2013 ONSC 3097
Ontario Superior Court of Justice

2256598 Ontario Inc. v. World Bowl Entertainment Centre Inc.

2013 CarswellOnt 6933, 2013 ONSC 3097, 228 A.C.W.S. (3d) 1118

2256598 Ontario Inc., Applicant and World Bowl Entertainment Centre Inc. and Coco Banana Inc., Respondents

M.F. Brown J.

Heard: January 18, 2013
Judgment: May 27, 2013
Docket: Newmarket CV-12-110884-00

Counsel: David Shiller, for Applicant
Kevin MacDonald, for Respondent, World Bowl Entertainment Inc.
David Winer, for Respondent, Coco Banana Inc.

Subject: Civil Practice and Procedure; Property

Table of Authorities

Cases considered by *M.F. Brown J.*:

Canadian Medical Laboratories Ltd. v. Windsor Drug Store Inc. (1992), 99 D.L.R. (4th) 559, 1992 CarswellOnt 826 (Ont. Gen. Div.) — followed

Church & Dwight Ltd./Ltée v. Sifto Canada Inc. (1994), 20 O.R. (3d) 483, 22 C.C.L.T. (2d) 304, 17 B.L.R. (2d) 92, *(*sub nom. *Church & Dwight Ltd. v. Sifto Canada Inc.)* 58 C.P.R. (3d) 316, 1994 CarswellOnt 1033 (Ont. Gen. Div.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Toronto (City) v. Polai (1969), [1970] 1 O.R. 483, 8 D.L.R. (3d) 689, 1969 CarswellOnt 907 (Ont. C.A.) — referred to

UL Canada Inc. v. Procter & Gamble Inc. (1996), 1996 CarswellOnt 615, 65 C.P.R. (3d) 534 (Ont. Gen. Div.) — referred to

Van Wagner Communications Co., Canada v. Penex Metropolis Ltd. (2008), 2008 CarswellOnt 218 (Ont. S.C.J.) — referred to

William Ashley Ltd. v. Manufacturers Life Insurance Co. (1999), 28 R.P.R. (3d) 105, 1999 CarswellOnt 3445 (Ont. S.C.J.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 38 — referred to

R. 38.10(1)(b) — considered

R. 38.10(2) — considered

R. 40.03 — considered

APPLICATION for permanent injunction or, alternatively, interlocutory injunction against respondents.

***M.F. Brown J.*:**

Overview

1 The applicant 2256598 Ontario Inc. ("Round 2 KTV") brings an application seeking, among other things, a permanent injunction or in the alternative, an interlocutory injunction, against the respondents, World Bowl Entertainment Centre Inc. ("World Bowl") and Coco Banana Inc. ("CBI").

2 The application concerns the enforcement of contractual rights with respect to subleases granted by the sublandlord, World Bowl, to its two subtenants, Round 2 KTV and CBI. Round 2 KTV is seeking to enforce an exclusivity clause in the sublease which provides an exclusive right to operate a karaoke club at premises located at 9 East Wilmot Drive, Richmond Hill, Ontario (the "premises"). On or about April 2012, World Bowl entered into a sublease with CBI pursuant

to which CBI agreed to lease a unit in the premises for the purpose of operating a restaurant and karaoke. In or around May 2012, CBI began extensive renovations to the unit in preparation for its opening in 2013.

3 Round 2 KTV submits that CBI's permitted use of the premises as set out in its sublease with World Bowl is a clear breach of the exclusivity clause in Round 2 KTV's sublease with World Bowl. World Bowl and CBI submit that because CBI will not be operating a karaoke club but rather a restaurant with karaoke, its use does not conflict with Round 2 KTV's exclusivity use clause and there is no breach of the sublease on the part of World Bowl.

4 On December 14, 2012 I made an order for an interim injunction preventing CBI from opening for business in the premises until the hearing of the interlocutory motion on January 18, 2013. On January 18, 2013, I continued that interim order pending a decision of the court on this matter and the release of these reasons.

Permanent Injunction and Other Relief

5 Generally the breach of a negative comment will give rise to injunctive relief. Round 2 KTV seeks a permanent injunction and other relief on the basis that there was a breach of the exclusivity clause in the sublease. World Bowl contests the granting of a permanent injunction (or any remedy) for the following reasons:

> (a) Round 2 KTV's exclusive use clause does not prohibit karaoke in other premises as long as the other subtenant is not operating a club;
>
> (b) CBI is not operating a karaoke club, but rather, a restaurant with karaoke. Its use does not conflict with Round 2 KTV's exclusive use clause;
>
> (c) Round 2 KTV has committed various other serious breaches of the sublease and World Bowl has served a notice of termination.

