Submitted by Professor Rosalie Jukier

Cie de construction Belcourt ltée v. Golden Griddle Pancake House Ltd.

LA COMPAGNIE DE CONSTRUCTION BELCOURT LTÉE and LES INVESTISSEMENTS RENARY INC., plaintiffs
vs.
GOLDEN GRIDDLE PANCAKE HOUSE LIMITED. defendant

[1987] Q.J. No. 2454
No.: 500-05-006995-870

Quebec superior Court
District of Montreal
The Honourable Henry Steinberg, J.S.C.

Judgment: December 7, 1987.
(85 paras.)

Counsel:

Sydney B. Sederoff (Adessky, Kingstone), attorney for plaintiffs.
Howard W. Dermer (Lapointe, Rosenstein), attorney for defendant.

JUDGMENT

1 The owners of a shopping centre have instituted this action for permanent injunction to enforce the continuous operation provision of a lease and compel a tenant who ceased operations to reopen and operate its restaurant, and for arrears of rental. The tenant alleges misrepresentation and counter-claims the cancellation of the lease.

2 The Plaintiffs (BELCOURT/RENARY) are owners of a farmer's market shopping centre situated on boulevard Les Galeries d'Anjou, Montreal, known as Les Halles d'Anjou (LES HALLES). Defendant, GOLDEN GRIDDLE PANCAKE HOUSE LIMITED (GOLDEN GRIDDLE) who is engaged in the business of developing and franchising pancake restaurants throughout Ontario leased premises for the operation of a restaurant in LES HALLES. GOLDEN GRIDDLE had entered into a franchise agreement on August 12, 1985, with Messrs. Sunny Banh and Henry Au Yeung, and in pursuance of that franchise agreement subleased the premises to Messrs. Banh and Au Yeung who, in turn, transferred their rights under the lease, the sublease and the franchise agreement to 146585 CANADA INC. After the restaurant was completed and open for business, the volume of business generated was insufficient and as a consequence 146585 CANADA INC. made an assignment in bankruptcy. When this case was heard, the restaurant had been closed for several months. BELCOURT/ RENARY by its action seeks the sum of $40,366.36 representing arrears of base rental, tax recoveries, common area charges and

promotion fund only for the months of July, August, September and October 1987, as well as a permanent injunction to compel GOLDEN GRIDDLE to reopen the restaurant and to operate it in a complete and continuous fashion as required under the terms of the lease.

3 GOLDEN GRIDDLE in its cross-demand and plea seeks the cancellation of the lease on the grounds of misrepresentation, further asserting that even if the lease must remain in effect the situation does not admit of a permanent injunction which would create excessive hardship for GOLDEN GRIDDLE without yielding commensurate and adequate benefit to BELCOURT/RENARY. Logically, the Court must first consider the evidence of misrepresentation and rule on the claim for cancellation of the lease.

4 The following is a schedule of the relevant dates:

DATE	EVENT
August 12, 1985	Franchise agreement executed
April 1986	First meeting between representatives of the parties
May 1, 1986	Opening of LES HALLES
June 26, 1986	Offer to lease executed by GOLDEN GRIDDLE
August 12, 1986	Assignment of rights by Banh and Au Yeung to 146585 CANADA INC.
Feb. 9, 1987	GOLDEN GRIDDLE restaurant opened
April 14, 1987	Lease executed
July 16, 1987	Restaurant closed
July 17, 1987	146585 CANADA INC. made assignment in bankruptcy

5 The parties are moral persons possessing substantial experience in their respective fields. BELCOURT/RENARY are large commercial real estate developers. GOLDEN GRIDDLE is a mature franchisor of pancake restaurants, having been in operation for approximately eleven years. At present, it has 35 franchisees in the Province of Ontario and maintains a complete training programme for the preparation of franchisees and the training of their personnel. Throughout the lease and related negotiations, GOLDEN GRIDDLE had the benefit of experienced negotiators in its employ, as well as competent outside counsel. These matters are relevant because misrepresentation, if it exists, can only give rise to a claim for cancellation and damages if the conditions of article 993 C.c. are established:

> "Art. 993. Fraud is a cause of nullity when the artifices practised by one party or with his knowledge are such that the other party would not have

contracted without them. ...".

6 The impact of any misrepresentation is subjective since the state of mind and knowledge of the pretended victim are relevant. A contracting party who does not rely upon a representation cannot subsequently seek relief on the ground that the representation was false.

7 The sophistication and state of mind of GOLDEN GRIDDLE, the degree to which it relied on representations and its capacity to distinguish between representations, statements of intent, pious wishes and simple puffery may be gleaned in part from the dealings between GOLDEN GRIDDLE and its franchisees.

8 Section 1.05 of the franchise agreement prepared by GOLDEN GRIDDLE and submitted to and signed by Messrs. Banh and Au Yeung provides:

> "Entire Agreement
>
> This agreement constitutes the entire agreement between the parties ... It is expressly understood and agreed that the Company has made no representations, inducements, warranties or promises, whether direct, indirect or collateral, express or implied, oral or otherwise, concerning this agreement, the matters herein, the business franchised hereunder or concerning any other matter, which are not embodied herein.".

9 On July 25th, 1986, GOLDEN GRIDDLE submitted to its franchisees, Messrs. Banh and Au Yeung, a statement of projected income with respect to the restaurant to be operated at LES HALLES. Page I of the statements contains the following disclaimer:

> "The accompanying projections made as of July 24, 1986, should not be construed as either statements of fact or as a warranty that such projections will in practice be achieved. The accuracy of any financial projection if dependent upon the occurrence of future events which cannot be assured, as well as the general business ability of each particular Associate, and therefore, the accuracy of the results achieved in practice may vary from these projections. Any person seeking to rely upon the information contained in these projections must accept the risk of not achieving the results indicated."

