1 of 1 DOCUMENT: Australian Law Reports/Judgments/128 ALR/NOVAMAZE PTY LTD and OTHERS v CUT PRICE DELI PTY LTD and OTHERS - 128 ALR 540 - 6 February 1995

11 pages

NOVAMAZE PTY LTD and OTHERS v CUT PRICE DELI PTY LTD and OTHERS - (1995) 128 ALR 540

FEDERAL COURT OF AUSTRALIA -- GENERAL DIVISION
Drummond J

3, 6 February 1995
-- Brisbane

Contract -- Delicatessen franchise agreement -- Clause in agreement permitting franchisor to enter premises and operate business in certain defined circumstances -- Whether such clause is against public policy and therefore void and unenforceable -- Clause operating as an ouster of court's jurisdiction -- Interlocutory injunction granted.

A deed of franchise was entered into between the first applicant and first respondent in October 1992. Pursuant to the deed the first applicant became the franchisee and operator of a Cut Price Deli shop. The franchise agreement required the franchisee, inter alia, to pay a monthly franchise fee to the franchisor.

In October 1994 the applicants filed a statement of claim claiming relief against the respondents in respect of alleged misrepresentations said to have infringed s 52 of the Trade Practices Act 1974 (Cth). The principal allegation was that the respondents had misrepresented the profitability of the shop.

Subsequent to the commencement of this action, the franchisees stopped paying the monthly franchise fee to the first respondent. They did continue to meet all their other obligations under the deed and their lease. The franchisees informed the first respondent, through their solicitors, that as their claim for damages far exceeded the unpaid franchise royalties, they had an equitable set-off. They informed the first respondent that they intended to suspend the making of any further payments of royalties pending the final determination of their claim for damages.

The first respondent responded by advising the franchisees that it intended to exercise its rights under cl 13 of the deed of franchise during a four week period commencing 6 February 1995. Clause 13 relevantly provided that upon the happening of certain specified events the franchisor had the right ``for such period as the franchisor shall in its absolute discretion determine'', to enter upon the franchised premises and operate the business. The first respondent's stated reason for doing this was so that it could get better discovery from the applicants than it would otherwise be able to get in the litigation on foot between the applicants and the respondents. It wanted to get the best evidence possible as to the actual earning capacity of the business.

The applicants filed a motion seeking, inter alia, an interlocutory injunction to restrain the first respondent, until the trial of the applicants' action, from entering into possession of the applicants' business and from entering upon the premises.

At the hearing of the motion, the first respondent sought only to rely upon cl 13.3 of the deed which permitted the

first respondent to enter upon the premises and take over the operation of the franchise ``in the event of proceedings at law having been brought or threatened to be brought by either the franchisor or the franchisee against the other".

Held, allowing the interlocutory application:

(i) If relief was not granted and it turned out at trial that the applicants were entitled to succeed in their claim for damages against the respondents, the applicants would in the meantime be deprived of their only source of income, at least for four weeks. It is unlikely that damages would adequately compensate them for the loss and disruption likely to flow from the first respondent taking over the operation of the business.

(ii) On the evidence, the first respondent had failed to demonstrate that it would obtain any real benefit from exercising its rights under cl 13 for the short period of four weeks.

128 ALR 540 at 541

Moreover, no attempt was made by the first respondent to identify what loss the respondent would suffer if the interlocutory injunction was granted, and no significant loss could be identified.

(iii) Clause 13.2 and cl 13.4 of the deed strongly indicated that the first respondent by cl 14 wanted to have the fullest power to move in and eject the franchisee from control of the business whenever, in its unfettered discretion, it wanted to do that. To that extent the clause was capable of operating as a powerful discouragement to the franchisee to take proceedings of any kind against the first respondent, no matter how strong a case the franchisee might have that it had suffered wrong at the hands of the first respondent. Such discouragement was the whole purpose of the clause.

(iv) It was well settled that a contract was against public policy and therefore void and unenforceable, to the extent that it operated as an ouster of the jurisdiction of the court to enforce the rights of a party under the contract or otherwise.

