Neutral Citation [2013] IEHC 70

THE HIGH COURT

[2013 No. 1496P]

BETWEEN

OCTAVIO HERNANDEZ

PLAINTIFF

AND

VODAFONE IRELAND LIMITED

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 21st day of February, 2013.

The application

1. The application to which this judgment relates is an application for interlocutory injunctions restraining the defendant, the plaintiff's former employer, from –

(a) actively preventing the plaintiff from engaging in a new employment contract with Telefonica Ireland Limited (02), and

(b) howsoever interfering with the plaintiff's new contract of employment with 02.

The plaintiff also seeks an order and declaration that Clause 9.3 of "the purported contract" between the plaintiff and the defendant dated 27th October, 2005 is void and unenforceable.

The factual background

2. The factual background to the proceedings is outlined in the grounding affidavit of the plaintiff sworn on 13th February, 2013 and the replying affidavit on behalf of the defendant sworn by Rachel Mooney, the Human Resources Director of the defendant, on 18th February, 2013.

3. The plaintiff, who is now aged forty one years, is a native of Mexico. He has lived and worked in Ireland for a number of years. He was in the employment of the defendant for over seven years from October 2005 to January 2013.

4. The plaintiff was initially retained by the defendant as a Business Case Analyst. His terms of employment were set out in a so-called "Contract of Employment [Permanent]" (the Contract) furnished to him with a letter dated 27th October, 2005 from the defendant's Human Resources, the terms of which he accepted on 3rd November, 2005. The terms of the Contract which are of relevance for present purposes are the following.

(a) Clause 9.3, which provided as follows:

> "You shall not, without the prior written consent of Vodafone, within 6 months after the termination of your employment with Vodafone howsoever caused, whether directly or indirectly and whether alone or with any other person, either as principal, shareholder, director, employee, agent, consultant or otherwise, work or be engaged or interested in . . . any business or commercial activity in Ireland which competes or conflicts (or is likely to compete or conflict) with any business interest or commercial activity of Vodafone."

(b) Clause 9.4 which provided as follows:

> "You will not, without the prior written consent of Vodafone, within 6 months after the termination of your employment with Vodafone howsoever caused, directly or indirectly and whether alone or with any other person, solicit or entice away or attempt or cause others to solicit or entice away from Vodafone any person who shall have been an employee, customer, or agent of Vodafone in the 6 months immediately preceding the termination of your employment.

(c) Clause 10, which was headed "Confidentiality" and contained detailed provisions protecting and restricting disclosure by the plaintiff of information obtained during his employment relating to any aspect of the defendant's business, which may be reasonably regarded as being of a confidential nature.

(d) Clause 13.1 under which the plaintiff was required to give not less than 1 month's notice of termination of his employment, subject to the proviso that the parties could agree to pay in lieu of notice.

5. Over the course of his seven year employment with the defendant, the plaintiff held a number of roles, the most recent role being Enterprise Roaming Proposition Manager.

6. The plaintiff was offered alternative employment by 02 by letter dated 20th December, 2012. The role he was offered was that of Business Product Manager, with a start date of 21st January, 2013. The terms of employment offered to him also contained post-employment restrictions which included post-termination restrictions for six months in relation to –

(a) carrying on or participating in any business in the Republic of Ireland which provides mobile telephony services in Ireland, and

(b) procuring or seeking to procure or solicit orders from or do business with any person who had been at any time during the period of two years immediately preceding the cessation of his employment a customer of 02; and

(c) soliciting the services of or engaging or attempting to engage any person who was an employee of 02 at any time during that two year period.

The restrictions at (a) and (b) were subject to the proviso that they should apply only in respect of services and/or products with which the plaintiff would be either personally concerned or for which he would be responsible while employed by 02 during the period of two years immediately preceding the cessation of his employment. It was the plaintiff who first put the terms of the contract of employment proffered by 02 before the Court and referred to the restrictive clauses to which I have just referred, although at the hearing of the application the defendant sought to capitalise on them also.

7. It is common case that the fact that the plaintiff had decided to leave the defendant's employment was communicated by him to his Line Manger on 24th December, 2012. Obviously, the Christmas break intervened. However, by letter dated 4th January, 2013, Ms. Mooney wrote to the plaintiff informing him of the following matters:

(a) That his resignation was accepted. However, he was required to provide at least one month's notice in writing of the termination of his employment under the Contract, so that his employment would terminate on 24th January, 2013, which was referred to as the "Termination Date". He would not be required to attend at the offices of the defendant in the period up to the Termination Date, but he would be paid his normal salary for the duration of the notice period.

