

**LOW
PRIORITY**

IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

24/10

CP No. 35/91

2027

BETWEEN ELECTRONIC MODULE MARKETING LIMITED

Plaintiff

AND IAN BERRYMAN

Defendant

In Chambers: Wellington

Date of Hearing: 30 September 1991

Date of Decision: 3 October 1991

Counsel:

T J McGinn for Plaintiff (Applicant)
N P Lucie-Smith for Defendant (Respondent)

**RESERVED DECISION OF McGECHAN J:
INTERLOCUTORY INJUNCTION**

Application

This is an application for orders:

- "1. UNTIL further order of this Court an interlocutory injunction shall issue restraining the Defendant himself or by his servants, agents, contractors or subsidiaries:
 - (a) From conducting any business in advertising or marketing making use of electronic modules or computer screens to generate graphics for advertising purposes or any recognizable equivalent of that process of advertising;
 - (b) From making false, untrue, or inaccurate representations of and concerning the Plaintiff's business activities to the

advertising market or the business community in general;

(c) From passing off services supplied by the Defendant as those supplied by the Plaintiff under licence or through any other connection with the Plaintiff.

2 THE Defendant withdraw all services relating to electronic module marketing or computer generated graphics for advertising purposes or such equivalent thereof from the market place immediately.

3 THE substantive hearing which finally determines this matter be awarded urgency."

Facts

Affidavits filed on both sides contain considerable contentious and hearsay material. There are a number of issues as to the course of dealings between plaintiff and defendant, and between both and customers or potential customers, which I cannot possibly resolve upon interlocutory application of this nature. Those findings which I do make are of course subject to that qualification, and are made for present interlocutory purposes only.

Prior to 1 February 1991 a Mr Glen Harley obtained the rights to an American computerised modular advertising system, and proceeded to develop its application in New Zealand. The underlying concept was that advertising material would be transferred to a "memory pack" which would activate its display by computer graphics, along with others in a series, in a computer module with screens set up at suitable locations. The locations were those where public audience concentration, preferably captive, would occur. There was of course an associated methodology. Advertisements and locations would be commercially solicited. There was an associated business structure and sales technique.

The use of such module advertising system possibly was new in New Zealand at the time. While that is controversial, I am prepared to accept it was at least uncommon. The use of modules, computer graphics, and of course advertising displays were not in themselves new.

The business started well enough. It termed itself "EMM". Mr Harley decided to expand by selling territories for a lump sum consideration. The essence of the arrangement was that he would supply leased modules, give support and know-how, and would transfer advertisements to memory packs in readiness for such displays for additional fees.

In the course of selling territories, he happened across the defendant, who expressed interest in a Nelson territory. Negotiations followed. I need not delve into details. The upshot was signature by Mr Harley and the defendant of a written agreement dated 27 February 1991. It granted an exclusive licence to the defendant to operate in the territory for 12 months with renewals for successive periods of 12 months by agreement (subject to a possibly conflicting appendix 4). There was provision for termination upon insolvency, or after 90 days notice following default. Consideration payable was \$28,000 90 days later, or \$22,000 if paid within 80 days, with provision for interest and other incentives. A deposit of \$2,000, and a training payment of \$3,000, were required forthwith. The contents otherwise are normal enough, but with two notable omissions. There is no restraint of trade clause. There is no confidentiality clause. Questioned as to the latter omissions, counsel for the applicant informed the Court that the agreement had not been professionally drawn. To my eye it has a certain American flavour.

The defendant paid the deposit and training money totalling (somehow) \$6,000. He received one or perhaps

two training sessions, as to which he is now less than complimentary. It does appear from the brevity of these sessions so far as technical matters were concerned that learning to manage the systems at least sufficiently for a licensee was not overly demanding. Mr Harley assisted with some initial sales. The defendant seems to have mastered the business, and marketed it in the early stages, with some application and some degree of success. I think I can take judicial notice of the fact that retail trading conditions over 1991 have not been ideal.

Pleased with progress in marketing New Zealand wide, Mr Harley (on advice) on 23 May 1991 incorporated the plaintiff company, which (it is pleaded) "assumed all rights and liabilities of EMM on incorporation". There is no evidence of novation, formal or informal, as amongst Mr Harley (EMM), the plaintiff, and the defendant.

