IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

18/10
22/10

C.P. No.293/91

2003

NOT RECOMMENDED

BETWEEN PENINSULAR REAL ESTATE LIMITED

Plaintiff

A N D S.W. HARRIS

First Defendant

A N A A.R. NOBBS

Second Defendant

Hearing: 3 October 1991

Counsel: D.H.P. Dawson for Plaintiff
A.C. Hughes-Johnson for Defendants

Judgment: 3 October 1991

ORAL JUDGMENT OF TIPPING, J.

On 6 September last I gave an oral judgment in which certain injunctions were issued against the First and Second Defendants in favour of the Plaintiff. The circumstances in which that relief came to be awarded to the Plaintiff are referred to in some detail in my judgment and I do not propose to repeat them now. The First and Second Defendants, as was foreshadowed as a distinct probability in my judgment, have now applied to vary or rescind certain of the orders made. Further evidence has been filed on each side and I note in particular the helpful affidavit of Mr Peter Cook, which

has traversed real estate practice in the areas with which this case is concerned.

The parties have been able to narrow the issues to the point where Mr Day for the Plaintiff has annexed to his recent affidavit of 2 October as Exhibit A, a list of 48 people whom he contends to be "live" clients within the ambit of that expression as used in my earlier judgment. Mr Day says that the two Defendants should be prevented until a date, which is also the subject of argument, from acting for any of the people on Exhibit A except that he is prepared, very reasonably and in my view and sensibly and responsibly, to acknowledge that if anyone on Exhibit A approaches either of the Defendants in a wholly unsolicited way to act for him as a buyer then the Defendants are entitled to act accordingly. Mr Day considers that it would not be appropriate for the Defendants to act for any of the people on Exhibit A in any shape or form as vendors.

Mr Hughes-Johnson has submitted in his detailed and helpful submissions that Messrs Harris and Nobbs should be entitled to approach the people on Exhibit A as potential purchasers. However Mr Dawson makes the rejoinder on behalf of the Plaintiff that were it not for the lists taken away neither Defendant would know of the people on Exhibit A as potential purchasers. I agree with Mr Dawson that the key point is the making of use of the knowledge gained by dint of the Defendants having carried away the lists.

It is my judgment that the stance of Mr Day is a fair and appropriate one in these circumstances, both so far as acting for people on Exhibit A as purchasers and as vendors is concerned. It is my view that bearing in mind the history of the matter and the nature of the proceedings it would be inappropriate for the First and Second Defendants to act for anyone on Exhibit A as vendors for a length of time, to which I shall turn to discuss in a minute. Similarly I am of the view that it would be a clear prima facie breach of the intellectual property considerations canvassed in my earlier judgment, to allow the First and Second Defendants to make use of the information on the list to canvas actively people on Exhibit A as potential purchasers. I agree with Mr Day that if anyone on Exhibit A were, to put it colloquially, to wander into the office of either Mr Harris or Mr Nobbs looking for real estate as a purchaser then neither of the Defendants should be prohibited from furthering that enquiry.

As to the duration of the relief which I propose to continue, subject to the exception which I have mentioned about unsolicited approaches by these people as purchasers, a number of considerations arise. Mr Hughes-Johnson, by reference to the facts and authorities, has submitted that the injunctions should continue only until 1 December 1991 which he points out is quite a considerable period of time from July when this matter first arose. However Mr Dawson draws my attention to several factors in opposition to that

approach and in support of his submission that the injunction should enure until the end of January 1992.

Mr Dawson draws to the Court's attention the particular nature of Akaroa and Banks Peninsula, its close community and the fact that it is very much a holiday resort where a substantial proportion of buyers and sellers are likely to have seasonal interest peaking particularly over the Christmas holidays. That in my view on its own takes this case out of the ordinary. However the case should not be regarded as any sort of general precedent for the duration of injunctions of this kind.

Secondly there is a further and in my view compelling point which Mr Dawson raises, namely the disruptive effect on the Plaintiff's business of the events with which we are concerned, by dint of which until comparatively recently the Plaintiff too has been effectively prevented from making use of his clientele . It was only as recently as 13 September last, as I understand it, that the relevant material was returned to the Plaintiff in full. The Plaintiff would certainly have had difficulty in consolidating his position and taking appropriate action to secure his goodwill during this period because by dint of the actions of the Defendants, and in particular the Defendant Harris, the Plaintiff was deprived substantially of knowing who his customers were.