(b) Referring to Clause 9 of the Contract, he was advised that he was prohibited from taking up his role with 02 until a period of six months from the Termination Date had expired and he was informed that he was "restricted from taking up any role with 02 until after 24th July, 2013".

(c) He was also reminded of the contents of Clause 10 of the Contract.

In the final paragraph of the letter it was stated that the defendant expected that he would comply with the Contract and, specifically, the restrictions in Clause 9 and Clause 10. In the event of failure to comply, the defendant would take such action as might be required, including applying to the High Court for injunctive relief.

8. On the same day, 4th January, 2013, the solicitor for the defendant wrote directly to 02 informing 02 that the plaintiff would remain an employee of the defendant until 24th January 2013. It was pointed out that the plaintiff would continue to be bound by, *inter alia*, "a strict six month non-compete and non-solicitation provision and a comprehensive confidentiality clause". In the final paragraph of the letter the possibility of the defendant seeking undertakings from 02 was adverted to and it was stated that –

"in the event that such undertakings are requested and not provided and he commences employment with 02 in breach of his contract or we discover that he has disclosed Confidential Information . . . to 02 we will apply for an injunction restraining him from breaching his contract and we will join 02 as being on notice of this breach."

As I understand it, the message which it was intended to convey to 02 in that paragraph was that the plaintiff would be in breach of the terms of the Contract if he commenced his employment with 02 before 24th July, 2013 and the defendant would treat 02 as having responsibility for that breach.

9. In any event, there was communication between 02 and the defendant, although the plaintiff's position is that he was not involved. As e-mails passed between their respective lawyers demonstrate, between 31st January, 2013 and 1st February, 2013 consensus was reached between Vodafone and 02 that the plaintiff would not commence working with 02 before 1st May, 2013 and that the defendant would release him from the restrictions in his contract as of that date.

10. Correspondence between the solicitors on record for the plaintiff in these proceedings and the solicitor for the defendant commenced on 30th January, 2013 with a letter from the plaintiff's solicitors of that date in which the complaints which are the subject of these proceedings were made and injunctive proceedings were threatened if a satisfactory response was not obtained. The response was dated 5th February, 2013. In that letter it was asserted that the defendant was entitled to rely on its contractual arrangements with the plaintiff, which were characterised as legitimate, reasonable and proportionate. However, the agreement with 02 in relation to a start date of 1st May, 2013 was also referred to.

11. As things stand, the outcome of the plaintiff's decision to leave employment with the defendant and to take up employment with 02, in consequence of the arrangement reached between the defendant and 02, is that the plaintiff is going to be without any income for the last week of January and the months of February, March and April this year. The plaintiff is a married man with two young children aged eight and three years, who has to meet the usual household expenses, mortgage repayments, utility costs, health insurance and so forth on a continuous basis. The plaintiff has also averred that he has supported his parents, who are in Mexico, and who are in poor health. He is concerned as to whether he will qualify for Jobseeker's Allowance, given that he resigned from his employment. He faces the prospect of having no income to meet his and his family's needs until 1st May next.

Respective positions of the parties on the core issue

12. Counsel for the plaintiff made it clear that the plaintiff accepts that he is bound by the non-solicit restriction contained in Clause 9.4 of the Contract. He also accepts that he is bound by the confidentiality restrictions contained in Clause 10 of the Contract. Therefore, the core issue from the plaintiff's perspective is the non-compete restriction contained in Clause 9.3 of the Contract. As I have recorded, on this application the plaintiff seeks a declaration that Clause 9.3 is void and unenforceable.

13. Counsel for the defendant submitted that it would be inappropriate for the Court to determine that core issue on an interlocutory application. He submitted that evidence, which I understand to mean oral evidence, would be necessary to reach a determination as to whether any business interest or commercial activity of the defendant would be affected by the plaintiff taking up new employment. In that connection, counsel for the defendant made it clear that the defendant would co-operate in procuring an early trial as to the issue of the enforceability of the non-compete clause. Apart from that, the central plank in the defendant's opposition to the application is that damages would be an adequate remedy for the plaintiff, having regard to the fact that, in the light of the arrangement between the defendant and 02, in reality the measure of damages is the plaintiff's lost salary for three months.

