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BETWEEN GRIFFITH LABORATORIES N.Z. LIMITED

Plaintiff

A N D ANTHONY I. LAUS

First Defendant

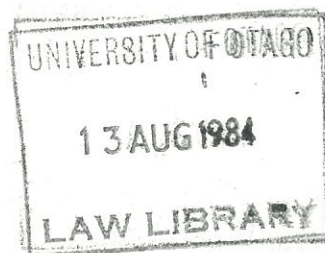
A N D MAURI BROTHERS & THOMSON (N.Z.) LIMITED

Second Defendant

Hearing : 18th April 1984

Counsel : R.O. Parmenter for Plaintiff
B.P. Henry for Defendants

Judgment : 18th April 1984



(ORAL) JUDGMENT OF BARKER, J.

This is an application by the plaintiff for the issue of an interim injunction against the first defendant in the following terms:

"That until further or other Order of this Court but in any event not after the 29th day of July 1984 the First Defendant be restrained within the Dominion of New Zealand from carrying on or being engaged concerned employed or interested either directly or indirectly either solely or jointly with any corporation person or persons in any capacity in the business of manufacturing or processing of the following food products (being food products manufactured or processed by the Plaintiff):

GRIFFITH LABORATORIES v LAUS (LABOUR)

Seasoned meals
 Hamburger pattie mixes
 Curing compounds
 Protein additives
 Snack and convenience food seasonings
 Batter mixes
 Meat colouring compounds

and in particular that the First Defendant be restrained from being employed by the Second Defendant until the 29th day of July 1984."

The notice of motion for injunction was filed on 17th November 1983; it came first before Vautier, J. as Duty Judge on 24th November 1983. Counsel then acknowledged that the matter was not ready to proceed; affidavits needed to be filed by the defendant. The motion then came before Moller, J. as Duty Judge, on 5th December 1983. He was unable to hear the matter because, at that stage, the estimate for the hearing was 2-3 days. Moller, J. noted the file to the effect that counsel for the plaintiff was to seek a priority fixture; the Judge recommended that some priority be given. No application was filed in the event, the motion has not been heard until today.

The affidavits establish that the plaintiff is the New Zealand operation of a worldwide organisation headquartered in the United States. The plaintiff manufactures seasoned meals, components of sausages and butchers' smallgoods, plus curing compounds for ham and bacon, protein additives and seasonings for snack and convenience foods. The first defendant was employed by the plaintiff as its company chemist and laboratory manager from 21st April 1981. He entered into a written agreement with the plaintiff on that date. The relevant parts of that agreement read as follows:

"WHEREAS:

A. Griffith is incorporated in New Zealand as a subsidiary company of Griffith Laboratories Incorporated in Chicago in the State of Illinois, United States of America for the purpose of organising the manufacture and sale in the Dominion of New Zealand and elsewhere of certain food products (herein called "the Products") to be processed in accordance with certain formulae and processes in the possession or at the disposal of Griffith.

B. The Employee is an employee of Griffith and in the course of such employment will acquire knowledge and familiarity with the said formulae and processes used in the processing of various products.

NOW THEREFORE IT IS HEREBY AGREED as follows:

1. The Employee hereby agrees that Griffith's methods and processes, formulae and other techniques used in the manufacture or processing of its products and all information pertaining thereto including among other things, the quantities or proportions of ingredients used or employed in any Griffith's products, the manner in which the ingredients are added, mixed or compounded in such products and the methods of use or application of the products are the property solely of Griffith and are trade and business secrets solely of Griffith.
2. The Employee agrees that any acquaintance with or information he may receive concerning the property and trade and business secrets of Griffith shall be received in the strictest confidence and he recognises that the confidence continues to exist after he leaves the employment of Griffith Laboratories NZ Limited.
3. The Employee agrees that during the course of his employment and thereafter he will not divulge to any person whomsoever any method of operation process, formulae or other technique used in the manufacture or processing of Griffith's products including any information concerning the quantities or preparations of the ingredients used or employed in Griffith's products or in the manner in which the ingredients are added, mixed or compounded in such products or the methods of use or

application of the products and that he will not use such methods, processes, formulae or other techniques or such information pertaining to quantities, preparations, admixtures, compounds, use or application as principal agent or employee.

