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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. A.126/82

UNIVERSITY OF OTAGO
20 SEP 1982
LAW LIBRARY

BETWEEN ELECTRIC FITMENTS LIMITED

Plaintiff

A N D BRIAN MERVYN PANKHURST

First Defendant

A N D JOHN WANSBOROUGH

Second Defendant

A N D TERRY R. BASTION

Third Defendant

A N D LIGHTING WORLD LIMITED

Fourth Defendant

Hearing: 27 July 1982

Counsel: R.E. Harrison for Plaintiff
S.R. Maling for First, Second, Third & Fourth Defendants

Judgment: [illegible]

JUDGMENT OF COOK J.

The plaintiff, which has its registered office in Auckland and carries on business as a seller of light fittings and lighting equipment in various places in New Zealand, including Christchurch, had in its employment at Christchurch the first, second and third defendants. In respect of the first, who had been in the employ of the plaintiff for a number of years and latterly had been the plaintiff's South Island manager, it was claimed that, on the 19th April 1982, he had purported to give the plaintiff one month's notice of resignation but, in fact, ceased working for the plaintiff on the 23rd April. This is admitted by the first defendant, with the qualification that the notice

given was effective notice in the circumstances. The plaintiff further claimed that there was no express term in the first defendant's contract of employment as to notice and that, accordingly, it was an implied term that the plaintiff was entitled to reasonable notice; that, in all the circumstances, six months would have been proper and reasonable. In response to this, the first defendant admit that there was no express term, but otherwise denies the plaintiff's allegations in this respect. The plaintiff further alleged that, in giving one month's notice and/or in departing four days after the giving of notice, this defendant was in breach of his contract and further, that it was an implied term of the contract that he would at all times act towards the plaintiff with good faith & fidelity. A substantial list of ways in which it is claimed the first defendant had broken the implied term is set out in the statement of claim and of these the following are relevant for present purposes:-

> "(a) Competing with the Plaintiff either on his own account or through the agency or person of the Fourth Defendant;
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> (b) Approaching or causing to be approached the existing customers and suppliers of the Plaintiff with the intention of inducing such customers or suppliers to deal with him personally or with his agent and alter ego the Fourth Defendant;
>
> (c) In making such approaches as aforesaid, utilising or seeking to utilise goodwill or business connections attaching or incidental to his association with or employment by the Plaintiff and/or belonging to the Plaintiff;"

Against the first defendant, the plaintiff claims certain injunctions, together with other remedies not relevant to the present application. The same relief was sought against the fourth defendant on the grounds that it is the agent or "alter ego" of the other defendants. This company, i.e.the fourth defendant, was incorporated on the 28th April 1982 by the first, second and third defendants and one other, the first three having 333 shares each and the fourth one share

and carries on business in Christchurch as a seller of light fittings and lighting equipment. Similar claims were made in respect of the second and third defendants in each case linked with the fourth.

It was further claimed against the first, second and third defendants that they had made false statements against the plaintiff whereby it had suffered damage and, in addition to damages, an injunction was sought in that respect also.

The present application is for certain interim injunctions; first, to restrain the first, second, third and fourth defendants from:-

> "(i) Competing with the Plaintiff in the business of selling, marketing or otherwise dealing in light fittings and lighting equipment;
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> (ii) Trading or otherwise dealing with the existing customers or suppliers or approaching or causing to be approached the existing customers or suppliers of the Plaintiff with the intention of inducing such customers or suppliers to deal with them or any of them;
>
> (iii) Utilising or seeking to utilise goodwill or business connections attaching or incidental to the association of them or any of them with the Plaintiff or the employment of them or any of them by the Plaintiff;"

and then a further interim injunction as follows:-

> "That pending the trial of this action an injunction do issue against the First, Second and Third Defendants restraining them or any of them from whether personally or by their employees or agents or otherwise howsoever from publishing by any means whatsoever false and untrue statements of and concerning the intention of the Plaintiff to cease or the likelihood of the Plaintiff ceasing to conduct its South Island business operations;"

In support of the first interim injunction it was

submitted that there had been a breach of an implied term of fidelity and good faith imposed on the defendants (other than the fourth defendant) by reason of their employment with the plaintiff and that that included a duty not to compete with the employer throughout the course of the employment; that the course of employment must be deemed to run until the end of the period for which notice terminating the contract ought to have been given. At the same time it was accepted that the particular obligation could last only until the expiry of the period that would have constituted due notice. Three months had already expired since the defendants had given notice and, as no longer period than that could be claimed to be reasonable in the case of the second and third defendants, it was accepted that no interim injunction could now be expected against them.

