18/11

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 218/94

1731

BETWEEN TERSON INDUSTRIES LIMITED

Plaintiff

A N D ALL DOOR SERVICES LIMITED

First Defendant

A N D GRAHAM COMMINS

Second Defendant

A N D PAUL THOMSON

Third Defendant

JUDGMENT OF DOOGUE J

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Hearing: 10 November 1994

Counsel: K.G. Stone for the plaintiff
A.A. Zohrab for the defendants

Judgment: 10 November 1994

JUDGMENT OF DOOGUE J

This is an application for an interlocutory injunction to restrain the defendants from carrying on the same type of business as the plaintiffs within a radius of 30 kilometres of the plaintiff's premises at Petone. The relief sought is more general than that, but that sufficiently delineates it for present purposes. The second and third defendants have previously been employees of the plaintiff. The first defendant is a company formed by them.

The application is in effect an application to reconsider, upon the basis of new information, an order

made by Neazor J on 19 August 1994 refusing rather wider relief couched in terms of the agreements in restraint of trade between the second and third defendants and the plaintiff. I think it unhelpful to restate in any detail what is recorded in considerable detail in the judgment of Neazor J. This judgment should, if anything, be read as a supplementary judgment to that judgment. The issue is whether there are new circumstances before the Court which entitle a different approach to be made.

The essential new circumstances which it is submitted for the plaintiff are now before the Court are as follows:

1. "It can no longer be said that there is no evidence that the plaintiff company has suffered, or is suffering, no financial loss as a result of the activities of the defendants."

This submission is made upon the basis of new evidence that the defendants are known to have approached more customers of the plaintiff and to have received work from them than was the time when the matter was considered by Neazor J in August of this year. At that time Neazor J recorded:

> "So far as the evidence goes, it does not suggest that the defendants to date have made any serious inroads on the plaintiff's business."

The defendants, in their affidavits in reply to the present application, acknowledge that at the present

time previous customers of the plaintiff represent approximately 36% of their present turn-over, with the remaining 64% being from customers who were not previously customers of the plaintiff. That in itself, however, along with the evidence of the plaintiff additional to the evidence before Neazor J, does not substantiate the submission made for the plaintiff. There is nothing before the Court to indicate that the plaintiff has suffered any financial loss as a result of the activities of the defendants. It was inevitable that any expanding competition by the defendants with the business of the plaintiff would lead to further customers of the plaintiff being likely to shed their allegiance from the plaintiff in favour of the defendants. The position remains the same as at the first hearing, namely that the evidence is that the customers have been achieved by reference to publications readily available to the public rather than by any reliance upon information confidential to the plaintiff.

This leads into the second point at present taken on behalf of the plaintiff, namely:

2. "That it is not a credible explanation for the defendants or any of them to deny that they are deliberately targeting the client base of their former employer. It is nonsense to suggest that

they are simply looking up directories, or knocking on doors, and that alone. It could not be coincidence that so many of the significant clients of the plaintiff company have not only been approached, but have had work done by the defendants."

It is a matter of supposition on the part of the plaintiff that this is the case. There is simply no evidence before the Court which would entitle the Court to draw such an inference when there is evidence before the Court from the defendants that they have relied upon provisions which enable them to approach the commercial community at large for the type of business carried on by both the plaintiff and the defendants. When 64% of the business of the defendants is from non-ex customers of the plaintiff, it is quite apparent that there is no deliberate targeting of the client base of the plaintiff. There is no evidence before the Court other than by way of assumption or possible inference which indicates that the defendants had been relying upon confidential information obtained during the course of their employment with the plaintiff in respect of prospective customers approached by them.

3. "The fact that the defendants, or at least the defendant Thomson, were well known to the persons

responsible for maintenance of the various buildings would make it especially easy for the defendants to obtain such work without necessarily indicating that they no longer represented the long-standing service company, namely Terson Industries Limited."

This may indeed be the case, but this point is not new and was one that would equally have been applicable at the time that the matter was dealt with by Neazor J. There is surprisingly no evidence before the court from any of the ex-customers of the plaintiff who it is said are now customers of the defendants to indicate that what is submitted has in fact occurred.

4. "The knowledge and skill which the second and third defendants acquired while employed by the plaintiff company is far more complex and specialised than they would have the Court believe. Attention is drawn in particular to Exhibit 'O', referred to in paragraph 18 of the affidavit of Mr Eldridge filed in support of the present application, in which the defendant Thomson states on 17 March 1994 (before leaving the plaintiff):

> 'Since joining the company in November 1990, I have as you are aware learned more about Frampton Engineering, its operation systems, business, clients, habits and quirks than any past or present (shareholders excluded) employee.

> As you are aware, all of the knowledge I have learned as a result of working for the company I am unable to use.'

Frampton Engineering is the trading name of the plaintiff company Terson Industries Limited.

This statement it is submitted is not only an acknowledgement of skills acquired, but of detailed information of the workings of the plaintiff company which must include details of its list of clients and the specific needs and agreements, formal or informal, with those clients for servicing and maintenance. Furthermore the last paragraph quoted appears to be an acknowledgement by the plaintiff that he is bound by the terms of his contract of employment."

Mr Stone in addition submitted that it was important to have in mind the contract of employment with the restraint of trade clause and that the second and third defendants run the risk of breaches of their contract of employment.

There is nothing in this point which was not capable of being put before Neazor J at the time of the August 1994 hearing. It does not add anything new to what was before him. Insofar as the material before the Court is slightly different from that before him, it does not assist the plaintiff. The statements on behalf of the plaintiff in the

affidavit relied upon do not indicate any particular complex and specialised knowledge and skill which the second and third defendants might have acquired whilst employed by the plaintiff company. Rather the contrary: they appear to highlight that the job in question is one which anyone with reasonable intelligence and mechanical skills, which the second and third defendants have, would be able to acquire the knowledge and skills required within a relatively short time.

There are no other aspects which are submitted for the plaintiff which are substantially different from those before Neazor J. There is therefore no substantial difference in the case at present before the Court and that before Neazor J. There is certainly no additional information which would entitle the Court at this stage in the exercise of its discretion, with the overall justice of the situation being paramount, to re-visit the decision of Neazor J, which was not appealed to the Court of Appeal and which has been accepted by the parties.

The application must be dismissed.

Costs are reserved. In the ordinary course the defendants are entitled to their costs. The parties have been in court a little over two hours.

Solicitors for plaintiff:
Luke, Cunningham & Clere, Wellington

Solicitors for defendants:
Gaskin Avison, Lower Hutt