4. The Employee further agrees that he will not during the said employment, nor for a period of twelve months after the termination of such employment, either solely or jointly, with or in any capacity, Director, Manager, servant, consultant, agent for any person or persons, firm or company, directly or indirectly, carry on or be engaged, concerned or interested in New Zealand in the manufacture or processing of any Griffith's products."

In May 1983, the second defendant approached the first defendant, offering him a position in its organisation. He then gave what is accepted to have been proper notice to the plaintiff of his intention to leave the plaintiff's employ. He told Mr Boday, the plaintiff's general manager, when he handed in his notice, that he was going to work in his vineyard and carry out some consultancy work. The first defendant left the plaintiff's employ on 29th July 1983. On 8th August 1983, he started work with the second defendant as a "senior technical representative". The second defendant manufactures smallgoods and associated products in competition with the first plaintiff. The second defendant has been taken over by the Wattie Group, a well-known food processor and distributor.

Various affidavits indicated that the first defendant did make some contact with persons in the butchering trade. He acknowledges that, initially, when he began working for the second defendant, he was responsible for quality control of its competing products. He altered the water and fat control systems

for the second defendant's smallgoods mixes to suit flavouring ingredients.

It is now said that the first defendant's contact now with "smallgoods" is only minimal in that he acts as some kind of quality control supervisor to ensure that the smallgoods comply with specifications; otherwise in his work for the second defendant, he is performing research with no contact with the selling or manufacture of smallgoods or related products.

In the proceedings issued by the plaintiff, it was sought first to enforce the restraint of trade clause referred to above; and secondly, to restrain the first defendant from divulging and the second defendant from making use of confidential information belonging to the plaintiff which might have been in the knowledge or possession of the first defendant, including such things as operating processes, formulae or other techniques of manufacture or recipes for the preparation of smallgoods.

The plaintiff does not seek an interim injunction in respect of alleged confidential information. It is of course at liberty to litigate that matter in the normal way. The plaintiff's proceedings were commenced by way of extraordinary remedy procedure; they do not seek damages as an alternative, as indeed they could not under the extraordinary remedy procedure. However, of course, if an injunction is declined, there is nothing to prevent the plaintiff from issuing a separate writ for damages.

What the plaintiff seeks now is an injunction for a period of something over 3 months to restrain the first defendant from working for the second defendant.

My first duty is to consider whether there is a "serious question" to be tried. It is not disputed that the plaintiff is the servant of the second defendant. The question is whether, in working for the second defendant, particularly in checking the quality control of the second defendant's goods, he could be in breach of his contract. In summarised form, the relevant clause restrains the first defendant for a period of 12 months after the termination of his employment with the plaintiff, from being a servant of any company directly or indirectly carrying on, engaged, concerned or interested in New Zealand in the manufacture or processing of any "Griffith's products".

Mr Henry submitted that since the word "Griffith" and the word "product" were defined in the agreement, the term "Griffith's products" bore a very narrow and technical meaning, namely, the actual products manufactured by the plaintiff; it could not therefore be said that the second defendant was a manufacturer etc. of "Griffith's products" because only the plaintiff could fit that description.

Mr Parmenter submitted that the term "Griffith's products" could only be taken to mean products of a kind reasonably similar to those manufactured by the plaintiff. Without deciding the matter finally, I am inclined towards the interpretation submitted by Mr Parmenter for the words "Griffith products". Otherwise, it would be difficult to see that the

clause bore any commercial sense. Therefore, for the purpose of holding that there is a reasonable question to be tried, I accept that the term "Griffith's products" means products of a kind reasonably similar to those manufactured by the plaintiff.