The defendant, on the plaintiff's case, began to prevaricate over payment of the balance due, eventually refusing to pay. The defendant's version of events is that after initial hard work he realised the licensing rights he had bought were over-priced for the return available, and he decided to negotiate the price downward. I need not detail the cut and thrust which followed. The upshot was the defendant refused to pay the sum which the plaintiff considered due, and at latest by a letter of 5 July 1991 Mr Harley or the plaintiff cancelled the agreement. The defendant did not resist. By further arrangement he stayed on and serviced certain customers for a further month (until 2 August 1991), while the plaintiff located and introduced a new licensee. The defendant was paid to do so. The defendant returned at least equipment and associated materials, except one monitor held as an incentive to refund the deposit, which he claimed. The defendant

claims also to have returned contracts entered into with customers.

At some point within the first half of June 1991, on the defendant's own evidence, he had discussed the EMM system with a Mr Butler, manager of a computer oriented company called Mandy Computing. It appears Mandy Computing was an EMM client. Mr Butler said there were more sophisticated options available for producing computer graphic advertising. Discussions continued. The interest generated, plus growing disillusionment with EMM system and prices, on the defendant's evidence led him to take the hard line on payment and to accept an anticipated termination as outlined. The defendant then clearly set up his own computer graphic advertising business, of a markedly similar variety, named "The Business Animator", although using somewhat different IBM compatible equipment and said to be in a higher price range.

There is vigorous dispute on the affidavits as to the extent to which the defendant has canvassed and captured EMM clients. Much if not all of it from the plaintiff's side is hearsay, and of doubtful reliability. Customers caught in the middle of a dispute of this variety do not always speak frankly, even to impartial questioners. All of it on the defendant's side is self-interested. Suffice it to say the plaintiff's version is that the defendant has taken over customers, maligning EMM in respect of any past problems, and offering itself as an alternative. Also, and perhaps somewhat inconsistently, it is pleaded the defendant has continued to represent his business as that of EMM. The defendant states he did not approach potential customers before termination on 2 August 1991; he has not criticised EMM; and he has been scrupulous in differentiating between the two businesses. I cannot at this stage of proceedings determine such controversies.

Clearly enough as matters stand neither side is in a satisfactory position. Neither can plan ahead. Customer unease over the situation could well be to the prejudice of both, unless the matter soon is resolved.

Law

I approach this matter in accordance with principles laid down in Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited (1985) 2 NZLR 129, 142 per Cooke P.

"The argument presented by Mr Brown leads us to add some more general observations. In substance he said that an over-mechanical following in the High Court of New Zealand of the two-stage approach enunciated in American Cyanamid Co v Ethicon Ltd (1975) AC 396 has resulted in plaintiffs in passing off and other actions obtaining too easily injunctions which, although nominally interim, have had the effect of putting an end to the litigation. We accept that this is at least a danger against which it is necessary to guard. The American Cyanamid approach has been qualified in the House of Lords itself in NWL Ltd v Woods (1979) 3 All ER 614. In this Court we have drawn attention from time to time to the importance of not seeking the answer to an interlocutory injunction application in the rigid application of a formula. See for instance Congoleum Corporation v Poly-Flor Products (NZ) Ltd (1979) 2 NZLR 560; Consolidated Traders Ltd v Downes (1981) 2 NZLR 247; Villa Maria Wines Ltd v Montana Wines Ltd (1984) 2 NZLR 422; New Zealand Baking Trades Employees' Industrial Union v General Foods Corporation (NZ) Ltd (1985) 2 NZLR 110.

Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications. As the NWL speeches bring out, the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case the Judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly or very clearly one way - as the Chief Justice did here - it will usually be right to be guided accordingly. But if the other rival considerations are still fairly evenly poised,

regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word "usually" deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities.

Very often a prompt hearing of the action itself is preferable to an interlocutory injunction hearing."

I was referred to authority the thrust of which was that in restraint of trade cases, and analogous confidence cases, a higher initial threshold is appropriate. I do not think this particular case is to be resolved by adopting some elevated threshold beyond the normal "serious question". The ultimate test always, not to be hidden behind rules of thumb, is overall justice. Provided there is some arguable case, its strength or otherwise is merely one variable to be weighed with others against that ultimate criterion. This case demands a more finely calculated weighing of all relative factors than some.

Serious Question

The plaintiff advised, in the course of argument, that the present statement of claim would be amended.