14. In reliance on two recent authorities of this Court, counsel for the plaintiff submitted that it is open to the Court to determine at this juncture that Clause 9.3 is void and unenforceable. The authorities cited were:

(a) *Murgitroyd & Co. Ltd. v. Purdy* [2005] 3 I.R. 12; and

(b) *Net Affinity Ltd. v. Conaghan & Anor.* [2012] 23 ELR 11

Murgitroyd & Co. Ltd. v. Purdy
15. As the headnote in the report succinctly sets out, in that case the plaintiff company was engaged in the provision of intellectual property services. The defendant was employed by the plaintiff as a European patent agent under a written service agreement which provided that it was to last for a period of three years and could be renewed for a further three years. The service agreement also contained a non-competition clause which provided that the defendant would not work within the Republic of Ireland for a period of twelve months following determination of his employment on his own account and in competition with the plaintiff company. The defendant left the plaintiff's employment and immediately commenced practising. The first procedural step in the proceedings was an application for an interlocutory injunction in which judgment was given by Clarke J. on 14th April, 2005 (Neutral Citation [2005] IEHC 110).

16. While counsel for the plaintiff did not refer the Court to the judgment of Clarke J. on the interlocutory application it is of particular relevance to the determination this Court has to make. As is clear from the judgment, there was, at the interlocutory stage, a factual dispute as to whether the defendant employee had continued to be bound by the non-compete clause. Moreover, it had been argued on behalf of the defendant that, even if the non-compete clause, as a matter of agreement between the parties, was still in existence, it should not be enforced as being an unreasonable restraint of trade. Clarke J. stated that those issues could not be resolved at the interlocutory stage, but he was satisfied that they raised a fair issue to be tried. Therefore, his decision on the application for an interlocutory injunction by the plaintiff employer to enforce the non-compete clause pending the trial of the action turned on the questions whether damages would be an adequate remedy for the plaintiff and where the balance of convenience lay, both issues being "somewhat interlinked". The conclusions of Clarke J. on those issues were as follows:

> "Thus if the Plaintiff fails to obtain an injunction in respect of non competition at this stage but ultimately succeeded at the trial it will have suffered the potential loss of clients (who may or may not return) and an intervening financial loss which may, in practice, not be capable of recovery.
>
> In the circumstances it seems to me that damages would not be an adequate remedy for the Plaintiff. However the issue in respect of the balance of convenience is more difficult. On balance I have come to the view that the balance of convenience would not favour the grant of an interlocutory injunction in respect of non competition provided that this aspect of the matter can be made ready for trial in a very short period of time. In the circumstances I propose that a preliminary issue should be tried as to the applicability and enforceability of the non competition clause and further propose imposing very strict time limits indeed on the parties to ensure that the trial of that issue can occur very quickly."

In the event, on the day he delivered judgment, Clarke J. directed that a preliminary issue be tried as to the applicability and enforceability of the non-competition clause contained in the defendant's contract of employment and it was that issue which was the subject of the reported judgment. Before considering that judgment, I think it is worth recording that, as is clear from the judgment on the interlocutory application, the non-compete clause in issue in that case, while restricting Mr. Purdy from carrying on business on his own account in competition with the plaintiff, did not preclude him from taking up employment. Moreover, within a short period of the defendant's departure from the plaintiff, two major clients of the plaintiff had indicated an intention to move their business to the firm operated by the defendant.

17. In his judgment, having found that the non-competition clause was applicable, that is to say, that it remained operative until the termination of the defendant's employment, Clarke J. went on to address the issue of enforceability (at p. 20 *et seq*.). It is clear from the judgment that that issue had been heard on oral evidence. Clarke J. concluded, on the facts, that a geographical restriction based upon the jurisdiction of the Irish state was not unreasonable having regard to the way in which the business (patent attorneys) operated in Ireland and he was also satisfied that the period of twelve months was not unreasonable. He continued (at p. 21):

> "However, it is also clear that a more restrictive view is taken of covenants by employees than is taken of covenants given on sale of a business. Covenants against competition by former employees are never reasonable as such. They may be upheld only where the employee might obtain such personal knowledge of, and influence over, the customers of his employer as would enable him, if competition were allowed, to take advantage of his employer's trade connection. . . .
>
> In those circumstances I have come to the view that the prohibition in this case on all competition is too wide. A prohibition on dealing with (in addition to soliciting of) customers of the plaintiff would, in my view, have been reasonable and sufficient to meet any legitimate requirements of the plaintiff. The wider prohibition which restricts dealing with those who might be, but are not, such customers is excessive."

