

GUARANTEED PURE MILK CO. LIMITED v. PATRY

INJUNCTION — BREACH OF CONTRACTUAL OBLIGATION — AGREEMENT NOT TO SELL DAIRY PRODUCTS IN A SPECIFIED TERRITORY FOR A PERIOD OF TWELVE MONTHS AFTER TERMINATION OF EMPLOYMENT — SPECIFIC PERFORMANCE — DAMAGES — C.C.P. 957

Prohibitive clauses are frequently inserted in employment contracts by the employer as one of the terms of the engagement. Employers have long sought to establish what recourses shall lie as a result of a breach of this prohibitive clause; the answers given to this question by our courts have by no means been uniform or consistent. Will an injunction lie to restrain the breach or will the employer's sole recourse be an action for damages? This problem is illustrated in the recent judgement of the Court of Queen's Bench in *Guaranteed Pure Milk Co. Limited v. Patry*.¹

The facts of the case can be outlined briefly: the respondent was hired as a milk route salesman with a prohibitive clause included in his contract of engagement:

"L'employé consent en plus, pendant le terme de cet engagement ou pour douze mois après, à ne pas aider qui que ce soit à faire connaissance avec les clients de la compagnie, ne pas divulguer les noms et adresses des clients de la compagnie, ou travailler comme laitier ou vendeur à son propre compte, ou pour toute autre personne, firme, ou corporation faisant un commerce semblable à la compagnie dans le territoire exploité par lui durant sa période d'emploi avec la compagnie."

The respondent left the petitioner's employ and proceeded to deal in dairy products in the territory allotted to him in his contract, whereupon the petitioner asked for an injunction to restrain the respondent from the breach of the contract. The sole issue in the case was whether an injunction would lie or were damages the recourse in this situation. The court held that "an injunction will lie only if it is shown that the loss or injury complained of cannot be made good by pecuniary condemnation," and further, the breach of the contract could only result in an action for damages. Consequently the injunction was denied.

The writer respectfully submits that it is not unknown to our jurisprudence for an injunction to be allowed in these circumstances, and further, that it is the more appropriate remedy to restrain the breach. In 1899, an injunction was granted as the suit of a purchaser of a business to restrain the vendor from violating a stipulation in the agreement not to enter the same business again at anytime or help anyone to do so.² Again, in 1907 a similar injunction was granted, despite a condition in the prohibitive clause "that the sum of

¹[1957] Q.B. 54.

²*Cook v. Brisebois* (1899), 2 P.R. 162.

\$50.00 shall be paid as liquidated damages for each contravention".³ Clearly, the petitioner was not limited to an action in damages, even where the quantum was clearly ascertainable by the terms of the contract itself. This decision was followed in *Aird v. Birse*⁴ where a bread-route salesman violated a similar prohibitive clause in his employment contract. The court, in an obiter dictum, remarked that it "could conceive such cases where an injunction could be granted." The same opinion was upheld and reinforced by Mr. Justice Survever in *Montreal Dairy Co. v. Gagnon*.⁵

"Les tribunaux ont le devoir de faire respecter les conventions, et que le respect de la parole donnée diminuerait si les tribunaux réduisaient le recours de la partie lésée à une simple réclamation en dommages".

This line of jurisprudence granting an injunction to restrain the breach of a prohibitive clause was followed in *Mount Royal Dairies v. Russman*,⁶ a case similar in fact to the case presently under examination. The respondent was also hired as a milk route salesman and in his contract of engagement he agreed to the following terms:

"Employee expressly binds himself that he will not secure employment either as salesman agent or otherwise with any person, firm, or company, carrying on a trade similar in whole or in part and will not during said delay assist in introducing others to any of the customers of the company."⁷

The court granted an injunction to restrain a breach of this clause reasoning that the petitioner

"is suffering irreparable loss and injury because the customers who are being taken away by the respondent and transferred to his new employers, will, in the opinion of the Court, be lost to the petitioner company forever."⁸

Should not the same reasoning apply to the *Patry* Case? No doubt, this decision coupled with a similar recent decision in *Wolkman v. Roncarelli*⁹ will influence the decisions to be reached in litigations of a similar nature arising in the future. It is the writer's opinion that an injunction should lie in these circumstances: firstly, to avoid the apparent difficulty which will be encountered in assessing the quantum of damages suffered by the petitioner, if these damages can be properly assessed at all; and secondly, to assure that no breach of the covenant will occur throughout the whole period of the prohibition as determined by the contract entered into. "Where a person plainly

³*Davis v. Nadel* (1907), 8 P.R. 422.

⁴(1913), 14 P.R. 285.

⁵(1938), 38 R.L.n.s. 272 at 280.

⁶(1934), 72 S.C. 241.

⁷The terms of the prohibitive clause are observed to be nearly identical to those of the *Patry* case.

⁸The same line of thinking was applied in *Selnekovic v. Matursky* (1936), 39 P.R. 260 and *Nebesny v. Demitroff*, [1944] S.C. 413: "The court considers that in view of respondent's disregard of his obligation not to carry on the business of a pool room, the petitioner is justified in asking for an interlocutory injunction."

⁹[1955] P.R. 88.

violates his contract, an injunction should issue almost as a matter of course."¹⁰ Mr. Justice Forest reaffirms this view and considers the injunction as the only alternative for the court under these circumstances:

"En droit, lorsqu'une partie s'engage sciemment par écrit à ne pas faire une chose précise et déterminée et qu'elle ne respecte pas cet engagement, alors que l'autre contractant expose ses griefs aux tribunaux, la seule alternative pour la cour est de lui accorder un bref d'injonction, afin d'empêcher que cet acte se continue."¹¹

An injunction does not seek to restrain or interfere with the personal liberty of a respondent; he is merely told that he must respect his contract, and if he does, no harm comes to him. If he does not he acts at his peril: he violates his contract and must take the consequences.¹² In the interests of clarity and certainty, it is respectfully submitted that our courts should reaffirm this principle. As a consequence, an employee will be certain that he cannot commit a breach of a prohibitive clause to which he has agreed simply by paying damages, and the employer will be assured of his remedy in the event of such a breach.

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¹⁰Trenholme, J. Dissenting opinion in *La Société Anonyme v. Lombard*, (1906), 15 K.B. 267 at page 277.

¹¹*Selnekovic v. Matursky*. *Supra* Footnote 8.

¹²Mr. Justice Martin. Dissenting opinion in the celebrated case of *Lombard v. Varennes et Theatre National* (1922), 32 K.B. 164 to 170.

*Of the Board of Editors.