

CANADA / JUDGMENT

## Cactus Restaurants Ltd. v. Morison

2009 BCSC 1905

COURT

Supreme Court of British Columbia

DECIDED

18 September 2009

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2009 BCSC 1905 Cactus Restaurants Ltd. v. Morison

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cactus Restaurants Ltd. v. Morison,

2009 BCSC 1905

Date: 20090918

Docket: S095312

Registry: Vancouver

Between:

Cactus Restaurants Ltd. and

Cactus World Holdings Ltd.

Plaintiffs

And

Scott Morison, Browns Social House Ltd. and

Browns Restaurant & Bard Ltd.

Defendants

Before: The Honourable Mr. Justice Kelleher

Oral Reasons for Judgment

Counsel for the Plaintiffs:

W.C. Kaplan, Q.C.

L. Cundari

Counsel for the Defendants:

L.J. Mackoff

F. Mohamed

Place and Date of Hearing:

Vancouver, B.C.

September 4, 2009

Place and Date of Judgment:

Vancouver, B.C.

## September 18, 2009

- [1] THE COURT: This is an application by the plaintiffs for an interlocutory injunction. The plaintiffs seek an order restraining the defendant Scott Morison from exercising rights he has arising from the sale of shares of the plaintiff Cactus Restaurants Ltd. ("Cactus") and the security provided in connection with that share transaction.
- [2] The defendant Morison and Richard Jaffray, who is president of the plaintiff companies, did business together for several years. They opened a restaurant called Cafe Cucamongas in 1986 and sold it in 1988. They then came up with the concept of Cactus Club Restaurants. Between 1988 and 2005 they opened Cactus Club Restaurants at some 12 locations in British Columbia and Alberta.
- [3] By 2003 differences between them began to surface. Mr. Morison began to develop ideas for his own restaurant chain. He deposed that his concept was a restaurant smaller than Cactus Club with less capital, an owner-operator structure, a smaller menu and a mid-century modern design.
- [4] There is a difference in the affidavits. Mr. Jaffray's evidence is that Mr. Morison was developing these plans in secret; Mr. Morison deposes that Mr. Jaffray was aware of his plans, that they discussed them and that there were discussions of Cactus being part of the ownership.
- [5] In March 2004, Mr. Morison resigned as an employee, officer and director of Cactus. The parties executed an employment termination agreement on March 18, 2004. Mr. Morison agreed to continue to perform normal duties until February 2005. The agreement permitted Mr. Morison to create a competing restaurant notwithstanding a non-competition covenant in the 1995 shareholders agreement to which he was a party. The employment termination agreement provides that Mr. Morison would not use any assets or property of Cactus other than the Cactus lease and franchise precedent. Mr. Jaffray deposes that he considers the interior design concept of Cactus to be an asset of Cactus.