Scott v Avery (1856) 5 HLC 810 ; *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 , considered and followed

(v) At the core of this head of public policy was the notion that the citizen was entitled to have recourse to the court for an adjudication on his legal rights. A contractual agreement to deny a person that ``inalienable right" contravened this public policy and was void. A disincentive to a person to exercise this right of recourse to the court could, depending on how powerfully it operated to discourage litigation, amount to a denial of this right just as completely as an express contractual prohibition against litigation.

(vi) It was at least arguable that a contractual provision that placed a substantial fetter on the right of recourse to the court was equally as bad as an express prohibition against going to court.

Czarnikow v Roth, Schmidt & Co [1922] 2 KB 478 , considered

(vii) The applicants had demonstrated that they had an arguable case that cl 13.3 was void and unenforceable as contravening this public policy. As the balance of convenience also strongly favoured the applicants, the injunction should be granted upon the applicants providing the usual undertaking as to damages.

Note

As to contracts purporting to oust the jurisdiction of the courts, see *Halsbury's Laws of Australia*, Vol 6, CONTRACT, [110-7120], [110-7125].

Application

This was an application for an interlocutory injunction pending the final hearing.

C E K Hampson QC and *T W Quinn* for the applicants.

J P Hamilton QC and *P Hackett* for the respondents.

Drummond J.

The applicants seek injunctions restraining the first respondent, until trial, from entering into possession of the applicants' business operated from the Cut Price Deli shop in the Stafford Shopping Centre and from advising suppliers to the applicants' business that the first respondent intends to take possession of the business.

In October 1992 the first applicant entered into the deed of franchise with the first respondent. It is not disputed that, from the date of commencement of the operation by the applicants of the business and up until the institution of the present proceedings two years later, in October 1994, the first applicant paid the first respondent all franchise and other moneys due to it pursuant to the deed of

franchise. Nor is it disputed that, subsequent to the institution of these proceedings, the applicants have continued to operate the business and to make prompt payment of all shop rental, chattel, lease payments and suppliers' invoices in the ordinary course of business. Nor is it disputed that the first applicant has provided the first respondent with details of the weekly turnover and stock purchases at regular intervals and has forwarded its weekly trading sheets to the first respondent, as required by the provisions of the deed. Nor is it disputed by evidence from the first respondent that from these weekly trading sheets the first respondent is provided with complete details of the financial information relevant to the trading of the business for every week, including amounts of stock purchases, gross profit and turnover.

The applicants' originating application seeks only orders for damages and the refund of all moneys paid to the first respondent under the deed of franchise from October 1992, as well as the refund of the purchase moneys the applicants paid to the fourth respondent, who is the first respondent's former franchisee, who sold this business to the first applicant in late 1992. On this sale, the first applicant entered into a new franchise agreement with the first respondent which is recorded in the deed of franchise to which I have already referred. The applicants have not sought rescission in equity of either the deed of franchise with the first respondent or the purchase agreement with the fourth respondent, nor have voidance orders under the Trade Practices Act 1974 (Cth) been sought in respect of either transaction in the proceedings as currently framed.

However, senior counsel for the applicants said that his instructions were that the applicants proposed to seek leave to amend their application at an appropriate future time to claim such relief, ie, voidance pursuant to the Trade Practices Act of both the deed of franchise and the purchase agreement, but only as from judgment. It is not intended, so I was told, to claim voidance of either transaction prior to then. The applicants' intention is to carry on the business in the meantime. The reason for this appears from what one of the applicants, Mr Weedman, says:

> The business conducted by the applicants at the Stafford Cut Price Deli shop is the sole source of income for my wife, myself and for the first applicant.

...

> The applicants are in a position to continue to meet all their other obligations of the delicatessen business [apart from paying the franchise fees] such as chattel lease payments, shop rent, etc, until the determination of the trial of this action.