10 These statements made by GOLDEN GRIDDLE to its franchisees confirm that the officers and managers of GOLDEN GRIDDLE were professionals, aware of the risks of relying upon projections and fully conversant with the difference between a warranty which is embodied in a written agreement between the parties and a mere statement of intention or hope respecting a future event which is not warranted or guaranteed by the parties.

11 The Court concludes that the officers and managers of GOLDEN GRIDDLE fully understood the meaning and significance of section 25 of the offer to lease executed by GOLDEN GRIDDLE, which provides:

> "Tenant acknowledges that there are no covenants, representations,

> agreements, warranties or conditions in any way relating to the subject matter of this Offer, whether expressed or implied, collateral or otherwise, either oral or written, including promotional material, except those set forth in this Offer; the Tenant agrees that he has not relied upon any representation in any brochures, and the Tenant expressly declaring that this Offer constitutes the entire agreement between the Landlord and the Tenant. Except as herein otherwise provided, no subsequent alteration, amendment, change or addition to this Offer shall be binding upon the Landlord or the Tenant unless given in writing by each of them.".

12 GOLDEN GRIDDLE asserts that there were a number of representations made by BELCOURT/ RENARY in respect of the proposed volume of customer traffic, projected sales, visibility of GOLDEN GRIDDLE's premises from within the shopping centre, signage, marketing, tenant mix, and Bank of Montreal. These will be examined by this Court sequentially in the light of the foregoing general observations and the specific form of the offer to lease and the lease.

13 It is most significant that the offer to lease was executed subsequent to the opening of LES HALLES and that the lease was executed subsequent to the opening of the restaurant.

14 Traffic representations. GOLDEN GRIDDLE's representatives claim to have relied upon material in printed brochures obtained from Mr. David Katz, of BELCOURT. In the brochure comparisons were made between LES HALLES and the farmer's market known as Marché de l'Ouest which was developed and operated by the Plaintiff on the West Island of Montreal. Attempts were made by GOLDEN GRIDDLE to transform the vaunting of BELCOURT's success at Le Marché de l'Ouest and a trade area analysis dated November 17, 1983, into a guarantee of future consumer traffic for LES HALLES. The brochure is a slick but superficial twelve page booklet featuring enticing photographs of food products and statements such as "You have probably heard of our Marché de l'Ouest and about the prospering merchants ... Now that same great food experience comes to eastern Montreal, where even more customers are expected to fill the busy new shops and restaurants of Les Halles d'Anjou.". Sophisticated restaurant franchisors, such as GOLDEN GRIDDLE, undoubtedly base their decisions on more profound studies and analysis. Moreover, in view of the specific provision in section 25 of the Offer that 'the Tenant agrees that he has not relied upon any representation in any brochures ... 1, this assertion cannot stand. If GOLDEN GRIDDLE intended to rely on a specific representation as to the volume of customer traffic at LES HALLES, it should have inserted such a specific provision in the offer to lease and the lease.

15 Projections. The lease provided for payment of percentage rental to the extent that 6% of the annual gross revenue effected in the premises exceeded the minimum net net rental of $65,400.00. No additional percentage base rental would be payable unless gross sales exceeded $1,090,000.00. Despite the pretensions of GOLDEN GRIDDLE, nothing in this provision can, should or does imply a warranty that its sales in the premises would exceed $1,090,000.00 or that the number of customers entering GOLDEN GRIDDLE's premises would equal the quotient obtained by dividing $1,090,000.00 by the amount of the average customer's bill. Although a

stipulation of percentage rental may in certain circumstances suggest certain implied obligations with respect to the promotion of a shopping centre, it does not imply a warranty by landlord of minimum sales by the tenant.

16 Visual representations. GOLDEN GRIDDLE asserts that the view of its restaurant from the interior of the mall was obstructed by kiosks operated by Loto-Québec and Maison de Franc Soie, as well as a sitting area and children's amusement games. This situation must be assessed in the light of section 90 of the lease, which provides:

> "The Landlord covenants and agrees that it shall not, except in case of emergency, unreasonably interfere with the Tenant's business operations in and from the Leased Premises, unreasonably obstruct the visibility in front of the Leased Premises, or unreasonably interfere with access to and from and the use and enjoyment of the Leased Premises. Notwithstanding the foregoing, however, Tenant acknowledges that a kiosk presently exists near the mall entrance and that similar structures may be erected in the future.".
>
> (emphasis added)

17 In view of the special provision with respect to 'similar structures', the fact that Loto-Québec and Maison de Franc Soie maintained kiosks in the vicinity of GOLDEN GRIDDLE's restaurant does not give rise to any recourse whatsoever. Moreover, the existence of a children's play area in the vicinity of the GOLDEN GRIDDLE restaurant must be perceived as an attraction rather than a disadvantage and is not an 'unreasonable' interference. The menu and advertising material of the GOLDEN GRIDDLE restaurant suggest the restaurant solicited a family clientele.

18 The play area established adjacent to its premises was consistent with the image promoted by GOLDEN GRIDDLE and the segment of the market to which its efforts were directed.

19 Moreover, it is readily apparent from the photographs and slides exhibited to the Court that GOLDEN GRIDDLE intended that the principal access to its restaurant be obtained from the exterior of the centre where the large windows and signage beckoned passers-by. This of course does not entitle the landlord to unreasonably restrain access from the mall.