- [6] In June 2004, Mr. Morison opened the first Browns Restaurant on Lonsdale in North Vancouver. Mr. Jaffray's evidence is that when he first saw this restaurant, he told Mr. Morison that it was a replication of the Cactus design concept. According to Mr. Jaffray, Mr. Morison agreed not to use a similar design in future restaurants and that he would modify the Browns' concept to distinguish it from Cactus Restaurants.
- [7] The parties eventually agreed that Mr. Morison would sell his shares in Cactus for \$4 million. Under the terms of the agreements, Mr. Jaffray was the purchaser of the shares. These shares were then assigned to a new entity, Cactus World Holdings Ltd. Cactus Restaurants Ltd. provided a guarantee in respect of security provided by Cactus World. The \$4 million was to be paid according to a schedule. The last payment of \$2 million was due on September 1, 2009. Payments under the share purchase agreement were made in a timely fashion until the last payment.
- [8] The security is contained in an agreement dated September 1, 2004. In default of payments of the purchase price of the shares by Cactus World, the agreement provides that Mr. Morison may exercise his security by once again becoming a shareholder of Cactus. He can then sell and transfer those reacquired shares to anyone he chooses.
- [9] In 2005, the parties entered into a final agreement, the Consulting Agreement, which brought their relationship to an end. A term of that agreement was that the design of Browns Restaurant would be distinct from that of Cactus.
- [10] In July 2009, the plaintiffs commenced this action. They allege breach of contract, misrepresentation, breach of fiduciary duty, passing off and trademark infringement. The plaintiffs' complaint in their action is that Mr. Morison has been duplicating Cactus restaurants with his design of Brown restaurants. In doing so, the plaintiffs say, Mr. Morison is in breach of his covenant in the consulting agreement that Brown Restaurants would be distinct from Cactus Restaurants. Their case is that the look of the Cactus Restaurants has been intentionally copied. The evidence, they say, establishes the tort of passing off.
- [11] In this application the plaintiffs seek an interlocutory injunction restraining or enjoining Mr. Jaffray until the trial of this matter from exercising any rights or remedies in respect of the security granted to him in connection with the Cactus Restaurant Ltd. shares.
- [12] The basis of the plaintiffs' application is this: the plaintiffs are seeking damages and disgorgement of profits based on their claims of passing off, breach of contract and misrepresentation. The plaintiffs' position is that under the share purchase agreement they are entitled to set those damages off against the obligation to make the \$2 million final payment for the shares. The plaintiffs argue that neither the share purchase agreement nor the share pledge agreement prohibits the plaintiffs from exercising set-off rights.
- [13] Under the terms of the latter agreement, in the event of default, Mr. Morison would be entitled to take possession of the shares. Mr. Jaffray deposes that there would be irreparable harm suffered if Mr. Morison took that action.

- [14] The application of the plaintiffs seeks to enjoin Mr. Morison from taking those steps. The plaintiffs are prepared to pay \$2 million as well as some amount for interest into court while their action is adjudicated. The plaintiffs argue that they would have claimed set-off as against amounts owed under the share purchase agreement and, after demand for payment by Mr. Morison, would have resisted demands for payment and resisted the exercise of any of his rights. The plaintiff has simply forecast the events by bringing procedures before the attempt by Mr. Morison to exercise security. The plaintiffs argue that it is clear that the plaintiffs have an entitlement to defend any action commenced by Mr. Morison in respect of the buy-out by way of equitable set-off. The injunction seeks to restrain Mr. Morison in the event he attempts to exercise his security where there is a claim of equitable set-off.
- [15] The plaintiffs propose to pay the amount into court that will substitute for the security in order to preserve the parties' rights. Additionally, the plaintiffs are providing the usual undertaking as to damages to ensure there is no potential harm to Mr. Morison if he succeeds at trial.
- [16] The defendants' position is that the evidence does not establish the essential elements of the tort of passing off. In *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120 at 132, 95 D.L.R. (4th) 385, the Court established the three-part test for passing off. This test can be summarized as follows:
- (a) Goodwill or reputation attached to the goods or services the plaintiff supplies in the mind of the purchasing public by associating with the identifying "get-up" such that it is recognized by the public as distinctive specifically of the plaintiff's goods or services.
  - (b) The plaintiff must demonstrate a misrepresentation whether intentional or not by the defendant that is likely to lead the public to believe that the goods and services offered by him are the goods and services of the plaintiff.
  - (c) He must demonstrate damage or the prospect of damage intended by the misrepresentation that the source of such goods and services are the same as the source of those offered by the plaintiff.
- [17] The defendants do not accept that any of these elements is present here. The defendants argue as well that equitable set-off may not be pleaded as a cause of action in the statement of claim.
- [18] In *Coolbreeze Ranch Ltd. v. Morgan Creek Tropicals Ltd.*, 2009 BCSC 151, [2009] B.C.J. No. 232, Pitfield J. summarized the concept of equitable set-off at para. 37. He said this:

Equitable set-off is a defence. It finds its base in the principle that a claimant should not be granted judgment on a claim against another where that other asserts a claim in response that is so related to the original claim that the cross claim can be said to go to the root of the claim. In such a case, the cross claims are regarded as components of a single transaction, such that judgment should not be granted on one of the components without concurrent disposition of the other. The set-off is regarded as equitable rather than legal because the validity of the cross claim

has not been confirmed or quantified, and in that sense, is an unliquidated claim.

