

LOFRA PTY LTD v BAKER

Supreme Court of the Northern Territory of Australia

Rice J.

6, 9 and 10 February 1989 at Darwin

PRACTICE AND PROCEDURE - Interlocutory injunction -
solicitor employed by partnership - alleged breach of
restraint of trade covenant - successive partnerships and
incorporated practice supervening - relief refused

Statutes:

Partnership Act (S.A.) s.38

Supreme Court Rules R.46 O.4(1)

Counsel for the Applicant:	P.J.B. Tiffin
Solicitor for the Applicant:	Halfpennys
Counsel for the Respondent:	J. Waters
Solicitor for the Respondent:	Waters, James & O'Neil

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
No. 62 of 1989

BETWEEN:

LOFRA PTY. LTD

Plaintiff

AND:

CHRISTOPHER JOHN BAKER

Defendant

CORAM: RICE J.

REASONS FOR JUDGMENT
(delivered 10 February 1989)

This is an application by the plaintiff for an interlocutory injunction pursuant to Rule 46.04(1) of the Supreme Court Rules seeking to restrain the defendant "from working as a legal practitioner in your right or as a partner or employee of another legal practitioner or firm within 100 km of the office of Loftus & Cameron in Katherine until the trial of this action or until 28 January 1990 (whichever first occurs)."

An affidavit of Walter Arnold Raby sworn herein on 5 February 1988 with annexures sets forth the history of the defendant's association with various legal practices which have been conducted in Katherine under the style or firm name of "Loftus & Cameron". Mr. Raby is a legal practitioner and a Director of the plaintiff company which

is a legal practice under the name or style of "Loftus & Cameron" from offices located both in Darwin and in Katherine. He deposes to the fact that that practice is the direct successor of a legal practice carried on by Edward Frederick Dunstan and himself, which in turn was the direct successor of a legal practice carried on by himself which was, in turn, the direct successor of a legal practice carried on by Patrick Loftus and himself.

The defendant was first employed on 21 April 1987 when the practice was being conducted by Patrick Loftus and Walter Arnold Raby. The defendant was employed by that partnership from April 1987 until March 1988, the defendant having tendered his resignation to take effect from 11 March 1988. The defendant left the Territory and went to Cairns but shortly after sought re-employment by that partnership as from 6 April 1988. The terms of re-employment are evidenced by a letter on "Loftus & Cameron" letterhead and signed by Mr. Raby. It was stipulated in that letter, which the defendant signed, that, as a term of his employment, he undertook "not to practise either in his own right or as a partner or employee of another legal firm within 100 km of our partnership for a period of 12 months from the date of your ceasing to be employed by us howsoever this occurs."

At first the defendant agreed to be based in Darwin, but subsequently it was agreed that he be employed in the firm's Katherine office as from 11 May 1988.

A further letter dated 9 May 1988 on the letterhead of "Loftus & Cameron" and signed by Mr. Raby, and also signed by the defendant, dealt at some length with the terms of the defendant's future employment in Katherine and the the firm paid the defendant a dollar as consideration for the agreement, a receipt for which was issued. I annex a photostat copy of that letter to these reasons. The same covenant as to not practising within the stated area or within the stated period was incorporated in that letter.

On 14 January 1989 the defendant gave written notice to "Messrs. Raby & Dunstan" of termination of his employment of "my employment with the firm from 5 p.m. on Sunday, 29 January 1989." In reply, Mr. Dunstan wrote to the defendant accepting his resignation and drew his attention to the "existence (of) a restraint of practice clause in the agreement you signed, and we would have little hesitation in seeking its enforcement, particularly about practice in Katherine."

Mr. Raby deposes to the fact that on 1 February 1989 he was present at the Katherine Court House and

observed the defendant in attendance there and, in particular, that he appeared in court as a legal practitioner before the visiting Magistrate. It was evident to Mr. Raby that the defendant was practising on behalf of the firm of Somerville & Associates at Katherine and he identified a former client of the firm of "Loftus & Cameron" who required Mr. Raby to give him his file to enable him to engage the defendant to act for him.