20 Signage representations. GOLDEN GRIDDLE asserts that the signs on the exterior of the shopping centre were inadequate in some instances and non existent in others and infers that this situation contributed to the poor clientele. There is conflicting testimony as to what signs were attached to or erected upon the premises generally to announce to the public the existence of the shopping centre and location of the parking areas.

21 On the other hand, it has been established, through witnesses and photographs, to the satisfaction of this Court, that there were substantial signs affixed to the premises of GOLDEN GRIDDLE which were visible from boulevard des Galeries d'Anjou and readily announced the restaurant's location.

22 Although GOLDEN GRIDDLE filed as an exhibit a report of one Mary Wolfe, a purported marketing and advertising consultant, the flippant tenor of the report and superficial study upon which it is based and the failure of the 'consultant' to testify rendered the report meaningless.

23 Moreover, there has been no written evidence, nor are there any provisions within the lease between the parties to substantiate the existence of representations with respect to signage.

24 Tenant misrepresentations. GOLDEN GRIDDLE asserted but failed to prove that specific representations were made respecting the proposed tenant mix and the location of premises to be occupied by the Bank of Montreal.

25 The Court in its assessment of Traffic Representations, Signage Representations, Visual Representations and Tenant Mix Representations, observes that LES HALLES. opened on May 1, 1986, and that prior to signing the Offer to Lease the representatives of GOLDEN GRIDDLE were able to view the centre as constructed and as leased. The offer to lease was signed by GOLDEN GRIDDLE two months later on June 26, 1986. Having failed to provide for such matters in the offer or the lease itself, GOLDEN GRIDDLE must be deemed to have acquiesced in the situation which obtained when it viewed LES HALLES prior to the signature of its offer to lease.

26 Marketing representations. GOLDEN GRIDDLE reproaches BELCOURT/RENARY for having failed to assure that LES HALLES was open and accessible during extended business hours. The Court notes that section 4 of the lease provided:

> "The said premises shall be kept open for business by the Tenant during such normal business hours as may from time to time be established for Les Halles by the Landlord or its Aunt.".

27 In the executed lease, this provision replaced by the following:

> "Landlord acknowledges that Tenant's restaurant may open on a twenty-four hour basis, subject to all relevant rules and regulations, without any additional charges to the Tenant except Percentage Rental. Landlord covenants to provide all necessary access, services and utilities during all hours Tenant is open for business.". (emphasis added)

28 Some evidence was adduced that on occasions when the mall was closed, access to the restaurant from the adjacent Pete and Marty's restaurant was restricted. However, other access from the mall was available and the entrance facing boulevard des Galeries d'Anjou was controlled by GOLDEN GRIDDLE. Moreover, the proof made was insufficient to justify a claim for cancellation of the lease although it may be sufficient to warrant a modest rental reduction or damages. Such an award or reduction was not sought by GOLDEN GRIDDLE in these proceedings.

29 For the foregoing reasons, GOLDEN GRIDDLE's cross-demand for cancellation of the lease on the grounds of misrepresentations must be rejected.

30 The Court must now determine if a permanent mandatory injunction is available to compel compliance by the tenant with the continuous operation provision of the lease, that is, the section which purportedly compels the tenant to operate its business during the term of the lease. It is instructive to review the attitude of the parties in this regard when the lease was signed.

31 Prior to consideration of the text of the continuous operation provision, it should be noted that the offer to lease executed by GOLDEN GRIDDLE on June 26, 1986, contains the following paragraph 22:

> "THE LEASE
>
> By October 15, 1986, Tenant agrees to execute Landlord's net net lease attached hereto as Schedule "F", such lease shall contain all the terms and conditions of this offer as well as those other terms and conditions customarily found in the standard lease, the whole subject to the reasonable comments of Tenant and Tenant's solicitors."
>
> (emphasis added)

32 A form lease attached to that offer ultimately served as the model for the lease executed by the parties on April 14, 1987.

33 A comparison of the form lease and the executed lease indicates that substantial changes resulted from the reasonable comment of Tenant and Tenant's solicitors. Substantial additions were made to the provisions of the form lease titled Gross Sales, Annual Statement, Independent Audit, Contestation of Taxes, Rent on a Net Net Basis, Imputation of Payments, Improvements and Alterations, Assignment and Subletting Consent Required, Parking and Insurance and substantial deletions were made from the provisions in the form lease titled Gross Revenue Achievement, Continuous Operations, Restrictive Covenant, Landlord's Option, Corporation Ownership, Occupancy, Complaints, as well as the provisions with respect to the Food Fair. These changes confirm that both Landlord and Tenant were adequately represented and either they or their legal advisors were totally conversant with the terms of the lease and their import.

34 The impact of the negotiations between the parties and their attorneys are nowhere more evident than in section 6 of the lease titled 'Completion of Work and Continuous Operations', which is reproduced below. It should be noted that each of subsections 6.1, 6.2 and 6.3 was altered during these negotiations. The square bracketed phrases were contained in the form lease and deleted from the executed lease.

> "COMPLETION OF WORK AND
> CONTINUOUS OPERATIONS
>
> 6.1 By the Commencement Date or such other date as the Landlord specifies in writing, Tenant will complete all Tenant's work, at its own cost, in accordance with Schedule "C" of this lease to the satisfaction of the Landlord and the Leased Premises will be sufficiently fixtured, stocked with merchandise and equipped with an adequate staff of sales and other personnel, so that the premises may be opened on such date. It

is understood that time is of the essence in the Lease, and Tenant acknowledges that the Landlord shall suffer damages to the reputation of Les Halles and shall be seriously and irreparably injured should the Tenant fail to open its business by the Commencement Date. [In the event a dispute arises as to whether the Tenant is conducting its business in accordance with this Section 6.1, the Landlord's opinion and judgment shall be final and binding on both parties.].

