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Transcript of Proceedings

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Date 14/1/02

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BYRNE J

No 10741 of 2001

CEDAR HILL FLOWERS AND FOLIAGE PTY LTD	First Plaintiff
and	
AUSTRALIAN FLORA CORPORATION PTY LTD	Second Plaintiff
and	
WILFRIDUS NICOLAAS SPIERENBURG	First Defendant
and	
BRIAN PETER LOADER	Second Defendant
and	
NORMA ANNE LOADER	Third Defendant
and	
ANTHONY JOHN MANDALL	Fourth Defendant

BRISBANE

..DATE 04/01/2002

JUDGMENT

04012002 slh (Byrne J)

HIS HONOUR: The first plaintiff ("Cedar Hill") has a business of growing, harvesting and processing Australian native flora, principally foliage. The second plaintiff ("AFC") is an associated company, the two entities having the same shareholders and directors. The businesses of the two companies are operated as one business in South-east Queensland, with the great bulk of the processed foliage being sold into Europe by AFC.

Mr Spierenburg once worked as a salesman and purchaser for an AFC customer in the Netherlands. Early in 1998, Mr Bennett, the chief executive officer of the plaintiffs, met him there. Mr Spierenburg's wife is an Australian, and the two of them decided to come to live here. In mid-1998, after arriving in Australia, Mr Spierenburg contacted Mr Bennett seeking employment in the plaintiffs' businesses. Initially, he was employed casually.

In mid-July 1998, Mr Spierenburg accepted an offer of a "permanent position as export manager of the plaintiffs' business": see para 4(e) of the statement of claim, which is admitted by paragraph 1 of the defence.

In September 1998, Mr Spierenburg entered into a written contract of employment with Cedar Hill. The contract described his duties and responsibilities as "export manager in the employer's foliage export business". In fact, Cedar Hill had no such business. It was always intended that Mr Spierenburg should become an AFC employee;

but governmental financial assistance had been sought towards the payment of Mr Spierenburg's salary, and that support would only be available in respect of export-related activity. So to protect business secrets and other confidential information pending approval of the grant and the employment of Mr Spierenburg by AFC, the contract with Cedar Hill was concluded.

It is common ground that the Cedar Hill employment contract was terminated, by consensual abandonment, upon Mr Spierenburg's entering into the written employment contract with AFC which is the subject of these proceedings.

Towards the end of July last year, Mr Spierenburg gave AFC written notice of his resignation as export manager with effect 31 August 2001. A month's notice was required because by Clause 6 of the contract "Either party may terminate this agreement by one (1) month's notice in writing to the other."

By the end of July 2001, Mr Spierenburg had put in place arrangements to compete with AFC's foliage export business. He had concluded discussions with Mr Loader, a supplier of foliage to Cedar Hill, to enter into a partnership business. This was to be for the harvesting and exporting of Queensland native foliage: in particular, Umbrella Fern, which was the mainstay of AFC's European export business.

In testifying, Mr Spierenburg candidly admitted to important breaches of his obligations of fidelity to AFC which were necessarily involved in his secretly setting up in competition with his employer's business the partnership venture with Mr Loader. As it happens, no relief is sought in respect of that established misconduct. Rather, the plaintiffs' present claims are for injunctive relief and damages for breach of the post-employment covenant against competition contained in the AFC employment agreement, and for injunctive relief to restrain the misuse of confidential information of both Cedar Hill and AFC.

While he worked for Cedar Hill and later for AFC, Mr Spierenburg acquired a deal of commercially sensitive information concerning the affairs of both plaintiffs. He must have appreciated throughout the duration of his employment with both that he was expected to keep confidential information concerning the trade secrets of both.

In considering the application of the principles of equity to the claim for injunctive relief in respect of the misuse of confidential information, there is in present circumstances no need to distinguish between the secrets of the two plaintiffs. As much is conceded from Mr Spierenburg. It also emerged during Mr Spierenburg's testimony that he will, unless restrained by injunction, appropriate for his own purposes any information acquired by him during his employment with the plaintiffs.

Boldly, and with considerable candour, he admitted, in effect, that he would use such information in the pursuit of his self-interest if he could.

Accordingly, provided that information having the necessary quality of confidentiality is identified with as much specificity as is practicable (see O'Brien v. Komesaroff (1982) 150 CLR 310, at 326 and 328; cf Maggbury Pty Ltd v. Hafele (Australia) Pty Ltd [2000] QCA 172, [33]), the use by Mr Spierenburg of confidential information ought to be restrained on the application of ordinary equitable principles concerning the protection of confidential information.

As it happens, the extent of injunctive relief with respect to confidential information has become a mere matter of detail. A draft form of order (Exhibit 18) identifies much of the information in respect of which protection is sought. The great bulk of it is not the subject of contest, and matters of detail concerning the restraint in relation to confidential information can be left for further submissions.

