26/00; [2000] VSC 200

SUPREME COURT OF VICTORIA

GIGG v MAGISTRATES' COURT of VICTORIA and ANOR

Beach J

12 May 2000

CIVIL PROCEEDINGS – INTERLOCUTORY INJUNCTION – ORDER MADE – NO CONSIDERATION WHETHER SERIOUS ISSUE TO BE TRIED – NO CONSIDERATION WHETHER APPLICANT WOULD BE ADEQUATELY COMPENSATED BY AN APPROPRIATE AWARD OF DAMAGES – NO UNDERTAKING GIVEN AS TO DAMAGES – NO TIME LIMIT PLACED UPON ORDER – WHETHER MAGISTRATE IN ERROR.

G. was employed by SISP/L as an accountant or financial planner. The employment agreement entered into between the parties included a restraint clause which came into effect upon termination. A few days after G. resigned, SISP/L filed a complaint whereby it sought an injunction to restrain G. for a certain period from acting and continuing to act in breach of the restraint clause. Seven days later, SISP/L sought an interlocutory injunction to restrain G. pending the hearing and final determination of the complaint. The magistrate made the order as sought. Upon an application for an order in the nature of *certiorari*—

HELD: Application granted. Order quashed.
1. The magistrate appears to have given no consideration as to whether there was a serious question to be tried in the proceeding. A restraint of trade clause is prima facie unenforceable, all the more so when it restrains a member of a profession from pursuing that profession. The onus in demonstrating that such a clause is enforceable rested upon the person seeking to enforce it namely, SISP/L.

2. The magistrate appears to have given no consideration to the question whether in the event SISP/L was ultimately successful in its proceeding it would be adequately compensated by an appropriate award of damages. This was an aspect of the utmost importance when considering where the balance of convenience lay.

3. The magistrate was in error in failing to require SISP/L to give an undertaking as to damages as a condition of obtaining the relief it was seeking.
***National Australia Bank Ltd & Ors v Bond Brewing Holdings Ltd & Ors* [1991] VicRp 31; [1991] 1 VR 386; (1990) 1 ACSR 445; (1990) 8 ACLC 403, applied.**

4. Another defect in the order which was made was that it was open-ended. The magistrate should have placed some time limit on the order which was made.

BEACH J:
1. This is an application by the plaintiff Thomas Gigg for an order in the nature of *certiorari*, bringing up and quashing the order of the Mildura Magistrates' Court made on 16 February 2000, whereby the court ordered that the defendant be restrained from knowingly soliciting, canvassing or securing work or attempting to do so, as an accountant or financial planner, from any client of the plaintiff in that proceeding, Sunraysia Investment Services Pty Ltd, at any time during a period of 12 months immediately preceding 3 February 2000, and that such restraint cover the areas of the plaintiff's business premises and within a radius of 25 kilometres therefrom, those premises being situate at Mildura, Robinvale, Wentworth, Ouyen and Murrayville.

2. It was further ordered by the court that the order was to remain in force until the final determination of the proceeding. The matter before the Magistrates' Court was then otherwise adjourned *sine die* and has not as yet come back before that court for hearing.

3. The background to the proceeding in the Magistrates' Court may be summarised as follows.

4. Sunraysia carries on the business of accounting and financial services in both the States of New South Wales and Victoria and has offices at the various places specified in the order of the Magistrates' Court.

5. On 17 August 1999 the plaintiff, Thomas Gigg, who had been employed by Sunraysia for some period of time prior to that date, entered into an employment agreement with Sunraysia, that agreement to operate from 1 July 1999. The agreement contained the following restraint clause:

> "19. RESTRAINT FOLLOWING TERMINATION
> i. The Employee agrees that the Employee will not without the prior written consent of the Employer within the Restraint Area, until the expiration of the Restraint Period as a principal, employee, agent, adviser, director, consultant or otherwise for any person;
> (a) solicit, canvass or secure or attempt to solicit, canvass or secure work as an accountant or financial planner from any person who is a client of the Employer at the commencement of the Restraint Period or who has been a client of the Employer at any time during a period of 12 months immediately preceding the commencement of the Restraint; or
> (b) solicit, employ or engage the services of any person who is or who has been an employee of the Employer, Accountancy One Pty Limited or any related party thereof within the meaning of the Corporations Law.
>
> ii. Without limiting the generality of the foregoing, sub-clause i. above relates to a person or company:
> (a) introduced by the Employee to the Employer; or
> (b) introduced by the Employer to the Employee — during the Employee's period of employment with the Employer."