On the foregoing basis, Clarke J. concluded that the clause in issue was an unreasonable restraint of trade and was unenforceable. He did, however, observe (at p. 22) that there may be types of business where it is not practicable to distinguish between customers and non-customers, unlike the case before him.

Net Affinity v. Conaghan & Anor.
18. As in the *Murgitroyd* case, the plaintiff in this case was the former employer and the first defendant was the former employee, who had entered into a non-compete clause. The new employer was the second defendant. As the headnote in the report, again succinctly, sets out the plaintiff was a company engaged in the provision of internet booking engines for Irish hotels, as well as the facilitating of digital and social media marketing for such hotels. The first defendant had been employed by the plaintiff as Head of Client Development, which the plaintiff claimed was a pivotal role, and she was responsible for engaging directly with the plaintiff's clients. The second defendant was a competitor of the plaintiff, engaged in the provision of similar services to the hotel market, albeit operating on a larger scale. The non-compete clause in the contract of employment which the first defendant had entered into with the plaintiff was part of a provision dealing with confidentiality and non-solicitation and it restricted the first defendant from setting up, consulting, contracting or working on a part-time basis for any individual or company providing services similar to the plaintiff's services "for a period of 12 months after termination of contract", but without prescribing any territorial limitation.

19. The outcome of the application for an interlocutory injunction was that the Court (Dunne J.) restrained both the defendants from approaching, soliciting or dealing with any existing customers of the plaintiff for a period of twelve months, but refused to restrain the first defendant from taking up employment with the second defendant for such period on the ground that the non-compete clause was void and unenforceable as it contained no geographical limitation and it prohibited the first named defendant from engaging in any employment which involved services similar to that of her former employer, following the *Murgitroyd* decision. In her judgment (at p. 30), Dunne J., having stated that she had no issue with a period of twelve months, went on to consider the fact that the scope of

the restriction was not limited geographically and she stated:

> "[The first defendant] is completely precluded by the clause from working for any individual or company that provides or plans to provide services similar to that which is provided by Net Affinity. To my mind, the clause at issue in this case is far too wide to protect the legitimate requirements of Net Affinity. It is a clause which does in fact prohibit all competition by Ms. Conaghan in the area of services provided by Net Affinity. As has been made clear in the judgment of Clarke J. in the case of *Murgitroyd and Company Limited v. Purdy* such a clause is too wide. In those circumstances, I have come to the conclusion that the non-compete clause is void and unenforceable."

20. The striking feature which distinguishes the conduct of the application for an interlocutory injunction in the *Net Affinity* case from this case is that it is clear that the former employer, which was the plaintiff in that case, engaged in, and, perhaps, initiated the discussion on the interlocutory application as to whether the prohibition on the first defendant on working for a competitor was void as being an unlawful restraint of trade. In this case, the position of the former employer, who is the defendant, is that the Court cannot determine that issue on an interlocutory application. Presumably, it is for that reason that Ms. Mooney did not attempt to refute in a specific and detailed manner the plaintiff's evidence as to what his core duties in his last role with the defendant were and what he considers to be the main aspects of the role which he will be performing for 02, which he averred will not have a "roaming" specific aspect, with a view to demonstrating that his role with 02 will not be a threat to the legitimate interests of the defendant. Ms. Mooney merely averred that the plaintiff has confidential information, having been party to multiple bid pricing discussions and that he has knowledge of the defendant's plans in respect of "roaming" to demonstrate that the defendant has a legitimate interest in enforcing Clause 9.3.

21. In the light of the stance adopted by the defendant, as was the case in the *Murgitroyd* case, it is not open to the Court to determine the issue as to the enforceability of the non-compete clause in the Contract at this juncture. The only determination the Court may make is whether the plaintiff is entitled to interlocutory injunctions in the terms sought pending the trial of the action.