The deed of franchise will thus remain on foot unless and until the court makes a voidance order under s 87 the Trade Practices Act. Until then, it will continue to confer rights and impose obligations on each of the first applicant and first respondent according to its terms and can be enforced at law by each. This will be the position in the intervening period, even if the court at trial makes an order voiding the deed of franchise retrospectively. The position is thus quite different from that which arises when a party to a contract asserts an equitable right to rescission: see *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 at 380 .

However, the applicants are, according to what Mr Weedman says, just getting by and, while able to make all other payments due to the first respondent under the deed of franchise, Mr Weedman says that given the poor performance of the business, he and his wife are barely able to make ends meet and after paying themselves a small drawing each week, there are insufficient moneys generated

by the business to make payment of the franchise fees provided for under the deed of franchise. The arrears of franchise fees that have accumulated over the past three months now amount to about $5000. It is this failure to pay franchise fees that has provoked the situation leading to the claim by the applicants for interlocutory relief.

By their statement of claim filed in October 1994, the applicants claim against the first respondent and those other respondents associated with it in respect of misrepresentations said to infringe s 52 of the Trade Practices Act which were made on behalf of the first respondent about the profitability of the Cut Price Deli business at Stafford and about related matters. It is further said that these misrepresentations caused the first applicant to buy the business from the fourth respondent and to enter into the deed of franchise with the first respondent.

If it were necessary for me to reach a conclusion on the matter I would be well satisfied that, on the material before me, the applicants have demonstrated that there is a serious question to be tried as to whether the first respondent infringed s 52, with consequent loss to the applicants. I have evidence before me from the applicants that their damages to date have been assessed by a suitably qualified consultant at over $450,000. The applicants informed the first respondent of their decision to stop paying franchise fees by their solicitors' letter of 3 November 1994. By this letter the first respondent was advised:

> Our clients allege that they have an equitable set-off in the amount of five hundred and fifty thousand dollars ($550,000) by way of damages sufficient to extinguish any claim by Cut Price Deli Pty Ltd for the payment of royalties pursuant to cl 4 of the deed of franchise.
>
> Our clients are therefore suspending the making of further payments of royalties to Cut Price Deli Pty Ltd pending the determination by the Federal Court of Australia of our clients' damages claim. No doubt, your client will bring a cross-claim for any royalties unpaid.
>
> However, our clients will comply with all of the other obligations contained in the deed of franchise and collateral documentation and will continue to make due and punctual payment of shop rental, equipment lease payments, etc.

The first respondent's response to this letter from the applicants was to invoke cl 13 of the franchise agreement. By its solicitors' letter of 18 January 1995, the first respondent advised the applicants as follows:

> We hereby give you notice that pursuant to cl 13 of the deed it is our intention upon Monday 6 February 1995 to exercise our

right to enter upon the premises and operate the business of a Cut Price Deli conducted by you thereon.

Our rights and obligations in this regard are found in cl 13.

...

It is our intention to operate the business for the period of four weeks to 4 March 1995 inclusive.

It is our intention to appoint Mr Trevor Demnar, our field representative, to be our manager for the period of management.

...

It is not our intention to dismiss any staff presently employed in the business and so as to ensure that they are not taken by surprise we request that you advise them of what is intended.

...

We will notify the appropriate suppliers accordingly of the above arrangements the week before we go into possession.

Clause 13 provides:

128 ALR 540 at 544

13.1 In the event of an unremedied default by the franchisee hereunder; or

13.2 in the event of a franchisee that has been in default but has subsequently remedied such default; or

13.3 in the event of proceedings at law having been brought or threatened to be brought by either the franchisor or the franchisee against the other; or

13.4 if the franchisor deems it justifiable for any other reason (other than as referred to in cl 12 hereof); and

13.5 as often as may be required;

13.6 THEN the franchisor may for such period as the franchisor shall in its absolute discretion determine enter upon and operate the business and the franchise and, inter alia, to appoint a manager, control staff and undertake all matters and things to operate the business and the franchise and incur all reasonable operating and management costs in so doing as if it were the franchisee and to apply all income received against such liabilities incurred by the franchisor during such period.