The next question is whether there is any evidence that the second defendant is manufacturing products of a kind similar to those manufactured by the plaintiff. It does seem, in general terms, that the second defendant has entered the marketplace as a manufacturer of smallgoods and that it has for some time been preparing a campaign to enter the market; as part of this campaign, the acquisition of the services of the first defendant was a feature.

However, the first defendant says that many recipes formerly belonging to the plaintiff were divulged publicly in a recipe book known as "The APV Recipe Book". In any event, it is submitted by the first defendant that flavourings used by the plaintiff were manufactured by a worldwide conglomerate, the recipes of which, or indeed of any other manufacturer, would require some amendment in order to produce the same flavo

There is little evidence of soliciting of customers. This is not the sort of case where a list of customers is something which would be valuable; the obvious persons to buy smallgoods are butchers; it would not be a very difficult exercise for someone, without any list of customers, to ascertain who all the butchers in New Zealand are.

Mr Parmenter's principal submission was based on the

English Court of Appeal decision in The Littlewoods Organisation Limited v. Harris, (1978) 1 All E.R. 1026. In the judgment of Lord Denning, M.R., appears the following passage at p.1033:

"The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade."

Mr Parmenter submitted that there were difficulties in the way of the plaintiff proving use of its confidential information, which was admitted by the first defendant to exist; the only way to preserve that confidential information and to prevent the servant from passing it on was to enforce a restraint of trade covenant. It is the gravamen of the plaintiff's claim that the restraint of trade covenant is necessary in order to preserve the confidential information; to refuse the plaintiff the injunction in circumstances where the covenant has only 3 months to run and before any hearing of the full case on the merits is possible, would be to deprive the covenant of meaning; it would encourage others likely to give these covenants in the expectation that the Court would not enforce them.

I mentioned that the first defendant stated that he had acquired confidential information relating to flavourings for sausage mixtures, cures and recipes for snack flavours. The plaintiff manufactures sausage mixes, snack flavourings; it sells curing compounds to butchers and others. The recipe book referred to in the main applies to cures; there is some argument as to what cures can be considered still confidential to the plaintiff.

In this context, it is also appropriate to record that the defendants are prepared to give undertakings to the Court along the following lines:

The first defendant undertakes not to divulge to any person or to use himself any of the plaintiff's recipes for flavouring sausage mixes or for flavouring snacks.

The second defendant, for its part, undertakes that it will not use any recipes of the plaintiff for flavouring sausage mixes or snacks if such should be divulged to it by the first defendant.

Mr Henry is prepared to give these undertakings; he has no doubt warned the defendants of the consequences of disobeying an undertaking given to the Court.

Mr Parmenter submitted that, on the Littlewoods case, the plaintiff does not have to show, where a restraint of trade clause exists, that confidential information has been divulged or used; it merely has to show that it has something to protect.

The next question is whether the covenant is intrinsically reasonable. The New Zealand situation of course is affected by Section 8 of the Illegal Contracts Act 1970 which gives the Court power to tailor restraint of trade contracts to what is reasonable; in that light must be considered the most recent Court of Appeal decision in Brown v. Brown, (1980) 1 N.Z.L.R. 482. That was a case involving 2 brothers who had become so incompatible that one bought the other's share out of

a business but exacted a restraint of trade covenant for 20 years

In that case, the various well-known principles on restraint of trade covenants were canvassed. In particular, McMullin, J. at p.499 noted that the law looks more benignly at a restraint imposed in the case of vendor and purchaser than it does on a restraint affecting a person's right to seek employment.

Richardson, J. at p.494 indicated that the ultimate question of reasonableness is whether the covenant as a whole is reasonable; a fair restriction as to scope, area of operation and duration were all elements in determining the reasonableness; not surprisingly in that case, a 20 year restriction was held unreasonable and the contract between the parties was modified under the statutory power.