The area and period specified in the covenant would appear to be not unreasonable but that issue is a matter to be determined at trial.

The covenant by its very nature was personal to the defendant and the partnership of Loftus & Raby. It enured during the subsistence of that particular partnership. On 30 June 1988, however, Mr. Loftus retired from the partnership to join the independant Bar in Darwin. In my opinion, the defendant's covenant and, indeed, his contract of service with that partnership as evidenced by the letter of 9 May 1988, terminated upon the dissolution of that partnership.

On 1 July 1988, presumably, Mr. Raby conducted the practice on his own account until some time later he entered into a new partnership with Mr. Dunstan, albeit still

practising under the style of "Loftus & Cameron". The defendant was employed by the new partnership; but no fresh contract of service was entered into, negotiated, or even alluded to.

On 1 October 1988, the plaintiff was registered as the sole proprietor of the firm named "Loftus & Cameron". Some months earlier the defendant was shown a copy of the Memorandum & Articles of Association of this company by a Mr. Rogerson, a solicitor employed by the partnership of Raby and Dunstan but there the evidence rests.

Mr. Raby deposed to the fact that in or about November 1988 the defendant caused to be printed a new letterhead to be used by the Katherine office of the firm and, on it, referred to the plaintiff company by name, followed by the words "an incorporated practice".

On 17 July 1988 a "bonus" of \$1,000 was paid to the defendant, which counsel for the plaintiff claimed was made pursuant to the defendant's contract of service. He submitted that this evidence supported the plaintiff's contention that the defendant thereby impliedly accepted his employment with the new firm on the same terms and conditions as its predecessor; moreover, when the practice was incorporated, his terms of employment remained the same.

While this may appear to be an attractive argument, in my opinion, whatever may have been the rights of the partners, Loftus and Raby, upon the dissolution of the partnership on 30 June 1988, the plaintiff's employment with that partnership was, at law, thereby terminated and in the absence of an express agreement with Mr. Raby or, later, with the partners of the new firm, to be bound by the earlier agreement, no rights enured to the partners of the new firm under that agreement. (See s.38 of the Partnership Act (1891) of the State of South Australia which applies in the Northern Territory.) A fortiori, when the new partners, Raby and Dunstan, took the additional step to incorporate their practice on 1 November 1988, they thereby lost their identity as partners and became Directors of the plaintiff company. In so doing, they brought about a dissolution of their partnership and in lieu thereof substituted a company having a separate legal identity with no contractual link with the defendant except that of master and servant evidenced only by the payment of his salary. The fact that the defendant was employed by the plaintiff company which continued the legal practice under the old firm name "Loftus & Cameron", does not, in my opinion, revive, or continue, by implication or otherwise, the original agreement. The firm name is no more than the style under which the successive legal practices were conducted. It has no existence as a legal entity. It is

a mere umbrella displaying a name under which successive partners, a person and a company have conducted their legal practices.

For these reasons I refuse the application.

Loftus & Cameron

Barristers and Solicitors

P. Loftus, LL.B.
W.A. Raby, O.B.E.

3rd Level,
13 Cavenagh Street,
Darwin
G.P.O. Box 1930,
Darwin, N.T. 5794

Our Ref:

WAR/2R33

Your Ref:

Phone: (089) 81 3974
Fax: (089) 41 1705

9 May 1988

Christopher Baker, Esq
Loftus & Cameron
DARWIN NT

*This is the document marked "B"
referred to in the Affidavit
of Walker Arnold Raby
sworn before me this fifth
day of February 1989.*

DONALD MALOUI *[Signature]*
COMMISSIONER OF OATHS (N.T.)

81-2196

Dear Christopher

Re: MOVE TO KATHERINE

As discussed orally, I confirm that you are to report for duty to our Katherine Branch on Wednesday 11 May 1988. You will be based permanently in Katherine for at least the next 12 months although you may be expected to work at our Darwin office from time to time at our sole discretion.

It would have been our desire to retain you at the Darwin Branch to deal with some of our more important civil matters with the departure of Peter Honey. We have a staff vacancy and the experience would have been beneficial to you. However we note your desire to return to Katherine for personal reasons.