13.7 The franchisee hereby indemnifies and holds harmless the franchisor against all such liabilities so incurred PROVIDED THAT any profits and losses of the business and the franchise shall continue to enure for the benefit of or fall upon (respectively) the franchisee other than where there are proceedings at law on foot between the franchisor and the franchisee in which case any losses during that period shall be to the account of the franchisor. The franchisee's obligations under this deed or under any collateral document shall not be suspended or abrogated during this period that the franchisor operates the business and the franchise.

13.8 The franchisee waives all rights it may have hereunder or under any collateral document to prevent, delay or otherwise hinder the franchisor exercising its rights hereunder. The franchisee acknowledges that this diminution in the right to operate the business and the franchise is reasonable PROVIDED THAT the franchisor agrees that in exercising its rights hereunder the franchisor shall use its best endeavours to operate the business and the franchise as a going concern but having regard to its state and condition as at the time of commencing to operate the same but having regard to the ordinary and reasonable exigencies of carrying on the franchise and the business.

Clause 12 of the deed contains this provision:

In order to prevent any interruption in the business and the franchise which would in the franchisor's absolute and uncontrolled discretion cause financial or other harm to the business and the franchise and thereby depreciate the value thereof

> and/or the operation of the system and the franchise business, the franchisee hereby irrevocably authorises the franchisor (but without any obligation upon the franchisor) to go in and operate and take over the management of the franchise in the event that the franchisee is absent or incapacitated by reason of illness, or otherwise and is not thereby in the reasonable opinion of the franchisor, able properly to operate the business and the franchise, or in the event of death, for so long as the franchisor deems necessary and practical and without waiver of any other rights or remedies, the franchisor may have under this deed.

It might be thought that cl 12, coupled with cl 13.1, gives the franchisor respondent reasonable protection against the value of its franchise being diminished by action or inaction on the part of a franchisee. If the first respondent had relied on the first applicant's refusal to pay franchise fees as a default within cl 13.1 and used that to justify its decision to go into the business pursuant to cl 13.6, it is probable that an injunction would have issued to prevent the first respondent doing that, given the fact that the first applicant has an arguable case for an equitable set off that greatly exceeds the amount of franchise fees outstanding: see *Tomlinson v Cut price Deli Pty Ltd* (1992) 38 FCR 490 at 494-5 ; 112 ALR 122 .

Although the first respondent relies generally on cl 13 in its letter of 18 January 1995 to justify its intention to take over the operation of the applicants' business,

128 ALR 540 at 545

at the hearing, the first respondent by its senior counsel stated that it was relying only on cl 13.3 and on the institution by the applicants in October last of the action based on the first respondent's alleged breaches of s 52 the Trade Practices Act to justify acting under cl 13.6.

If the applicants can show that there is a serious question as to whether they have either a legal or equitable basis for relief, I would have no difficulty in granting the interlocutory relief now sought. The balance of convenience is heavily in the applicants' favour. If relief is not granted but it turns out at trial that the applicants are entitled to succeed, the applicants will in the meantime be deprived of their only source of livelihood, at least for four weeks. They have finance repayments to meet in respect of commitments they incurred in acquiring the franchise business, as well as personal living expenses. There must be a real question mark as to the harm, financial and in terms of business reputation, that exclusion from the business, even for four weeks, will inflict on them. It is unlikely that damages would adequately compensate for the loss and disruption likely to flow from the first respondent taking over the operation of the business.

On the other hand, on the material before me, it is undisputed that the first respondent is getting everything it bargained for under the deed of franchise, both in respect of money payments and business information from the first applicant, apart only from the relatively small amount of franchise fees; and as to those fees, the first applicant, on the material before me, has a substantial case that nothing is in fact due to the first respondent because the first applicant has a claim for damages against the first respondent that greatly exceeds the fees outstanding and the fees likely to accumulate, if unpaid, for a long while in the future.