Plaintiff's entitlement to interlocutory injunctions

22. An unusual feature of this application is that it is the former employee who is the subject of the non-compete clause, rather than his former employer, who initiated these proceedings. Hence the relief sought by the plaintiff is framed as prohibitory relief restraining the defendant from preventing the plaintiff taking up his new employment with 02. The position which has been adopted by the defendant, namely, that it is not interfering with the plaintiff's contractual arrangements with 02, that it has not done anything wrong, and that it is merely enforcing its contractual rights, is, to put it mildly, utterly naive. The clear and unequivocal message which the defendant conveyed to 02 in the letter of 4th January, 2013 was that the plaintiff would be in breach of the Contract with the defendant if he commenced employment with 02 within six months and that 02 would be joined in proceedings initiated by the defendant to remedy the breach. In those circumstances, it is hardly surprising that 02 came to an arrangement with the defendant, whereby 02 would be absolved if the plaintiff's employment with 02 did not commence until 1st May, 2013, which, of course, is within 02's control. The position of the plaintiff is that he was not a party to that arrangement. Whether that is correct or not cannot be determined on this application.

23. However, the nub of the matter is that, in reliance on the non-compete clause, which may or may not be enforceable, the defendant has created the situation in consequence of which the plaintiff is not able to take up his employment with 02 until 1st May, 2013 and will lose in excess of three month's salary. If the non-compete clause is unenforceable, the defendant has done wrong in preventing the plaintiff taking up his employment with 02 on the 24th January, 2013, resulting in him being unemployed and without an income for three months. It is on the basis of the plaintiff's contention that the defendant has committed such a wrong, that the plaintiff's entitlement to an interlocutory injunction falls to be considered.

24. As regards the first criterion for the grant of an interlocutory injunction, whether the plaintiff has established that there is a fair issue to be tried, I have absolutely no doubt that the plaintiff has established that there is a fair issue to be tried that, by its actions, the defendant has wrongfully prevented him taking up his employment with 02 as of 24th January, 2013. As I have made clear, that issue turns on whether Clause 9.3 of the Contract is enforceable. In determining that issue, in due course, it will be immaterial that, as Ms. Mooney averred, the plaintiff was "fully aware" of the provision in Clause 9.3 and that he was entering into and accepting a contract from 02 which contains what is asserted to be "a broadly similar restraint".

25. The second criterion is whether damages would be an adequate remedy for the plaintiff if the Court were to refuse to grant the injunctive relief sought and it was subsequently to transpire on the determination of the substantive action that Clause 9.3 was unenforceable. It is true, as counsel for the defendant submitted, that what the plaintiff is being deprived of is three month's remuneration and, presumably, perquisites. The quantum of that loss would be less than €20,000. Nonetheless, on the basis of the facts averred to by the plaintiff in the grounding affidavit, it is of crucial importance to the plaintiff and his family that he has a continuing source of income. On that basis, I am satisfied that he has made out a strong case that damages would not be an adequate remedy. On the other hand, the defendant has not made the case that damages would not be an adequate remedy for it, if an injunction was granted and it was to transpire subsequently that the non-compete clause is valid and enforceable. As I have already recorded, the plaintiff accepts that he is bound by the non-solicit clause (Clause 9.4) and the confidentiality clause (Clause 10) in the Contract. Subject to the plaintiff giving an undertaking to the Court to comply with those provisions pending the trial of the action, the defendant should have ample protection by reason of that undertaking and the plaintiff's usual undertaking as to damages, the adequacy of which has not been questioned by the defendant.

26. The final criterion is where the balance of convenience lies. It is important to emphasise that the interlocutory relief which the plaintiff is seeking against the defendant is merely to restrain the defendant from interfering with his contractual relationship with 02. He is not, as happens in many employment injunction cases, seeking an order for the payment of his salary by the defendant pending the trial of the action. Indeed, Ms. Mooney has averred that the payment of the plaintiff's salary from 24th January, 2013 to 1st May, 2013 "is not a matter for the account of the" defendant. However, the actions of the defendant have created the situation in which the plaintiff now finds himself, which is obviously distressful not only for him but also for his family. That being the case, the balance of convenience lies in favour of granting the injunction.

Order

27. Subject to the defendant giving an undertaking on oath to the Court to comply with Clause 9.4 and Clause 10 of the Contract, and on the basis of the undertaking as to damages which he has given to the Court in his grounding affidavit, orders granting injunctive relief in the terms sought will be made pending the trial of the action.

28. The Court will endeavour to assist the parties in having the substantive issue tried at the earliest possible date.