The questions that arise, therefore, are primarily in respect of the first defendant; whether he was under such an obligation and, if so, whether in his case a time such as six months would have been reasonable notice. It was further submitted, however, that there was a fiduciary relationship between him and the company and, consequently, a fiduciary duty in relation to the assets of the company, in particular, goodwill and information relating to the company's customers. This was relied on to support the granting of injunctions in terms of paras (ii) and (iii) quoted above. The position of the fourth defendant may be set aside meantime.

As to a duty upon an employee to observe good faith and fidelity, this was clearly recognised by the Court of Appeal in Schilling v Kidd Garrett Limited (1977) 1 N.Z.L.R. 243. Indeed, it was common ground, as noted by Richmond P. (p. 247):-

> "But the judge held that the approach so made to Husqvarna was in breach of a term implied in Schilling's contract of employment with Kidd Garrett that Schilling would serve Kidd Garrett with good faith and fidelity. On the hearing of the present appeal it was common ground that a term of the foregoing kind was implied by law in Schilling's contract of employment. There is no need for me to refer to the decided cases which support the implication of such a term."

However, I do think it helpful to refer to the judgment of Lord Esher M R in Robb v Green (1895) 2 QB 315 where the Master of the Rolls said:

> 'The question is whether such conduct was not what any person of ordinary honesty would look upon as dishonest conduct towards his employer and a dereliction from the duty which the defendant owed to his employer to act towards him with good faith' (ibid, 316).

It seems to be impossible to lay down any fixed test applicable to all circumstances. Some helpful passages from various judgments will be found collected by Havers J in Saunders v Parry (1967) 1 WLR 753, 766; (1967) 2 All ER 803, 808-809. One of those references is to the judgment of Lord Greene M R in Hivac Ltd v Park Royal Scientific Instruments Ltd (1946) Ch 169; (1946) 1 All ER 350, where Lord Greene said:

> ' It has been said on many occasions that an employee owes a duty of fidelity to his employer. As a general proposition that is indisputable. The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends' (ibid, 173; 353)."

That any such obligation continues to the point of time when, had proper notice been given, the contract would have come to an end and not merely to the time when the employee sees fit to depart from the employer with inadequate notice of his intention, or before such notice has run its course, seems equally clear. In Thomas Marshall Ltd v Guinle (1979) 1 Ch. 227, a managing director of a company, under a contract for a term of years, purported to resign when the contract had over four years still to run - at p 243 - Sir Robert Megarry V.-C.:-

> "To say that a contract of service remains in existence despite the servant's resolute refusal to do any work under it produces odd results. Here, however, I am concerned only with the issue whether the servant's wrongful refusal to serve has set him free of the obligations which bound him while his contract of service continued. Furthermore, since what is before me is a mere motion for an interlocutory injunction, strictly speaking all that I have to do before I turn to consider the balance of

convenience is to see whether there is a serious question to be tried, and whether the company has any real prospect of succeeding at the trial: see In re Lord Cable, decd. (1977) 1 W.L.R. 7, 19. To these questions I would answer with an unhesitating Yes. But, as I have mentioned, the interlocutory stage is so important to both parties that I have examined the authorities in some detail, and I think it right, for their assistance, to express my views more fully. I may summarise them as follows. First, in my judgment the service agreement between the parties has not been determined but remains still in force. Second, the defendant is subject to all the obligations that flow from his being bound by the service agreement. Third, as the service agreement is still in force, clause J.2, which provides for the defendant to be free from restrictions when he ceases to be managing director, has not come into operation, and that is so whether or not the two provisos are satisfied. Fourth, there is ample jurisdiction in the court to grant an injunction to restrain the defendant from doing acts contrary to his obligations under the service agreement, subject always to the exercise of the court's discretion whether to grant an injunction at all, and, if so, in what width."

For present purposes, i.e. consideration whether or not an interim injunction should be decreed until the substantial issue may be determined, or until some earlier date, I am ready to accept that the first defendant was under a duty to observe good faith and fidelity towards his employer and that this duty did not terminate upon the day when he departed from the company, or upon the day when the notice which he did give expired, unless it can be said that, in the case of the latter, it was in fact reasonable. Without traversing the evidence contained in the affidavits, I would only say that it would appear that the plaintiff has much more than an arguable case that the first defendant was in breach of that duty.

A question may arise whether it may be said that the plaintiff, by the action it took following the knowledge that the first defendant had gone, had acquiesced in the limited notice given. Possibly, when all the evidence is before the Court this may prove to be so but the facts in support of such a proposition are not strong enough to persuade

me at this stage that, if an interim injunction would otherwise be warranted but for this reason, it should be denied.

