

L'ACROPOLE Ltd. vs GERBE D'OR Ltd. and anor.

1982 MR 153

SCR 169

Lallah, J.

The applicant company runs a bakery and a pastry factory. It is seeking an interlocutory injunction, pending a main action, preventing the two respondents from operating a pastry factory, which the respondents propose to do almost next door, on the ground that the activities of the two respondents would amount to unfair competition ("concurrence déloyale") which could not be adequately compensated by damages. The application is resisted.

The case for the applicant is that the second respondent, Laval Lee Fye, is a shareholder of the applicant company and, at the time of the application in September 1981, had been one of its employees over the previous five years. He had been given charge of its pastry making operations and had been in regular contact with the employees and customers of the applicant company. However, he resigned from his post in October 1981 but with effect from 31st January 1982 by reason of contractual requirements as to notice. In the course of his employment, Lee Fye had received contributions from the applicant company to finance his visits abroad for the purpose of familiarising himself with developments in pastry making equipment and techniques.

Now, the brunt of the applicant's complaint is that, in the context of this special relationship with the applicant company, Lee Fye did a number of unjustifiable things. He was, together with his brother-in-law, instrumental in having the second respondent company, La Gerbe d'Or Ltd., incorporated around April 1981 for the purpose of running a pastry making business, though not a bakery. He and his brother-in-law are the shareholders of La Gerbe d'Or and he is also its manager. La Gerbe d'Or has already applied to the Municipality of Port-Louis for a licence to instal pastry making machinery at the same postal address as the applicant company at No. 131, Pamplemousses Road. Lee Fye has caused four bags of flour to be removed from part of the premises rented by the applicant company at No. 131, Pamplemousses Road from one of Lee Fye's brothers (also a shareholder in the applicant company) so as to enable La Gerbe d'Or to occupy it. In addition, in his quality as proxy of his father, a director of the applicant company, Lee Fye has attempted to make an abuse of his position in order to get information about the transactions and operations of the applicant company.

The case for the respondents is, in its material aspects, entirely different. As regards his relationship with the applicant company, Lee Fye says that he has been permanently employed as Manager of a bakery known as Boulangerie La Concorde, but that, when the applicant company started business some five or six years ago, he gave it all assistance in view of his experience and subsequently took up part time employment with the applicant company in its pastry making operations. It is true that the applicant company made some contribution to the visits he was undertaking on his own account abroad but that contribution amounted to nothing like a training scholarship or something of a similar nature. In any event, he gave to the applicant company all information he had usefully gathered on its behalf. However, he decided to strike out on his own sometime last year with a view to improve his prospects. To this end, he set up a company together with his brother-in-law, obtained a development permit to run a pastry factory and applied to the Municipality for the necessary licence to instal machinery. He contends that the applicant cannot claim to have a monopoly in that part of town in respect of the products the respondent company

proposes to manufacture and that, with regard to himself, the granting of the application would amount to a restraint of trade.

As regards the premises occupied by the applicant company, Lee Fye maintains that what was previously designated as No. 131 are now three separate numbers to designate three separate premises, the first being owned by the applicant company, the second by his own father and the third by his brother Nelson who authorised him to remove the four bags of flour belonging to the applicant company to place them in the premises owned by the applicant company. Lee Fye also maintains that the applicant company's premises are separated from the premises in which the respondent company proposes to operate by the premises of Lee Fye's father.

Finally, concerning the alleged abuse of his powers as proxy of the father, Lee Fye maintains that he believed that he had a right of access to various documents which, in any case, were not given to him.

A number of difficulties lie in the way of the applicant company in this matter but, before they are examined, it is as well to note that it is not the case for the applicant, first, that no bakery or pastry factory would be entitled to operate in the same street or even next door and, secondly, that the respondents would not be entitled to run their pastry making operations elsewhere.

The first difficulty that faces the applicant company concerns the establishment of such a *prima facie* case as to justify the making of the order prayed for. The question which arises is what is the extent to which a person may legitimately conduct business or exercise his skills where this inevitably has adverse consequences on the affairs of a competitor? In other words, when is competition fair and when is it unfair? Our case law contains little on this subject apart from those cases involving patents or trade marks which are governed by specific enactments.

Some authors, in relation to French law, draw the distinction between "concurrency illicite" (where the incriminated acts causing loss to another are in breach of specific laws e.g. trading after hours permitted by law or using false weights or measures, acting in breach of a lawful monopoly) and "concurrency déloyale" (where the incriminated acts result in winning over the customers of another by means which may be either illegal, as in the case of "concurrency illicite", or else plainly tortious). The distinction is drawn on the ground that illegal competition does not presuppose bad faith whereas unfair competition essentially does, in order to generate liability under Article 1382 or 1383 of the Civil Code (vide e.g. Lalou, *Traité Pratique de la Responsabilité Civile*, 5th Edition, paragraphs 928 et seq., Planiol et Ripert - *Droit Civil* - Vol VI paragraphs 514, 590 and 591.)

The general rule appears to be that competition, unless regulated by law or precluded by a monopoly established by law, is free. So that every individual may freely exercise an economic activity of his choice, organise it freely and seek customers in competition with others even where this activity inevitably has adverse consequences on a competitor. Any damage caused thereby remains unproductive of any liability, the justification being the countervailing legality of free competition and the freedom of enterprise and of human endeavour. It is for this reason, no doubt, that throughout history, whether recent or not so recent, the trading, industrial, vocational or professional

community have tended so to organise and run their activities as to be largely in the same part of town or village, not only in their own interests but also for the sake of better availability to the community in general. For this reason as well, town and country planning authorities so organise the disposition of new habitats as to take those realities into account. No peanut vendor, cobbler, doctor, lawyer or other provider of services, therefore, could legitimately complain of the proximity of competitors, their only salvation lying in the provision of better services or in their ability, exercised by legitimate means, to obtain custom.

