

THE HIGH COURT

1983 No. 2745P

BETWEEN:-

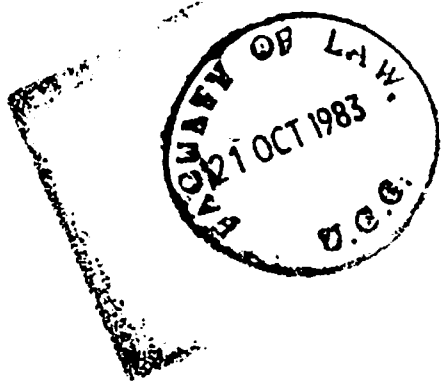
HEUBLEIN INC.
KENTUCKY FRIED CHICKEN (GREAT BRITAIN) LIMITED
KENTUCKY FRIED CHICKEN LIMITED AND
IRISHFRIED CHICKEN LIMITED

Plaintiffs

- and -

PATRICK GRACE

Defendant



Judgment delivered by O'Hanlon J. the 13th June, 1983.

In this case I have come to the conclusion that the Plaintiffs are entitled to the interlocutory relief sought by them, restraining the Defendant pending the hearing of the action from continuing to trade in a manner which involves the use by him of the style and title of "Kentucky Fried Chicken" or "Colonel Sanders" or other material in respect of which the Plaintiffs or some one or more of them are the holders of the relevant trade-mark.

The Defendant has for some years past been carrying on such trade in a number of outlets in Dublin and Limerick,

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pursuant to the terms of an agreement made between him and the Plaintiffs, dated the 14th February, 1975, with which were incorporated the terms and conditions of two other agreements which were to apply in the selection of sites for outlets and in the opening and operation of such outlets, and also in relation to the operation of four existing outlets which were at that time already being operated by the Plaintiffs.

The conditions which were incorporated into the 1975 Agreement concerning the operation by the Defendant of his existing trade outlets and any new ones which he might open, included conditions providing for the payment to the Licensor (Kentucky Fried Chicken Limited) of a monthly service charge of 4% of gross sales on all items sold on or from the Licensed Premises or £40 whichever should be the greater, such service charge to be paid on or before the 10th day of each month in respect of the previous month.

(Clause 2 (x)). It further provided in Clause 2(iv) and Clause 2(xvii) that the Licensee would not use any cooking

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materials other than those prescribed by the Licensor or sell or permit the selling of chickens prepared by any method or process other than as authorized under the said Licence.

Clause 3 then provided (inter alia) that the Agreement should cease and determine if the Licensee should fail to observe and perform all or any of the stipulations and agreements thereinbefore contained and should not comply with the said stipulations and agreements within twenty days of receiving written notice by the Licensor of such failure.

On the evidence disclosed in the affidavits it appears to me that the Defendant has been shown to have been in breach of the agreement to pay the monthly percentage on sales, and also of the agreement to use only cooking materials and methods approved of by the Licensor, and failed after due notice to remedy the breaches complained of. In these circumstances the Plaintiffs appear to me to have shown substantial grounds to justify their purported termination of their agreement with the Defendant, and with it his licence to continue trading as part of the "Kentucky Fried Chicken" network.

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The replying affidavit of the Defendant alleges a number of breaches of contract against the Plaintiffs, and also indicates his dissatisfaction with the cooking material and methods prescribed by them. If the Plaintiffs have been in breach of their agreement then this, if sufficiently serious, would entitle the Defendant to treat the agreement as having been repudiated by the Plaintiffs, and himself as discharged from further obligations to the Plaintiffs under the agreement. Alternatively, it could entitle him to regard the agreement as still subsisting, but with a further entitlement in his favour to claim damages against the Plaintiffs for breach of contract. In neither event, however, would the breaches he alleges against the Plaintiffs amount, in my opinion, to an answer to their claim that he has broken the terms of his agreement with them and given rise to a situation where they are entitled to terminate the agreement in accordance with its express provisions. Accordingly, I commence by concluding that the Plaintiffs have shown not merely a prima facie case in support of their present claim

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but what I regard as a coercive claim subject to any entitlement on the part of the Defendant to claim damages by way of counterclaim.

In these circumstances it may well be unnecessary for me to consider the issue of the balance of convenience in granting or refusing interlocutory relief, but as the matter has been fully argued by the parties I propose to do so.

It appears to me that the test of the balance of convenience clearly favours the Plaintiffs rather than the Defendant. If not granted interlocutory relief, they are faced with a situation where the Defendant can continue to trade pending the hearing of the action, while holding back from them the periodical payments which the agreement says they should receive. The Plaintiffs estimate the amount already due as being in the region of £250,000; the Defendant says the figure should be only a fraction of that amount. If the hearing of the action is delayed for a year or more, the Defendant's liability may well mount up to a figure which he would be unable to satisfy if the ultimate decision of the court went against him.

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In addition, the Plaintiffs claim - and in this respect they derive some support from averments in the Defendant's own affidavit - that it becomes very difficult, if not impossible, to open new outlets while other persons are already operating existing outlets in the same area, whether licensed or unlicensed, and that the existence of unlicensed outlets using the same trade name undermines the efficacy of the whole operation. Consequently, the Plaintiffs would be prevented from establishing the use of their franchise on a proper basis pending the hearing of the action and could suffer heavy financial loss in the process.

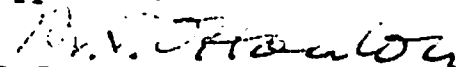
If interlocutory relief is granted against the Defendant, it would mean that in seven or eight food take-away centres which he operates at present in Dublin and Limerick, he would have to carry on his business pending the hearing of the action, without the benefit of the Plaintiffs' trade name and signs and publicity, but otherwise he would be free to carry on his business as before. As he has already expressed considerable dissatisfaction about the quality of

the product he is forced to market if complying with the strict terms of his agreement with the Plaintiffs, it is difficult for him to claim that he will be in a worse trading position if given a free hand as to the methods and materials he proposes to use in the preparation of the food which he sells

I do not think the danger of the Defendant being unable to recover his damages against the Plaintiffs is one of any substance having regard to the world-wide nature of the business carried on by the Plaintiffs. I have no similar evidence that the Defendant would be a good mark for damages if the Plaintiffs are denied interlocutory relief and are ultimately found to be entitled to substantial damages and moneys due as against the Defendant.

For these reasons I propose to grant an interlocutory injunction in the terms claimed at Paragraphs (a) and (b) of the Notice of Motion, to take effect from the 1st September, 1983, and to continue until the hearing of the action or until further order.

Approved.


R.J. O'Hanlon.
13th June, 1983.