On the evidence, it seems that there is at least a "serious question" to be tried; the covenant is prima facie reasonable as to duration, area, scope and ambit. As Lord Denning noted in the Littlewoods' case, a relatively short period in similar circumstances might be considered reasonable. As to area, there must be, in New Zealand, relatively few suppliers of the specialist mixes for smallgoods; a New Zealand-wide area might not prima facie be unreasonable. As to scope or ambit, the extension to competitors in a fairly narrow field might also be thought not unreasonable. I therefore consider that there is a "serious question" to be tried.

I then turn to whether the balance of convenience

requires the issue of the injunction. I have noted of course that the application is made almost three-quarters of the way through the life of the period of restraint. Mr Parmenter submitted that damages would not only be difficult if not impossible to assess, but also that there would be other results if an injunction were not issued. He submitted that there could be further attempts to "poach" on the plaintiff's customers. As to this point, I am not satisfied that there is sufficient evidence to justify an injunction.

Counsel submitted very strongly that the first defendant would be available to the second defendant to enhance its products; then there were the alleged pro bono type considerations, that others might feel, if an injunction were not granted, that they could regard considerations with impunity. I am not interested in what might happen with contracts in other situations. I am dealing purely with the matter presently before me.

Mr Henry drew my attention to an interesting passage in this area in Commercial Plastics Limited v. Vincent, (1964) 3 All E.R. 546. Pearson, L.J. at p.551 had this to say on the question of confidential information, quoting from the well-known case of Herbert Morris Limited v. Saxelby, (1916) 1 A.C. 703, 704:

"In applying the law in this case, the first question that arises is whether the plaintiffs had any trade secrets or confidential information which the defendant would be likely to divulge if he entered the employment of a competitor. They do not claim any trade secrets or confidential information in the general field of P.V.C. calendering, or even in respect of P.V.C. calendered sheeting as a whole, but only in the special field of such sheeting for adhesive tape. It is not easy to see what is the relevant

confidential information in this case. (a) The defendant has, no doubt, gained much skill and aptitude and general technical knowledge with regard to the production of P.V.C. calendered sheeting in general, and particularly for the production of such sheeting for adhesive tape. But such things have become part of himself, and he cannot be restrained from taking them away and using them. (b) The defendant had access to the mixing specifications recorded in code and the confidential test reports and other confidential documents. It is not contended, however, that the defendant would be able to carry away in his memory the many details recorded in such documents. If he took away, or copied, the documents, other remedies would be available. (c) The plaintiffs' scheme of organisation and methods of business are not to be counted as trade secrets, but fall into the same class as the general technical knowledge referred to in (a) above. Lord Atkinson said in Herbert Morris Ltd. v. Saxelby, (1916) 1 A.C. 703, 704:

"The respondent cannot, however, get rid of the impressions left upon his mind of his experience in the appellants' works; they are part of himself; and, in my view, he violates no obligation express or implied arising from the relation in which he stood to the appellants by using in the service of some persons other than them the general knowledge he has acquired of their scheme of organisation and methods of business." "

In other words, it is clear that a person cannot divorce himself from being what he is; if he has absorbed information in the course of his work, it is possible for him unwittingly to use this information in making various decisions in the course of his new employment, even though he may not consciously be wishing to infringe any undertaking given to a former employer.

The issue of the balance of convenience seems to have been clouded by another decision of the English Court of Appeal which attempts to extend yet again the well-known principles of the American Cyanamid case. This is Cayne v. Global Natural Resources plc, (1984) 1 All E.R. 225. There was another endeavour by that

Court to interpret not only Cyanamid but the more recent House of Lords decision in NWL Limited v. Woods, (1979) 3 All E.R. 614.

