IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No. 394/84

NZLR 560

BETWEEN PROBERT INDUSTRIES LIMITED
First Plaintiff

AND MELLON MANAGEMENT LIMITED
Second Plaintiff

AND MARK ARTHUR ROGERS
First Defendant

AND MOULDING SERVICES LIMITED
Second Defendant

Hearing: 8th May, 1984

Counsel: Toogood for Plaintiffs
Curry and Miss Dolan for Defendants

Judgment: 29.5.84

JUDGMENT OF SINCLAIR, J.

This is an application for an interim injunction brought by the Plaintiffs against the Defendants and arising essentially from the First Defendant's former employment with the Plaintiffs.

The motion for an interim injunction seeks thirteen different injunctions and I do not intend to set out particulars of each of the injunctions sought. Suffice it to say that they are injunctions directed towards restraining in the main the First Defendant from using any knowledge he has acquired at least for a period, in relation to the trading activities of the Second Defendant and to ensure that he maintains the duty of secrecy and confidentiality which is incumbent upon him having regard to his former position with

the Plaintiffs and the knowledge which he acquired during his employment by them. Additional injunctions are sought against the Second Defendant to restrain it from inducing the First Defendant from breaching any duty which he owes to either or both of the Plaintiffs. Included amongst the orders sought against the First Defendant is an injunction to restrain him from dealing with one particular firm which is said to be a client of the First Plaintiff, while in respect of the Second Defendant there is a specific injunction sought to prohibit it from using a particular machine which is in its possession.

It is necessary to consider some of the history of the matter before a decision can be arrived at.

Probert Industries Ltd is a wholly owned subsidiary of Abacus Holdings Ltd while Mellon Management Ltd is a party to a management agreement with Abacus dated 1st October, 1983 in which Mellon Management agreed to undertake the management administration of the business of Abacus. The Defendant, Mr Rogers, entered into an executive agreement with Mellon on 1st October, 1983 and pursuant to the executive agreement which had been entered into between Abacus and Mellon Mr Rogers was appointed General Manager of Probert and at the same time became a director of that firm .

Under the executive agreement with Mellon Rogers was required during normal business hours (unless prevented by health or accident) to devote the whole of his time, attention and abilities to the business and affairs of Mellon and Probert and to faithfully serve those two companies, using his best endeavours to promote the interests of those same two companies.

Under Clause 5.01 of the executive agreement Mr Rogers covenanted not to disclose at any time after the 1st October, 1983 to any person, firm or corporation any information concerning the business, affairs, policies, methods or operations of Mellon and Probert. By the same executive agreement Mr Rogers was precluded, except with the prior consent of Mellon, from being engaged or interested in or concerned with, and whether directly or indirectly, and whether as Director, shareholder, partner or otherwise, in business the same as or similar to that carried on by Mellon or Probert.

Mr Rogers' term of appointment was for a period of five years from 1st October, 1983. In February, 1984 Mr Rogers approached Mr Strange, the Managing Director of Abacus, with a request that he be permitted to sell his shares in Mellon and that he be released from the executive agreement. Consequently his shares were disposed of by him by agreement with Mr Strange and it was agreed that Mr Rogers would remain as a Director of Abacus at the discretion of the other Directors, but that from 31st March, 1984 so far as Probert was concerned his services as General Manager would be provided through the medium of a company to be called Bayswater Consultants Limited which, as I understand it, is a company in which Mr Rogers and his wife are the shareholders.

Mr Strange in his affidavit states that neither he nor his fellow Directors up until the end of March 1984 were aware that Mr Rogers had any interest in any other company which was involved in trading similar to that carried on by Mellon or Probert. He deposes to the fact that at the end

of March, 1984 he was approached by Mr Rogers who asked whether Abacus would agree to his taking a 10% interest in a small plastics company which was engaged in the manufacture of plastic bottles. Mr Strange states that he informed Mr Rogers that such an interest would not be approved by Abacus, but that the Board would be willing to consider any specific request.

