

Set I

A.No. 293/82

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

11/17/85 (206)

BETWEEN GRAPHIC PRESS HOLDINGS LIMITED

First Plaintiff

AND LITHO PRODUCTIONS (1979) LIMITED

Second Plaintiff

AND RICHARD DUNNE

First Defendant

AND LITHOPRINT (NZ) LIMITED

Second Defendant

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JUDGMENT OF EICHELBAUM J

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First Plaintiff

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Second Plaintiff

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AND LITHOPRINT (NZ) LIMITED

Second Defendant

Hearing: 9 July 1984

Counsel: T.M. Gault for First and Second Plaintiffs
W.S. Shires Q.C. for First Defendant
T.J. Castle and Susan J Taylor for Second
Defendant

Judgment:

11/7/84

JUDGMENT OF EICHELBAUM J

Motion for Interrogatories.

Prior to July 1979 the first defendant Mr Dunne was a director and shareholder of a company called Litho Productions Ltd. A substantial part of the business of that company was printing work undertaken for the Prudential Assurance Company Ltd (the Prudential). In that month the second plaintiff purchased the assets and goodwill of Litho Productions Ltd. Following the purchase the first defendant was employed by the second plaintiff. Subsequently the business of the second plaintiff was transferred to the first plaintiff which in the course of

argument was referred to as its "parent company". The second plaintiff and later the first plaintiff continued to carry out printing work for the Prudential. Both the agreement for sale and purchase and the contract of service pursuant to which Mr Dunne was employed by the second plaintiff contained provisions, not in identical terms, to restrain competition and prevent the use or communication of any secret or confidential information relating to the business of Litho Productions Ltd. However the restraint of trade covenant included an express proviso that in the event that the first defendant's contract of employment should be terminated he was not prohibited from employment within the printing trade anywhere in New Zealand so long as the employer was not Litho Productions Ltd or its successor and with certain other exceptions not presently relevant. Both covenants were still current when in May 1982 Mr Dunne's employment terminated. He then took employment with the second defendant.

The amended statement of claim alleges that Mr Dunne has had a close association with Mr Ternent an officer of the Prudential and that the business of the Prudential has now followed the first defendant to the second defendant. Four causes of action are set out. The first two are against Mr Dunne alone. The first relies simply on the covenants contained in clauses 11 and 12 of the agreement for sale and purchase. On its face clause 12 is a covenant by the vendor company alone but it is pleaded that its terms are binding on Mr Dunne. The plaintiffs allege that Mr Dunne has been instrumental in the Prudential's printing business being placed with him for the benefit of the second defendant, in alleged breach of the covenant contained in clause 11.

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The second cause of action is founded on the covenants contained in clauses 10 and 11 of the contract of service. It is pleaded that in the course of his duties as director and employee of Litho Productions Ltd and subsequently as an employee of the plaintiffs Mr Dunne acquired secret and confidential business information relating to the business of his respective employers, particularly in relation to the Prudential, including its requirements as to type styles, layout and design and also of the costing and production methods of the plaintiffs applied thereto. In negotiating accepting and undertaking printing work from the Prudential for himself or for the second defendant Mr Dunne, it is contended, has used and communicated to the second defendant such secret and confidential information, in breach of clauses 10 and 11.

The third cause of action is against both defendants. The plaintiffs allege that the secret and confidential information allegedly passed to the second defendant by Mr Dunne was communicated under circumstances imposing upon the second defendant an obligation of confidence not to use or disclose such information otherwise than with the authority of the plaintiff. In negotiating for accepting and undertaking printing work from the Prudential both defendants used such information in breach of the obligation of confidence upon them.

The fourth cause of action is against the second defendant alone. Here the plaintiffs allege that the second defendant's acts committed with knowledge of the contractual obligations of the first defendant, constituted unlawful interference with the contractual relations between the plaintiffs and Mr Dunne.

In respect of each cause of action it is alleged that the actions of the defendant or defendants have damaged the plaintiffs' goodwill, and in each instance they seek an injunction and damages.

Against this background the plaintiffs seek to administer 20 interrogatories to the first defendant and a further 20 to the second. I do not see any sufficient foundation for the global objection made on behalf of the first defendant that the interrogatories were oppressive; the situation bears no analogy to Shore v Thomas 1949 NZLR 690. It is necessary that I now go through the interrogatories and deal with them either individually or in groups.

Int. 1. Nos. 1 to 9 are directed to the special relationship which it is alleged had obtained between Mr Dunne and Mr Ternent. Objection was raised to No 1, as in the case of a number of other questions, on the basis that it related to evidence rather than facts in issue. But as Lord Esher said in his classic judgment in Marriott v Chamberlain 1886 17 QBD 154, 163 the right to interrogate is not confined to facts directly in issue, but extends to any facts the existence or non existence of which is relevant to the existence or non existence of the facts directly in issue. The nature and extent of the relationship between Mr Dunne and Mr Ternent prior to 1 July 1979 undoubtedly is relevant to at least one fact in issue namely the scope of the goodwill acquired by the second plaintiff when it purchased the business of Litho Productions Ltd. It was also said that the second defendant had admitted the existence of a close relationship in a letter written by his solicitors but I do not think that that affords a reason why the plaintiff should be prevented from seeking a more specific admission from the first defendant in person. Interrogatories are not

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limited to enquiry about information that the interrogator does not presently have, see The Supreme Court Practice 1982 Vol 1 p 486. I do not regard the existence of the admission contained in the letter as a sufficient reason for exercising my discretion against the applicant. Accordingly this interrogatory is allowed.