- [19] The defendants argue that neither Browns nor Mr. Morison has brought an action for payment of the final \$2 million instalment. There will not necessarily be such an action. The defendants say that Mr. Morison has a number of options. If there is a default, he could elect to sue Cactus World as the primary obligor or Cactus Restaurants as the guarantor. He may also exercise his rights to re-register the pledged shares in his name. That remedy does not require an action to be commenced. As such, the plaintiffs would be unable to plead equitable set-off. Finally, the defendants argue, the plaintiffs' delay in proceeding disentitles them to injunctive relief.
- [20] In British Columbia, an applicant for an interlocutory injunction is required to show that there is a serious question to be tried and that the balance of convenience favours granting the injunction: *British Columbia (Attorney-General) v. Wale* (1986), 9 B.C.L.R. (2d) 333, [1987] 2 W.W.R. 331 (C.A.).
- [21] The first test has a low threshold. It is meant if the chambers judge is satisfied that the application is not vexatious or frivolous even if the judge is of the opinion that the plaintiff is unlikely to succeed at trial: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.
- [22] The defendant argues that the test is different for injunctions in respect of passing off. Counsel argues that the plaintiff must establish on a balance of probabilities that the tort has been made out.
- [23] I am of the view that the RJR-MacDonald test is applicable. Here the plaintiffs do not seek to restrain the passing off; they seek to restrain Mr. Morison from exercising his security.
- [24] I turn to the balance of convenience. I conclude that the balance of convenience squarely favours the defendants. An essential part of the balance of convenience test is that the plaintiffs demonstrate they would suffer irreparable harm if the injunction were not granted. This concept was described by Ballance J. in *Global Internet Management v. McLeod et al.*, 2003 BCSC 652, 121 A.C.W.S. (3d) 946. She said at para. 51:

In this phase of the assessment, the plaintiffs must demonstrate that without an injunction they will suffer irreparable harm. In the context of an interlocutory injunction in particular, this element requires the plaintiffs to show that the risk of injury without an injunction prior to trial cannot be adequately compensated by damages or other non-injunctive relief. Although the notion of irreparable harm is a familiar one in equity, it does not carry a precise definition.

[25] She went on to say at para. 52 that:

In *RJR-MacDonald*, *supra*, the Supreme Court of Canada described irreparable harm this way:

At this stage, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

[26] The Supreme Court of Canada said at 341 of *RJR-MacDonald*:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined....The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration....

[27] I conclude that there is no irreparable harm here. I say that for two reasons. First, if the injunction is not granted, the use of equitable set-off as a defence is denied to the plaintiffs. But as the defendants argue, there is no application by Mr. Morison to defend. There may well not be an application to defend. In the absence of an action brought by Mr. Morison, the notion of equitable set-off has no application.

[28] Put another way, if the application were granted, the effect would be to permit equitable set-off to be used as a claim, not a defence. To borrow from the language of the law of promissory estoppel, equitable set-off would then be a sword and not a shield.

[29] Second, the defendants are thriving enterprises. If, because of my decision, the plaintiffs choose to make the final payment for the shares, they may still proceed with their action for passing off, breach of contract, and misrepresentation. There is no suggestion that the defendants are impecunious. The evidence is to the opposite effect.

[30] I conclude that there is no irreparable harm as that term is used in *RJR-MacDonald*. The balance of convenience favours denying the injunction. There is, therefore, no reason to consider the submissions of the parties concerning unreasonable delay.

[31] The application for an interlocutory injunction is dismissed. Costs may be spoken to if counsel cannot agree.

[32] Are there any questions?

[33] MR. MACKOFF: No, My Lord. We will seek costs, but we'll adjourn that matter so that I can have discussions with my friend.

[34] THE COURT: Thank you. Is there anything further?

[35] MR. MACKOFF: No. Thank you.

[36] THE COURT: Thank you.

"Mr. Justice Kelleher"

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