1986

N.Z.L. Reports

M.224/84

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

660

BETWEEN KEVIN ERIC THROWER of 17 Wright Street, Wainuiomata, Driver

Appellant

AND W J HAMILTON (1980) LTD a duly incorporated company having its registered office at Upper Hutt and carrying on business as carriers

Respondent

Hearing: 28 May 1984

Counsel: D.G. Dewar for Appellant
D.G. Hurd for Respondent

Judgment: 28 May 1984

ORAL JUDGMENT OF EICHELBAUM J

It will be convenient to refer to the parties as plaintiff and defendant. The plaintiff company is a cartage contractor. The parties entered into an agreement to commence 9 May 1983 which in brief was to the following effect. The defendant was to provide services to the plaintiff as an owner-driver. He was to provide a vehicle and make himself and the truck available for the plaintiff's work each working day. He was not without the plaintiff's consent to engage in any work other than the plaintiff's. The plaintiff company in turn

provided the necessary administrative and managerial umbrella. The company was to account to the plaintiff in respect of all work carried out by him, subject to various deductions and subject further to a guaranteed minimum monthly payment. The contract included a restraint of trade clause in the following terms :

> " 52. The contractor shall not for a period of one (1) year from the expiration or sooner determination of the term hereby created be engaged, employed or interested either directly or indirectly in the business as of cartage . "

The agreement was for a term in excess of three years with a right of renewal, but purporting to act pursuant to one of the provisions the company terminated the contract by letter dated 6 April 1984. On the evidence adduced so far it is clear that the defendant then proposed to continue to engage himself in the cartage business. The plaintiff issued proceedings for an injunction and damages and on these an interim injunction was made from which appeal is now brought.

The principles upon which interim injunctions are granted are too well known to make it necessary to set them out in detail. In their modern form they originated in the House of Lords decision of American Cyanamid Co v Ethicon Ltd 1975 AC 396, were discussed in Fellowes & Son v Fisher 1976 QB 122, approved by the Privy Council in Eng Mee Yong v Letchumanan 1979 3 WLR 373, and approved by our Court of Appeal in Consolidated Traders Ltd v Downes 1981 2 NZLR 247. Likewise the principles on which the Court acts in dealing with an appeal against the exercise of a discretion are well established. For present purposes it is necessary to refer only to Cottage Foods Ltd v Milk Marketing Board 1983 3 WLR 143, House of Lords, the particular passage being in the speech of Lord Diplock at p 146.

On the threshold question of a serious issue to be tried, it cannot be doubted that the plaintiff has satisfied that test in relation to the existence of a contract and in regard to a threatened or actual breach of cl 52. The only aspect requiring discussion at this stage relates to the validity of that clause. Without prejudging the outcome at all, obviously there is room for the contention that in terms of area the provision may be wider than is reasonable. However, I share the view of the learned District Court Judge that the plaintiff has an arguable case that if the clause is regarded as unreasonable in this respect, the provision may be modified under the Illegal Contracts Act 1970, so as to entitle the plaintiff to protection in the Hutt Valley and Wainuiomata areas. The decisions in Brown v Brown 1980 1 NZLR 484, and H & R Block Ltd v Sanott 1976 1 NZLR 213 are sufficient authority for that view. Accordingly, I agree that the plaintiff's case passes the threshold test; and indeed in this Court Mr Dewar did not contend otherwise, nor was it contested that the Court had jurisdiction to enforce a negative covenant : see Thomas Borthwick & Sons v South Otago Freezing Co Ltd 1978 1 NZLR 538.

The case therefore turns on the issue of balance of convenience. The Judge, before whom the matter came at short notice and in less than ideal circumstances, did not address the subject in his decision, at least overtly. I should therefore state my own conclusions on that.

The first question is whether, if the plaintiff succeeds at the trial, it will be adequately compensated by damages for any loss consequent upon refusal to grant an interim injunction. On this aspect the evidence was relatively sparse. The danger that is of concern to the plaintiff company in

wishing to have an enforceable restraint of trade is fairly obvious. The work of the defendant and all others similarly employed brings the drivers into direct contact with customers of the plaintiff. If a mutually satisfactory relationship should develop between the driver and the customer there may be a temptation for those parties to seek to cut out the plaintiff company by a direct engagement between the customer and the driver. If, in the vernacular, one driver gets away with it, others may be tempted to follow suit. By the time the present action is tried, even if the validity of the covenant in restraint of trade is then upheld the business of the plaintiff company could be seriously damaged, if not destroyed. Further, there are reasons to doubt the defendendant's capacity to meet a substantial award of damages. Against this background I consider that damages would not be an adequate remedy to the plaintiff.

I turn to consider the defendant's position on the postulation that he is successful in resisting the claim for an injunction at the ultimate hearing. Again, the evidence bearing on the subject is not extensive. However, I accept that considerable hardship to the defendant may result. At the same time I observe that the injunction does not render him unemployable. It is true that so far as the cartage business is concerned he would have to establish himself elsewhere than in the Hutt Valley, Wainuiomata area. However, that leaves a number of areas where he could be engaged in cartage without the necessity of having to move his home. Further he is left free to follow such other occupation as he may be able to obtain. The carrying business is not so specialised or skilful as to lead one to believe that the defendant will necessarily become unemployed. However, I do not discount the upset and inconvenience to the defendant should the interim injunction be maintained, yet he ultimately succeeded on this issue. I conclude that damages would not be an adequate remedy for the defendant either.

The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is regarded as a significant factor in assessing the balance of convenience, American Cyanamid at p 409. As I see it the evidence discloses at least a risk that failure to restrain the defendant could lead to long term damage to the plaintiff's business. The effects on the defendant of a continuation of the interim injunction on the other hand I regard as likely to be of a more temporary nature. In my view the balance of convenience favours the plaintiff.

If I had taken the view that on the aspects discussed so far, the question of convenience was evenly balanced, three further considerations would still lead me to the conclusion that it was proper to continue the interim injunction. The first is the preservation of the status quo, meaning on these facts the situation which existed prior to the commencement of the activities of the defendant of which complaint is made, see Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd 1977 2 NZLR 35. Secondly, a matter that weighed heavily with White J in the same case (and with approval from Richmond P in the Court of Appeal, see 1977 2 NZLR 41) was that the defendant there went into the infringing venture with its eyes open. To some extent I am afraid that comment must be applied to the defendant here. Thirdly, there is the question of the strength of the respective cases. Again without meaning in any way to pre-judge the final result, the fact is that the plaintiff has a covenant for restraint of trade in its favour, the breach can scarcely be denied on the facts, and the prospects that some form of injunction will ultimately issue on a permanent basis appeal to me as strong.

For these reasons, despite the thorough argument presented to me by Mr Dewar today, I consider that the District Ccurt Judge came to the correct conclusion and dismiss the appeal. Notwithstanding my earlier remarks I am sympathetic to the difficulties of the defendant's position and therefore express the hope that the substantive hearing can be given an early fixture. Costs are reserved.

Solicitors:
Gibson Sheat (Lower Hutt) for Appellant
Renshaw Edwards Hurd & Paino (Upper Hutt) for Respondent