Neutral Citation Number: [2005] IEHC 280

THE HIGH COURT

Record Number: 2005 No. 2483P

BETWEEN:

EUROPEAN PAINT IMPORTERS LIMITED

PLANTIFF

AND

JOHN O'CALLAGHAN, PATRICK O'MAHONY, COMPLETE COATINGS LIMITED, TIKKURLA COATINGS LIMITED, AND TIKKURLA COATINGS (IRL) LIMITED

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 10th day of August 2005:

1. In the time available to me at this time of the year, and sitting as I am as the duty judge, I am not in a position to set out in full detail the affidavits filed on behalf of the parties to this application, nor do justice to the extensive and helpful oral and written submissions which have been made to the Court by Gary McCarthy BL for the plaintiff and David Holland SC for the first, second and third named defendants.

2. The plaintiff seeks an interlocutory injunction until the trial of this action to restrain the first and second named defendants, who were formerly its employees, and third named defendant which is a new company set up by the first and second named defendants and which is in competition directly with the business of the plaintiff company, from acting in breach of a restrictive covenant contained in the contracts of employment entered into by the first and second named defendants. That clause provides as follows:

> *"The employee covenants with the Company that he will not for the period of one year after ceasing to be employed by the Company, in connection with the carrying on of any business similar to or in competition with the business of Heavy Duty Coating, and Industrial Paint Sales, on its own behalf or on behalf of any person, firm or company, directly or indirectly seek to procure orders from or do business with any person, firm or company who has any time during the One Year immediately preceding such cessation of employment done business with the Company." (my emphasis)*

3. There is a dispute between the parties as to precisely what meaning is to be attached to the words *"seek to procure orders from or do business with……".* The plaintiff submits that it means that the defendants shall not seek orders or do business, whereas the defendants submit that it means that they shall not seek orders or seek to do business". The distinction is not immediately but the plaintiff's contention is that by this clause the defendants must first of all not seek orders from existing customers of the plaintiff company, and that as a second matter must not do business with them. The effect of the latter, if correct, would be that even if no business was solicited and an existing customer of the plaintiff freely and voluntarily to do business with the defendants, the defendants would be bound to refuse that business even though they had not sought it out in contravention of the first requirement of the clause. The defendants on the other hand submit that the clause means that they must not seek orders and must not seek to do business. Accordingly, the defendants contention would mean, if correct, that they would be permitted to respond to business which came their way which had not been sought out or solicited by them.

4. The next relevant fact is that it is accepted and admitted by the defendants that contrary to the first part of the clause they did in fact seek orders from existing customers of the plaintiff, although they say that at the time that they approached these customers they were unaware of the existence of the restrictive clause in their contract of employment with the plaintiff company. They say that once they became aware that they were in breach of the clause, they acknowledged this and indicated a readiness to give an undertaking to the plaintiff company in terms which reflected their understanding of the meaning of the clause, namely that they would not seek orders or seek to do business with the plaintiff's customers, but that this would not prevent them from fulfilling orders for product which came their way without having been solicited in any way by them.

5. The difficulty which I see with an undertaking of that kind, even if it were to last only for a period between now until the trail of the action, is that the solicitation has already occurred and to all the plaintiff's customer base. That means that the damage has already been done, so that it would now be impossible to know if any order received by the defendants from any existing customer of the plaintiff came as a result of the solicitation or came spontaneously from the customer without regard to any approach from the defendants. If no solicitation had taken place, then there would be some point to seeking at this stage to make the distinction between the two possible interpretations of the clause, and decide which was correct. The Court could order, or accept the defendants' undertaking in that regard, that they would not seek orders or seek to do business. But6 in the present situation the Court feels that the only manner in which the status quo can be maintained is to order that the defendants may not either seek out orders, or do any business with existing customers who have already been solicited, since to do otherwise would be to permit the defendants reap the harvest of their acknowledged breach of the obligation not to seek orders. They have done so, and that removes any realistic possibility of deciding at some future date which of the orders came from the admitted solicitation and which came out of the blue, so to speak, and not as a result of solicitation.