I turn to the restraint of trade issue.

Two classes of relief are sought by AFC for contravention of the anti-competitive restraint in Mr Spierenburg's employment contract. Damages are claimed for losses alleged to have been sustained as a consequence of

Mr Spierenburg's partnership venture with Mr Loader. For the future, injunctive relief is sought to restrain Mr Spierenburg from, put shortly, acting inconsistently with his promise in the employment contract so far as it relates to the balance of the one year "base restraint period": see clause 5.1 of the agreement.

Relevantly, Mr Spierenburg's promises included that he would not:

"5.1.1 Be directly or indirectly engaged, concerned or interested whether on his own account or as a member, partner, director, shareholder, consultant, advisor, agent, employee, beneficiary, trustee or otherwise in any enterprise, partnership, corporation, firm, trust, joint venture or syndicate which is engaged, concerned or interested in or carrying on (or is in the process of planning or preparing to carry on) any business the same as or substantially similar to or in competition with the employer's business.

5.1.2 On his own account or for or by means of any person, enterprise, corporation, firm, trust, joint venture or syndicate entice away from the employer any customer or supplier of the employer's business."

The business Mr Spierenburg established in partnership with Mr Loader is in direct competition with AFC's business. It involved the sale of foliage harvested in Queensland of species AFC sold to its European customers. Competing sales were made to existing customers of AFC.

It is not in contest that Mr Spierenburg's participation in that partnership venture involved contravention of the terms of his anti-competitive promise. Nor is it in issue that it was the intervention of Mr Spierenburg and the use of his knowledge, skill and labour which generated the

partnership's export sales. This is not surprising. Mr Loader had not previously exported, and Mr Spierenburg acknowledged that it was his knowledge and labour which produced the competing export sales for his partnership with Mr Loader.

Mr Spierenburg resists liability to compensate for such loss as AFC may prove it has sustained as a consequence of that breach of his anti-competitive promise in reliance on a contention that the relevant promises are in unlawful restraint of trade.

AFC, however, contends that the doctrine cannot be invoked here for the reason that it can have no application to the venture with Mr Loader upon the footing that the doctrine exists to serve public interests which cannot have been put in jeopardy by the partnership with Mr Loader. The factual premise underlying this legal contention is, put in a summary way, that the partnership business was, as Mr Spierenburg certainly knew, to be conducted in plain, direct and substantial contravention of provisions of State and Federal law.

The partnership venture involved harvesting, and (in some cases at least) treating, and exporting the product. Permissions or licences were required pursuant to State and Federal legislation to enter upon State Crown land from which it was intended to harvest at least some of the products, to harvest the products themselves, to deal in

the foliage, and to export the goods. The business was, in all its essential respects, and as Mr Spierenburg believed, illegal in the absence of permission for the harvesting, dealing and exporting mentioned.

Nonetheless, Mr Spierenburg intended to conduct his business unlawfully. The case is, therefore, not one in which some incidental infringement of a statutory provision might have been involved in the venture. It was one where the only significant aspects of the venture - the harvesting and the export - were, as Mr Spierenburg believed, prohibited by statute in the absence of appropriate permissions or licences.

The public interest which is protected by the restraint of trade doctrine as it operates in respect of former employees is that the former employee may, for his own and for the public benefit, "use skill, experience and knowhow acquired in the service of the employer in legitimate competition": Wright v. Gasweld Pty Ltd (1991) 22 NSWLR 317 at page 329, per Gleeson CJ, dissenting, but not on this point; see also Esso Petroleum Co Ltd v. Harper's Garage (Stourport) [1968] AC 269 at page 298.

The restraint of trade doctrine, therefore, cannot be invoked by Mr Spierenburg: his activities were not, and were not intended to be, conducted in a lawful way. So the only public policy consideration of present significance is that which requires contracts voluntarily

made by persons of full capacity to be enforced.

In these circumstances, AFC has established its entitlement to injunctive relief for the balance of the basic restraint period (that is, until the end of August this year) and to such damages as can be proved to have been caused by the breach of contract inherent in Mr Spierenburg facilitating the export business with Mr Loader.

A question arises concerning the nature of the injunctive relief which ought to be granted for the future.

It is unnecessary for present purposes to consider whether the restraint in clause 5.1.1 and 5.1.2 is wider than is necessary to protect AFC from lawful competitive activity. I may have been inclined to the view that the restraint in clause 5.1.2 - essentially the anti-solicitation provision - might well have been justifiable having regard to the nature and extent of contacts with customers that were anticipated when Mr Spierenburg entered into the AFC employment contract in view of the responsibilities he was to assume under that agreement. But it is unnecessary to decide whether the broader covenant in clause 5.1.1 provides no more than adequate protection to those interests of AFC deserving of protection: customer connection and confidential information relating to it.