Int. 2. Similar arguments were raised as in relation to Int. 1. Here however an additional ground of objection is that the form of the question seeks an expression of opinion rather than any matter of fact. In general interrogatories are not permitted for the purpose of securing an admission of a fact the truth of which is a matter of opinion, see The Supreme Court Practice 1982 Vol 1 p 489. Accordingly I disallow Int. 2.

Ints. 3 - 6. These were objected to on the basis that they related to evidence and were not material. Their materiality follows from what I have said under the heading of Int. 1. Likewise for the reasons given under that heading it is my opinion that they sufficiently relate to a fact in issue in the proceedings. They are therefore all allowed.

Ints. 7 - 9. It was common ground that Mr Dunne commenced his new employment on Monday 24 May 1982. From the bar I was informed without objection that inspection had revealed that the following day 25 May the second defendant received 16 orders from the Prudential. These interrogatories elicit facts relating to the manner in which the Prudential's work came to the second defendant. In my view these questions are directly relevant to facts in issue in the first three causes of action and I allow them accordingly.

6.

Ints. 10 and 11. These were objected to on the ground that it is not permissible for a plaintiff to interrogate one defendant in order to obtain evidence against the other. At any rate where separate torts are alleged such interrogatories are not permissible, even though it is a proper case for joinder of the defendants under R 61 : Davin v Brown 1930 GLR 552. The principle as I see it is that the interrogatory must be relevant to a matter in issue between the interrogator and the party sought to be interrogated. In these questions the plaintiffs seek an admission from the first defendant that prior to the Prudential placing orders for work with the second defendant Mr Dunne had not informed either the Prudential or the second defendant of the existence of the restrictive covenants. Those I consider are matters relevant to the allegation in the causes of action against the first defendant that in breach of an obligation of confidentiality he negotiated for work from the Prudential. I therefore allow both questions.

Int. 12. As Mr Gault conceded this called for an expression of opinion. The interrogatory is disallowed.

Int. 13. Clearly this is relevant to breach of confidentiality. The interrogatory is allowed.

Ints. 14 and 15. These were objected to on grounds that the information sought was covered by a letter written by the solicitors for Mr Dunne. On analysis I do not think that this is so. In addition, as discussed under Int. 1, I do not consider that this objection is sound in principle. Both are allowed.

Ints. 16 - 18. These revert to the allegation of a close relationship between Mr Dunne and the Prudential which continued while he was employed by the plaintiffs. That matter in turn is relevant to the plaintiffs' contention that Mr Dunne procured or enticed the Prudential's business to the second defendant. Being in my opinion material to the existence of facts relevant to matters in issue, these interrogatories are allowed.

Int. 19. This seeks to know whether in his employment with the second defendant Mr Dunne has prepared or participated in the preparation of costing for the Prudential's printing work. It was objected to on the basis that it relates solely to the claims against the second defendant. As I see it, in relation to the allegations of misuse of confidential information, it is relevant also to the claim against Mr Dunne and I allow it accordingly.

The remaining interrogatories are directed against the second defendant. Counsel for the plaintiffs agreed to the deletion of No 20 as the information sought had been elicited upon inspection.

Int. 22. Interrogatory No 21, to which no objection was made, enquires as to the date upon which an employee of the Prudential first approached the second defendant to discuss or order printing work. Int. 22 asks the name of the employee. Had the question been limited to enquiring whether the employee was Mr Ternent it would have seemed relevant but in its wider form it appears simply to enquire about evidence. Accordingly I disallow the question.

Int. 24. Before Int. 23 was amended, Mr Castle objected to Nos 23 and 24 on the same ground, namely

that they sought the name of a witness. No. 24 relates only to the actions of the first defendant and appears to me to be relevant to the question of the creation of relations between the Prudential and the second defendant. It is therefore allowed.

Int. 35. This enquires whether Mr Dunne received any remuneration from the second defendant beyond his agreed salary. It was argued that this was relevant in that an affirmative answer could be the foundation for questions in cross-examination as to the nature of the services for which the additional payment had been made. It is not enough that questions may help the interrogator indirectly if they relate to matters which need not be proved by him : Wilkins v Connell 1903 22 NZLR 961 (although for completeness it should be added that interrogatories are permitted for the purpose of destroying the opposite party's case). Here the answer does not lead directly to any matter in issue and being in my opinion too remote to relevant issues, I disallow it.

Ints. 36 - 39. I regard 36, 37 and 38 as relevant to establishing that the first defendant was employed by the second defendant in a position where, for the benefit of the latter, he was able to take advantage of confidential information he may have acquired prior to the commencement of his employment. As such, contrary to the submission on behalf of the second defendant, they are relevant to the causes of action against the latter and I allow them accordingly. No. 39 assumes, without sufficient foundation, that the Prudential was included among the customers of the second defendant for which Mr Dunne was responsible. As a matter of form it is oppressive and I disallow it.

Int. 40. This was eventually abandoned.

The second defendant did not object to the interrogatories not specifically mentioned viz Nos 21, 23 and 25 - 34, in some cases after they had been amended. As a number of the interrogatories underwent alteration during the course of the hearing I will attach to this judgment a copy of the draft interrogatories indicating the amendments made, and showing those disallowed.

I formally order that the plaintiffs have leave to deliver interrogatories in writing to the defendants in accordance with this judgment, that the defendants answer the interrogatories by affidavit within 21 days of service of the order upon them (the answer in the case of the second defendant to be by their director Allan Cecil Read) and that costs be reserved.



Solicitors :
Craig Bell & Bond (Wellington) for Plaintiffs
Webb Paris & Stevenson (Wellington) for First Defendant
Castle Pope & Partners (Wellington) for Second Defendant