All that the grant of the injunctions now sought will do is prevent the first respondent taking over the business for the short period of four weeks; and that will be for the financial benefit of the applicants in any event, if any profits are made. The first respondent does not explain in its evidence why it wants to do this. I was told from the bar table by the first respondent's counsel that it wanted to do this to get, in effect, better discovery than it could get in the litigation on foot between the applicants and the respondents and to arm itself thereby with the best evidence procurable as to the actual earning capacity of the business. The first respondent does not, however, attempt in its material, to lay any foundation for thinking that the detailed records of its operation that the first applicant is required to keep under the deed of franchise and pass on to the first respondent are not being properly kept. On the evidence before me, I can see no real benefit that the first respondent would obtain from going into the operation of the business for the short period of four weeks, which is all it says it wants to do, which it cannot obtain from the reports that it is getting from the first applicant in accordance with the deed of franchise, and from discovery available to it under the rules of court.

Moreover, no attempt was made to identify what loss, compensable in money terms, the first respondent would suffer if the interlocutory injunction sought is granted. I find it difficult to identify any significant loss at all. That the first respondent is likely to suffer no significant loss if interlocutory relief is granted is confirmed, in my view, by the fact that the applicants' undertaking as to damages was not suggested to be inadequate protection to the first respondent notwithstanding what is said by the applicants to be their difficult financial position.

128 ALR 540 at 546

However, the question remains: have the applicants shown that there is a real question to be tried as to whether there is a legal or equitable ground sufficient to justify interlocutory intervention?

The applicants submit that, if the first respondent goes into operation of the business even for as short a period of four weeks, that may make its foreshadowed, but not as yet pleaded, claim against the fourth respondent for avoidance ab initio of the contract of sale of the business to it, completed over two years ago, more difficult to achieve. It is said that it may impede the applicants' ability to restore the fourth respondent to the status quo ante. It is difficult to attach much weight to this. It is in the first respondent's interest to ensure that the business runs well in the four weeks it says it now wants to operate it, if it is accepted that it wants the opportunity to operate the business to obtain evidence to counter the applicants' claims in the action that the business is not capable of generating the profits the applicants say the respondents represented could be achieved. A similar argument is relied on by the applicants with respect to possible difficulties for the applicants in restoring the first respondent to the status quo ante, given that it has foreshadowed an intention to amend to seek voidance orders against the first respondent also in respect of the deed of franchise. But the first respondent's own operation of the business under cl 13 could not conceivably create a situation in which the applicants, otherwise able to restore the first respondent to the status quo ante, would be held not able to do that.

It is then said that reliance by the first respondent on cl 13 is precluded by lack of mutuality; it is not disputed that the first respondent has suspended the provision of benefits to the first applicant, required to be made by it to the first applicant by the deed, yet it is said that the first respondent seeks to take advantage of provisions of the same deed of agreement, viz, cl 13. It is then submitted that a party to a contract will not be entitled to enforce its terms in his favour if, at the same time, he is not discharging his own obligations under the agreement. It is not submitted that the first respondent's right to rely on cl 13 is dependent upon the first respondent performing its obligations, which Mr Weedman says the first respondent has breached. No authority for this novel proposition is given. The first applicant intends to keep the deed of franchise on foot until judgment. It does not matter in those circumstances, it seems to me, that the first respondent may be in breach of certain of its own obligations under the deed that are independent of the first respondent's rights under cl 13. It is entitled to enforce against the first applicant those other provisions of the deed that are for its benefit, although the first applicant will of course be entitled to recover damages in respect of any breaches of the deed committed by the first respondent.

The applicants next submit that the first respondent is, by relying on cl 13, asserting a right to the continued enforcement of the franchise agreement in circumstances where, if the applicants succeed, they would be likely to obtain consequential relief, including orders pursuant to s 87 of the Trade Practices Act terminating or declaring unenforceable the provisions of the franchise agreement, including that same cl 13. But since both the first applicant and the first respondent are proceeding on the basis that the deed of franchise is still on foot and will, at least so far as the first applicant is concerned, remain on foot until trial and judgment when, and not before, the first applicant will claim an order voiding the deed, the first respondent is free for the time being, in my view, to enforce cl 13 as a provision of the deed that continues to operate for the benefit of both parties.

