

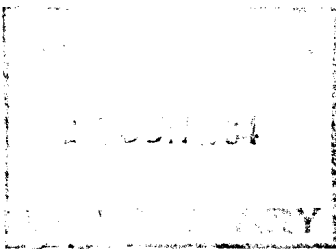
Set I

BETWEEN WEBB SUPPLIES LIMITED

PLAINTIFF

AND DOUGLAS BRUCE STAMP

DEFENDANT



Hearing: 3 February 1984
Counsel: Mr. Dillon for Plaintiff
Mr. Ingram for Defendant
Judgment: 3 February 1984

ORAL JUDGMENT OF GALLEN, J.

I am indebted to Counsel for their clear, helpful and detailed submissions which have enabled me to come to a conclusion and I propose, therefore, to deliver an oral decision immediately.

This is a notice of motion for an interim injunction. The parties are substantially agreed on the background facts from which the application arises.

The plaintiff company, Webb Supplies Limited, is a company involved, according to the affidavit of its manager, in the maintenance of wells and pump installations. The defendant indicates in his affidavit in opposition that he has had seven years' experience as a water pump service engineer. He was employed by the plaintiff for a period of

some two years and, for reasons which are not wholly agreed, his employment ceased and he became an independent contractor engaged on appropriate terms by the plaintiff. Some time subsequently, he entered into a partnership arrangement with the plaintiff. An agreement was completed by the parties. It appears that this was drawn by the accountant to the plaintiff and it contains in clause 18 the following:

"There will be a restraint of trade placed upon Doug Stamp that if the partnership is dissolved, he will not start in opposition to Webb Supplies for the period of two (2) years or within a radius of fifteen (15) miles."

The partnership was dissolved on 27 October 1982. There is no dispute over this date.

Subsequently, the plaintiff claims that it learned the defendant had carried out certain work which the plaintiff contends is in breach of the restraint of trade clause contained in the partnership agreement. These proceedings are the outcome of the concern expressed by the plaintiff at these activities.

Following the decision of the Court of Appeal in Consolidated Traders Limited v. Downes (1981) 2 NZLR 247, it is clear that the two major matters to be considered on interlocutory or interim injunction applications are whether there is a serious question to be tried, and the balance of convenience. As Mr. Justice Cooke said in that case, at p.255, they are not the only matters but they are important.

Mr. Dillon contends that there is a serious question to be tried and that this, summarising the provisions of the statement of claim, involves allegations that the restraint of trade clause has been breached by the defendant.

Mr. Ingram submitted that there was, in fact, no serious question to be tried as those words are understood in the cases, and gave a number of reasons in support of that contention. He submitted that the clause itself was invalid on various grounds. He also submitted that any breach which might have occurred was too illusory or insignificant to give rise to a cause of action. I appreciate that those were not the terms used by Mr. Ingram, but that is the effect of his submission at that stage of the argument.

In my opinion there is a serious question to be tried and in my view the various points which are made by Mr. Ingram are matters which I am not able to determine in these proceedings. They are contentions which would fall to be considered at the substantive hearing of the major dispute between the parties.

However, it is also necessary to consider the balance of convenience.

I am concerned that, bearing in mind the amounts which the affidavits suggest are at stake and which do not

seem to be, at least on the evidence before me, particularly significant, and the shortness of time which remains before the effect of the clause is terminated, that a decision granting an interim injunction on these proceedings might well be effective finally to determine proceedings, which is a matter for concern, as was pointed out in Parnass Pelly Limited v. Hodges (1982) FSR 329, comments which have been taken into account in other cases. This could effectively prevent the defendant from arguing as to the validity of the restraint of trade clause and raising, at the appropriate time, contentions which Mr. Ingram has raised and which I consider as being of sufficient strength to at least be given the advantage of development in the appropriate forum.

I am also concerned as to the differing effect on the parties of the granting of an interim injunction. The defendant has stated that his livelihood depends upon his being able to carry on the occupation for which he is qualified and which the plaintiff seeks to prevent in the area covered by the clause. While this is not necessarily a decisive matter, because a person who has chosen to enter into a binding agreement presumably accepts the consequences of that agreement, it is a factor which I consider I am entitled to take into account when considering the balance of convenience.

By contrast, as Mr. Ingram pointed out, the accounts of the plaintiff company do not suggest that it has been seriously affected by the activities of the defendant to date.

Finally, there is the question of the adequacy of the remedy. The normal remedy for breach of contract is the payment of damages. An injunction is a special and very powerful remedy which should be reserved for cases where damages are inadequate or inappropriate. In this case both parties have sworn that they are in a position to meet any award of damages. The defendant states that he has unencumbered assets, although he does not enumerate these. There is no evidence before me which would indicate that he is unable to meet an award of damages, if such is ultimately found properly to be payable, and the amounts which have been canvassed in the papers, insofar as they are quantifiable at all, do not appear to be so large as to cast doubt on his ability to meet any order.

These considerations lead me to the conclusion that, on the balance of convenience, it is not appropriate for an interim injunction to issue against the defendant and, of course, in coming to that conclusion, I also exercise that discretion which is an important part of the jurisdiction.

The notice of motion will therefore be dismissed. In all the circumstances all questions of costs will be reserved.

R.S. Salko J.

Solicitors: Messrs. McCaw, Lewis, Jecks, Hamilton, for
Plaintiff

H.J.I. Oliver, Cambridge, for Defendant