Early in April, according to Mr Strange, he learnt that Mr Rogers had an association with the Second Defendant, namely Moulding Services Limited, in which the shareholding was held by Mr Rogers' wife, a Mr Mills who had formerly been Probert's factory supervisor, a Mr Nicholson, a Miss Oborn who was the daughter of the Regional Manager of Westpac Bank, the bankers of both Probert and both Defendants, Mr R. J. Kelly and Mr G. A. Lanauze who is the Managing Director of Warwick Browne Plastics Ltd, a customer of Probert. According to Mr Strange he learnt that Moulding Services Limited intended to carry on business using injection moulding processes to manufacture plastic goods and that Mr Rogers had been responsible for the acquisition of a 400 ton Battenfeldt injection moulding machine which was to be used by Moulding Services in the carrying on of its operations. Mr Strange alleged that Mr Rogers became aware of the availability of this machine through an employee of Proberts, one Kenneth Gilbert, who considered that the machine would be useful in Probert's operation.

In view of what had been ascertained, it was considered that Mr Rogers had become associated with a firm which was a potential, if not actual, competitor of Proberts and on

the 9th April, 1984 Mr Rogers was dismissed from his position as General Manager of Proberts. He was handed a cheque for his salary to that date and was given a further one month's salary in lieu of notice. On the 9th April, 1984 Mr Rogers resigned as a Director of Abacus so that from that date he had no employment with any of the companies in the Abacus group, nor did he have any share-holding in any of the companies or any official position in them.

Other than for the contractual obligation of confid-entiality which was set forth in paragraph 5.01 of the executive agreement, there was no other contract or con-tractual term between the plaintiff companies and Mr Rogers which would in any way restrict Mr Rogers in his avenues of employment or commercial expertise after 9th April, 1984.

From the affidavits it becomes apparent that one Mr Lewis, a chartered accountant of Christchurch, was the receiver of a company known as Toolco Industries Limited, and that one of the assets owned by that company was the Battenfeldt machine. He deposes to the fact that for some 18 months prior to April, 1984 he had been attempting to sell the machine and that in January of this year he happened to mention that fact to Mr Gilbert who has earlier been referred to. On 1st February, 1984 Mr Rogers rang Mr Lewis and Mr Rogers gave an Auckland telephone number which is that of Probert Industries. Price was discussed and in mid February a Mr Mills, who unquestionably is the same person who is a shareholder in the Second Defendant, inspected the machine. Later on the 21st February, 1984

Mr Rogers rang and upon being asked by Mr Lewis who Mr Rogers was representing, Mr Lewis was informed that it was Probert Industries Limited. A bargain was reached whereby the machine was agreed to be sold for $65,000 and that a confirming letter and cheque would be despatched by Mr Rogers the following day. In fact on the 22nd February, 1984 and on Probert Industries' letter-head, a letter was despatched to Mr Lewis over Mr Rogers' signature as General Manager of Probert Industries Ltd, enclosing the cheque for the deposit and confirming the price. There was some delay, apparently, in the receipt of that letter and there were some intermediate communications in relation to it, but it eventually arrived in Mr Lewis' office in the first week in March. After some toing and froing concerning the balance of the purchase price a bank cheque was forwarded for the balance, but that was on the letter-head of Moulding Services Ltd, once again over the signature of Mr Rogers, but Mr Lewis believed that Moulding Services was merely an associated company of Proberts and he thought nothing further of it. Incidentally the original cheque for the deposit was drawn on Mr Rogers' account with the Westpac Bank. In his affidavit Mr Lewis somewhat naturally stated that he felt that he was dealing with Proberts.

In reply Mr Rogers contends that he explained that he was not acting for Proberts when he contacted Mr Lewis initially, but that I find somewhat difficult to accept in view of the later correspondence on the Probert letterhead and the plain understanding which Mr Lewis had on the subject. However, Mr Rogers states in his affidavit that in July, 1983 he was approached by Mr Maurice Nicholson of Cirman Sales Limited to advise in relation to the financial viability

of a plastic injection moulding operation for Cirman Sales. That company was not a customer of Probert, but it did decide to join Warwick Browne Plastics Ltd which did have certain work carried out for it by Probert.

The affidavits disclose that Moulding Services was incorporated for the express purpose of moulding for Cirman Sales and Warwick Browne and that that was to be the destination of the Battenfeldt machine. Mr Nicholson by his affidavit confirms that situation and went on to say that one of the reasons why the Battenfeldt machine was obtained was in relation to the supply by his company of coat hangers to various firms in New Zealand and to Spotless Plastics Ltd in Melbourne and it could be said with certainty that Probert were not involved in the manufacture of such coat hangers.

