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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CHAMBERS

SUIT NO. C.L. M-081/94

BETWEEN	MITCO WATER LABORATORIES LIMITED	PLAINTIFF
AND	HUGH SMALL	DEFENDANT

Mr. Alexander Williams for Plaintiff.

Mr. Ravel Golding for Defendant.

Heard: 19th and 20th December, 1994

SMITH, J.

This is a restraint of trade case between employer and employee. The plaintiff is a limited liability company engaged in the business of water treatment services and manufacturing with business place at 18 Riverton Boulevard, Kingston 11.

The defendant Hugh Small was engaged as an employee with the plaintiff company from about 1979.

By a Deed of Agreement made on the 2nd of January, 1986 between the plaintiff and the defendant it was agreed that the defendant would continue in the employ of the plaintiff but in the capacity as Service Manager upon the express agreement that the defendant would be bound by certain restraints.

The Deed of Agreement is reproduced below:

> THIS DEED OF AGREEMENT is made this 2nd day of January, 1986 BETWEEN MITCO WATER LABORATORIES LIMITED of 18 Riverton Boulevard in the parish of Kingston (hereinafter called "the Employer") of the ONE PART and HUGH SMALL of LOT 253 MEADOWVALE CLOSE, SURREY MEADOWS, GREGORY PK in the parish of ST. CATHERINE (hereinafter called "the Employee") of the OTHER PART.
>
> W H E R E A S
>
> (1) The Employer carries on business at 18 Riverton Boulevard in the parish aforesaid and has offered to continue to employ the Employee in connection with the said business in the capacity of SERVICE MANAGER upon an express agreement that the said Employee shall be bound by the undermentioned restraints.

(2) The Employee has agreed to continue in the employment of the Employer and to be bound by the said restraints.

NOW THEREFORE in consideration of the continuation of the employment of the Employee by the Employer and in consideration of the mutual benefits to be derived therefrom it is HEREBY AGREED as follows:

1. NON-DISCLOSURE OF COMPANY AFFAIRS

The Employee hereby undertakes that he shall not at any time during the continuance in force of this Agreement or at any time after the termination thereof divulge any information in relation to the Employer's affairs or business or method of carrying on business or any of the Employer's formulaes or trade secrets.

2. NON-SOLICITING

For a period of three (3) years after the determination for any reason whatsoever of the Employee's employment with the Employer the Employee shall not on behalf of himself or any person, firm or company canvass or solicit orders, jobs, contracts or any other engagements relating to any business being of a like kind to that carried on by the Employer from any person, firm or company who shall at the time of such determination have been a customer or client of the Employer or provide technical service of a like kind to that provided by the Employer to any such person firm or company.

3. CONDUCT OF BUSINESS AFTER TERMINATION

For a period of three (3) years after the determination for any reason whatsoever of the 'Employee's employment with the Employer the Employee shall not directly or indirectly within a radius of fifteen (15) miles of the Employer's address aforesaid whether as principal, agent, employee or director of a company or otherwise carry on or be engaged in or concerned with any business of a like kind to that carried on by the Employer.

4. SEVERABILITY

The restraints imposed hereunder are distinct and severable and a determination that any restraint is void shall not affect any other restraint which shall remain in full force and effect. In the event that any restraint is found to be void then such restraint shall be reformed to such extent as is necessary to render it valid and enforceable.

The defendant continued in the plaintiff's employ until the 31st January, 1993. During this time he acquired information in relation to the special formulae developed by the plaintiff in its industrial water treatment products, which are designed to prevent scaling and corrosion. The defendant as the Service Manager was directly responsible for soliciting customers for the plaintiff.

The defendant resigned in January 1993 to accept a position with Century Farms Limited. Later on in the same year the defendant went to work with ANCO Incorporated a water treatment company at 145 Windward Road, Kingston 4, St. Andrew as a Director of Sales and Marketing.

By Summons for Interlocutory Injunction (as amended) dated the 23rd of February, 1994 the plaintiff applies for an Order:

(1) That the Defendant on behalf of himself or any person, firm or company be restrained until the trial of the action herein, from divulging trade secrets of the plaintiff, from canvassing or soliciting orders, jobs, contracts or any other engagements relating to any business being of a like kind to that carried on by the Plaintiff from any person, firm or company who shall at the 31st day of January, 1993 have been a customer or client of the Plaintiff or provide technical services of a like kind to that provided by the Plaintiff to any such person or company.

(2) That the Defendant be restrained until the trial of this action from directly or indirectly within a radius of fifteen (15) miles from 18 Riverton Boulevard, Kingston 11 in the Parish of Saint Andrew, whether as principal, agent, employee or director of a company or otherwise carry on or be engaged in or concerned with any business of a like kind to that carried on by the employer.