6. Having said that, and I have been pressed by both parties to arrive at even a provisional interpretation of the clause at this interlocutory stage of the proceedings, I would be of the view, and I say immediately that it is unsatisfactory to arrive at a concluded view on the basis of an interlocutory hearing, that a reasonable and sensible view as to the meaning of the clause, and one which is proportionate is that the defendants are obliged not to seek orders from customers of the plaintiff for a period of one year from the date of cessation of employment, and not seek to do business with such customers. I appreciate as is submitted by the plaintiff that such an interpretation renders the second part of the clause to be redundant, in the sense that "to seek orders" amounts to seeking "to do business" and therefore the second part is not necessary to be included. But the consequence of the interpretation contended for by the plaintiff is more restricted than that proposed by the defendants, and in so far as there is a reluctance to interpret such clauses more restrictively than is necessary to achieve the objective of such clauses, I would favour the less restrictive interpretation, provided the object of the clause could be reasonably achieved. In that regard the objective must be that the defendants should be prevented from trying to poach the existing customers from the plaintiff, and some reasonable restraint in that regard is permissible. But to go further and say that for a period of twelve months the defendants must not only not seek out orders, but having not done so, and when approached by such a customer, who perhaps for some reason does not wish to do business any longer with the plaintiff, must refuse that custom forcing the customer to go to another competitor in the same market, other than the plaintiff seems to go beyond the reasonable intention of such a clause. It would amount in my view to an unwarranted restriction, and serve only to unreasonably and unjustifiably place an obstacle in the way of a fledgling company which is legitimately entitled to try and get off the ground. It seems to me that the most which ought to be required of the defendants is not to take any positive step to seek business from existing customers of the plaintiff for a period of twelve months.

7. However, I make that comment in a general way and because the parties have encouraged me to make a finding in this regard, since the Court at this stage of the case is in every bit as good a position to determine the meaning of the clause, as it would be at any more substantial hearing of the case. My finding in this regard has to be on the basis of an interlocutory hearing, and I am not straying from the function of the Court, namely to identify in the first instance if there is a fair issue to be tried. In my view the argument for the more restrictive interpretation put forward by the plaintiff is perfectly arguable and raises a fair issue for the purpose of considering whether an interlocutory injunction should be granted. I have expressed my view for the possible assistance of the parties, but at the same time re-iterating that I have not been asked to treat the interlocutory hearing as the hearing of the action. I think it is important to maintain these distinctions at this stage.

8. However, as I have adverted to already, the position is complicated as far as any order is concerned, since I am also satisfied that in view of the admitted breach of the first part of the clause about which there is no ambiguity, the distinction between the two arms of the clause has evaporated for practical purposes. If the Court is to grant an interlocutory injunction at this stage, it ought I think to be in terms that do not permit the defendants to gain the fruits of their breach between now and the hearing of the action proper. As against that, if the defendants are successful in contending for their interpretation, and my view at the moment is that they may well be correct, then there will have been nothing wrong done by them if they do business with such a customer which has not been solicited. But how can one possibly decide what orders came from solicitation and which arrived out of the blue and not as a result of solicitation. I do not think that in the admitted events which have happened it is possible to work that out in any satisfactory way. To that extent, the defendants have shot themselves in the foot by actively going out and seeking business, however innocently they did it.

9. In other words, an order, which in different circumstances might have been made on an interlocutory basis which would allow them to avail of orders which they did not seek, cannot now be put in place because of the likelihood of unfairness to the plaintiff, since it would not simply be difficult to assess damages in the event that the defendants ought not to have done business with particular customers, it would in fact be impossible to calculate such damage, because of the impossibility of determining which orders came as a result of the solicitation and which did not.