6 Round 2 KTV takes a very different view as to the material facts, especially with respect to the issues regarding the alleged breaches of the sublease by Round 2 KTV. As well, there are credibility issues between the evidence of Ms. Chen who filed affidavit material on behalf of Round 2 KTV and the evidence of Ms. Mok who filed evidence on behalf of World Bowl.

7 Round 2 KTV submits that there are no material facts in dispute. I do not agree with that submission. There are significant facts in dispute regarding Round 2 KTV's performance under its lease with World Bowl. World Bowl is relying on certain disputed facts as a defence. World Bowl submits that Round 2 KTV should not be permitted to enforce a negative covenant in a sublease that Round 2 KTV is, itself, in breach of.

8 In my view, on the basis of the record before me on this application, there are sufficient material facts in dispute and issues of conflicting credibility that this is a matter that should proceed to trial as opposed to by way of application. Accordingly, pursuant to Rule 38.10(1)(b), I order that the whole application proceed to trial.

9 As well, pursuant to Rule 38.10(2), the proceeding shall hereafter be treated as an action, subject to the directions I shall give regarding this action later in my reasons.

Interlocutory Injunction

10 As this matter is now proceeding to trial, I will consider the issue of the Round 2 KTV's alternative request regarding an interlocutory injunction.

11 In the case of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), the Supreme Court of Canada set out the test for granting an interlocutory injunction as follows:

(a) Is there a serious to be tried?

(b) Will the applicant suffer irreparable harm if the injunction is not granted?

(c) Does the balance of convenience favour the applicant?

12 I will deal with each part of the three part test individually.

(a) Is There a Serious Issue to be Tried?

13 On a motion for an interlocutory injunction, the Court is not to undertake a prolonged or detailed examination of the merits when determining if there is a serious issue to be tried. The threshold is low. The judge must make a preliminary assessment of the merits and need only satisfy himself or herself that the issues raised are not frivolous or vexatious.

14 In this case, Round 2 KTV alleges that in violation of its negative covenant with World Bowl, World Bowl has leased a unit to CBI, in part for karaoke usage, which is in breach of its exclusive use covenant to operate a karaoke club. World Bowl submits it is not in breach of the exclusivity clause. World Bowl submits that Round 2 KTV is interpreting the sublease as meaning one can't have any karaoke performances anywhere in the premises. If that were the case, submits World Bowl, the wording in the exclusivity clause would have been very different.

15 On the basis of the evidentiary record before me and at this early stage of the proceedings, I am satisfied that 2 KTV's case is not frivolous and vexatious and raises a serious issue to be tried. I am also satisfied that Round 2 KTV has established a *prima facie* case on the merits.

16 That being said, with the advantage of a full review of the facts and the law in this matter and on the basis of a fully complete evidentiary record, a trial judge might well conclude at trial that there has been no breach of the negative covenant. However, at this stage of the proceedings, based on my preliminary assessment of the merits of the case, I am satisfied that there is a serious issue to be tried and a *prima facie* case has been made out.

(b) Irreparable Harm

17 In my view, in the case of an interlocutory injunction to restrain a breach of a negative covenant, irreparable harm and the balance of convenience still need to be considered. The extent of the consideration, however, will be directly influenced by the strength of a moving party's case. Even where there is a clear breach of a negative covenant, the issues of irreparable harm and balance of convenience cannot be ignored. They may, however, become less of a factor in reaching the final determination of the issue depending on the strength of the moving part's case: *Van Wagner Communications Co., Canada v. Penex Metropolis Ltd.*, 2008 CarswellOnt 218 (Ont. S.C.J.) at para. 39.

18 The moving party has the onus of establishing on the evidence that it will suffer actual harm which is not compensable in damages. The law is clear that the applicant must lead evidence of irreparable harm which is not founded upon mere speculation.

19 Round 2 KTV has put forth evidence that if CBI is allowed to have karaoke on the premises, it will be irreparably harmed because it will lose customers, will lose substantial business and may even be put out of business. Round 2 KTV submits that it has an existing karaoke clientele and its customers will see CBI's establishment featuring karaoke when they come to Round 2 KTV and CBI's newer, larger premises will be attractive to these customers. Round 2 KTV argues that this is the exact type of irreparable harm an injunction is designed to prevent.