Mr Lanauze in his affidavit confirms that Probert made a small range of his firm's products and that he was aware that some of that work was contracted out by Probert. He has indicated in his affidavit that his company still intends to purchase the same value of contract moulding from Probert in the future and of a nature which would not require Probert to contract out any of the work. The affidavit also discloses that there have been some inter related, but separate business dealings between Warwick Browne Plastics Ltd and Probert, but to my mind at the moment those separate dealings have little or no bearing upon the matters in issue.

It is evident from the totality of the affidavits that Mr Strange considers that had his company become aware that the Battenfeldt machine was available it would have been interested in acquiring it, although for his part Mr Rogers

contends that having regard to the attitude of the Board of Abacus he was of the view that they would not have countenanced the purchase of such a machine.

Mr Rogers contends, and there is no evidence to the contrary, that he has faithfully observed the duty of confidentiality and secrecy which was imposed upon him by the executive agreement and that he has no intention of breaching it. In fact, both Defendants were prepared to give certain undertakings to that effect, and in addition the Second Defendant undertook not to make use of any confidential information which was reposed in Mr Rogers and which was referred to in the proceedings.

One aspect that did cause Probert some considerable concern was the fact that it had a contract to supply General Foods Limited with certain ice cream containers and that certain events had occurred which tended to suggest that Moulding Services intended to set up in opposition in respect of similar ice cream containers and thus attempt to woo General Foods Ltd away from Probert so that Moulding Services would obtain that firm's contract for the supply of those containers. Both Defendants have indicated that they are prepared to undertake not to induce General Foods Ltd to breach its current contract with Probert in relation to those particular containers.

The Plaintiffs, in my view, face some considerable difficulties in seeking injunctions of the type which they are seeking at the moment because Mr Rogers' employment has come to an end and other than for the one provision in

the executive agreement there is no contractual term at all restricting him in any way in his business operations once his employment with the Abacus group came to an end. I appreciate that Mr Toogood contends that the Plaintiffs seek to restrain both Defendants from obtaining the benefit of certain things which were said to have been done by Mr Rogers during the course of his employment with Probert, but I repeat that his contract of employment is at an end and in my view that has certain consequences in law which I will shortly refer to and which, to my mind, preclude the Plaintiffs from seeking the interim remedy which they now seek.

The matter is further complicated by the fact that Moulding Services Ltd was not incorporated until 30 March, 1984 and while it is true that that company now appears to have as one of its assets the Battenfeldt machine, the only inference to be drawn from what occurred is that Mr Rogers' activities were on behalf of a company to be formed and in which, on the face of it at least for the moment, he has no shareholding although his wife is a shareholder. Nor is there any evidence at the moment as to just precisely what Mr Rogers' position is with Moulding Services. I am unsure, but as he has indicated in his affidavit that he anticipates an income of $50,000 per annum I think I am entitled to assume that in some fashion or other that income will be derived from his activities with Moulding Services.

I turn now to review the legal considerations which are involved: three causes of action are pleaded in the statement of claim. The first cause of action is based

on breach of contract and in a general way the allegations are as against Mr Rogers only in respect of breaches of duties expressly or impliedly imposed upon him as an employee of Probert and Mellon. The second is directed against Moulding Services and is framed in such a way as to plead that Moulding Services induced the breaches of contract which are alleged against Mr Rogers and which are referred to in the first cause of action. The third cause of action is based on alleged breaches of confidence, such confidence having been imposed in Mr Rogers; but the allegations are made not only as against him under this head, but also against Moulding Services.

Mr Toogood acknowledges that before he can succeed he must show that there was a duty owed by Mr Rogers to the Plaintiffs and one which was contractual in nature as there is no other legal basis on which he could hope to obtain the orders which he seeks on behalf of the Plaintiffs. So far as the breach of confidence is concerned he relies upon the explicit provision in the executive agreement earlier referred to and so far as the other breaches alleged against Mr Rogers are concerned he maintains that those are breaches which occurred during the period of Mr Rogers' actual employment with the Plaintiffs, or either of them, and which have a continuing effect after the termination of his employment, thereby entitling the Plaintiffs to seek the relief sought.

For the Defendants Mr Curry accepts that there is a continuing obligation on Mr Rogers to maintain the duty cast upon him by the executive agreement in relation to

confidence, but says that is where Mr Rogers' duty ends in view of the fact that his employment has been terminated. By the same token he concedes that Moulding Services cannot take any advantage of information which has been obtained by Mr Rogers in confidence from the Plaintiffs, but otherwise says that it can make full use now of Mr Rogers' services.