6.2 From and after the Commencement Date, Tenant will continuously, actively and diligently conduct its business in the whole of the Leased Premises in and up to date, high class, reputable and efficient manner and shall keep the Leased Premises sufficiently fixtured, stocked with merchandise and equipped with an adequate staff of sales and other personnel to courteously and efficiently service customers, so as to produce the maximum amount of Gross Revenue from the Leased Premises, during all business hours Landlord designates for the tenants. of Les Halles from time to time, unless prohibited from doing so by law. (In the event a dispute arises as to whether the Tenant is conducting its business in accordance with this Section 6.2, the Landlord's opinion and judgement shall be final and binding on both parties.].

6.3 (If the Tenant fails to complete tenant's work in accordance with Schedule "C" annexed hereto as provided in Section 6.1 above, or if the Tenant fails to open the Leased Premises fully fixtured, stocked and staffed on the Commencement Date, or having thus opened for business, fails to operate continuously as provided in Section 6.2 above, then in each such event, the Tenant will pay to the Landlord (in addition to all other amounts payable hereunder) an amount equal to the greater of fifty cents ($0.50) per square foot of Leased Premises or one thousand dollars ($1,000.00), for each day Tenant delays in performing its obligations pursuant to the present clause, the whole under reserve and without prejudice to any other recourses of Landlord. Tenant hereby renounces all rights to have the penalty reduced even if the obligations referred to in this Section 6 have been performed in part.). All of Landlord's rights hereunder shall be strictly without prejudice to its other rights and recourses in the circumstances, including without limitation to the right to obtain both an Interlocutory and Final Injunction to force Tenant to operate the business as aforesaid in view of the serious and irreparable harm, such a closure and non compliance will cause to the Landlord and Les Halles due to decreased traffic flow and the adverse effect on the merchandising balance of Les Halles the closure or non compliance will have.".

(square brackets and emphasis added)

35 The negotiated changes to subsections 6.1 and 6.2 are readily understandable. They remove landlord's arbitrary right to impose a settlement on disputes and are reproduced above merely to indicate that each of these subsections was the object of negotiation and modification.

36 The negotiated changes to subsection 6.3 are most relevant to the issue under dispute. The original text of subsection 6.3 subjected tenant to a penalty of $0.50 per square foot (the area of the premises is 5,450 square feet), or $2,725.00 daily for failing to operate its business continuously. Landlord had the additional right to obtain injunctive relief in these circumstances.

37 In the course of the negotiations, the penalty provision of subsection 6.3 was deleted and the stipulation of permanent injunctive relief retained. In its defense to the current proceedings, GOLDEN GRIDDLE pleads hardship and the non applicability of the injunctive provisions retained in the lease and now suggests that damages is a more appropriate recourse than injunction.

38 If the content of the lease were the sole criterion, undoubtedly, as agreed between the parties, injunction would be the appropriate remedy to enforce the continuous operation provisions of the lease.

39 An injunction must be distinguished from other remedies available to the creditor of an obligation because it is an equitable remedy. It imposes a duty, the violation of which constitutes contempt of court. A stipulation in an agreement by the debtor that his creditor may obtain injunctive relief upon the occurrence of a default does not automatically create a right to such remedy. It is therefore necessary to review the circumstances in which the law provides for the issue of an injunction as a means of obtaining specific performance of an obligation and determine their applicability to the case at bar.

40 It is elementary law, readily apparent from articles 983 and 1022 of the Civil Code of Lower Canada that 'obligations arise from contracts' and 'contracts produce obligations'.

41 The consequence of a failure to respect an obligation is set forth in article 1065 C.c. which provides the following:

> "Art. 1065. Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this Code, and without prejudice, in either case, to his claim for damages." (emphasis added)

42 The language of the Code is clear. It provides the creditor of the obligation with the right, at his option, to require specific performance of the obligation, subject only to the qualification that the situation be one of the 'cases which admit of it'. It is not the role of the Court to select or predetermine the creditor's recourse, but rather to respond to his election.

43 There are three distinct types of specific performance:

1) The substitution of a judgment of the Court for an act of the debtor. Examples of this are judgments conveying title to a property, either en passation de titre or dation en paiement or ordering certain

radiations.

2) The substitution of the act of creditor for that of the debtor. An example is contained in article 1644 C.c., which provides:

"Art. 1644. After having-informed or attempted to inform the lessor and if the latter does not act in due course, the lessee may undertake urgent and necessary repairs for the preservation or use of the immoveable leased..."

3) Compulsion of the debtor by Court order to perform a positive obligation he has undertaken to do, or cease doing that which he has undertaken not to do.

44 The recent doctrine of Quebec confirms that article 1065, and by necessary implication, articles 1610 and 1628, grant to the creditor of the obligation the option of requiring specific performance or claiming the damages which may result from the breach of the obligation. The Court refers to the comments of Professor Maurice Tancelin in DES OBLIGATIONS - contrat & responsabilité - Edition Wilson & Lafleur, 1984, page 374, number 728:

"728. La règle de l'exécution en nature - En droit civil il est faux de poser en principe que l'exécution en nature soit l'exception et les dommages-intérêts la règle même dans un domaine limité comme les contrats de services. Cette présentation simpliste aboutit inévitablement à la négation pure et simple du droit à l'exécution directe, qui est fausse dans son principe et inadéquate dans ses conséquences pratiques.