128 ALR 540 at 547

Finally, the applicants mounted an attack on the validity of cl 13.3. They submitted that this subclause purports to confer a right against the franchisee in consequence of the institution of legal proceedings and such provision is void as

contrary to public policy in that it has a tendency to subvert the rule of law by providing a substantial disincentive to the commencement of legal proceedings to enforce entitlements. In oral argument it was also suggested that cl 13.3 makes the whole franchise agreement illusory in so far as it confers on the first respondent the right, at its discretion, to deprive the first applicant of one of the essential things it bargained for in entering into the deed, viz, the right to operate the franchised business. The suggestion was also made in argument, without any attempt to develop it, that cl 13.3 was void as a derogation by the first respondent from its own grant.

The applicants provided little assistance by way of reference to authority to support any of these contentions.

As to the suggestion that the clause operates to make the contract illusory, I do not think cl 13.3 is arguably void for this reason. Whatever may be the status of cl 13.4, by cl 13.3 the parties have agreed that in certain limited circumstances the franchisee can be deprived of the right it bargained for when it entered into the deed of franchise to operate the franchised business. But in that event, the franchisee is still entitled to the profits, and immune from any losses, that arise during the period it is deprived of that opportunity. The clause does not, I think, vest in the franchisor, at the franchisor's uncontrolled discretion, the power to deprive the franchisee of a central entitlement it entered into the deed to obtain, viz, the opportunity to earn a profit from the business. There being no attempt to develop the proposition that the clause was void as a derogation by the first respondent from its own grant, I do not propose to consider that particular matter further.

Two points can be made about cl 13.3. First, while I do not think it is necessary for me to reach a concluded opinion, I doubt very much whether cl 13.3 is capable of being read down as counsel for the first respondent suggested to operate only where the proceedings that are threatened or commenced relate to the franchised business. This is the first respondent's own document; where the first respondent has wanted to have rights to take over the management of the business for reasons connected with the way the business is being run by the franchisee, the first respondent has drafted provisions to achieve that: eg, cl 12.2.1. Clause 13.2 and cl 13.4 seem to me strong indications that the first respondent by cl 13 wanted to have the fullest power to move in and eject the franchisee from control of the business whenever, in its unfettered discretion, it wanted to do that.

Secondly, while cl 13.3 confers rights only on the first respondent as franchisor, viz, the right to take over the operation of the business, it is within the franchisor's power to create a situation in which the first respondent will be able to invoke the subclause. All the first respondent has to do to achieve that is commence or threaten to commence legal proceedings against the first applicant. No doubt the first respondent would have to act in good faith and could not invoke the clause by, for example, merely threatening proceedings, without any intention of taking legal action against the first applicant, solely for the purpose of triggering the clause. But subject to that one limitation, once the first respondent threatens to sue the first applicant, even on a claim wholly unconnected with the franchise business, for example, because the first applicant was suing to recover for damage done to the first applicant's property in a

collision with the first respondent's motor vehicle, the first respondent could also move in and deprive the first applicant of the opportunity to earn for itself income from the business for the whole or any part of the period of time which the franchise agreement then had left to run.

On the view I take as to the likely construction of cl 13.3, it is capable of operating as a powerful disincentive to the franchisee to take proceedings of any kind against the first respondent, no matter how strong a case the franchisee may have that it has suffered wrong at the hands of the first respondent. So far as can be discerned from the deed of franchise, discouraging the franchisee from litigating against the franchisor on any account whatsoever during the term of the franchise is the whole purpose of the clause.

It is well settled that a contract is against public policy and therefore void and unenforceable, to the extent that it operates as an ouster of the jurisdiction of the court to enforce the rights of a party under the contract or otherwise. In *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 , Rich, Dixon, Evatt and McTiernan JJ said at 652-3:

> What no contract can do is to take from a party to whom a right actually accrues, whether ex contractu or otherwise, his power of invoking the jurisdiction of the courts to enforce it.