The reason is this: Mr Spierenburg has made it plain that he has no present intention of obtaining such licences or

permits as may be required to enable him to carry on any competitive business lawfully.

As things stand, therefore, it is appropriate to proceed upon the basis that the restraint of trade doctrine does not now, and will not in future, provide a basis for the declining to enforce the agreed anti-competitive arrangement.

As it is not suggested that there is any other reason not to enforce clause 5.1.1, this brings me to damages.

Evidence has been adduced from the accountant, Mr Vincent, whose report identifies the classes of claims for compensation made. Broadly speaking, there are three components: first, gross profit lost on sales said to have been taken by the Loader partnership; secondly, gross profit lost on reduced selling prices, the prices having been reduced to cope with the competition from the Loader/Spierenburg partnership; and, thirdly, "direct costs": a claim for $26,583 expenses incurred in travelling to Europe to meet with customers in an attempt to diminish the damage to AFC's business occasioned (and likely to be occasioned) by the continuing breach of the restraint provision by Mr Spierenburg.

With respect to the claim for loss of sales, I am satisfied that at least the great bulk of those achieved by the partnership business would have been made by AFC but for

the breach. AFC's product was prized in the European market. The fact that the Spierenburg/Loader partnership achieved sales of equivalent products is additional evidence supporting a conclusion otherwise emerging from the evidence that there was considerable demand for the products which Mr Spierenburg sold. Apart from AFC there was no other supplier of such products. And the supplies made by Mr Spierenburg's partnership were to existing AFC customers. The logical inference, therefore, is that if the Spierenburg/Loader partnership had not supplied the foliage, AFC would have done so.

The detail of the calculation of the loss appears in Mr Vincent's reports.

There is, it should be acknowledged, a chance that not all the Spierenburg sales would have been made by AFC. But the chances of that do not seem considerable. And the prospect that not all the partnership sales would have been made by AFC is, I think, sufficiently accommodated by reducing that component of the damages by 10 percent.

So far as the gross profit lost on reduced selling prices is concerned, there seems every reason to suppose that the reductions resulted only from a need to accommodate the competition from the Spierenburg/Loader partnership. I do not see a basis upon which any discount ought specially to be made in reduction of that claim.

There was also a challenge to the reasonableness of the European trip undertaken by Mr Bennett and another senior executive in early September. But I am satisfied that the cost was reasonably incurred.

It was suggested for Mr Spierenburg that the trip was unnecessary, that the jeopardy to AFC's business created by the breach of contract might have been adequately dealt with by Email or by telephone, and that visiting the overseas customers was an unjustifiable expense. I do not agree. The senior executives were accustomed to undertaking their business connections in that way. And AFC incurred the expense in circumstances where it was justifiably considered necessary to cope with the breach and the predictable future consequences of its continuation.

The $26,583 will therefore be allowed.

Gentlemen, I am wondering whether I ought not now give you an opportunity to see if you can agree upon forms of order which will give effect to those reasons.

Mr Martin, so far as the costs are concerned, is there anything you wish to say?

MR MARTIN: No, your Honour.

HIS HONOUR: You may have your costs, Mr Morris. Does any

interest question arise in relation to the damages?

MR MORRIS: Your Honour, in light of the way the case has fallen out, the matter has been tried very quickly and the interest would be negligible in the circumstances.

HIS HONOUR: In view of what Mr Martin said before, so far as the future restraint is concerned, I expect that there will be no difficulty of substance in my making an order in terms of paragraph 1, although there may be matters of detail which you would wish to argue about.

MR MORRIS: Yes.

HIS HONOUR: There may be points of detail about 3. The calculation will need to be done with respect to 4.

MR MORRIS: I have just done that, your Honour, yes. My calculation brings it to $106,334 leaving out the cents.

HIS HONOUR: You can discuss with Mr Martin the mathematics, and as to the form of order. If it is to be in the traditional common law form it should be in terms that the second plaintiff recover from the first defendant the amount in question, although I see the current rules seem to anticipate that even an order on the common law side will provide for payment. You could adopt the form in the rules, I suppose. The only difference appears to be under the form in the rules that if you do not pay you can

go to prison, whereas under the old form the result was different.

...

HIS HONOUR: Are there any reserved costs?

MR MORRIS: I think they are in the cause, your Honour. We will check that and adjust the draft accordingly.

HIS HONOUR: Shall I leave it to you to work on the detail? I will come back at 2.30 if you wish. If you prefer, I will leave it until later this afternoon and you can let my associate know.

MR MORRIS: Your Honour, I would have a fair degree of confidence that we need not trouble your Honour in any formal sense. I am sure Mr Martin and I can work something out and send it over to your Honour's associate, if that is a course that would be acceptable to your Honour.

MR MARTIN: I think that is correct.

HIS HONOUR: Let us see how you go. I thank you for your submissions, gentlemen.
