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IN THE ROYAL COURT OF THE ISLAND OF JERSEY

Before: Commissioner F. C. Hamon  
Jurat P. G. Blampied  
Jurat C. L. Gruchy

69.

BETWEEN REPRO LIMITED PLAINTIFF  
AND DAVID JOHN PASTOR DEFENDANT

Advocate B. A. C. Yandell for the Plaintiff  
Advocate S. A. Meiklejohn for the Defendant

On the 1st May, 1990 Repro Ltd., the plaintiff in this action, obtained an injunction against its former Sales Manager by way of an Order of Justice. That Order of Justice was served on the defendant on the 3rd May, 1990. The Order of Justice makes certain allegations against the defendant, states that by reason of gross and persistent breach of his contract of employment he was dismissed, and then sets out the basis upon which the injunction was obtained in three short paragraphs:-

"4. That the defendant thereupon commenced an action on the plaintiff for alleged wrongful dismissal and has since been engaged in visiting a number of the plaintiff's customers and soliciting the said customers for testimonials as to his character and business ability; which requests on the defendant's part have been in every case refused by the said customers.

5. That as a result of these activities on the part of the Defendant the Plaintiff has received numerous and very strong complaints from such customers, a number of whom have threatened to withdraw their custom by reason of such annoyance by the defendant.

6. That such activities on the part of the defendant are causing and are likely to cause disruption and damage to the plaintiff respecting its said business and business connections."

And the injunction then obtained is in these terms:-

"1. That service of this Order of Justice upon the defendant shall operate as an immediate injunction restraining the defendant from approaching contacting or in any manner soliciting the plaintiff's said customers whether for any testimonial as to his character, business ability or otherwise."

No affidavit was filed in support of the Injunction. An affidavit made by Maurice Edward Green, one of the Directors of the plaintiff was eventually sworn on the 15th May, 1990, only two days before this hearing.

The application before us is on a summons to discharge the injunctions.

Because we were not prepared to allow injunctions to stand where an affidavit in support had not been filed (see *Walters and Twenty Eight Others v. Bingham*, Royal Court 22nd December, 1986) we dismissed the plaintiff's injunctions but reimposed it with effect from the 15th May, 1990.

The dates are probably not important because all the wrongful acts complained of by the plaintiff apparently took place before the Order of Justice was obtained.

The affidavit of Mr. Green~~f~~ set out in identical terms the matters complained of in the Order of Justice. It raises ~~it~~ no new matters.

There is neither in the Order of Justice nor in the affidavit an undertaking in damages.

The plaintiff called no witnesses and submitted no written evidence. The only evidence supporting ~~his~~<sup>its</sup> claim was given to us by ~~his~~<sup>its</sup> opponent. It consisted of two letters which because they are short we will not attempt to paraphrase. They are both addressed to Mr. Green~~f~~ and both are from the manager of a local hotel. One was sent on the 3rd July, 1989 and the other was sent on the 28th February, 1990.

They read:-

"With reference to my past remarks, I am sorry to have chewed your ear in such a way.

Since Mr. Pastor is no longer with you, I will deal differently with him should he appear again."

and secondly:-

"Regarding our excellent business relations<sup>h</sup> which goes back over many years now, I realise that I was angry with the events, but would simply be grateful if, from time to time, you could give me your personal attention as you have done in the past, and not send that new sales manager. Then I am sure that matters will be back to normal."

The defendant's Service Agreement contains no covenant in restraint of trade. In our view, it might well have done so. There is nothing in Jersey law (unless of course there were trades secrets or matters of confidentiality which do not arise here) to prevent a former employee, in the absence of a special covenant, from soliciting or doing business with the customer of a former employee. Mr. Yandell for the plaintiff conceded as much. His objection appears to have been the manner in which the soliciting was done. But in reply to that the defendant filed a very detailed affidavit. He says in that affidavit that, although he had been dismissed at a Directors' meeting, the only reason given for his dismissal was that he was not generating sufficient income to justify his salary and expenses. It was only when Advocate Yandell wrote in reply to Advocate Meiklejohn on the 6th February, 1990 that more serious allegations were made (and I cite part of that letter) :-

"His dismissal is abundantly justified in that inter alia he has consistently antagonised both customers and staff (of which various persons are very willing testify); has lost the company in this way much business; has taken unauthorised holidays contrary to Clause 7 of the said Agreement, and has drunk too much in working hours."