Scott v Avery (1856) 5 HLC 810 established that a contractual term that made the obtaining of an arbitral award a condition precedent to the accruing of a right of action on a contract did not infringe this public policy, for the reason that there existed no cause of action whose prosecution could be interfered with by the contractual agreement until an award had first been made. The reason for the existence of this head of policy appears from the various judgments. Baron Martin at 830 said:

> The true ground I believe to be, that a prospective agreement not to have recourse to the courts of law or equity of the country in respect of future causes of action to arise, is against the liberty of the law, which secures to every one the right of submitting to the courts any matters in respect of which he claims redress.

Creswell J at 839 said, after referring to the particular contractual provision there under consideration:

> In all this I find no attempt to prevent the courts from exercising their jurisdiction in ascertaining and adjudicating upon the rights of the parties arising out of the contract which they have made.

Coleridge J said at 841:

> The courts will not enforce or sanction an agreement which deprives the subject of that recourse to their jurisdiction, which has been considered a right inalienable even by the concurrent will of the parties. But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject-matter of decision by the courts.

In *Dobbs,* supra , their Honours also said, at 652:

> No contractual provision which attempts to disable a party from resorting to the courts of law was ever recognised as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the courts to enforce them.

At the core of this head of public policy is the notion that the citizen is entitled to have recourse to the court for an adjudication on his legal rights. A contractual

agreement to deny a person that ``inalienable right'' contravenes this public policy and is void. A disincentive to a person to exercise this right of recourse to the court can, depending upon how powerfully it operates to discourage litigation, amount to a denial of this right just as complete as an express contractual prohibition against litigation. In *Czarnikow v Roth, Schmidt and Co* [1922] 2 KB 478 , Bankes LJ said at 485:

> No one has ever attempted a definition of what constitutes an ouster of jurisdiction. Each case must depend on its own circumstances. Each agreement needs to be separately considered.

There is no necessity to assume that only an express ouster of jurisdiction will infringe this head of public policy. Given this and given the importance of the right of the citizen to resort to the court for an adjudication upon his legal rights, it is, I think, at the very least, arguable that a contractual provision that places a substantial fetter on this right of recourse to the court is equally as bad as an express prohibition against going to court. The dicta in *Scott v Avery* and in *Dobbs* to which I have referred are, I think, consistent with this view and there is American authority that a provision that does not purport in terms to oust the jurisdiction of the court but which operates to discourage a party from going to court contravenes this public policy. In *Corpus Juris Secundum*, Vol 17, the following appears at p 1069-70:

> If a court has jurisdiction of an action, the parties cannot deprive the court thereof by contract; and agreements made in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.
>
> The principle has been applied to a stipulation in a contract that a party who breaks it may not be sued ... *[and] to a provision imposing a penalty on a party who seeks a remedy in the courts* ... [Emphasis added.]

I therefore consider that the applicants have an arguable case that cl 13.3, on which alone the first respondent relies to justify its foreshadowed entry into control of the applicants' business, is void and unenforceable as contravening this public policy.

The balance of convenience strongly favouring the applicants, the injunction sought will therefore be granted. I will discharge the orders I made on Friday last and make orders in terms of paras 1 and 2 of the notice of motion. Those orders will be made upon the first and second applicants giving the usual undertaking as to damages.

Order

(1) Upon each of the applicants giving the usual undertaking as to damages, the first respondent, whether by itself or its servants or agents or any of them or otherwise, be restrained until the trial of this action, or earlier order, from entering into possession of the applicants' business operated from the Cut Price Deli shop, Stafford Shopping Centre and the plant and equipment and stock situated thereat and from entering upon the premises at the Stafford Shopping Centre from which the applicants conduct the said business.

(2) The first respondent, whether by itself or its servants or agents or any of them or otherwise, be restrained until the trial of this action, or earlier order, from advising the suppliers to the applicants' business operated from the Cut Price Deli shop, Stafford Shopping Centre that the first respondent is or will be taking possesion of the said business.

(3) The costs of and incidental to this motion are reserved.

128 ALR 540 at 550

Solicitors for the applicants: *Lynch & Company.*

Solicitors for the respondents: *Snelgrove & Partners.*

C J WHITELAW
BARRISTER