There is force in my view in Mr Dawson's submission that the Plaintiff is entitled to further

protection, not from a datum point of early July, but from a datum point of mid September. That puts the question of time in this particular case into a rather different context. Mr Dawson raised certain other matters in support of his suggested date but those two seem to me to be the most compelling. It is therefore my view that the injunctive relief in the form in which it will continue should enure until the end of January 1992.

The next matter to be considered is the question of how the injunction can reasonably be policed. Mr Dawson has suggested that the Defendants should be obliged to notify the Plaintiff of any contract entered into with the people on Exhibit A through the instrumentality of either Defendant so that the Plaintiff can have the opportunity, if it wishes, of checking that the contract was entered into in a manner which did not breach the injunction. Mr Hughes-Johnson has argued that this may involve some breach of the rights of those on Exhibit A to have their affairs remain private. However that possible problem seems to me to be largely cured by the fact that the condition should be one requiring reporting only after a contract has been signed and not during the course of negotiations, which I agree would be wrong.

The final matter which should be recorded is that Mr Dawson's client has made it perfectly plain, and this is a proper stance, that it entirely reserves its position as to damages and its concession as to the ambit of the injunction is also to be regarded as without

prejudice to any claim for damages that may in the future be made.

I have not traversed in detail the various points raised by counsel on either side but the parties may be assured that I have considered all the points raised. In particular I have considered the point which Mr Hughes-Johnson raised, and which I have not hitherto mentioned, of the possible implications of the Commerce Act 1986 which is designed to promote rather than to lessen competition in the marketplace. I need not go into this in detail, but it seems to me that the more general provisions of the Commerce Act should not be regarded as overriding the rights of private citizens to protect goodwill and the like by way of intellectual property relief.

That proposition is perhaps stated too widely for a purist, but in this particular case I am not troubled in the slightest at the suggestion that any continuation of the injunction might fall foul of the Commerce Act by having the effect of substantially lessening competition in a market. Competition must be fair competition and not competition in breach of the principles which I traversed in my substantive judgment.

I am mindful of Mr Peter Cook's affidavit earlier mentioned. While I respect the views therein set out, coming from someone of Mr Cook's stature and experience, it must be acknowledged in this case that what might loosely be called again intellectual property considerations can sometimes supervene over the issues to

which Mr Cook has helpfully directed his attention. This is a case of that kind.

For those reasons the I make the following orders:

1. Order number 3 in my earlier judgment is varied so as henceforth to read: "Both Defendants are hereby restrained until 31 January 1992 from soliciting, approaching or otherwise acting for any person listed on Exhibit A to Mr Day's affidavit of 2 October 1991, save as hereinafter provided".
2. Order 4 is hereby amended so as to read: "Both Defendants are hereby restrained until 31 January 1992 from otherwise using or disclosing to any other person any of the names or addresses contained on Exhibit A aforesaid".
3. The foregoing orders shall not prevent the First and Second Defendants, or either of them, from acting for any person as a purchaser who is listed on Exhibit A if such person has approached them or either of them in an unsolicited way or in response to a public advertisement.
4. In any case where the First or Second Defendant acts for any person listed on Exhibit A in terms of order 3 above, it shall be a condition of his doing so that he shall give notice to the Plaintiff of his doing so within 7 days of the formation of any contract whether conditional or unconditional.

5. The variation of the earlier orders hereby effected shall be without prejudice to the Plaintiff's right to claim damages for events occurring both prior to today's date and after today's date.

As to costs I have heard counsel. The Defendants have achieved some variation from the earlier orders but only in terms of what the Plaintiff was ultimately prepared to accept. In essence the Plaintiff has succeeded in preserving his position in terms of the earlier orders, save for the small concession which was properly made. I acknowledge Mr Hughes-Johnson's point that the application for variation was almost inevitable but that really derived from earlier events for which the Defendants were largely responsible.

It seems to me that in the circumstances the Plaintiff should have some costs, but on a balance of the points that have been put to me at a reasonably modest level for the substantial amount of paper that this latest exercise has generated. $500.00 costs in the cause to be born by the Defendants equally.