The commencing point is, as Mr Curry submitted, Rule 462 of the Code of Civil Procedure which provides as follows:

> "462. Injunction - Where the assistance of the Court is sought to restrain any officer or person from breach of any duty incumbent upon him which he has threatened or has already commenced to commit, the Court may issue a writ of injunction to restrain such threatened breach or the continuance of any breach which is of a continuous character."

In amplification of the Rule Mr Curry refers to Forsythe Downs Ltd v. Miller (1974)1 N.Z.L.R. 542 and, in particular, to that part of the judgment which appears at page 544 when, after discussing the English rule which was somewhat different from the New Zealand Rule 462, Wilson, J. said:

> "Under Rule 462 it was necessary for the plaintiff to show that the defendant had committed, or was threatening to commit, a breach of some duty incumbent upon him. Such a duty must be a legal duty."

Therefore the first consideration is by applying the decisions in American Cyanamid Company v. Ethicon Ltd (1975) A.C. 396 to decide whether there is a serious question to be tried and, if so, as to where the balance of convenience lies. It is also convenient in this context to refer to Eng Mee Yong v. Letchumanan (1980) A.C. 311.

In respect of the first cause of action it is emphasized by the Defendants that Mr Rogers' employment with Mellon in fact terminated on 31st March, 1984, that being my understanding in accordance with his resignation from that firm, and his contract with Probert was terminated on 9th April, 1984 when he was dismissed. In those circumstances Mr Rogers was in no different a position than the employee in Wessex Dairies Limited v. Smith (1935)2 K.B. 80. At page 85 Greer, J., when discussing an employee's duty to his master, said as follows:

> "The obligation to protect his master's interests lasts until the last hour of his service. The dividing line between owing his master a duty and owing him none is that imperceptible period of time between the termination of his service and the moment he acquires freedom of action after his service has terminated."

The same principle was enunciated in Thomas Marshall Exports Ltd v. Guinle (1979)1 Ch. 227, at p.244, and Holland, J. had much the same to say at page 11 of his judgment in S.S.C. & B. Lintas N.Z. Ltd v. Murphy & Anor, A.966/81, Auckland Registry, judgment 14th October 1981.

Reference may also be had to the decisions in Baker v. Gibbons (1972)2 All ER 759 and Roberts v. Elwell Engineers Limited (1972)2 All E.R. 890. From this latter case I quote from page 894 where the following is said in relation to the employee's right to canvass customers of his former employer:

> "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 in 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 has 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. 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."

From the above cases and in particular from the quotations which I have reproduced, it becomes apparent that in the absence of any express contract to the contrary once an employment contract is terminated the employee whose services have been dispensed with is fully entitled to act in any manner in which he thinks fit, even to the extent of competing with his former employer and canvassing or soliciting orders from customers of his former employer provided that he does not work from a list which he has prepared during the course of his employment with the former employer or which the former employer himself has prepared and which the employee has taken with him for his own use once his employment has been terminated. In other words, unless affected by a restraint of trade clause in his contract the employee can do what he wishes so long as he does not breach any confidential information or secret information which has come into his possession as a result of his former employment. That is particularly so in this case because the only restriction imposed by the contract in this case is, as I have already mentioned, of the limited nature referred to in the executive agreement.

Accordingly I am of the view that there is no serious question to be tried in respect of the first cause of action despite Mr Toogood's submissions because any breaches committed by Mr Rogers during the course of his employment with the Plaintiffs, or either of them, and which did not fall within the ambit of the executive agreement, are compensible in damages only.

So far as the second cause of action is concerned, once again in my view no serious question to be tried arises as of necessity this cause of action, being against Moulding Services, depends on whether or not there was any duty owed in the particular circumstances by Mr Rogers to the Plaintiffs. Moulding Services is, of course, fully entitled to compete with Probert and to canvass and solicit customers and suppliers of that company, and is entitled to approach employees of Probert and induce them to work for Moulding Services. It is generally acknowledged in the business field that in the absence of express contracts there is nothing to prevent one employer going to the servant of another and attempting to persuade that servant to change his employment to the firm or person seeking to induce him to make the change. Even in legal circles it frequently happens that a firm of solicitors will be desirous of endeavouring to persuade an employee of another firm to transfer his services to the new firm. There is no rule of law, nor is there any convention, to prohibit such a solicitation.

Therefore there is, in my view, no ground for granting an injunction in respect of the second cause of action.