Le refus d'accorder des injonctions interlocutoires s'appuyait dans tous ces arrêts sur une interprétation superficielle de l'article 1065 C.c., selon laquelle l'exécution en nature serait par principe exclue pour certaines catégories d'obligations. L'article 1065 n'a pas d'effet discriminatoire contre des catégories mais contre des "cas". Il pose en règle que l'exécution en nature est un droit du créancier, droit qu'il ne pourra pas mettre en oeuvre si les circonstances de l'espèce s'y opposent." (Emphasis added)

45 Professor Jean-Louis Baudouin, in LES OBLIGATIONS, Les Editions Yvon Blais Inc., 1983, acknowledges that the recourse in specific performance should be on an equal footing with the recourse in damages, despite the previous unwillingness of the Courts to issue injunctions to implement such a recourse:

"700 - Principes généraux - La force juridique du lien d'obligation veut que le créancier sait en droit d'exiger du débiteur l'exécution mime de l'obligation. En droit français, l'exécution en nature forcée sous autorité de justice semble la règle. Les tribunaux peuvent, grâce à la procédure de l'astreinte, vaincre la résistance du débiteur récalcitrant et le forcer à

> s'exécuter. En droit anglo-américain au contraire, l'exécution forcée en nature (specific performance) est l'exception et reste limitée aux cas précis dégagés peu à peu par la tradition jurisprudentielle, la règle générale restant la compensation sous forme de dommages-intérêts. Le droit québécois occupe, lui, une position curieuse. Les articles 1065 et 1066 C.c. ont été rédigés en des termes différents des articles 1142, 1143 et 1144 du Code Napoléon. Ils reconnaissent le droit à l'exécution en nature, le plaçant apparemment sur le même pied que le recours en dommages, mais limitent son exercice aux "cas qui le permettent"... Une étude de la jurisprudence révèle une réticence caractérisée des tribunaux à accorder l'exécution forcée en nature, même s'il existe quelques exemples de son octroi. Certaines décisions, probablement à cause de l'influence du régime anglais de l'injonction, laissent même clairement entendre que le recours en exécution spécifique est exceptionnel et que normalement le manquement à une obligation ne peut donner droit qu'à des dommages, position semblable à celle du Common Law. De plus, en pratique, il est fréquent de voir le créancier préférer lui-même la demande en dommages-intérêts. Toutefois le choix du recours en cas d'inexécution appartient au créancier et non au débiteur, et le fait de réclamer l'exécution en nature n'empêche pas le créancier d'obtenir une réparation par équivalent en dommages, surtout s'il y a des conclusions subsidiaires à cet effet." (emphasis added)

46 In the most recent doctrinal expression on the subject, Professor Rosalie Jukier, in an article titled THE EMERGENCE OF SPECIFIC PERFORMANCE AS A MAJOR REMEDY IN QUEBEC LAW, (1987) 47 R. du B. 49, after reviewing the doctrine and jurisprudence concludes:

> "As a matter of civil law theory, the foundation of contractual obligations in Quebec continues to be the autonomy of the will. If the will of the parties is the source of contractual obligations, the will of the parties, as evidenced the contract, dictates that contractual obligations actually be performed. The obligation to pay damages is clearly subsidiary. Thus, while there will always be cases where specific performance cannot lie and damages are the only appropriate remedy, specific performance should be considered the principal recourse for creditors whose debtors breach their contractual obligations." (P 72) (emphasis added)

47 It is settled law that the parties to a lease are entitled to demand specific performance in the appropriate cases.

48 In 1973, when the legislature revised the provisions of the Civil Code with respect to lease and hire, the did not rely solely upon article 1065 C.c. but reiterated its provisions in the following articles 1610 and 1628:

> "Art. 1610. Inexecution of an obligation by the lessor entitles the lessee to demand, in addition to damages:

1. specific performance of the obligation, in cases which admit of it;
2. cancellation of the contract if the inexecution causes him serious prejudice;
3. reduction of the rent."

"Art. 1628. Inexecution of an obligation by the lessee entitles the lessor to demand, in addition to damages;

1. specific performance of the obligation, in cases which admit of it;
2. cancellation of the contract, if the inexecution causes him serious prejudice."

(emphasis added)

49 This was confirmed in SOCIETE COINAMATIC INC. c. ARMSTRONG, (19841 C.A. 23. In that case Mayrand J. noted:

> "La loi donne au locataire le droit d'opter entre le recours en dommages-intérêts et l'exécution en nature de l'obligation du locateur de lui procurer la jouissance paisible des lieux loués... Ce locataire peut préférer la jouissance des lieux aux dollars d'une indemnité future et il a le droit de l'exiger.".

50 Courts have not hesitated to enforce the recourse of the frustrated buyer who institutes proceedings to obtain title to a property or of a tenant who seeks to perform urgent repairs which the landlord has failed to make. In those cases, the determination whether it is one of the 'cases which admit of it' is determined by reference to the substantive law and objective criteria. Hardship and personal consequences are irrelevant. The Court will not consider these subjective factors. Cases which do not admit of specific performance are usually situations where the performance of the obligation has become virtually impossible, when the time within which the obligation was to be performed has elapsed, or the property to be delivered has perished or is no longer in the patrimony of the debtor of the obligation.

51 Similarly, courts have not hesitated to intervene and issue injunctions to enforce the provisions of agreements which impose the obligation not to do upon a party, although in the case of non competition covenants courts have invariably ruled on the reasonableness of the restriction prior to enforcing its provisions.

52 Where specific performance could only be obtained by judicial compulsion of the debtor of the obligation to perform a positive obligation, the courts have been reluctant, even recalcitrant to compel compliance with the obligation and preferred to award damages in these circumstances.

53 The courts only acquired the instrument to compel specific performance in these situations in 1965 when the mandatory injunction was introduced by the adoption of the following article 751 C.c.p.:

> "751. An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties."