Really, what the Cayne decision seems to say is that Cyanamid is not the universal test; in the case such as Cayne, where the decision of the Court on the interim injunction must inevitably go one way or the other, then the approach of the Court must be to consider where the justice of the case would lie. In the words of May, L.J. at p.238:

"Where a plaintiff brings an action for an injunction, I think that it is, in general, an injustice to grant one at an interlocutory stage if this effectively precludes a defendant from the opportunity of having his rights determined in a full trial. There may be cases where the plaintiff's evidence is so strong that to refuse an injunction and to allow the case to go through to trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff. But those cases would, in my judgment be exceptional."

Both counsel sought to derive comfort from the Cayne case and from the above observations; both counsel said that because there was no chance of obtaining a full hearing of this case before the covenant expired on 29th July 1984, then the only hearing that the parties would have would be the present application for interim injunction. Both counsel submitted that an overwhelming injustice would be caused if a ruling were made contrary to counsel's submissions.

In my view, the Cayne case is really of no application here because it is still open to the plaintiff, whatever the outcome of an interim injunction application, to apply for damages.

In the present case, the plaintiff has chosen not to issue proceedings for damages at this stage; there is no reason why it cannot do so. It may have to issue a fresh writ but that should not present any major difficulty.

Mr Parmenter submitted that, although theoretically what I have just said is possible, there are difficulties in favour of a plaintiff in establishing quantum of damages against the defendant; the difficulties of finding "hard" evidence of breach of confidential information, soliciting customers and the like, would make such an exercise futile.

With respect, I cannot agree; it has been said in many cases that difficulty in assessment of damages is not a reason why an attempt should not be essayed.

In my view, the Cayne case is of little help to either party; so far as the plaintiff is concerned, it is still open to it to seek damages against the defendant if, after a full hearing it is established that the covenant of restraint of trade was valid and that the first defendant breached it.

I also note that there will still be a hearing on the second cause of action which did not form part of the interlocutory injunction, namely, the application for a permanent injunction in respect of alleged confidential information.

In all the circumstances of this case, I do not think this is a proper case for the issue of an interim injunction. Most of my reasons I think are apparent from what I have already said. I summarise them as follows:

First, there is some argument as to the scope of the clause, assuming it to have the meaning contended by the plaintiff; there is also argument as to the ambit of the confidential information.

Secondly, this is a case where an injunction is sought, without any very strong evidence of breach of confidential information to restrain someone from earning his livelihood in a field where he is obviously competent.

Thirdly, it is apparent that the first defendant's involvement in areas directly competing with the plaintiff's business is not great; he is involved in food technology and research - areas which have no bearing on the plaintiff's business - to require him to leave his present employment just because the first defendant happens to sell smallgoods when he himself is not involved greatly in the smallgoods area, might be unduly harsh.

The plaintiff has alternative remedies. The contract has only 3 months to run. I might have taken a different view had the matter been brought before the Court earlier and the contract had longer to go. One would have thought that, if there has been any damage suffered by the plaintiff, it has been well truly suffered by now. The second defendant has had almost 9 months with the first defendant.

Although I consider that there is a serious question to be tried, I am not convinced that the case for the plaintiff is a particularly strong one; there has been no suggestion of the first defendant doing what some persons in his position have been

known to do, namely, blatantly using confidential information and lists of customers and that sort of thing, to the detriment of the former employer.

I have given an oral judgment in this matter because I have a fairly clear mind as to what should happen; if I had taken time to reserve it and to express my thoughts more felicitously, it may well be that the covenant would have had even less time to run, such being the pressures on the Auckland Judges at present.

Accordingly, the application for interim injunction must be declined.

However, I record the undertakings given by the first defendant and the second defendant which of course are still enforceable.

The action is still alive because of the alternative application for permanent injunction which is yet to be heard.

The question of costs, therefore must be reserved.

R. J. Barker J.

SOLICITORS:

Towle & Cooper, Auckland, for Plaintiff.
Wilson, Henry, Martin & Co., Auckland, for Defendants.