In relation to the third cause of action, in view of

the willingness of the two Defendants to give undertakings in relation to the duty of confidence which is reposed in Mr Rogers, it seems to me that it is inappropriate to direct an injunction. Despite the express term in the executive agreement Mr Rogers was still under the equitable duty of confidence which survived the termination of his employment contracts with Probert and Mellon, but there is no such equitable duty on Moulding Services Limited. However, if that company obtained such confidential information from Mr Rogers then of course it can be restrained from using it or further divulging it. Both Defendants are entitled to use information which is freely available in the market place. It is said that that was the situation so far as the Battenfeldt machine was concerned. To some degree that submission is correct, but the way Mr Rogers went about acquiring that machine is, as I have already indicated when discussing the facts, open to the construction that he at least led the person with whom he was dealing to believe on reasonable grounds that he, Mr Rogers, was acting on behalf of Probert.

Under this head, having regard to the way in which Mr Rogers acted in obtaining that particular machine, and in failing to disclose to his employers his involvement with Mr Nicholson and Mr Lanauze, I do not consider it will do him or Moulding Services Ltd any great injustice to require them to lodge in this Court the undertakings which they have offered. If the offer is genuine, as I accept it is, then no possible harm could be done to anybody by requiring both Defendants to file those undertakings. If, of course, the offer is not genuine, then the fact that the

undertakings are required to be lodged will give the Plaintiffs that degree of protection which in all the circumstances I consider they are entitled to. I draw attention again to the fact that Moulding Services was not incorporated until 30th March, 1984 so that there are practical difficulties facing the Plaintiffs insofar as any allegations can be made against that company in relation to inducing by Mr Rogers breaches of his contract with the Plaintiffs or either of them.

That leaves merely the balance of convenience argument to be disposed of. As I have come to the conclusion that at the moment there is no serious question to be tried, there is no necessity to consider this particular aspect, but in any event if I should be wrong in the conclusion I have come to I am of the view that the balance of convenience now rests with permitting Moulding Services to carry on with its operations appreciating to the full that if the Plaintiffs or either of them have any remedies as against either Defendant then they can be compensated in damages which I would regard in all the circumstances as being an adequate remedy.

From the information which has been disclosed I am satisfied that the Defendants would be in a position to meet any damages likely to arise from any breaches on Mr Rogers part or, indeed, in respect of any breaches which may be established as against Moulding Services.

In summary, therefore, I require the Defendants to file in this Court within 14 days of the delivery of this judgment

undertakings in the following form:-

"(a) The First Defendant undertakes not to disclose to any person, firm or corporation any confidential information concerning the business, affairs, policies, methods or operations of the First and Second Plaintiffs.

(b) The Second Defendant undertakes whether by its servants or agents or any affiliated company or holding company or otherwise, not to make use of or disclose to any person, firm or corporation any confidential information obtained from the First Defendant concerning the business, affairs, policies, methods or operations of the First and Second Plaintiffs.

(c) The First Defendant undertakes not to disclose to any person, firm or corporation any of the confidential information as set out in the First Schedule annexed to the Statement of Claim;

(d) The Second Defendant undertakes not to make use of or disclose to any person, firm or corporation any of the confidential information as set out in the First Schedule annexed to the Statement of Claim, whether by its servants or agents or any affiliated company or holding company or otherwise.

(e) The Second Defendant undertakes not to induce the First Defendant to breach any of his duties to the First Plaintiff pursuant to his contract of employment with the First Plaintiff.

(f) The First and Second Defendants undertake not to

induce General Foods Limited to breach the current contract between it and Probert Industries Limited relating to the production of two litre square plastic containers and lids.

Dated at Auckland this

day of

1984

Signed by the above-named First Defendant
Mark Arthur Rogers in the presence of:-

The Company Seal of Moulding Services Limited
was hereunto affixed in the presence of:- "

If the above undertakings are not forthcoming within the time limit then leave is reserved to the Plaintiffs to bring the motion on for hearing again, but I can indicate now that unless new matter is produced any further hearing will be restricted as to whether or not an interim injunction should be granted in relation to the matters which are set forth in the above form of undertaking.

In the meantime all question of costs is reserved.

P Boswell J.

SOLICITORS:
Luke, Cunningham & Clere, Wellington for Plaintiffs
Russell, McVeagh, McKenzie, Bartleet & Co., Auckland for Defendants