Privy Council Appeal No. 80 *of* 1930.

The Ford Service Station Company, Limited, and others - - *Appellants*

v.

The Auto Car and Sport Equipment Company, Limited - - *Respondents*

FROM

THE SUPREME COURT OF MAURITIUS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1931.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BLANESBURGH.
LORD DARLING.
LORD THANKERTON.

[*Delivered by* LORD BLANESBURGH.]

The question for solution on this appeal is whether the appellant firm, Rogers & Co., are precluded by an agreement with the respondents and so long as it continues from conceding to the appellant Company, The Ford Service Station Company, Limited, the privilege of selling "genuine Ford spare parts" within the Island of Mauritius. The Supreme Court of Mauritius has so held. The firm and the Ford Service Station Company appeal.

Rogers & Co. had in 1926 been for upwards of 17 years the sole agents of the Ford Company of Canada for the sale and distribution within the Island of Mauritius of Ford motor vehicles and Ford spare parts. The sale of the vehicles Rogers & Co. kept in their own hands. The marketing of the spare parts was entrusted by them practically exclusively to the Mauritius Motor Supply & Hardware Company, Limited, of St. Louis, a concern of which three partners of Rogers & Co. were directors, and in which the firm was otherwise interested. In 1926, as a result of a visit by Mr. Telfer, of the Ford Company of Canada, the reorganisation of the sale in the Island of the spare parts was decided upon, and it was then resolved to

entrust the exclusive rights to "garages," limited in number and enjoying identical privileges and being subject to identical duties and responsibilities.

In the first instance, four separate garages were suggested by Mr. Telfer for the privilege, but on objection taken by the other three, one of the four was left out, and finally the proposed concession was offered to each of the others in three letters, dated the 1st February, 1926, in terms, *mutatis mutandis*, identical, and addressed by Rogers & Co. to the designated concessionnaires: the Mauritius Motor Supply & Hardware Company, already mentioned, the Garage Poulet & Company, Limited, and the Electric Motor Supply Company, Limited, all of St. Louis.

The proposal so made was that the exclusive right of sale of Ford spare parts should be conferred upon the three named garages. They were each to order all spare parts required by them from Rogers & Co., and no other spare parts were either to be sold or ordered by any of them. There were provisions with reference to prices, discounts and commission, and the letters concluded with two paragraphs which have bulked largely in the present dispute:—

> (*i*) Pour le moment nous vous réserverons, ainsi qu'aux deux autres garages précités l'exclusivité en tant que réceptionnaires de "Genuine Ford Parts" mais nous nous réservons le droit ultérieurement de faire les mêmes conditions à encore deux autres garages à être choisis par nous.
>
> (*j*) Cet accord pourra être terminé au gré des parties sujet à trois mois de pré avis.

On receipt of the letters exception was taken by all the recipients to the terms of paragraph (*i*), and a meeting between Mr. Edmund Rogers, a member of the firm, and representatives of each of the three garages took place, at which, according to the recollection of these three representatives, Mr. Rogers intimated that there was no intention of appointing any other garage to share the privilege, and he promised that if his firm were pressed by their principals further to extend it, they would choose a garage at Curepipe and the choice would only be made after agreement with the three original garages. On that assurance, such was the evidence, each of the three garages accepted, without requiring any alteration in its terms, the proposal contained in the letters referred to.

In the opinion of the learned Trial Judge this agreement on the part of Mr. Rogers was not established. Mr. Rogers was very confident that it had not been made—and this finding was accepted by the respondents as final even in the Court below. The letters must therefore be read with clause (*i*) duly inserted therein. The incident, however, remains to show that the clause, by both sides regarded as important, must not in any direction be extended beyond its reasonable intendment.

In September, 1926, the Mauritius Motor Supply & Hardware Company went into voluntary liquidation, and Mr. Merven, its manager, at the request, as he said, of Rogers & Co., promoted

and formed a new Company, to wit, the respondents, entirely independent of Rogers & Co., and empowered and intended to take over the stock-in-trade of the Company in liquidation and its sub-agency business in Ford spare parts upon the same terms as that Company had held such sub-agency, except that instead of being terminable at three months' notice, the respondent Company's sub-agency was to continue so long as Rogers & Co. remained the agents in Mauritius of the Ford Company of Canada. The consideration for this agreement ultimately concluded was the sum of Rs. 10,000, to be paid by the respondent Company to Rogers & Co. Their Lordships are at one with the Supreme Court in the view, not seriously contested before the Board, that the Rs. 10,000 was the price payable by the respondents to Rogers & Co. for the right, under the provisions in other respects of the letter of February 1st, 1926, to sell Ford spare parts for the prescribed period, and the respondents, their Lordships also agree, became entitled in connection with that transaction to the benefit of Article 1625 of the French Code, which is in the following terms :—

> " La garantie que le vendeur doit a l'acquéreur a deux objets : le premier est la possession paisible de la chose vendue ; le second, les défauts cachés de cette chose ou les vices rédhibitoires."