(emphasis added)

54 A careful reading of the article reveals that the qualifying phrase 'in cases which admit of it' only applies to mandatory injunctions.

55 When the creditor seeks an injunction to compel specific performance of an obligation it is not sufficient to establish the objective right. An injunction is an equitable remedy and the Court must be satisfied that it lies in the particular case under consideration. The phrase 'in cases which admit of it' is more than an echo of articles 1065, 1610 and 1628 C.c. It obliges the presiding magistrate to make this second and subjective determination having regard to the nature of the act, the personality and capacity of the debtor and the enforceability of the proposed order.

56 During an earlier period, when commercial relationships were less elaborate and were conducted in large part by physical persons, or by moral persons, who could readily be identified as the extension of the personality of the shareholder, courts were loath to grant injunctive relief to compel a debtor to operate a business or engage in a series of business transactions.

57 Such orders were repugnant as their enforcement required measures, which bordered on physical violence. Specific performance was not ordered to compel an athlete to compete, an opera singer to sing and a small businessman to operate his business.

58 This posture was justified by the application of the maxim nomo praecise cogi ad factum -one cannot be compelled to act. The maxim does not reflect the reality of modern society. The abhorrence of the coercion that may be required to compel the athlete to compete, or the musician to perform and the operation of the small one man business should not be extended to encompass an order to compel the performance of obligations by moral persons who by their magnitude transcend the will of one person.

59 This situation was first addressed by the courts of this province in the case of LASALLE AUTOMOBILE INC. vs. CHRYSLER CANADA LTEE, [1974] C.S. 642, CSM 05-806546-72, November 8, 1974, in which Dugas J. reviewed the elaborate series of contracts between an automobile manufacturer and an automobile dealer and ordered the manufacturer to respect in their entirety (intégralement) all of the obligations assumed. He incorporated the following order in a final injunction:

> "Ordonne à la défenderesse, jusqu'à ce qu'ils soient résiliés légalement, de respecter intégralement et sous toutes peines que de droit les divers contrats passés entre les parties pour la vente et la distribution des produits de la défenderesse.".

60 In appeal (09-001039-74, January 24, 1978) the monetary condemnation was modified but the order to respect the contracts remained unaltered.

61 The issue of an injunction to compel compliance by a moral person with an intricate management agreement between the owner and the manager of a substantial downtown hotel arose again in the case of LOEWS HOTELS MONTREAL, INC. vs. CONCORDIA CITY PROPERTIES LIMITED, C.S. 500-05-012189-799, August 2, 1979. Hugessen J. made the following comment:

> "I have previously summarized the agreement; to me it is simply inconceivable that parties, clearly acting with legal advice, would have entered into a contract of this length and complexity, with provisions for termination and options for renewal of the type which we see here, and intended that nonetheless the contract be set at naught and flung aside at the will of one of them alone. Everything in the management agreement indicates to me, in terms at least as clear as if they had said so in so many words, that it was intention of the parties that their agreement should remain in force for its term, in accordance with its terms and conditions." (p. 11).
>
> (emphasis added)

62 He then posed the question;

> "The question that then arises is whether proceedings by way of injunction are the appropriate remedy in the circumstances." (p. 13).
>
> He noted:
>
> "There is, however, a difficulty here. Is this a case where injunctive relief should be granted? Such relief is traditionally refused in cases of contracts for personal services." (p. 15).

63 After referring to the judgment of DUPRE QUARRIES LIMITED v. DUPRE, [1934] S.C.R. 528, and the judgment of NEWCASTLE PRODUCTS (CANADA) LIMITED v. MODERN FOLD (BAS ST-LAURENT LIMITEE), [1970] C.A. 29, both of which refused the issue of an injunction to compel compliance with an agreement, he followed the judgment in CHRYSLER CANADA LIMITED, v. LASALLE AUTOMOBILE INC. referred to above and declared:

> "Perhaps it is not necessary for me to go too far down the road regarding a changing attitude of the courts towards injunctions for the enforcement of contracts for personal services for, in my view, this contract is not one for personal services. It is a commercial arrangement between two corporations. To apply to it criteria drawn from a simpler age, when even commercial relationships were on a more human scale than they are today is, I think, to deny the drastic changes that have taken place in the organization of the modern business world.
>
> It is, in my view, simply a parody to talk of an agreement of this sort as being a contract for personal services." (p. 19). (emphasis added)

64 He cited the cases of EVANS MARSHALL & CO LTD v. BERTOLA SA (1973) 1 ALL E.R., page 992, YULE INC. v. ATLANTIC PIZZA DELIGHT

FRANCHISE (1968) LTD, 80 D.L.R. (3d) 725, and BELL AND ATKINS & DURBROW LTD. v. MILNER, 3 D.L.R. (2d), page 202, all of which are authority for the proposition that an injunction can be granted to compel compliance with an agreement, and Hugessen J. concluded:

> "Regarding the second point, while the right of property is no doubt fundamental to our law, the integrity of contracts freely made and entered into between parties is surely at lease as important. It was regarded by Thomas Hobbes as a law of nature "That men perform their Covenants made", a law which he said was "the Fountain and Original of Justice". (Leviathan, Ch. XV). Here, if Concordia is, to some extent, deprived or restricted in its right of property, it is because it has entered into an agreement restricting its right of property." (p. 23).