The affidavit at paragraph 12 reads :-

"12. I sought advice from Advocate Meiklejohn about my future work and my position with Repro. On advice I commenced proceedings against the Repro for damages and the commission owed to me for 1989. Because it was alleged that I had been rude and arrogant to customers I was advised I should contact customers to see if they had any complaints about me and if not whether they would support me either in letter or at trial by giving oral evidence. As for the future, I was advised that the Employment Agreement did not prevent me from either soliciting the company's customers or from setting up on my own. As it is, when I contacted people it was not to solicit them in any event.

13. That the persons contacted fell into categories which are listed below. The precise people and firms contacted which fall into each category are listed on schedules annexed hereto and marked "DP8".

Category I :-

Persons contacted who wrote, gave outright support and would come trial on my behalf;

Category 2 :-

Persons contacted who gave support verbally and suggested my lawyer write to their superiors for written confirmation;

Category 3 :-

Persons contacted who gave support verbally but did not believe they could get involved; "

We read the letters referred to in Category 1. The four were fulsome in their praise. We do not accept Mr. Yandell's interpretation that they are merely formal letters between former business associates.

Mr. Meiklejohn gave us a very detailed helpful and cogent line of authorities. We have carefully considered all his authorities. In particular we found persuasive the work Commercial Litigation : Pre-emptive Remedies by Goldrein and Wilkinson (1987) where the learned authors say at page 6 :-

"2. The Primary hurdles. In most applications for interlocutory relief the plaintiff will have to surmount the following hurdles :

- (a) First he must establish as a triable issue, the infringement of a right.
- (b) Secondly : He must go on to show that the defendant threatens and intends, unless restrained, to continue to infringe that right.
- (c) Thirdly : He must prove that if such right is further infringed he will suffer injury for which damages are not complete remedy."

There is a further point : that is promptness in acting. The learned authors at page 13 say this :-

"Since the granting of an ex parte injunction is the exercise of a very extraordinary jurisdiction, the Court will look closely at the time at which the plaintiff first had notice of the act complained of. Its purpose is to prevent an improper order being made against a party in its absence. The affidavit should therefore state the precise time at which he or those acting for him should become aware of the threatened injury and go on to show why the Court should grant the Order before service on the defendant."

It does seem to us extraordinary that the only concrete evidence (and that in itself not entirely clear) concerned an incident that must have taken place in July 1989 some ten months prior to the service of the Order of Justice.

This matter falls, we regret, at the first hurdle. We cannot, in law, in the absence of better evidence allow these inj<sup>u</sup>nctions to stand. Mr. Yandell has done his very best but he called no witnesses, he produced no evidence, and the plaintiffs' affidavit contains nothing but vague allegations.

We do not decide in any way on the matters at issue between the parties. We merely say that for the purposes of this hearing we discharge the immediate injunction obtained on 1st May, 1990 and reinstated by us on the 15th May, 1990.

AUTHORITIES REFERRED TO:-

Grant of injunctions

Walters and twenty-eight others -v- Bingham (1985-86) JLR 439

The White Book (1988 edition), Order 29/1-3 and 8

Commercial Litigation Pre-emptive Remedies by Goldrein and

Wilkinson (1987 edition)-

(a) pages 1 - 20; and

(b) pages 116 - 124

Abridgement of time

Royal Court Rules, 1982, as amended - Rule 1/5

No property in a witness

The White Book (1988 edition), Order 38/1/2

Harmony Shipping Co.S.A. -v- Davis and others CA (1979)

3 All ER 177

Duties of a former employee

Chitty on Contracts (26th edition) Volume II : Specific

Contracts - paragraphs 3902 - 3903

Halsbury (4th edition) at paragraph 549

Faccenda Chicken Ltd -v- Fowler and others; and

Fowler -v- Faccenda Chicken Ltd CA (1986) 1 All ER 617

Hi-Speed Freight Services Lt -v- Gaudion (1985-86) JLR 216