20 On the other hand, World Bowl submits that Round 2 KTV's claims for damages are based on pure speculation. It submits that damages for lost sales are usually quantifiable. Moreover, World Bowl submits that Round 2 KTV will not provide what, if any, lost sales that will incur.

21 In Ontario, there are numerous cases that have concluded that lost sales or lost market share can be measured with the availability of sales history, sales projections and sophisticated accounting: *UL Canada Inc. v. Procter & Gamble Inc.* (1996), 65 C.P.R. (3d) 534 (Ont. Gen. Div.).

22 However, loss of actual and potential customers is recognized as irreparable harm not compensable in damages. It is also clear that actual and potential loss of goodwill and diminution of a plaintiff's reputation also constitutes irreparable harm: *Church & Dwight Ltd./Ltée v. Sifto Canada Inc.*, [1994] O.J. No. 2139 (Ont. Gen. Div.).

23 At this stage in dealing with the issue of irreparable harm, 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. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or which cannot be cured. Examples of the former include instances where one party will be put out of business by the court's decision or where one party will suffer permanent market loss or irrevocable damage to its business reputation: *RJR-MacDonald*, *supra*, at para. 64.

24 While I agree with World Bowl that lost sales are damages that can be determined at trial, the damages that Round 2 KTV may suffer as a result of World Bowl's actions go beyond lost sales. The undermining of Round 2 KTV's exclusivity clause threatens Round 2 KTV's continued existence as a going concern. In my view, such harm is irreparable.

25 Accordingly, it is my view that Round 2 KTV has established that it will suffer irreparable harm in the sense that an award of damages would not be an adequate remedy.

(c) Balance of Convenience

26 The third part of the test for an interlocutory injunction requires a court to consider on the particular facts of the case, which party will suffer the greater harm from the granting or refusal of the injunction sought pending determination of the merits. The Court must weigh the consequences which will flow to each party should the injunction be granted or refused and come to a conclusion as to where the balance of convenience lies.

27 World Bowl and CBI argue that the balance of convenience favours them. They say they will suffer greater harm than if an injunction is granted, as their contractual rights will be substantially impacted. In contrast, so they argue, Round 2 KTV's damages can be easily quantified. On the other hand, Round 2 KTV submits that the balance of convenience favours it. To begin with, it argues, Round 2 KTV is open and operating and CBI is not. As well, World Bowl entered into its contractual relationship with CBI fully aware of its other contractual obligations with Round 2 KTV.

28 Injunctions are most often issued to preserve the status quo between the parties until trial. In this case, I must ask: Which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits?

29 In my view, Round 2 KTV will suffer the greater harm if I refuse the interlocutory injunction because there is a real risk that it may be put out of business. The balance of convenience favours Round 2 KTV and maintaining the status quo. Any harm to World Bowl or CBI can be ameliorated by limiting the injunctive relief to karaoke and permitting CBI to open and carry on the restaurant

portion of the business. As well, in order to lessen any harm to World Bowl and CBI, I intend to order that the trial of this action proceed with dispatch. In addition, Round 2 KTV will be required to provide an undertaking in damages to both World Bowl and CBI.

Additional Issues

(a) Clean Hands

30 World Bowl argues that Round 2 KTV has committed numerous breaches of its sublease and that it should not be granted the equitable remedy of injunctive relief when it does not itself have "clean hands". It may well be that Round 2 KTV has not been a very good tenant. Indeed the transgressions listed by World Bowl, if proven, may well justify World Bowl in terminating the sublease of Round 2 KTV. However, that issue is not for me to determine. The allegations of misconduct on the part of Round 2 KTV have relevance only in so far as they relate to the issues on this application for injunctive relief.

31 The misconduct alleged against Round 2 KTV invoking the equitable maxim of "clean hands" must relate directly to the very transaction concerning which the complaint is made and not merely to the general morals or conduct of the person seeking relief: *Toronto (City) v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.) at p. 699-700.

32 As well, injunctive relief will not be denied because the plaintiff is in breach of a contact it seeks to enforce unless the effect of the breach is so serious that it discharges the defendant from further performance of the contract: Robert J. Sharpe, *Injunctions and Specific Performance*, Canada Law Book 2012 Looseleaf Edition, para. 10.580 - 10.600.

33 In my view on the state of the record before me which has disputed facts and raises issues of conflicting evidence and credibility, I am unable to conclude that the allegations in question are sufficient to deny Round 2 KTV the equitable relief it seeks.