65 The judgment was unanimously confirmed in appeal under number 500-09-001124-791, December 17, 1979.

66 The applicability of this jurisprudence to the continuous operation provision of a lease was next considered in two related cases. In LES PROPRIETES CITE CONCORDIA LIMITEE c. LA BANQUE ROYALE DU CANADA, [1980] C.S. 118, Benoit J. refused to issue a mandatory interlocutory injunction to enforce a continuous operation covenant. He expressed concern that such order could be framed with sufficient precision to encompass the operation of a business, as well as the problems of supervision or enforcement. A careful reading of that judgment invites speculation that Benoit J. may well have been prepared, upon adequate proof, to issue a final mandatory injunction in the circumstances. At page 123 he observed:

> "En permettant l'injonction mandatoire "dans les cas qui le permettent", le Législateur a modifié les règles traditionnelles en matière de sanction des obligations. Une plus grande justice dans les rapports entre les personnes est susceptible de résulter de l'application intelligente de cette nouvelle sanction en ce qu'elle assure le respect de l'obligation elle-même. On la conçoit facilement applicable au débiteur obstiné et de mauvaise foi ou insolvable.
>
> Le Juge appelé à prononcer une injonction mandatoire finale le fera s'il estime, dans sa sagesse et sa prudence, qu'il s agit d'un cas qui le permet, après avoir considéré les faits révélés par une preuve complète, analysé l'obligation de faire en l'espèce, conclut à son non-respect et invoqué le droit lui-même dans son état actuel."

67 And at page 128;

> "Voici donc les raisons qui incitent le Tribunal à ne pas accorder l'injonction mandatoire à ce state de la procédure, quoique l'intimée paraisse enfreindre l'obligation qu'elle a assumée par le bail P-1.". (emphasis added)

68 He proceeded to note that other banking facility existed in the shopping plaza, that the lease with the ROYAL BANK did not contain provision with respect to

percentage rent, and no proof had been made with respect to the impact on other tenants.

69 Hence, the dismissal of the application for interlocutory injunction by Benoit J. left open the possibility that in other circumstances an injunction to that effect might issue.

70 These other circumstances were recognized by Hurtubise J. the following year when the same parties engaged in similar combat involving the same real estate complex in a suit arising out of a lease containing a continuous operation provision identical to that upon which Benoit J. had pronounced. In LES PROPRIETES CITE CONCORDIA LIMITEE v. LA BANQUE ROYALE DU CANADA, (19811 C.S. 812, Hurtubise J. made a comprehensive survey of the doctrine and concluded:

> "Ce survol de la doctrine termine, nous constatons que les principes du droit substantif, à notre avis, ne s'opposent pas à l'exécution spécifique en nature d'une obligation de faire.".

71 He referred with approval to the judgment of Hugessen J. in LOEWS HOTELS MONTREAL, INC. v. CONCORDIA CITY PROPERTIES LIMITED, made particular mention of the distinction between a contract for personal services between physical persons and that entered between substantial corporations. Referring to the corporations before him, he remarked:

> "Donc, il ne faut pas a priori confondre les parties signataires avec des mineurs ou des néophytes en semblables matières." (P. 818).

72 He then issued the following order:

> "Pour ces motifs, la Cour rejette la demande en irrecevabilité; accueille la requête en injonction interlocutoire;
>
> 1) Emet en conséquence une ordonnance enjoignant à l'intimée, ses agents et employés :
>
> a) de se conformer à tous égards à ses obligations contractuelles spécifiées dans les baux produits comme pièces P-1 et P-2 et en particulier à l'article 24.12 de chacun de ces baux qui stipule ce qui suit :
>
> From and after the Commencement Date, tenant shall open and keep the Premises open for business at such times as are determined by Tenant consistent with tenant's normal practise in similar locations, and permitted by law." (P. 821).

73 The judgment of Hurtubise J. was confirmed by the Court of Appeal in THE ROYAL BANK OF CANADA c. LES PROPRIETES CITE CONCORDIA LIMITEE [19831 R.D.J. 524. After quoting the commissioner's comments respecting article 751 C.c.p., Montgomery J. commented:

> "It will be left to the prudence and wisdom of the judges to appreciate each case, taking into account of course the rules of substantive law which must apply."

he concluded:

> "I am entirely satisfied with the reasons given by the first judge for the exercise of his discretion."

he then continued at page 528:

> "Two recent decisions of our court demonstrate that we are prepared in appropriate cases to grant an injunction ordering parties to continue a business relationship deemed unsatisfactory by one of them. See CHRYSLER CANADA LIMITEE v. LaSALLE AUTOMOBILE INC... and PROPRIETES CITE CONCORDIA v. LOEWS HOTELS MONTREAL INC.".

74 In AVIS IMMOBILIEN GMBH c. NATIONAL TRUST COMPANY, [1986] R.J.Q. 1794, Mailhot J. refused to issue a mandatory interlocutory injunction to compel a tenant to remain in possession and operate its business. That case must be distinguished from the recent mainstream of jurisprudence cited above because the lease between AVIS IMMOBILIEN GMBH and NATIONAL TRUST COMPANY did not contain a continuous operation provision; the synergy phenomenon was not established and NATIONAL TRUST was not an anchor tenant.

75 BELCOURT/RENARY is entitled to receive additional percentage rent calculated in direct proportion to GOLDEN GRIDDLE's sales above an agreed minimum amount in the case at bar. By contrast, THE ROYAL BANK lease upon which Hurtubise J. ruled and the NATIONAL TRUST lease studied by Mailhot J. contained no such provision. The synergy phenomenon and anchor tenant status are much less significant when the lease contains a percentage rental provision.

76 It was established that GOLDEN GRIDDLE was one of the three large restaurants in the centre. Although the other two have enjoyed substantial sales volumes, the closure of GOLDEN GRIDDLE will affect the atmosphere of the centre and sales by other tenants. GOLDEN GRIDDLE cannot obtain relief from its obligation to operate on the grounds that it had failed to generate a satisfactory level of sales. Moreover, it acknowledged its consequences of closure in section 6.3 of the lease respecting the damages to the landlord that "closure and non compliance will cause to the Landlord and Les Halles due to decreased traffic flow and the adverse effect on the merchandising balance of Les Halles the closure or non compliance will have".