(3) Costs.

(4) Such further or other relief.

It is not disputed that the address of ANCO Incorporated is within a 15 mile radius of the plaintiff's address.

The plaintiff asserts that there is a real danger that the defendant will divulge its formulae to his new employer and that this will result in severe financial losses and damage which the plaintiff could not quantify.

Mr. Solomon Beharie a former employee of the plaintiff company and now a consultant to the company, in an affidavit, stated that there was literally no secret kept from the defendant as he was considered part of the "MITCO family."

The plaintiff also claims that the defendant has since his employment with ANCO Inc. solicited the plaintiff's clients. This allegation was denied by the defendant.

Mr. Alexander Williams for the Plaintiff company submitted that generally covenants in restraint of trade are prima facie unenforceable unless it can be said that the covenants are reasonable. However, he argued, once such a covenant is limited as to time and space the onus shifts to the defendant to show that the covenant is unreasonable. He relied on Thorsten Nordenfelt (Pauper) v. The Maxim Nordenfelt Guns and Ammunition, Co. Ltd. 1894 A.C. 535 at 565 where Lord Macnaghten said:

> "The true view at the present time, I think is this: The public have an interest in every person carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, if the restriction is reasonable - reasonable that is, in reference to the interests of the parties concerned and reasonable in reference to the interest of the public..."

and at 566:

> "The doctrine that the area of restriction should correspond with the area within which protection is required is an old doctrine. But it used to be laid down that the correspondence must be exact, and that it was incumbent on the plaintiff to show that the restriction sought to be enforced was neither excessive nor contrary to public policy. Now the better opinion is that the Court ought not to hold the contract void unless the defendant "made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed" if the proposed restraint were upheld."

Mr. Williams also relied on Caribonum Co. Ltd. v. Le Couch The Law Times November 15, 1913, Vol. 109 p. 385; Haynes v. Doman (1899) The Law Reports 2 Ch. p. 13 and G. W. Plowman & Son v. Ash (1964) 2 All E.R. 10. He submitted that on the evidence before the Court, granting an injunction would not in this case have the effect of ordering specific performance of a contract of employment or forcing the defendant to be idle.

He submitted that the restraint in question is reasonable and therefore the contract is enforceable and ought to be enforced by the injunctive relief sought.

Mr. Golding for the defendant submitted that the restraint on the defendant's conduct of business after termination is unreasonable in that the provision as to the 15 mile radius would effectively bar the defendant from working in every water treatment business in Jamaica since all companies so engaged are registered in Kingston and would therefore fall within the 15 mile radius. He referred to Clifford Davis Management Limited v. W. E. A. Records Limited et al (1975) 1 All E.R. 237 at 240C.

The earlier authorities as I understand them seem to be saying that the important question the Court must ask itself is: "What is a reasonable restraint with reference to the particular case?" Perhaps it could be put this way: Is the restraint wider than was reasonably necessary to protect the proprietary interest of the plaintiff? In Mason v. Provident Clothing & Supply Co. Ltd. (1913) A.C. 724 the House of Lords approved the test of reasonableness as propounded by Lord Macnaghten in the Nordenfelt case. The House in the Mason case made a distinction between contracts of service and contracts for the sale of a business. It seems that a contract of restraint will be enforced more readily upon the vendor of a business in the interest of a purchaser, than upon a servant in the interest of the master. As is stated in Cheshire, Fifoot and Furmston's Law of Contract Eleventh Edition at p. 383, this is so because in the former case "not only are the parties dealing at arm's length but the purchaser has paid the full market value for the acquisition of a proprietary interest, and it is obvious that this will lose much of its value if the vendor is free to continue his trade with his old customers."

This is certainly not the situation in a contract of service, and, different considerations apply. Let me again refer to the above mentioned work. "For one thing the parties are not in an equally strong bargaining position and the servant will often find it difficult to resist the imposition of terms favourable to the master and unfavourable to himself. He may find his freedom to request higher wages seriously impeded, for should he be unsuccessful his choice of fresh employment will be considerably narrowed if the restraint is binding." In Herbert Morris Ltd. v. Saxelby (1916) A.C. 688 the House of Lords held that a covenant which restrains a servant from competition is always void as being unreasonable unless there is some exceptional proprietary interest owned by the master that requires protection. In that case a covenant by the employee in a contract of service provided that he would not at any time during a period of seven (7) years from the date of his ceasing to be employed by the employer carry on or be concerned, directly or indirectly in the United Kingdom in the same industry as his employer. It was held having regard to all the circumstances to be unreasonable in reference to the interests of the parties and was prejudicial to the interest of the public and therefore it was Void and unenforceable.

