1980 CarswellOnt 723, 28 O.R. (2d) 637

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Bitoff v. Fran Restaurants Ltd.

Re Bitoff and Fran Restaurants Ltd.

Ontario High Court of Justice

Callaghan, J.

Oral reasons: April 21, 1980

Counsel: *S. Smither*, for applicant.

D. Hager, for respondent.

Subject: Civil Practice and Procedure

Practice --- Institution of proceedings — Originating notice, summons or application — When appropriate

Originating notice inappropriate for determination of whether or not agreement restraining trade — Ont. R. 611, 612, 613.

Callaghan, J. **(orally):**

1 This is an application for an order declaring and determining the rights of the parties hereto under a certain memorandum of agreement dated January 20, 1960, between the applicant, Evelyne Bitoff, and the respondent, Fran Restaurants Limited.

2 The applicant owns premises described for municipal purposes as 11 St. Clair Ave. W. in the City of Toronto. The respondent owns the premises at 21 St. Clair Ave. W. in the said city and therein carries on a restaurant business.

3 The respondent initially leased the premises in the year 1949. The reason for choosing this particular location for a restaurant business was the steady flow of people passing the premises due to the close proximity of a public transportation facility and a major traffic intersection at the corner of St. Clair Ave. W. and Yonge St. in the said city, being the intersection immediately to the east of both premises.

4 In 1954 the applicant leased 11 St. Clair Ave. W. to a restaurant known as "King's Plate Restaurant". This restaurant discontinued operations in 1956 and thereupon the applicant re-leased the premises to a restaurant known as "Two Sisters Restaurant". The last-mentioned restaurant operated from July, 1956 to August, 1959, but discontinued business as a result of slow sales and the applicant again leased the premises to a restaurant operated as "Callas Restaurant Limited", which discontinued operations on January 31, 1960, again, as a result of slow sales and other economic considerations.

5 Although the three restaurants which operated at 11 St. Clair Ave. between 1954 and 1960 were unsuccessful, their presence during that period resulted in a loss of profit to the respondent herein. Since 11 St. Clair Ave. W. was closer than 21 St. Clair Ave. W. to the major intersection of Yonge and St. Clair the tenants of the applicant were able to attract customers who, the respondent alleges, would otherwise have patronized its restaurant.

6 As a result of negotiations the agreement dated January 20, 1960, was entered. That agreement provides as follows:

> 3. That the party of the first part [applicant] will lease the premises known as 11 St. Clair Avenue West to some other line of business other than a restaurant, such as a dry cleaning retail store, trust companies, bank, ladies' wear store, beauty parlour, novelty, drug, etc.. In other words to any other person or business who does not handle or sell food and will continue not to again rent the premises as a restaurant in the future.

7 In return for this covenant, the respondent paid the applicant the sum of $5,000. The Court is asked in these proceedings to determine the enforceability of this agreement and in particular to declare and determine what rights (if any) the applicant has to rent 11 St. Clair Ave. W. as a restaurant.

8 The applicant brings this motion pursuant to Rules 611 and 612 of the Rules of Practice. While those Rules permit the Court to make a determination as to the rights of parties arising on a construction of a deed, will or other instrument Rule 613 reserves to the Court the authority to give such directions as it thinks proper for the trial of any question arising upon the application.

9 In an earlier proceeding before this Court dated March 12, 1980, a preliminary objection was taken by the respondent to the manner in which this application was constituted. That objection was overruled. The respondent renewed the objection today, namely, that this application was not properly within Rules 611 and 612, on the ground that it cannot be said that the rights of the parties depend on undisputed facts. It is the applicant's position that the covenant is a covenant in restraint of trade and falls clearly within the common law prohibition against bare covenants not to compete: see *Vancouver Breweries Ltd. v. Vancouver Malt & Sake Brewing Co.*, [1934] A.C. 181, [1934] 1 W.W.R. 471, [1934] 2 D.L.R. 310 (P.C.), *per* Lord MacMillan.

10 While at first impression the above-mentioned clause to some extent falls within the prohibition set out above it is important, in my view, to recognize that the determination of the enforceability of such a covenant in restraint of trade (assuming the said covenant above-mentioned is in restraint of trade) raises questions which are not in the main questions of construction at all. While incidentally some matters of construction might arise for consider ation in

determining the enforceability, the questions raised are questions of law based on public policy depending to a large extent on the circumstances proved to exist at the time the covenant was entered.

11 In these circumstances, therefore, in my view, it is not proper to apply to the Court under Rules 611 and 612 for the determination of the enforceability of a covenant in restraint of trade: see *Connors Brothers Ltd. v. Connors* (1940), [1941] 3 W.W.R. 666, [1940] 4 All E.R. 79, [1941] 1 D.L.R. 81 (P.C.), *per* Viscount Maugham.

12 Accordingly, I am of the view that this application is improperly framed and that the same must be dismissed without prejudice to the right of the applicant to commence an action for a declaration for the determination of the rights of the parties under the said covenant which action can proceed by way of agreed statement of facts if the parties are so inclined.

13 I note for the record, however, that the respondent herein has continually taken the position throughout that this application was improperly constituted under the above-mentioned Rules and in that position I am in agreement with him.

14 Accordingly, the application will be dismissed with costs without prejudice, as I have said, to the right of the applicant to commence an action for declaration.

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