Neutral Citation Number: [2006] IEHC 50

THE HIGH COURT

[2006 No. 497 P]

BETWEEN

THE PULSE GROUP LIMITED AND PULSE MARKETING SERVICES LIMITED

PLAINTIFFS

AND

CIARAN O'REILLY AND EYE GEN LIMITED TRADING AS "BRANDO"

DEFENDANTS

Judgment of Mr. Justice Clarke delivered 17th February, 2006.

1. Introduction

1.1 The plaintiffs are companies involved in the advertising business. The first named plaintiff is the majority shareholder of the second named plaintiff. As the difference between the two plaintiffs is not material to the issues which I have to decide at this stage I will refer to either or both plaintiffs as "Pulse".

1.2 The first named defendant ("Mr. O'Reilly") had been Chief Executive Officer of the second named plaintiff until he resigned on 30th January, 2006 in circumstances to which I will refer in some more detail later in the course of this judgment. The second named defendant ("Brando") is owned partly by Mr. O'Reilly and partly by three other persons. It has, in recent months, commenced trading by offering advertising services.

1.3 Pulse contends that Mr. O'Reilly was in breach of his contract of employment and his fiduciary duty in relation to the manner in which the business of Brando was established. In those circumstances Pulse seeks to restrain Mr. O'Reilly and Brando from interfering with or otherwise contacting suppliers, contractors, distributors or employees of Pulse or from using, in any fashion whatsoever, information relating to Pulse's business. For clarity a list of such persons and bodies was scheduled to the documentation

1.4 An interim order in the above terms was made by Finlay Geoghegan J. on 2nd February, 2006. The matter came on for hearing before me at the interlocutory stage on Thursday 9th February (having been adjourned from Monday 6th February with the interim order continuing).

1.5 At the conclusion of the hearing on the 9th I indicated that I would inform the parties of the result of the hearing on the following day (Friday 10th February) but would defer giving a reasoned judgment for some days thereafter. On Friday 10th February I indicated that I was not prepared to make an interlocutory order in terms of the interim order previously given by Finlay Geoghegan J. However I did indicate that I was prepared to make an interlocutory order that would require the return of any confidential information or property of Pulse which might be in the possession of either defendant.

1.6 The purpose of this judgment is to set out the reasons for coming to those views. It is necessary to turn first to the allegations made against both Mr. O'Reilly and Brando for the purposes of determining whether Pulse had established a fair issue to be tried and, as will become clear, the extent of any such possible claims.

2. The Alleged Breaches

2.1 There is no doubt but that Mr. O'Reilly was involved with the Brando project for at least a number of months while he remained Chief Executive of Pulse. On the evidence currently before the court it would appear that Brando commenced trading in September 2005. It would appear that there are four equal shareholders in Brando. They are Mr. O'Reilly, Mr. Darren McGrath who is the Managing Director of Brando, a Mr. Brendan O'Flaherty, and a Mr. Damien Ryan. It would appear that Mr. O'Reilly is a non-Executive Director of Brando while Mr. O'Flaherty and Mr. Ryan hold no office in the company.

2.2 It is clear that Mr. O'Flaherty was significantly involved in Pulse and is described in much recent publicity material as a significant member of the Pulse team acting as Creative Director. There appears to be some dispute as to whether he was an employee or carried out his duties on a contract basis. Whichever may turn out to be the case it does not appear, on the evidence currently available, that Pulse (other than, of course, Mr. O'Reilly) was aware of Mr. O'Flaherty's involvement with Brando.

Mr. Ryan is the principal of "The Money Show" which is a client of both Pulse and Brando and it is the establishment of contractual relations by that company (together with some others) with Brando which, Pulse says, gives rise to breach of obligation. Mr. Ryan is also, it would appear, the principal of a number of the other scheduled companies in relation to which contact is sought to be restrained.

2.3 It would also appear that Brando operated, for much of its history, from the same premises as Pulse on foot of an agreement entered into on behalf of the second named plaintiff (acting through Mr. O'Reilly) for a sub-letting of a portion of Pulse's premises. It does not appear that Mr. O'Reilly informed his fellow directors in the second named plaintiff that the subletting which he had entered into on behalf of Pulse was with a company in which he had an interest. This was undoubtedly imprudent and arguably unlawful. There can be little doubt but that it has contributed to the air of suspicion which surrounds the events giving rise to these proceedings.

2.4 Furthermore there was evidence before the court to the effect that while both companies were trading from the same premises, resources of Pulse were, on occasion, used by Brando. This is denied. It is obviously not possible at this interlocutory stage to resolve such conflicts of fact. I should therefore confine myself to indicating that, in my view of the evidence currently available, there is a fair issue to be tried as to whether there was an improper use by Brando of Pulse resources.

2.5 It would also appear that a small number of third party companies which were clients of Pulse are now also clients of Brando. These, as indicated above, include "The Money Show". There is a significant conflict of fact, however in the affidavit evidence, concerning the extent to which the business of Brando can be said to be in competition with Pulse.