There have over the years been a number of decided cases in France illustrating this general rule. I will refer to one which best illustrates the point and which is a case decided by the Cour de Cassation (Ch Com) in 1973 and is reported in D. 73.6 (Benarouche v. Ouaknine). Benarouche had been found by the Cour d'appel of having indulged in unfair competition in that, having been an employee over many years in the hairdressing Saloon of Ouaknine, he opened a saloon of his own next door when he ought to have known that, in choosing to do so, he was bound to attract a large part of the custom of his former employer and that, to that end, he need only have to appear on the doorstep a few times whether deliberately or not. The Court de Cassation quashed the decision of the Court d'appel on the ground that - since the Court d'appel had found that (a) there was no law or regulation which prevented the opening of a hairdressing saloon next to another and (b) Benarouche was not subject to any obligation preventing him from competing with his former employer and since, additionally, there were no circumstances which made the competition "déloyale" - there was no legal foundation for the decision in terms of article 1382 or 1383 of the Civil Code.

As adumbrated in that decision, there are a number of limitations to freedom of competition and these are analysed in the note written by Professor Yves Serra, reproduced in D. 73.6, commenting the decision with particular reference to the application of the general rule in cases of competition exercised by a former employee vis-à-vis his former employer. For, in this situation, competition by the former employee could indeed take formidable proportions given the access he had to privileged information about the business of his former employer and the contacts he had established with his former employer's customers. The note usefully and correctly analyses these limitations in accordance with, not the traditional distinction between "compétition illicite" and "compétition déloyale", but a more concrete and practical threefold classification - i.e. whether the competition is, first, illegal or, secondly, anti-contractual or, thirdly, disloyal.

In the first situation, no particular difficulty arises since it is the law itself which renders the competition illegal and consequently tortious.

In the second situation, both doctrine and case law support the proposition that, as long as the employee is bound by his contract of employment, competition by him vis-à-vis his employer is anti-contractual. It is therefore tortious. In this situation, the competition is inherently in breach of the contract of employment. The rights of the employer prevail over the employee's freedom to compete - a freedom which he must be taken to have chosen to limit by entering into a contract of employment. However, a contrary solution suggests itself when the contract is terminated. The employee then recovers his entire freedom to compete. The former employee's right to work on his own account has primacy over the protection of the former employer's business, unless the employee is subject to a term in the contract of employment preventing him from engaging in a competing activity after the termination of

his contract. Two observations are here called for. In the first place, Professor Serra's note does not consider the extent to which the Courts might be willing to give effect to contractual terms restricting the former employee's future activities by reason of either the length of time or the geographical area over which the terms are designed to operate. Secondly, the note does not consider the situation (which appears to arise in the present application) where the contract does not relate to full time employment but to part time employment where the employee ought, in principle, to be free to exercise activities of his own outside the requirements of his contract of employment.

In the third situation, competition by a former employee, unless it is either illegal or anti-contractual, could not be properly sanctioned except to the extent that it is disloyal or unfair. What is of relevance in this third situation is that, unlike the case in the first two situations, the act of competition is itself lawful but the means of exercising the competition should not be unlawful. The employee is here free to compete but is under an obligation, like any other competitor, not to do so by unfair means.

The question what means are fair and what means are not inevitably depends on the facts of individual cases e.g. D. 1979 I.R. 248, a case of unfair competition constituted by a "détournement de clientèle" in circumstances where former employees sought employment with their previous employer precisely for the purpose of knowing the customers and systematically prospected that custom after the termination of their employment for the benefit of their own enterprise; D. 1979 I.R. 501, where the employment of former employees of an existing enterprise by a competitor was held not to be a "débauchage d'employés" and was not accompanied by any acts tending to confuse in the mind of the public the enterprise with that of the competitor; and D. 1979 I.R. 131, where competition was held to be disloyal in that a business was started by employees while their employment was still in force and were guilty of "débauchage" of a significant number of their colleagues. These are but a few examples picked out at random. The reports abound every year in a variety of examples, some illustrating good use of human endeavour and ingenuity while others illustrate abuses.

In the present application, it is disputed that Lee Fye has started operations in the new company, that his attempt to get certain information about the applicant's business was not the genuine exercise of a proxy's powers, that the premises belonging to Nelson are in fact rented to the applicant company and that the removal of four bags of flour from those premises by Lee Fye was done without authority. I find some difficulty in finding that the applicant company has such a prima facie case as would justify the making of the order prayed for. This, however, is not the only difficulty.

As between the exercise of Lee Fye's freedom to run a business in conjunction with another associate and the rights of the applicant company to be protected in its own business, it would seem to me that the former ought to prevail and that any unlawful damage that may eventually be caused thereby to the applicant company could best be compensated by damages, should the competition turn out to be unlawful when the respondents start operating.

Lastly, the applicant company contends that the premises in which the two respondents intend to run a competing business are in fact rented to it. If this is the case, the applicant company would appear to have a remedy under the Landlord and Tenant (Control) Ordinance, 1962 as a protected tenant. And if the remedy had been sought at the time that this application was made (September

1981) it could very well, with due diligence, have been obtained in good time. It is still not too late for the applicant company to seek such a remedy.

The application is set aside with costs. I certify as to counsel.

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In Chambers