboard" injunction; and the decision of Dunne J. in *Net Affinity Ltd. v. Conaghan & Anor.* [2011] IEHC 160. As regards a remedy in the form of an interlocutory injunction to restrain breach of a non-compete or a non-use of confidential information obligation in an agreement, in my view, it is apt to have regard to distinctions that undoubtedly exist between relationships based on contracts of employment and relationships which arise under franchise agreements. It is also true that in many of the authorities in which the relevant relationship was that created by a franchise agreement, the focus was on the enforceability of posttermination restraint of trade clause. As Mr. Griffin properly acknowledged on behalf of the plaintiff in this case, there is no post-termination non-compete obligation on the defendant under the Franchise Agreement.

2.8 In relation to the remaining injunctive relief which the plaintiff is now seeking against the defendant, the first question which arises, in applying the well established principles laid down by the Supreme Court in *Campus Oil v. Minister for Energy (No. 2)* [1983] 2 I.R. 88, is a very simple question. It is whether there is a fair issue to be tried that in operating the yoga teacher training courses for students enrolled by her during the operation of the Franchise Agreement in Autumn 2010 and Autumn 2011, the defendant is in breach of the terms of the Franchise Agreement.

2.9 There are certainly deficiencies in the Franchise Agreement from the perspective of both the franchisor and the franchisee. Clause 4 clearly envisages the franchisee having a right to terminate the Agreement, but that is not expressly provided for. The consequences of that deficiency are not material for present purposes, because the plaintiff accepted by the letter of 10th November, 2011 that termination had taken place. From the perspective of the plaintiff, as the successor of the franchisor, one would have expected to find a valid non-compete post-termination clause, but that is not provided for in Clause 8.2. Again, in my view, that deficiency is not material to the issue which arises here. The clause which is at issue here is Clause 8.3 and the restraint provided for in that clause applies both during and after the termination of the Franchise Agreement. I am satisfied that there is a fair issue to be tried that, by her conduct in using the information she had -

(a) as to the identity of the students who had commenced the course with her in Autumn 2010 and, who, as a matter of probability, would be continuing the course in the Autumn of 2011, and

(b) as to the identity of the customers who intended to become students and enrol for the course in Autumn 2011,

to procure customer students for the courses which she operated following the termination of the Franchise Agreement, she was acting in breach of Clause 8.3. There is a fair issue to be tried that, on a plain reading of Clause 8.3, the expression "Confidential Information" must cover information as to the identity of potential customers for the business the subject of the Franchise Agreement. As regards the identity of the potential customers for the 2011 course, the defendant withheld that information (allegedly in breach of Clause 16.1, on which point I think there is also a fair issue to be tried) from the defendant and used it for her own benefit.

2.10 The second question which arises on the basis of the application of the *Campus Oil* principles is whether damages would be an adequate remedy for the plaintiff in the event that the injunctive relief sought was refused but the plaintiff was successful on the issue of the breach of Clause 8.3 at the trial of the action. Counsel for the defendant made the point that, in reality, all that is at issue here is the loss to the plaintiff of franchise fees in relation to twenty four students. In my view, the fact that the capacity of the defendant to use the confidential information in relation to the students in question is finite because, as counsel for the defendant put it, the number of students involved is static, is not determinative. This is a case in which the plaintiff contends that, in consequence of the actions of the defendant, the goodwill, business and reputation of its franchise enterprise is being damaged and seeks damages for various forms of alleged wrongdoing, including passing off. While it was submitted that the plaintiff had offered no evidence to support the contention that any loss would accrue to the plaintiff other than the loss of franchise fees in respect of the students in question, in my view, having regard to the nature of the plaintiffs business the Court is entitled to draw certain inferences in determining whether the damages would be an adequate remedy. As Clarke J. observed in *Metro International S.A. v. Independent News and Media Plc* [2006] 1 ILRM 414 (at p. 424)-

"... the court can and should have regard to the question of whether the right sought to be enforced or protected by interlocutory injunction is one which is of a type which the court will normally protect by injunction even though it might, in one sense, be possible to value the extinguishment or diminution of that right in monetary terms."