The question which next must be considered is whether the plaintiff has a sufficiently good arguable case, any real prospect of succeeding in its claim, that reasonable notice by one or other of the parties to terminate the contrac of the first defendant would have been six months or more. Clearly, what is reasonable must depend on the particular circumstances. Here we have the unusual situation of the employer saying the notice should be lengthy and the employee arguing for the reverse. From the affidavits it appears that the first defendant had entered the plaintiff's employment in 1971 when the Christchurch branch opened and was promoted to branch manager in about 1972. His title was changed to South Island manager in 1979, but with no additional responsibility. When he left he was receiving a salary of $16,000, which does not indicate a position of great responsibility, and it seems that the turnover of the Christchurch branch for the last financial year to the 31st March 1982 was about $660,000, a little more than a quarter of the total company turnover. While Mr Davies, the managing director of the company, spoke of him as second overall in the organisation, I do not understand this to mean that he had any responsibility for the New Zealand wide operation; rather, that he was regarded as the senior branch manager. It appears that there was a suggestion that he be made a director, but this had not in fact happened. Overall, he seems to have had a position of local responsibility in a moderate-sized organisation. What is reasonable, on either side, is not easy to say. Some indication may be gained from the cases listed in Halsbury 4th Ed. Vol 16 para 607 and in Szakats' Law of Employment 2nd Ed. p. 354. In the present case, no doubt an argument can be made for six months as reasonable, but it would not be a strong one.

I turn now to the submission that, quite apart from the duty to observe good faith and fidelity towards the company, there is also a fiduciary relationship which existed during the employment and continued for a time at least after that employment terminated. In respect of a

director of a company the point was discussed by Sir Robert Megarry V.-C. in Thomas Marshall Ltd v Guinle (supra) in thi manner:-

> " I turn to the second main head of Mr Morritt's contentions based on the fiduciary duty of a director of a company to apply the company's property for the benefit of the company and not himself. For this, Mr Morritt cited Cook v. Deeks (1916) 1 A.C. 554. That case established that it is a breach of duty for a company director to take for himself the benefit of a contract which he has ostensibly been negotiating on behalf of the company whose interests he should be protecting; and if he does he will hold the benefit of the contract in trust for the company. The way in which Mr Morritt uses this decision is to say that it was by acting as managing director of the company that the defendant had established his relationship with the suppliers and customers of the company, and that even if he ceased to be managing director of the company or to be subject to the service agreement, he could not claim instant freedom to use for himself the relationship which he had established on behalf of the company."

That the fiduciary relationship is not necessarily restricted to directors, vis a vis the company, or to the body of shareholders which they serve, appears to be accepted. In Gower's Modern Company Law, Fourth Ed., after discussing the general equitable principle which applies as between a director and the company, the learned author goes on to say:-

> " Thirdly, these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorised to act on its behalf and in particular to those acting in a managerial capacity. This is a matter of considerable practical importance now that it is common for the management of public companies to be delegated by the board to a smaller body. At present the managers to whom the directors delegate their powers are likely themselves to be managing and other full-time service directors. But the modern tendency seems to be towards a clearer distinction between

> the management which runs the business and the board of directors which oversees the management and lays down broad lines of policy. This may, in time, lead to the practice of delegating managerial powers to professional managers without seats on the board. In that event certain statutory rules will need amplification but the general principles of equity are already sufficiently all-embracing to deal with most of the resulting possibilities. In the following discussion we shall refer to directors but, except where the context requires otherwise, what is said is equally applicable to all agents of the company; their fiduciary duties are the same but, of course, the lower one goes in the official hierarchy the less opportunity there is for a breach of these duties."

In N.Z. Netherland Society v Kuys (1973) 2 N.Z.L.R. 163 the fiduciary relationship was discussed as follows (p 166):-

> " Their Lordships are in agreement with these contentions in so far as they stress the necessity to give consideration to the nature of the relationship between Kuys and the society and to the question whether that relationship imposed upon him, in relation to the particular transaction under investigation, duties of a fiduciary character. The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords (Boardman v Phipps (1947) 2 AC 46; (1966) 3 All ER 721). It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in Boardman v Phipps (supra):
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> > ' Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case' (ibid, 123; 756)."

On the other hand, it is to be borne in mind that the first defendant, once his contract of employment was at an end - i.e. at the latest when a time had elapsed which could be said to represent a reasonable period of notice - was or, if that time is not yet expired, will be fully at liberty to enter into the same line of business as the plaintiff company and to compete with it. There is, of course, no restraining covenant between him and the plaintiff, and in the absence of that, he is free not only to compete but also, it seems, to approach the plaintiff's customers and solicit their business. The so-called right to canvass was described thus by Lord Denning M.R. in Roberts v Elwells Engineers Ltd (1972) 2 All ER 890, at 894:-

> " In my opinion, after the agency terminated, Mr Roberts was entitled to canvass any of the customers of Elwells. A commission agent is not like the seller of a business. He does not dispose of his goodwill for reward. When his agency is terminated, he is free to canvass the customers of the old firm on his own behalf, or on behalf of any new principal for whom he becomes agent. No matter whether they were 'his' customers whom he introduced, or old customers of the firm, nevertheless he can canvass them. It is settled law that a servant, having left his master's service, may, without fear of legal consequences, canvass for the custom of his late master's customers, whose names and addresses he had learned during the period of his service, so long as he does not take a list of them away with him: see Robb v Green (1895) 2 QB 315, (1895-99) All ER Rep 1053. All the more so, an agent may do so, especially when the customers have been introduced by the agent himself. In the absence of express restriction (which must be reasonable) he cannot be restrained from canvassing the customers for a new principal."

