IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

NO. A.82/81

BETWEEN NEIL DUNCAN FERGUSON, SANTOKH SINGH BHULLAR and TIMOTHY SCOTT all of Taumarunui, Barristers and Solicitors

Plaintiffs

A N D JAMES CHRISTOPHER LAHATTE of Taumarunui, Barrister and Solicitor

Defendant

Hearing: February 11, 1981

Counsel: Mr Lawson for Plaintiffs
Mr Worth for Defendant

Judgment: 19 FEB 1981

REASONS FOR JUDGMENT OF HOLLAND, J.

The Plaintiffs carry on practice as barristers and solicitors at Taumarunui. The Defendant is a barrister and solicitor at present carrying on practice on his own account in Taumarunui. The Plaintiffs seek an interim injunction to restrain him from practising as a barrister and solicitor within a radius of five miles from the Taumarunui Post Office for three years.

In August, 1978 the Plaintiffs employed the Defendant, who had not obtained the qualifications of a barrister and solicitor, as a law clerk. He had had at that stage 5 years previous experience as a law clerk in legal offices mostly in Auckland. On 18 December, 1978 he was formally admitted as a barrister and solicitor and continued in his employment with the Plaintiffs. On 1st May, 1980 a written agreement was executed by the Plaintiffs and the Defendant purporting to admit the Defendant into partnership in the firm conducted by the Plaintiffs from the 1st day of April, 1980. Provision was made that the Defendant was to be paid a salary of $9,000 per annum plus one quarter of the amount of fees earned for the partnership by the Defendant in excess of the sum of $23,500 in each year. The agreement provided that the Defendant shall have no share in the capital of the partnership and that any of the parties may dissolve the partnership by 3 months notice in writing. The agreement thereupon provided that in such case the Defendant "shall not practice as a barrister or solicitor within a radius of five miles from the Taumarunui Post Office until after the expiry of three years from the date of such dissolution". The agreement further provided that it shall enure until 31 March, 1982 and on that date the parties "shall enter into a further agreement of partnership upon and subject to terms to be agreed on that date".

Taumarunui is a small rural town with a population of approximately 6,500 people but serving a relatively closely populated rural area. The nearest township at which legal services are available is Te Kuiti some 84 kilometres away.

Following the execution of the agreement apparently the Plaintiffs and the Defendant carried on business without any major problems until 9 December last when the Defendant informed the Plaintiffs that he wished to leave the firm and to commence business on his own account. At a meeting on 14 December between the Plaintiffs and the Defendant he was asked how he proposed to avoid the covenant not to practice within five miles of the Taumarunui Post Office and he replied that he hoped that would be a matter for negotiation. There were, however, no such negotiations and the Defendant was handed a written notice signed by the three Plaintiffs as follows:-

> "To James Christopher LaHatte
>
> We, Neil Duncan Ferguson, Santokh Singh Bhullar, and Timothy Scott, your undersigned partners, hereby give you notice to determine the partnership between us at the end of three months from the date hereof
>
> Dated at Taumarunui the 14th day of (sic) 1980
>
> 'N.D. Ferguson
>
> T. Scott
>
> S.S. Bhullar' "

The Plaintiffs immediately prepared an application to the Court seeking an injunction to restrain the Defendant but the documents were not filed or served until 19 January, 1981. However, Counsel advising the Defendant was informed on 23 December, 1980 of the Plaintiffs' intention to seek an injunction.

On 19 January, 1981 after the Defendant had been served with the application for an injunction, he served notice on the Plaintiffs as follows:-

> "On advice of my Counsel I wish to advise that I give notice to quit my employment as at 5.00 pm, 30 January 1981.
>
> After that date I will make myself available if required for any outstanding matters or queries.
>
> I will be at my offices, K.C.E.P.B. Building, telephones 8126 and 8127 and P.O. Box 150, during usual hours."

Apparently the Defendant has commenced practice on his own account since 2 February, 1981.

An order for a change of venue from the Hamilton Registry was made on 5 February, 1981 and the matter was set down to be heard in Auckland before me on 11 February.

As is now commonplace, the argument commenced with a reference to American Cyanimid v. Ethicon Ltd. (1975) A.C. 396, and Stratford (J.T.) & Son Ltd. v. Lindley (1965) A.C., 269. There may be some degree of uncertainty in the New Zealand Courts as to whether it is appropriate for this Court to apply the principles adopted by the House of Lords in the first named case or the principles ennunciated in the earlier case which were not referred to in the American Cyanimid decision. The New Zealand Court of Appeal has applied the principles in Stratford (J.T.) & Son Ltd. v. Lindley (supra) and it appears that the safer course at this level is to follow Stratford (J.T.) & Son Ltd. v. Lindley, but I have not felt it necessary at length to attempt to reconcile the principles or to explain the apparent conflict between the two cases because I am satisfied that in the circumstances of this case the result would be the same whichever principles were adopted.

I am quite satisfied that the Plaintiffs have a strong prima facie case for a breach of

covenant in restraint of trade which, of course, includes the lesser test of a reasonably arguable case.