10. In my view, the plaintiff may suffer irreparable damage as a result of the defendants actions in having solicited already all the customers of the plaintiff. They did this by the use of material and information gained during the course of their previous employment with the plaintiff company where they had long and close contact with the customer base of the plaintiff company. The plaintiff has averred that his company has lost business already as a result of the activities of the defendants. Their turnover is already reduced. The defendants have said that they will be put out of business if they are prevented from doing business with the plaintiff's customers, and they are prepared to undertake that they will not seek orders or seek to do business with them. They accept that all the turnover of their new company comprises business which they have done with customers of the plaintiff. It seems to me, and it was something which I mentioned during the hearing, that the logic of the defendants submission that they will be put out of business if they are obliged to not do any business with the plaintiff's customers for one year, is that their business was doomed to failure from day one, since if they had not breached the terms of their contract of employment, they would receive no orders from anybody; whereas there seems to be no doubt that the market for the products in question is a nationwide market and having a value of about €27 million. The plaintiff's share of that market is I believe about 9%. In the plaintiff's submission there is a large share of the market available to be tapped by the defendants without them being permitted to poach the plaintiff's share of that market during the twelve month period. The defendants say on the other hand that the natural market for them is the Munster area which they know from their time with the plaintiff company, but that ignores the very purpose of the restraint clause in the first place.

11. The plaintiff, as I have said, will in my view suffer irreparable damage. The defendants will now doubt suffer also, but only in a way which they would have had to endure for the most part during the first twelve months of business in any event, if the obligation not to seek orders had been adhered to. That first year of setting up in business and seeking business from customers other than from customers of the plaintiff must be assumed reasonably to have been part of their business plan. It is not reasonable to assume that these men decided to set up their new company without any thought for the first year's survival. They now seek to avail of the plaintiff's customers business in a way which is not permitted. The fact that such a restriction will cause them difficulty is something which must weigh in the balance to a lesser extent than the potential loss to the plaintiff.

12. The defendants submit that there would be no damage to the plaintiff company if it was run properly and seek to show that the plaintiff would not be losing its customers to the defendants if those customers were happy with the service provided. They have stated on affidavit that the plaintiff is being refused supplies by some suppliers – that a "stop" has been put on the plaintiff company. That is denied by the plaintiff. In my view that is a dispute which may be capable of resolution at any hearing of this case, but not one which I should make any determination on or place any reliance on at this stage. The plaintiff is entitled to the protection of the clause, and the fact that the company may be criticised in some ways for the manner in which it is run cannot dilute the working of that clause for the plaintiff's benefit, in circumstances where the defendants acknowledge they are in breach of at least the first part of the clause.

13. I do not feel that damages will be an adequate remedy in this case. I do not say that because of any financial frailty which is apparent in the financial status of the new defendant company. As Counsel for the defendant pointed out, it would be unfair on many new companies if the adequacy of damages as a remedy was to be determined by the ability of the company to meet an award of damages. It would in effect be to disadvantage a new company who has to defend against an interlocutory order being made. I am of the view that damages would be incapable of assessment first of all, and not simply difficult. That situation has come about because the poaching or seeking out of orders has already taken place and having already rung the bell, so to speak, the bell cannot now be unrung! The damage is already done, and it will never be possible to determine how much loss has resulted from the solicitation for the reasons which I have already set out. To this extent the defendants cannot avail of the otherwise available principles emanating from the judgment of Finlay CJ. in *Curust Financial Services Ltd. V. Loewe-Lack-Werk* [1994] 1 IR. 450.

14. As far as the balance of convenience is concerned, I believe it lies in favour of the plaintiffs who are innocent in all of this. The defendants have already taken away business and are likely to lose more if the defendants are not restrained for the period of the restriction on the basis of the wider of the two available interpretations. In no other way can I see a way of ensuring that the plaintiff is put back in the same position as if the defendants had not gone ahead and breached the first part of the clause by soliciting all the plaintiff's customers. I am satisfied that the plaintiff's business could be placed in serious jeopardy if it loses further business to the defendants during the twelve month period from the date of the defendants' employment. I am also of the view that if the defendants are not restrained in the manner which I intend, the damage to the goodwill of the plaintiff will be something which cannot be easily restored. On the other hand, the defendants must be taken to have factored into their plans the leanness of the first year's trading on the basis that they would not have access to the plaintiff's customers during that time.