If there is a fiduciary relationship which survives the due termination of the employment, it would seem that, in a situation such as the present one it must take the form of an obligation upon the employee not to acquire for himself some property or form of proprietary right, e.g. the benefit of some contract, to which the employer, but for the action of the employee, would have been entitled, or to make use for his own advantage of information, belonging to the employer, information going beyond that which is inevitably acquired by

the employee in the day to day operation of the employer's business. Whether there is such a continuing obligation in the present case and, if so, what its precise nature may be, I do not attempt to decide. I can only say that, from the evidence, it does not appear that there has been a breach of it; that is, that the first defendant has done more than compete, making use of his own knowledge of the plaintiff's customers and suppliers in the process. If there were more, it would have to be in relation to the goodwill of the business or property in the way of records of the plaintiff which the first defendant had taken or copies for use in soliciting business. As to goodwill, that is of too intangible a nature to enable one to say that the first defendant was using the goodwill belonging to the plaintiff's business,as opposed to the goodwill that he himself must have developed with the individuals with whom he dealt; goodwill which is personal to him and upon which he is entitled to rely. As to records or the like, there is no real evidence of taking anything which would provide him with knowledge which he did not already possess. There is a suggestion by Mr Davies that the defendant had secured a contract with New Zealand Breweries Limited that should have been made with the plaintiff company, but there is an affidavit from a design manufacturer employed by the brewery company and it is by no means clear that the allegations made by Mr Davies in this respect are necessarily correct.

These are not matters for decision at this stage, but I do not see that the plaintiff has such a case, based on a fiduciary obligation of this notice, sufficient to warrant an injunction until the main issues may be disposed of.

Accordingly,if there is to be an injunction, it must be upon the grounds that the first defendant is to be regarded as still subject to the contract of employment with the plaintiff, by reason of the fact that a time which would constitute reasonable notice has not yet elapsed i.e., that he continues to be in breach of a duty of good faith and fidelity towards his employer. That he was so in breach would seem, on the basis of the affidavits, to be crystal

clear, but I am unable to see that it can be said at this point of time, three months after he departed from the plaintiff's employment, that there is a strong prima facie case in favour of the plaintiff, as counsel submits.

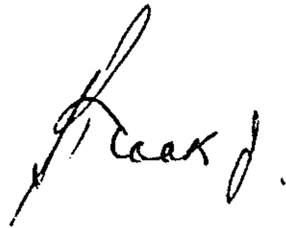
In any event, I am by no means satisfied that, at this stage, the balance of convenience favours the granting of an interim injunction. The plaintiff has conceded, and I have no doubt correctly, that it could not now succeed in obtaining injunctions against the second and third defendants. An injunction against the first defendant alone is not sufficient as the competing business is conducted through the medium of Lighting World Limited, the fourth defendant. If the first defendant were the sole proprietor of that company, possibly an injunction could issue against it also, as sought by the plaintiff, but the second and third defendants are shareholders also and, whatever one may think of their activities when they broke away from the plaintiff company, they are now entitled to compete with it.

It has been submitted that damages would not provide an adequate remedy. The departure of the first, second and third defendants and their activities generally at that time, the breaches of good faith and fidelity which it is alleged occurred then and subsequently, should they be ultimately proved, must have had a considerable impact on the plaintiff's business in the South Island; it is surely to be expected that the extent will be apparent from reduced returns. While the capacity of the defendants to pay damages is not known, I do not think that should be a governing factor in making a decision.

Overall, I am not satisfied that this is a proper case to order interim injunctions of the first type set out above.

As to an injunction restraining the first, second and third defendants from publishing false and untrue statements concerning the plaintiff and its intentions in the South Island, counsel for the defendants stated that they

were prepared to give any undertaking that might be required not to act in this manner. Accordingly, I see no need to order an interim injunction, but the point is reserved should an adequate undertaking not be received. Otherwise the application is dismissed and costs are reserved.
I may add that this matter has been most thoroughly argued and an endeavour has been made to give due consideration to all submissions made and authorities cited,even although time has not permitted full mention of each to be given in this judgment.



Solicitors:

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Lane, Neave & Co., Christchurch, for First, Second, Third and Fourth Defendants.