It seems that during the first half of this century there was a tendency to understate the principle of public policy on which the doctrine of restraint of trade is based, and to combine it with the principle of reasonableness. However, the House of Lords in Esso Petroleum Co. Ltd. v. Harper's Garage Ltd. (1968) A.C. 269 reaffirmed the true role of the principle. In that case their Lordships were at pains to point out that there were two independent questions that must be given consideration.

The first is whether the contract in restraint of trade is so restrictive of the promissor's liberty to trade with others that it must be treated as prima facie void. If the Court finds that it is, then the second question is whether the restrictive clause can be justified as being reasonable. I will follow this approach.

Thus the first question that I must consider is whether any of the three clauses is so restrictive of the defendant's liberty to trade with others or to use his personal skill and knowledge as to be prejudicial to public policy.

The first clause concerns the non-disclosure of the plaintiff's affairs. By this the defendant undertakes not to at any time "divulge any information in relation to the Employer's affairs or business or method of carrying on business or any of the Employers formulae or trade secrets." I am unable to see how this restraint by itself can in any way be said to be contrary to public policy. Indeed there is no evidence to this effect and Mr. Golding did not so contend. To my thinking this would encourage rather than limit trade. I am therefore of the view that this particular clause is not prima facie void. This means that the defendant must show by evidence that this clause can be said to be unreasonable. There is not a single line in the evidence of the defendant which goes to show that this clause is unreasonable. It follows that the defendant has no arguable case. But even if the burden lies upon the plaintiff in this respect, the plaintiff has in my opinion for the purposes of an interlocutory prohibitory injunction sufficiently discharged it.

The second clause is captioned "Non-soliciting" By this clause the defendant undertakes not to canvass or solicit orders, jobs, contracts or any other engagements from any customer of the plaintiff for a period of 3 years after the determination of his employment with the plaintiff.

Again after careful consideration of this clause I am unable to conclude that it is by itself contrary to public policy. It is clear, to me, that the aim is to protect the trade connection of the plaintiff and this is legitimate. The intention is not to limit the use of the personal skill and knowledge of the defendant. It is my view therefore that this clause is also prima facie valid and may be enforced unless the defendant shows that it is unreasonable. As in the case of clause 1 there is no evidence from the defendant which goes to show that this restraint is unreasonable having regard to all the circumstances. The defendant has no arguable case. The fact that it is not limited as to area is not objectionable when dealing with a solicitation restraint as opposed to a restraint on carrying on of business - See G. W. Plowman and Son Ltd. v. Ash (Supra) at p. 13A. In my opinion there is sufficient evidence before me for the purposes of granting the interlocutory relief sought in so far as this clause is concerned.

It is as regards the third clause that the submissions of both counsel were directed mainly. By this clause the defendant is restrained for a period of 3 years and within a radius of 15 miles of the plaintiff's address from carrying on or being engaged in or concerned with any business of a like kind to that of the plaintiff.

The evidence is that all such businesses are registered in Kingston and would therefore fall within the 15 mile radius. There is much merit in Mr. Golding's submission that this would in effect preclude the defendant from trading or using his skill and knowledge in Jamaica. This might well be directed to the prevention of competition - which by itself is contrary to public policy having regard "the changing face of commerce." This clause, in my view, is so restrictive of the defendant's liberty to trade with others that it must be treated as prima facie void. This means that at trial the plaintiff must show that it is no wider than was reasonably necessary to protect the plaintiff's proprietary interest. Everything depends upon the circumstances. See for example Empire Meat Co. Ltd. v. Patrick (1939) 2 All E.R. 85 where the manager of a butcher's shop at Cambridge agreed not to carry on a similar business within a radius of 5 miles from the shop. The Court held that the restraint 'was invalidated by the excessive area of its sphere of intended operation! In the instant case the plaintiff has not attempted to show why a radius of 15 miles is reasonable in all the circumstances to protect its trade secrets or trade connections. Why 15 miles? Is it the area in which the defendant was employed to canvass? The evidence is that the defendant is now employed by ANCO Inc. and within the 15 mile radius of the plaintiff's business. Thus the injunctive relief sought would be mandatory by nature. If I am right by so holding then the plaintiff must show that its claim that this restraint is not too wide and is reasonably necessary for the protection of its proprietary interest is "unusually strong and clear" and is such that would make me "feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted". See Esso Standard Oil S.A. Ltd. v. Lloyd Chan SCCA No. 12/88. The evidence before me has not reached this high standard. Accordingly, the application fails in so far as the third (3rd) clause is concerned.

To summarise:

(1) Application for interlocutory injunction granted in respect of clauses 1 and 2 of the agreement.

(2) Application for interlocutory injunction refused in respect of the 3rd clause.

Accordingly, order granted only in terms of paragraph 1 of Summons as amended.

Costs to be costs in the cause. Leave to appeal granted to both parties.