15. I am satisfied that in the event that it be later found that the interlocutory injunction should not have been granted, and the defendants are able to show that they are entitled to recover from the plaintiff on foot of the undertaking as to damages given by

the plaintiff, they have no reasonable ground to suppose that recovery will not be achievable. The assessment of any such damage will be quantifiable on the basis, but not necessarily confined to this, of the figures for the defendants' trading to date.

16. As I have been at pains to explain, and I hope clearly, it is the fact that the soliciting has already taken place that prevents me from considering granting an injunction only in respect of seeking out orders, and therefore on the basis of the wider interpretation of the clause contended for by the defendants. To this extent they have only themselves to blame, although they say that they breached that clause innocently. There is some evidence, which I need not go into in detail, but it is on affidavit, and which demonstrates that possibly the breach was less innocent than what is maintained by them. The defendants have submitted that the information which they used in order to seek out orders from the plaintiff's customers was information which they had in any event as a result of their employment, and that it was not the same as someone who uses confidential information which belonged exclusively to the plaintiff, such as a trade secret. Counsel relied on an English decision in *Faccenda Chicken Ltd v. Fowler* [1997] Ch. 117 in this regard, where certain information availed of by the defendants was held not to come within the definition of confidential or trade information gained by them during the course of their employment. However in that case it was held that the activity of the defendants about which the plaintiff complained was in breach of an implied term in their contract of employment not to use confidential information after their employment ceased. That appears to me to be a different situation to that in the present case, where it is not an implied term which is relied upon, but an express term, albeit one around the meaning of which there is some controversy. The classification of the information used by the defendants in this case as not being confidential or secret information is not of any relevance in my view. Either they offended against the express term or they did not, and the nature of the information availed of in order to do that seems not to be a matter to which any significance need be attached.

17. I have been urged to set aside the interim injunction on the basis that it ought not have been granted by Mr Justice Clarke. That submission is based on the broad ground of lack of candour by the plaintiff in the manner in which the affidavit grounding the interim application was drafted. It is submitted that in material ways the Court was not given the full facts, especially in relation to the financial strength of the plaintiff company in the context of the offer of an undertaking as to damages. In particular it is submitted that the Court was misled into believing that the plaintiff company was a company with an asset value of €1.5 million, whereas it appears to be the case that of that figure the sum of €1.2 million represents the value of a premises which though contracted to be bought by the plaintiff company, was in fact purchased in the name of Kieran Mulcahy, the principal shareholder. This reduces the value of the company to perhaps €300,000, and the defendants submit that if the Court had been made aware of the true position in this regard it would not have granted the injunction, because it would not have been content to accept the undertaking as to damages. There are other respects also in which the defendants submit that there has been a breach of the uberrima fides, or utmost good faith, principle, and a lack of candour. I am not satisfied that a case has been made out in this regard. There will inevitably in applications for interim relief be some haste in the preparation of affidavits and exhibits. It is inevitable that there may later be found to be some shortcomings in those papers, but it would require such a shortcoming to go to something much more fundamental that anything in the present case before the Court would feel that the process had been abused to the extent of obtaining an order under a false pretence. I am satisfied that such is not the case in this instance.

18. I am also satisfied that the plaintiff has been not guilty of any delay such as to disentitle him to the relief sought.

19. For all these reasons, I am satisfied that the Court should make an order of an interlocutory nature by which the first, second and third named defendants are restrained until further order from seeking to procure orders from, or doing any business with any person, firm or company who had at any time during a period of one year prior to the 30th day of June 2005 been a customer of the plaintiff, irrespective of whether the business in question was sought out by the said defendants or not, until the determination of these proceedings.