

CANADA / JUDGMENT

Jirna v. Mister Donut of Canada

[1975] 1 SCR 2

COURT

Supreme Court of Canada

DECIDED

29 October 1973

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Jirna v. Mister Donut of Canada Collection Supreme Court Judgments Date 1973-10-29 Report

[1975] 1 SCR 2 Judges Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Laskin, Bora On appeal from Ontario Subjects Contract Decision Content Supreme Court of Canada Jirna v. Mister Donut of Canada, [1975] 1 S.C.R. 2 1973-10-29 Jirna Limited (Plaintiff) Appellant; and Mister Donut of Canada Ltd. (Defendant) Respondent. 1973: April 25, 26; 1973: October 29. Present: Martland, Judson, Ritchie, Spence and Laskin JJ. ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. Contracts—Franchise agreement—Whether relationship between franchisor and franchisee fiduciary—Duty of franchisor to disclose and account for hidden profit. APPEAL from a judgment of the Court of Appeal for Ontario[1]. Appeal dismissed. Fred M. Catzman, Q.C., and Marvin A. Catzman, for the appellant. G.D. Findlayson, Q.C., and Colin L. Campbell, for the respondent. The judgment of the Court was delivered by MARTLAND J.—The facts in this case are fully stated in the judgments in the Courts below. The appellant’s claim as against the respondent, as framed in its statement of claim, is, essentially, a claim based upon fraud, within the definition stated in Derry v. Peek[2]. Neither of the Courts below has found that there was liability on the part of the respondent under the principles stated in that case, and, although it was argued in this Court, I am not prepared to find that there was a cause of action based upon legal fraud. The learned trial judge found in favour of the appellant on the ground that the close association between the parties created what must be construed as a fiduciary relationship and that the actions of the respondent could best be described as “constructive fraud”, as defined in Nocton v. Lord Ashburton[3]. This finding was made, notwithstanding the fact that the parties had, themselves, defined their relationship, in the agreements made between them, as follows: The relationship between the parties is only that of independent contractors. No partnership, joint venture or relationship of principal and agent is intended. The Court of Appeal allowed the respondent’s appeal, holding that it must give full effect to the express intention of the terms of the agreement made between the parties on equal footing and at arm’s length. I am in agreement with the reasons and conclusions of the Court of Appeal and would only add that para. 7 of the agreements between the parties does not assist the appellant in its claim to recover secret profits, commissions or

rebates received by the respondent in respect of products which the appellant bought from firms approved by the respondent. That paragraph is, so far as relevant, in these terms: The Company shall sell to the Dealer and the Dealer shall buy from the Company, or from such sources as the Company may first approve in writing, any and all ingredients and commodities which may form any part or the whole of any end product of food or beverage made, sold, or consumed on the Dealer's Premises, including by way of illustration but not by limitation, doughnut flours, doughnut sugars, toppings, fillings, frostings, flavorings, shortenings, milk, cream, ice cream and other dairy products, coffee, tea, chocolate and other non-alcoholic beverages. ... It was not contended that the respondent used its position under this paragraph to make it impossible or even difficult for the appellant to carry on a profitable business. That would have raised other considerations which do not arise here because, on the evidence, the appellant's franchise has been profitable, albeit not as profitable as it expected. It is unnecessary to go into detail on the price comparisons, some favourable and some unfavourable to the appellant, relating to various products purchased from approved sources and also available elsewhere. There is no commitment under para. 7 to see that prices on individual products are similar or competitive; and the fact that the respondent, under largely pre-existing arrangements with suppliers, profited under this paragraph through the franchises to the appellant does not alone give rise to any enforceable claim in the appellant to recover the profit. I would dismiss the appeal with costs. Appeal dismissed with costs. Solicitors for the plaintiff, appellant: Catzman & Wahl, Toronto. Solicitors for the defendant, respondent: Gordon, Deyfetz, Hall & Baker, Toronto.

[1] [1972] 1 O.R. 251.

[2] (1889), 14 A.C. 337.

[3] [1914] A.C. 932.

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