As you know the Katherine branch is currently a problem to us. The overdraft is running at approximately \$16,000. There also appear to be many files that require immediate attention if serious problems are not to arise. The morale of Caroline and Kay also appears to be very low and, I may add, the impression created by Caroline in particular, to clients is not of the best.

I do not wish to indulge in the luxury of recriminations, however I believe you would be the first to admit that your "on/off" resignations and subsequent hasty departure placed us in the predicament of having to utilise the services of a very expensive "temp". To be frank, your actions have cost us a lot of money and have harmed the practice.

We were more than happy to re-employ you and, as evidenced by our desire to grant your request to return to Katherine, a faith that you will work well for us. There is no bitterness and you should not believe otherwise. However, you should understand very clearly that we will not tolerate a repetition of this behaviour.

I note the various offers made to us in your letter of 25 April 1988 and accept your undertaking to remain in Katherine for at least a year, not to take leave during this period and to work extra hours to get up to date, as well as making personal visits to Dick David to service his requirements. I do not however, wish you to undertake any further study at this juncture or to get overly involved in various committees. I do not believe that you will have the time to do this.

Much of the foregoing may appear to be written in a negative way. Now let me turn to more positive matters. Your salary will remain at \$36,000 per annum and, of course, there will be no rental subsidy as in the past as I believe you will be residing with Sara. This salary level will remain fixed for 12 months and will be reviewed then. However, you will receive a one off bonus of \$1,000 as soon as the Katherine branch overdraft has been eradicated and stands in credit in the sum of \$1,000. I believe this is a goal you can legitimately aim for.

As you have been told we identify you as potential partnership material. However recent upheavals have convinced us of the need for stability for a period of two years. It would be reasonable for you to assume that, subject to satisfactory performance, you will be offered a partnership at this stage. Prior to this we may, after discussions with yourself, attempt to formulate a profit sharing scheme for you. In any event your salary will certainly be increased.

The pressure of work in Katherine is great. Do not fall into the trap of trying to do it all alone. As much as possible work should be diverted to Darwin. Either myself or Andrew will visit you every few weeks. During this visit you will be expected to make time to discuss with us each matter which is currently on hand. (I note on my last visit to Katherine that no-one had any idea about that). I also was shocked to note that there was no bring-forward system in operation. These are the matters that I expect you to attend to as a first priority. I also require a monthly report to be prepared by Caroline along the lines of that prepared by Raelene of this office. Raelene is to visit Katherine this week, it may well be that she recommends that the bookkeeping be centralised. In any event a system of control will have to be implemented by yourself.

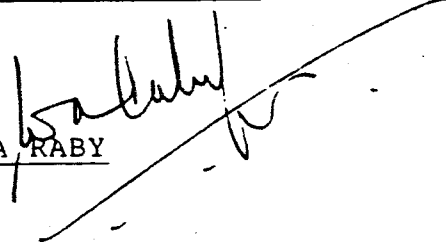
Obviously you will be expected to re-confirm your undertaking as contained in my letter to you dated 5 April 1988 that you will not practice in opposition to us. For the sake of clarity I restate this.

You must undertake not to practice either in your own right or as a partner or an employee of another legal firm within 100 km of our Katherine branch for a period of 12 months from the date of your ceasing to be employed by us, howsoever this occurs.

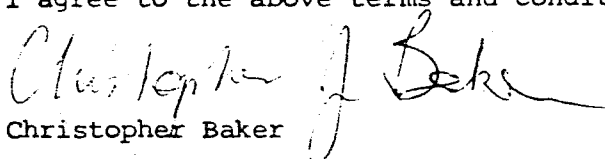
As the above allows for a variation of the terms of your employment we will pay you the sum of \$1.00 by way of consideration.

If you are agreeable to the terms and conditions of your future employment in Katherine, will you kindly sign a copy hereof and return to me.

Yours sincerely
LOFTUS & CAMERON


W A RABY

I agree to the above terms and conditions.


Christopher Baker


Witness