The great question in the case is whether the action of the firm in forming as is now to be stated the Ford Service Station Company, Limited, and conceding to that Company, *inter alia*, the privilege of sale of Ford spare parts within the Island is a breach of this agreement amounting also to an interference with " la possession paisible " of the privileges already acquired by the respondents from Rogers & Co. for the consideration and on the terms just stated.

In 1928 the members of the firm of Rogers & Co. were four in number : Louis Goupille, Edmund C. Rogers, Réné Maingard and Raoul de Senneville. In April, 1928, they promoted and incorporated the appellant Company, the Ford Service Station Company, Limited. In that Company's issued share capital the four members of the firm took and retained a controlling interest, the remaining issued shares being held by relatives or employees. Mr. Rogers and Mr. Goupille were two of the Company's directors. The members of the firm appointed as its manager an employee of their own, Mr. Langlois, who had theretofore been manager of their department for sale of motor cars : and from the date of its formation they accorded to the appellant Company certain advantages of which the respondents complain as enabling the appellant Company to compete unfairly with them in their sale of spare parts under their agreement of exclusive privilege. It is significant that the formal arrangements between Rogers & Co. and the appellant Company—if any such there be—are not disclosed, but it was proved or admitted at the Trial amongst other things that the firm had given the appellant Company

financial assistance: that it was necessarily by its permission that the word "Ford" was included in the Company's designation: that Rogers & Co. had conceded to it, or that it enjoyed not only the right to sell Ford spare parts, but to fit up and sell Ford cars—the right in fact, to be and become and represent itself as being the Ford retail distributor for the Island of Mauritius, in which connection Rogers & Co. published conspicuous advertisements giving publicity to the appellant Company at the expense of the respondents and the two other sub-agent garages.

The action of the firm in these matters was quite open and above-board. It was inspired, their Lordships cannot doubt, by the belief entertained by the partners—this fact was deposed to by Mr. Rogers—that the letters of the 1st February, 1926, left the firm free to select itself as one of the two further garages referred to in paragraph (7). What the firm could do itself it could do through any organisation controlled by it. And granted the premises, this conclusion might well follow.

But their Lordships cannot accept the premises. Rogers & Co. were not entitled under clause (*i*), as their Lordships read it, to choose themselves as a "garage" to whom the privileges of the letter might be extended, and to their Lordships' minds this disqualification of the firm was, in a business sense, vital for the very reason that competition in the retail sale of Ford spare parts by Rogers & Co., the general and sole agents of Ford in the Island, might be fatal to the prospects of the other concessionnaires, who had to begin their task of sale by satisfying their customers that the Ford spare parts they had for disposal were really genuine.

And to their Lordships' minds the course adopted by the firm in forming the appellant Company, itself to undertake the sales with the name and prestige of "Ford" added to its designation and entrusted with every retail activity in relation to all Ford products must, in a business sense, have been not less damaging to the interests of the three other concessionnaire garages than would have been the similar activities of the firm itself: and indeed the result was shown to be so serious to the respondents that the Supreme Court of Mauritius by its judgment of the 6th November, 1929, granted them an injunction against Rogers & Co. restraining that firm from extending to the appellant Company the right to sell genuine Ford spares and ordering it to pay to the respondents Rs. 5,000 damages in respect of proved loss already sustained.

With reference to the actual amount of damages awarded no complaint was made before the Board, while the grant of the injunction was, in their Lordships' judgment, fully justified on the simple ground already foreshadowed. Although it may be that the controlling interest in the appellant Company held by the four members of the firm of Rogers & Co.

individually is no part of their partnership property, the appellant Company is, their Lordships are fully satisfied, the *alter ego* in all respects of the firm, and may not any more than could the firm itself act in the matter of the sale of Ford spare parts to the prejudice of the respondents, so long as the exclusive privileges of the respondents in relation to that sale remain subsisting.

Their Lordships are able to reach this conclusion on the terms of the agreement itself. If support from the Code is necessary, their Lordships are in agreement with the Supreme Court in thinking that it is thence also forthcoming.

This appeal from the order of the 6th November, in their Lordships' judgment, fails. It should be dismissed and with costs. And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE FORD SERVICE STATION COMPANY, LIMITED, AND OTHERS

v.

THE AUTO CAR AND SPORT EQUIPMENT COMPANY, LIMITED.

DELIVERED BY LORD BLANESBURGH.

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