2.6 Brando asserts that it is clear from the documentary material placed before the court that its business is confined to services connected with internet advertising only and that it does not, nor does it intend to, operate in other sectors of the advertising business. Without reaching any concluded view on the matter it did seem to me that the contention put forward by Counsel on behalf of Brando as to the proper construction of the press publicity surrounding the launch of Brando appeared to be correct. On that basis I was not satisfied that there was, at this stage, any evidence which would allow me to conclude that there was an issue to be tried as to whether Brando has, or intends to, compete in the non-internet side of the advertising business. There is, however, a conflict as to the extent to which Pulse itself was and is involved in internet advertising. That conflict is not capable of resolution at this

interlocutory stage.

2.7 However it should be noted that Mr. O'Reilly's contract of employment is to be found in a letter from Gerry Ellender, the Managing Director of Pulse, of the 16th August, 2001. Under the heading "Responsibilities" it is noted that Mr. O'Reilly is:-

> "…responsible for retaining existing clients and developing new business with the objective of establishing PMSI as the most progressive, integrated marketing services agency in Ireland."

2.8 Even if internet advertising was not a significant portion of Pulse's business, it is at least arguable that Mr. O'Reilly's general duties as Chief Executive included the development of new forms of business including internet advertising. In that context it is worthy of some note that there was evidence that Pulse had subcontracted the internet aspect of some of its general advertising business. On that basis it was argued that Pulse was not really involved in the internet side of the business at all. That proposition does not necessarily follow.

2.9 In modern business (and not only in advertising) it is not unusual for companies to wish to provide a so called "one stop shop" whereby the company meets all of the needs of clients within a broad sector. In such circumstances it may be that the company supplying the goods or services concerned is not in a position, from within its own resources, to supply the full range. It may, therefore, outsource some elements to another company which may have the appropriate expertise. Even where this is done it does not follow that the principal company is not involved in the business of supplying the relevant service, in that its commercial advantage is, in part, secured by allowing other clients to obtain all of their goods and services through a single point of contact.

2.10 There is also controversy concerning Mr. O'Reilly's departure from Pulse. On his case he gave an orderly 90 days notice as per his contract. On Pulse's case his resignation was a response to questions being raised as to his conduct. It is common case that the sequence of events is complicated by the fact that, for much of the period leading up to Mr. O'Reilly's departure, he was involved in negotiations to buy the first named plaintiff's interest in the second named plaintiff. The inferences to be drawn from that course of dealing are also disputed.

2.11 In all those circumstances I am satisfied that there is a fair issue to be tried to the effect that Mr. O'Reilly was in breach of his fiduciary obligation as a director of the second named plaintiff and also in breach of his duty of fidelity to the second named plaintiff as an employee with the status of Chief Executive and with the responsibilities to which I have referred above.

2.12 There are, therefore, in my view, fair issues to be tried as to whether Mr. O'Reilly may have been, while he remained Chief Executive, in breach of his obligations to Pulse and the second named plaintiff in particular.

3. The Extent of Mr. O'Reilly's Obligations

3.1 Mr. O'Reilly's legal obligations, however, are no longer governed by his contract of employment. In *Wallis Bogan & Company –v- Cove* (1997) IRLR 453 the English Court of Appeal had to consider whether, in the absence of an express covenant or contractual term, there would be implied into a contract of employment a term that would restrict an ex-employee from canvassing or doing business with customers of a former employer. The case involved three individual solicitors who had formerly been employed by the plaintiff firm. The matter came before the courts, as here, on an application for interlocutory orders. Leggett L.J. concluded on the issue in the following way;-

> "The essential question is: whether the solicitor is entitled to canvass clients of the firm. In so doing, the solicitor is, indeed, taking advantage of a professional connection with the client. But that connection is no different in principle from the trade connection that, for instance, a milk roundsman may acquire with his employer's customers. Clients and customers alike represent the employers' goodwill which the employers are entitled to protect by an express covenant in reasonable restraint of trade, but which is not protected for them by an implied term if they do not bother to exact an express covenant."

3.2 There are no relevant express covenants in Mr. O'Reilly's contract. I was not satisfied that there are arguable grounds for implying any such covenant.

3.3 In the leading case of *Faccenda Chickens Limited –v- Fowler* [1987] 1 Ch 117 the English Court of Appeal came to the view that a covenant would be implied into a contract of employment to the effect that an employee was bound by a duty of good faith to his employer not to use or disclose, for the duration of his employment, confidential information gained in the course of the employment, and that furthermore such an employee would be bound by an implied term not to use or disclose, either during his employment or thereafter, information which was not merely confidential, but which was properly to be described as a trade secret. However it is clear from that authority that no term will be implied into a contract of employment which precludes the employee, after his employment has ceased, from the disclosure of confidential information short of a trade secret.