6. In Clause 1 of the agreement both "restraint period" and "restraint area" are defined as follows:

> " 'Restraint period' means whichever of the periods being 36 months, 24 months and 12 months is lawful and enforceable and if more than one, the longer of such periods commencing at the end of Term to the intent that:
> (a) if any period shall be held to be invalid for any reason by any court of competent jurisdiction such invalidity shall not prejudice or in any way affect the validity of any lesser period specified; and
> (b) all such periods shall bind the parties to the extent that no such finding is made.
>
> 'Restraint area' means whichever of the areas being within a radius of twenty five (25) kilometres from any business premises of the Firm, within a radius of one hundred (100) kilometres from any business premises of the Firm, the State of Victoria and the Commonwealth of Australia is lawful and enforceable and if more than one, the greatest area to the intent that:
>
> (a) if any such area shall be held to be invalid for any reason by any court of competent jurisdiction such invalidity shall not prejudice or in any way affect the validity of any lesser area specified; and
>
> (b) all such areas shall bind the parties to the extent that no such finding is made."

7. On 3 February 2000 the plaintiff resigned from the employ of Sunraysia. Sunraysia contends that since that time the plaintiff has been soliciting its clients and acting for those clients.

8. On 8 February Sunraysia filed a complaint in the Magistrates' Court at Mildura, whereby it seeks an injunction restraining the defendant for a period of 12, 24 or 36 months from 3 February 2000 from either personally or by its agent or by letter, circulars or advertisements and whether for himself or on behalf of any other person, company or firm from acting and continuing to act in breach of Clause 19 of the Agreement, and damages.

9. On 14 February Sunraysia filed an application in the Magistrates' Court at Mildura whereby it sought an interlocutory injunction that the plaintiff be so restrained, pending the hearing and final determination of its complaint. That application came before the court on 16 February. Following a hearing that day the court made the order that I have already stated at the outset of my reasons for judgment.

10. It would seem to me that there are three basic errors of law which the magistrate made in arriving at the conclusion he did in the matter and in making the order he did. In the first place, the magistrate appears to have given no consideration as to whether there was a serious question to be tried in the proceeding. A restraint of trade clause is *prima facie* unenforceable, all the more so when it restrains a member of a profession from pursuing that profession. The onus in demonstrating that such a clause is enforceable rests upon the person seeking to enforce it, in this case Sunraysia.

11. In my opinion the magistrate had no evidence before him as to that, and in the absence of such evidence from the defendant Sunraysia, I consider that he was not justified in making the order he did in the matter.

12. In the second place, the magistrate appears to have given no consideration to the question whether in the event Sunraysia is ultimately successful in its proceeding it would be adequately compensated by an appropriate award of damages.

13. In the circumstances of this case I consider that that aspect was of the utmost importance when considering where the balance of convenience lay, but of more significance was the failure of the magistrate to require Sunraysia to give an undertaking as to damages as a condition of obtaining the relief it was seeking.

14. In that regard it is sufficient to do no more than refer to what the Full Court of this court said in *National Australia Bank Ltd and Others v Bond Brewing Holdings Ltd and Others* [1991] VicRp 31; [1991] 1 VR 386 at p559; (1990) 1 ACSR 445; (1990) 8 ACLC 403:

> "The usual undertaking as to damages is the price that must be paid by almost every applicant for an interim or interlocutory injunction. An injunction will by its nature require a person to do or abstain from doing some act and so is by its nature an order with a tendency to prejudice the person to whom it is directed. The practice of requiring the undertaking recognises that, the injunction being only interim or interlocutory and so the rights of the parties not having been finally determined, it may at a later stage appear that the applicant should in fairness compensate the party enjoined for the harm he has suffered."

15. In my opinion there was a clear error of law on the face of the record in this proceeding sufficient to vitiate the magistrate's order, indeed, counsel for Sunraysia did not seriously contend before me this morning that there was not. What he submitted in that regard was that the proceeding should be remitted to the Magistrates' Court to enable the magistrate to seek such an undertaking. However, when this matter was before the Magistrates' Court on 16 February the magistrate asked the solicitor for Sunraysia if Sunraysia was prepared to give an undertaking as to damages. Sunraysia's solicitor informed the magistrate that it was not. In that situation I consider that there would be no justification for remitting the matter to the Magistrates' Court.

16. I consider that there was also a further defect in the order made that day. It is open-ended. Here we are almost three months down the track and the order is still in force. In my opinion that is a totally unsatisfactory state of affairs. There should have been some time limit placed upon any order of the type the magistrate was contemplating making and did in fact make.

17. I order that the order of the Magistrates' Court at Mildura made on 16 February 2000, whereby the magistrate ordered that the plaintiff Thomas Gigg be restrained from knowingly soliciting, canvassing or securing work or attempting to do so as an accountant or financial planner, from any client of Sunraysia Investment Services Pty Ltd at any time during a period of 12 months immediately preceding 3 February 2000, and such restraint to cover the areas of Sunraysia's business premises and within a radius of 25 kilometres therefrom, those premises being situate at Mildura, Robinvale, Wentworth, Ouyen and Murrayville, be brought up into this court and quashed.

18. I order that the second-named defendant, Sunraysia Investment Services Pty Ltd, pay the plaintiff's costs of this proceeding.

APPEARANCES: For the plaintiff Gigg: Mr C Dowling, counsel. Slater & Gordon, solicitors. For the defendants: Mr P Lacava, counsel. Ryan Maloney Anderson, solicitors.