77 GOLDEN GRIDDLE invokes the doctrine of hardship asserting that the reopening and operation of its restaurant would necessitate the expenditure of hundreds of thousands of dollars without commensurate benefit to BELCOURT/RENARY. The application of this doctrine was summarized by Lévesque J. in LA BRASSERIE LABATT LIMITEE c. VILLE DE MONTREAL, [1987] R.J.Q. 1941, as follows:

> "2. Quelle est la discrétion du Tribunal?
>
> A l'occasion de la demande d'injonction permanente, lorsque le droit à l'exécution en nature est acquis, le droit à l'injonction prohibitive est acquis presque automatiquement, tandis que l'injonction mandatoire est généralement soumise à la règle de la balance of hardship...
>
> La balance of hardship est applicable lorsque le préjudice qui découle de l'injonction est oppressif et déraisonnable et reste beaucoup moins important que le poids des inconvénients en matière d'injonction interlocutoire ...
>
> Le hardship qui découle de la conduite d'un défendeur ne peut être opposé à un demandeur. Si l'émission d'une injonction a pour effet de causer un préjudice à des tiers, le Tribunal peut en tenir compte. Enfin, le requérant doit se présenter devant le Tribunal les "mains propres" s'il veut que la discrétion soit en sa faveur.".

78 In the case at bar GOLDEN GRIDDLE was fully aware of the cost of opening and operating a restaurant when it signed the offer to lease and the lease. Third parties' rights will not be adversely affected by the issue of an injunction. Undoubtedly the Defendant will be obliged to expend considerable funds to reopen the restaurant and may be obliged to subsidize its operations. These were readily foreseeable consequences at the time GOLDEN GRIDDLE contracted its obligations under the lease and are commensurate with the rewards to be earned if the restaurant's operations are successful. It is specious to suggest that courts should refrain from enforcing contracts if the defendant will lose money as a consequence. Judicial intervention is rarely necessary to enforce contracts which will yield a profit to the defendant.

79 Finally, the Court must determine whether an order can be appropriately framed. In this determination, the judge must bear in mind that the effect of an injunction is to transform a private obligation into a public duty. If the order is to be executory the nature and extent of such duty must be expressed clearly so that a breach thereof be susceptible of proof beyond reasonable doubt. If the order is ambiguous and a breach cannot ever be established, the remedy itself becomes a mockery.

80 A court may be reluctant to order that the operation of a business be continued if compliance with such order cannot be measured. Where the act or series of acts can be readily defined and subsequently assessed, a court should not hesitate to issue the order.

81 The recent closure of the GOLDEN GRIDDLE restaurant, the photographs and menus filed, the testimony in this case and the records available to the parties provide a standard which can be defined and against which compliance with the order can be measured in the present case. Should it become necessary, a Superior Court offered appropriate evidence could ascertain beyond a reasonable doubt if the terms of the order have been respected.

82 The inclusion in the order of the obligation of the Defendant to feature its corporate name or trade mark was not specifically sought in the conclusions of the action, but the Court is satisfied that it was implied in the conclusion of the proceeding that Plaintiff be constrained from the "implementation of measures to reduce or eliminate the restaurant services offered", and, as such, falls within article 468 C.c.p.

83 In LA BANQUE ROYALE DU CANADA v. PROPRIETES CITE CONCORDIA LIMITEE (cited above), Montgomery J. commented:

> "I have reviewed the conclusions of the judgment and cannot deny the possibility that they could give rise to further litigation.
>
> On the other hand, I am unwilling to presume at this stage that the Bank will exercise its ingenuity to frustrate the judgment of that Respondent will endeavour to take unfair advantage of it. The prestige of the Bank is such that I cannot believe that it would wish to keep open a branch -at which it did not offer an acceptable level of banking services.".

84 The prestige and self-interest of the Defendant in this case is undoubtedly such that it will not readily destroy the value of its trade mark and its franchises by permitting a restaurant which bears the words GOLDEN GRIDDLE both on its signage and menus to be operated in a shoddy manner.

The Defendant has admitted to the amount of the claim for arrears of rental and a condemnation for such amount automatically follows from the rejection of the cross-demand.

85 FOR THE FOREGOING REASONS, THE COURT:

> DISMISSES Defendant's cross-demand;
>
> ISSUES a permanent injunction ordering the Defendant, within 60 days following the service of this judgment, to reopen to the public its GOLDEN GRIDDLE restaurant in the premises leased by Defendant from Plaintiff in Les Halles d'Anjou, and thereafter, during the pendency of its lease for these premises, a) to operate such restaurant in the entire leased premises continuously during the normal business hours of Les Halles d'Anjou; and b) to maintain therein restaurant services including equipment, personnel, seating, products offered, service and advertising (including the display of the words GOLDEN GRIDDLE on its signs and menus)at a level that shall not be less than the average level of these services in the GOLDEN GRIDDLE restaurant in Les Halles d'Anjou during the month of May 1987;
>
> CONDEMNS the Defendant to pay to Plaintiff the sum of $40,366.36, representing arrears of base rental, tax recoveries, common area charges and promotion fund only, for the months of July, August, September and October 1987, inclusive, with interest at the rate of sixteen percent (16%) from the due date of such arrears;

RESERVES Plaintiffs' rights and recourses to recover any additional rental and charges due for such period;

THE WHOLE with costs.

HENRY STEINBERG, J.S.C.