I accept the submissions of Counsel for the Defendant that the principles applicable to covenants in restraint of trade are correctly stated in the speech of Lord MacNaughton in Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. (1894) A.C. 535 and applied by our Court of Appeal in the recent case of Brown v. Brown (1980) 1 N.Z.L.R. 484. The general rule is that restraints of trade of themselves are contrary to public policy and therefore void, but a restraint which is reasonable in relation to the interests of the parties to the agreement and is also reasonable in the public interest, is an exception to the general rule and may be valid.

Section 8 (1)(b) of the Illegal Contracts Act, 1970 specifically authorises the Court to modify a provision which is unreasonable and to give effect to the contract as modified.

Examining the matter on an interlocutory application without having had the benefit of a full hearing, I am satisfied that a partnership agreement between solicitors in a town the size of Taumarunui providing that on dissolution a partner shall be restrained from practising within five miles of the town for three years, may be a valid exception to the general rule.

It is not necessary for me to consider the provisions of the Illegal Contracts Act. It was submitted to me that I should not consider those provisions on an interlocutory application. That submission is too sweeping. If the restraint were held to be invalid, then I readily accept that on

an application for an interim injunction, such an injunction should not be granted unless the Court felt certain that relief would be given under the Illegal Contracts Act and there may well be many instances where such a state of certainty cannot be reached on an interlocutory application. This I do not believe to be one of them and had I not reached the conclusion that the provision, standing alone, was valid I would have felt certain that to any extent that it was excessive it would have been varied by the Illegal Contracts Act and enforced.

However, all the foregoing is based on the assumption that this was a partnership agreement. Counsel for the Defendant submits that it is not a partnership agreement at all and that it is merely a contract of service designed in a way to defeat the provisions of the Award which provided a minimum remuneration for a solicitor of the Defendant's experience.

It does not seem to me appropriate to make decisions on the merits but there may well be some substance in this submission. The evidence appears to indicate that when the Defendant was clearly only an employee he was paid less than the Award rate for his services. At the time of the agreement the Award provided that he was to be paid a salary of $252.38 per week which amounts to $13,123.76 per annum. His partnership agreement provided for him to be paid a salary of $9,000 per annum plus a right to one quarter of the earnings which he made for the partnership over and above $23,500 in each year. He had no interest in the capital of the partnership and he did not share in the profits. He no doubt ran the risk in the sharing of the liabilities/holding out as being a partner.

Apart from the fact that his name was shown as a partner in the letterhead, he did not otherwise have the rights which would normally be expected of a partner.

The Defendant submits that the agreement was illegal as being in breach of s.149 of the Industrial Relations Act, 1973 which provides:-

> "Action with intent to defeat award or collective agreement -
>
> If at any time while an award or collective agreement is in force any employer, worker, union, or association, or any combination of either employers or workers, has taken action with the intention to defeat any of the provisions of the award or collective agreement, the employer, worker, union, association, or combination, and every member thereof respectively, shall be deemed to have committed a breach of the award or collective agreement, and shall be liable accordingly."

That submission is denied by the Plaintiffs and no doubt it would be countered by a submission that the Illegal Contracts Act was capable of preserving the agreement notwithstanding any breach. Those matters are impossible of final solution on an interlocutory application but, as previously stated, the Plaintiffs appear to have a strong prima facie case.

I accept that ordinarily damages are not regarded as an adequate remedy for a breach of a valid covenant in restraint of trade. I am, however, dealing only with damages for a period from the date of this hearing until the action is finally disposed of. There seems to be no good reason why that should not be achieved within six months. If at that stage the Court reaches the view that the

Defendant is in breach and should be enjoined, the Plaintiffs will be entitled to damages for the intervening period. Those damages will essentially be the value of the loss of goodwill from the short period that the Defendant has been operating and presumably taken some part of their goodwill. I cannot see that the damages will be substantial. Also, such of the clients of the Plaintiffs as may have been lured to the Defendant's practice would, in most cases, no doubt return to the Plaintiffs if the Defendant is unable to continue practice. I am therefore satisfied that in relation to an interim injunction, damages are an adequate remedy.

Looking at the matter the other way, if I were to grant an injunction to restrain the Defendant from practice now until the hearing, he is likely to be unemployed. He has purchased a house in Taumarunui and he has a fiancee resident in Taumarunui.

The three Plaintiffs have signed an undertaking to pay damages and I am satisfied that they would be able to meet an award for damages if such were awarded, but it would be difficult to assess the appropriate damages to compensate a man wrongly deprived of his right to practice and cast on the unemployment market.

For the foregoing reasons I am also of the view that the balance of convenience is in favour of refusing an injunction. The status quo cannot be maintained. It would be unreal to suggest that the Defendant should continue his employment with the Plaintiffs or his practice in partnership. Indeed, that was not suggested. It is desirable that this matter be finally resolved

as speedily as possible and the parties should ensure that the pleadings and all interlocutory matters are complete at the earliest possible date and an application made for a fixture. I am satisfied that in the meantime until all the relevant material is before the Court, it is inappropriate and would be unjust to restrain the Defendant from practising.

Although the Defendant has succeeded on this application it may ultimately be held that he is in breach of contract and has acted wrongly. In those circumstances I do not consider it appropriate to award costs at this stage but reserve the question of costs of the parties for consideration by the trial Judge.

A D. Holland J

Solicitors:

Annan Kellaway & Co., Hamilton, for Plaintiffs
Butler White & Hanna, Auckland, for Defendant