If this were the substantive hearing of the action and if the plaintiff had established, on the balance of probabilities, a continuing breach of Clause 8.3, notwithstanding that the breach could only continue for approximately another year, nonetheless, in my view, the Court would grant a permanent injunction to restrain the breach. In the circumstances, I consider it appropriate to conclude that damages would not be an adequate remedy for the plaintiff, should an injunction be refused and the plaintiff be successful in the substantive action.

2.11 On the other hand, the plaintiff has given the usual undertaking as to damages on the basis of which the defendant will be entitled to obtain redress, if it transpires that the interlocutory injunction should not have been granted. While the defendant has taken issue with the ability of the plaintiff to meet a claim by the defendant on foot of the undertaking as to damages, if it transpires that the injunction should not have been granted, on the basis of the evidence put before the Court, including the plaintiffs abridged accounts for the year ended 31st December, 2010 and in the light of the likely quantum of the loss which the defendant would be able to prove, I am satisfied that the plaintiffs undertaking as to damages will provide adequate redress for the defendant, if the interlocutory injunction should not have been granted.

2.12 In submitting that the balance of convenience lies against the grant of an interlocutory injunction, it was submitted on behalf of the defendant that the Court should have regard to the impact of such an order on the students who are currently attending the courses run by the plaintiff, which are the subject of the application for an injunction. While the students in question may be adversely affected, the issues before the Court arise between the plaintiff franchisor and the defendant former franchisee. Whatever commitments the defendant has engaged in with third parties is not a factor to be taken into consideration. Moreover, even if it is true, the assertion on behalf of the defendant that an interlocutory injunction will put her out of business is not a factor to be taken into account. I would point out that at an early stage in these proceedings the plaintiff acknowledged that the defendant can set up a business in competition with it. The issue before the Court is whether the contractual rights which the plaintiff contends it has against the defendant should be protected at this juncture by interlocutory injunction. I am satisfied that, in accordance with well established principles, they should.

2.13 Accordingly, there will be an injunction until the hearing of the action in the terms set out in paragraph 1.7 above and also an order in the terms referred to at the end of para. 1.6 above. Further, the undertakings outlined in para. 1.6 proffered by the defendant will be noted in the order.

### **3. The defendant's motion**

3.1 Order 56A, rule 2(1) of the Rules of the Superior Courts 1986, as inserted by S.I. No. 502 of 2010, provides:

"The Court, on the application of any of the parties or of its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, order that the proceedings or any issue therein be adjourned for such time as the Court considers just and convenient and -

(i) invite the parties to use an ADR process to settle or determine the proceedings or issue, or

(ii) where the parties consent, refer the proceedings or issue to such process,

and may, for the purposes of such invitation or reference, invite the parties to attend such information session on the use of mediation, if any, as the Court may specify."

In rule 1, the expression "an ADR process" is defined as meaning mediation, conciliation or another dispute resolution process approved by the Court, but does not include arbitration.

3.2 The only sanction which the Court can impose for failure to accept such an invitation when given is to be found in rule 1B of Order 99 of the Rules, inserted by S.I. 502 of 2010, which provides that, in considering the awarding of costs of any action, the Court may, where it considers it just, have regard to the refusal or failure without good reason of a party to participate in any ADR process where an order has been made under Order 56A, rule 2.

3.3 I can understand why the plaintiff wished to continue with the interlocutory application in Court after the defendant's motion for an order pursuant to Order 56A was issued on 5th March, 2012. However, now that an interlocutory injunction has been granted, I think prudence dictates that the parties should process the remainder of their differences through an ADR process. What is at stake in these proceedings is totally disproportionate to the costs which will be incurred in pursuing a High Court action.

3.4 Accordingly, there will be an order under Order 56A inviting the parties to use an ADR process.