The first cause of action alleges breach of confidence. Presently it is pleaded as derived from an implied term. It will be amended to allege a general equitable basis. The confidence concerned is said to arise from knowledge of the concept of electronic modular marketing, and the associated methodology and business structure. The second cause of action, deceit, will not be pursued.

Breach of confidence is alleged on the basis of AB Consolidated Limited v Europe Strength Food Co Pty Ltd (1978) 2 NZLR 515; with reference also to Coco v A J Clark (Engineers) Limited (1969) RPC 41; Aquaculture

Corporation v NZ Green Mussel Co Ltd (No 1) (1985) 5 IPR 353; and other standard authorities. I am not prepared entirely to exclude the possibility some such cause of action might be made out. While the process and structure involved in this business seems obvious enough, it is conceivable that on further evidence there could be elements which would be sufficiently the plaintiff's own to attract protection. To that extent, there is some serious question to be tried. The plaintiff obviously, however, faces severe hurdles. An initial problem may arise from privity. It is far from clear on the evidence to this point that any contractual or other relationship of a legally relevant nature arises as between defendant and the present plaintiff company. Turning more to the merits, there is no contractual restraint of trade or even covenant for confidentiality following cessation of the licence. There is not even an express obligation to hand back customer records. Those omissions do not sit easily with asserted confidence obligations. The second paragraph of cl. 1.3 (to act in best interests) does not much assist the plaintiff. It reads most naturally as referring to a situation during the currency of the licence. At best, I am obliged to say, the plaintiff's case is not strong.

The third cause of action, based on passing off and the Fair Trading Act 1986, depends at this stage very much on evidence which, if admissible at all, does not as presently presented carry much weight. Again I will not exclude the possibility of a serious question to be tried, but the present case is not strong.

Balance of Convenience

Rights to damages, as often in cases of this type, do not in the end much advance matters. The plaintiff would have obvious difficulties in quantifying damages if an interim injunction were refused, and there is little

solid information as to the defendant's net worth. The defendant would have comparable difficulties as to quantification if an interim injunction wrongly were granted, and I would want a more detailed picture of the plaintiff's net worth than references to turnover figures to be satisfied of ability to pay. The status quo is an arguable guide unless a point in time at which it should be determined is beyond question. Plaintiff's counsel did not nominate a fixed point. I am inclined to take 5 August 1991 as appropriate. At that stage the state of affairs on the defendant's evidence somewhat favours preservation of the plaintiff's position. On the other hand, as to relative strengths of cases, so far as presently ascertainable, the balance favours the defendant. Continuation of the activity obviously would be prejudicial to the plaintiff. I think it likely it would be worse than that to the defendant. It is very difficult to make two starts in a business depending upon consumer confidence. A temporary complete restraint could well prove terminal.

Overall Justice

Given my assessment of the prospects of the plaintiff's case; balance of convenience considerations; and greater harm which could be done to the defendant if wrongly albeit restrained, I consider the just solution in this case is an intermediate one. It is to decline the present interim injunction sought (which in event is much too widely worded); but to balance this by discouraging expansion by the defendant into other territory, and by directing urgent hearing. If the plaintiff is genuine in wishing to take this matter further, beyond some mere try for interim relief, it should be assisted to do so. Matters should be resolved properly, on a fully informed basis, without delay.

Decision

- (1) Orders (1) and (2) (interim injunctions) as sought are declined.
- (2) Leave is reserved to apply further in event the defendant expands operations outside the territory specified in the agreement dated 27 February 1991 on additional affidavits if desired.
- (3) Order (3) (urgency) is granted.
- (4) The following timetable is directed:
 - (a) amended statement of claim to be filed by 11 October 1991;
 - (b) statement of defence thereto to be filed by 21 October 1991;
 - (c) discovery by verified lists to be made by 4 November 1991;
 - (d) proceeding to be called before a Judge immediately thereafter, in Wellington if no Judge is available in Nelson, for review and consideration of fixture date (5 days plus) in Nelson.
 - (e) Leave reserved to apply.

(5) Costs reserved.

A handwritten signature in black ink, appearing to read "R A McGechan J", is written above a horizontal dotted line.

R A McGechan J

Solicitors

Macfarlanes, Christchurch for Plaintiffs
Knapps, Nelson for Defendant