34 As I mentioned previously, with the advantage of a full review of the facts and the law in this matter and on the basis of a fully complete evidentiary record a trial judge might well conclude that the misconduct of Round 2 KTV is such that it precludes it from enforcing the negative covenant of the sublease. However, given the conflicting evidence on the record before me, I am unable to do that at this stage.

(b) Privity of Contract

35 CBI submits that because it is not a party to the sublease between Round 2 KTV and World Bowl, Round 2 KTV cannot obtain injunctive relief against CBI. CBI relies upon *William Ashley Ltd. v. Manufacturers Life Insurance Co.*, 1999 CarswellOnt 3445 (Ont. S.C.J.) for this submission.

36 In my view, the reasoning of Justice Granger in *Canadian Medical Laboratories Ltd. v. Windsor Drug Store Inc.* (1992), 99 D.L.R. (4th) 559 (Ont. Gen. Div.) is more apt on the facts of this case. In *Canadian Medical Laboratories*, Justice Granger ordered an injunction against a party who was not privy to the contract between two other parties in order to ensure the injunctive relief that was ordered was not rendered meaningless. That, in my view, is the situation in this case. There is nothing in the materials filed to suggest that CBI was an innocent third party. Even if it was, a non-signatory to a lease can still be enjoined in circumstances where a continuation of their activities would amount to a breach of the negative covenant entered into between Round 2 KTV and World Bowl. As well, the requirement that Round 2 KTV will enter into an undertaking in damages to both World Bowl and CBI will serve to provide some protection to CBI from financial harm of being subject to the interlocutory injunction.

(c) Undertaking as to Damages

37 It is well established that as a condition of obtaining an interlocutory injunction, the plaintiff must give an undertaking to pay to the defendant any damages that the defendant sustains by reason of the injunction, should the plaintiff fail in the ultimate result. The rationale for the undertaking is to protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been determined. In the event the defendant succeeds at trial, the interlocutory injunction will have prevented the defendant from acting in accordance with his or her legal rights. The undertaking in damages shifts all or part of that risk to the party who is asking for a pre-trial remedy, the plaintiff: Sharpe, *Injunctions and Specific Performance*, *supra*, para. 2.470.

38 In a motion for an interlocutory injunction, Rule 40.03 requires that the moving party shall, unless the court orders otherwise, provide an undertaking to pay for any damages occasioned by the respondent should it turn out that the injunction was improperly granted.

39 In this case, Round 2 KTV has not given such an undertaking in damages but I was advised by counsel at the hearing that Round 2 KTV would be prepared to give such an undertaking.

40 On the basis of the material filed before me and the submissions of counsel, I see no reason why this order should not be made.

41 Accordingly, pursuant to Rule 40.03, an order will go that Round 2 KTV provide an undertaking in writing to both World Bowl and CBI to abide by any order concerning damages that the court may make if it ultimately appears that the granting of this order has caused damage to World Bowl or CBI or both for which Round 2 KTV ought to compensate World Bowl or CBI or both.

Conclusion

42 In conclusion, Round 2 KTV has established that there is a serious issue to be tried and that a *prima face* case has been made out, that it would suffer irreparable harm without the order and that the balance of convenience favours it and not World Bowl or CBI.

43 Accordingly, an order will go granting an interlocutory injunction until trial.

44 The terms of the order are as follows:

(i) my interim order of January 18, 2013 extending my order of December 14, 2012 is vacated;

(ii) an order will issue requiring World Bowl to ensure that until trial, CBI or any other party refrains from providing karaoke services or permitting karaoke performances at the premises leased to CBI at 9 East Wilmot Drive, Richmond Hill;

(iii) an order will issue restraining CBI, until trial, from providing karaoke services or permitting karaoke performances at the premises leased to CBI at 9 East Wilmot Drive, Richmond Hill;

(iv) Round 2 KTV will provide an undertaking in damages to World Bowl and CBI in written form following the terms of Rule 40.03 as set out in paragraph 41 of these reasons. Such undertaking will be served on World Bowl and CBI and filed with the court within 7 days of today's date;

(v) Pursuant to Rule 38, the proceeding hereafter shall be treated as an action and the whole application shall proceed to trial to be heard in the November 2013 civil trial sittings in Newmarket or such other courthouse in the Central East Region that the Regional Senior Justice directs. The parties are to attempt to agree on the necessary procedural steps to ensure the date for trial can be met. If they cannot agree, they may seek further directions from me;

(vi) Costs of the motion are reserved to the trial judge.

Application granted.