3.4 Therefore in summary, the law is clear. In the absence of an express term in a contract of employment the only enduring obligation on the part of an employee after his employment has ceased is one which precludes the employee from disclosing a trade secret.

3.5 As indicated above there are no relevant express terms in Mr. O'Reilly's contract. Nor is there any evidence which would suggest that Mr. O'Reilly is in possession of or has used anything which might amount to a trade secret in the sense in which that term is used in *Faccenda Chickens*. There was not, therefore, in my view, any basis for suggesting that Mr. O'Reilly has been in breach of his obligations to Pulse at any time after his contract of employment ceased.

3.6 While I was, therefore, satisfied that there is a fair issue to be tried to the effect that Mr. O'Reilly was guilty of a breach of his obligations of fidelity and good faith towards the second named plaintiff while he remained in their employment and was a director of the company, I was not satisfied that there is a fair issue to be tried to the effect that any breach occurred after that relationship ceased.

4. The Extent of the Claim

4.1 In that context it is necessary to consider the possible relief which might, on that basis, arguably be available to Pulse in the event of it succeeding at trial. It is arguable that Pulse would be entitled to an account of any profits made on foot of any wrongful actions established. Alternatively Pulse might be entitled to damages for any loss suffered by it by virtue of such wrongful actions. By analogy with the calculation of damages in the case of a breach of a commercial secret obligation, it may be that the basis upon which such damages would be calculated would be the loss occasioned by virtue of Brando having had a head start or springboard to which it should not have been entitled. See *Schauenbourg Industries Limited and Ors. –v- Borowski* [1979] 101 D.L.R. 701.

4.2 Whichever may be the more appropriate way of approaching the question of remedy, it is clear that the remedy can only be one designed to meet the wrong established. For the reasons analysed above, that wrong can only concern actions taken by Mr. O'Reilly while he remained an employee and director. Mr. O'Reilly would, on any view, have been entirely free to compete fully and completely with Pulse as soon as his contract of employment and his directorship ended. Therefore any new clients acquired by Brando after the termination of Mr. O'Reilly's relationship with Pulse could not be said, on any basis, to have been secured as a result of any wrongdoing save in a limited case where it might be established that substantial preliminary efforts had been made to secure the client concerned at a time when Mr. O'Reilly remained a director and employee of Pulse and thus duty bound to Pulse.

4.3 On the evidence currently before the court it does not appear that more than three or four clients of Pulse have now contractual relations with Brando. For the reasons indicated above I was not satisfied that any further clients who may be secured by Brando could be said to have been so secured in circumstances giving rise to a finding of wrongdoing against Mr. O'Reilly, and, by implication, Brando. It, therefore, seemed to me to follow that the extent of any claim which Pulse may have as against Mr. O'Reilly (and by extension as against Brando) would be to recover the profits made in respect of those clients who were secured while Mr. O'Reilly remained connected to Pulse or alternatively damages attributable to any loss suffered by Pulse as a result of the business done between Brando and such clients.

4.4 In either case the sum of money concerned would, on the evidence currently available, be capable of reasonable calculation and would not, in my view, be likely to be very substantial. In those circumstances it seemed to me that damages would be an adequate remedy for any wrong which might be established.

4.5 In saying that I would want to make clear that a different situation might well pertain had it been established on behalf of Pulse that there was a fair issue to be tried as to a basis upon which it might be contended that Mr. O'Reilly and Brando were under a continuing obligation not to canvass clients of Pulse. On that basis it would be no means by clear that damages would be an adequate remedy not least because of the question of recoverability. However for the reasons which I have sought to analyse it seemed to me that the only arguable wrongdoing on the part of Mr. O'Reilly was historic. The only remedy can, therefore, be one designed to compensate for that historic wrong. On the basis that that wrongdoing is ultimately established at trial, it will only be to the extent that Mr. O'Reilly and/or Brando obtained an inappropriate head start by virtue of Mr. O'Reilly's actions while still connected to Pulse that an entitlement to recover could exist.

4.6 It seemed to me that to make an order of the type sought on behalf of Pulse would be to, in effect, permit Pulse to enforce a non solicitation clause which does not exist in Mr. O'Reilly's contract either expressly or by implication.

5. Conclusions

5.1 Finally it is necessary to turn to the additional relief sought on behalf of Pulse which seeks the delivery by the defendants of "all information, data, documentation or any other thing in their power procurement or possession relating to the plaintiff's business". It is not contested but that Mr. O'Reilly would have had an obligation, upon ceasing to be involved with Pulse, to leave behind him or give to Pulse any documentation or materials which were concerned with the business of Pulse. It appears on the affidavits that Mr. O'Reilly had retained, at least at the time of the hearing before me, some such materials or documentation. It therefore seemed to me to be appropriate to make an order requiring the defendants to deliver up to the plaintiffs all such data, documentation or other property in accordance with the terms of paragraph D of the notice of motion.

5.2 It was for the above reasons that I refused the relief sought on the notice of motion with the exception of the relief set out at paragraph D.