[2005] QSC 372

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Date: 5 December, 2005

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No S9604 of 2005

ALL PURPOSE ENTERPRISES PTY LTD ACN 010 084 367 TRADING AS ALL PURPOSE TRANSPORT SERVICES	Applicant
and	
MARK JAMES HUDSON	First Respondent
and	
HELEN VERONICA HUDSON	Second Respondent

BRISBANE

..DATE 18/11/2005

JUDGMENT

1th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: This is an application for a number of interlocutory orders. The application is made by way of originating application. The applicant is seeking an interlocutory injunction to prevent the respondents acting in breach of a restraint of trade clause which prevents them from undertaking carrying work for a major client of the applicant for a period of six months within a geographical radius of twenty kilometres from the applicant's place of business.

The applicant is a logistics provider that undertakes carrying services in south-east Queensland. It currently has about 260 Queensland-based staff and contractors and, according to the evidence, its yearly sales come to approximately $20,000,000. It is alleged that it earns a net profit before tax of about $1,000,000. The carrying services that the applicant provides include courier, pallet, and furniture deliveries as well as specialist delivery services such as container deliveries. It has approximately 1,000 clients including QR National Pty Ltd which is part of Queensland Rail. The applicant's head office is at Rocklea in Brisbane.

The applicant uses the services of contractors to fulfil its contracts for carrying services. It has a standard agreement with contractors, and the respondents have entered into such an agreement. They first executed an agreement on 11 August, 1997, and later a contract dated 14 December, 1998, the terms of which are the subject of this application. Since about 2000 the respondents have been the sole contractor responsible

for services provided to QR National for Fisher and Paykel containers.

The applicant has been the principal carrying contractor for QR National since the first tender for carrying work was put out in about 1990. The applicant has been a successful tenderer since then.

Until recently, the QR National carrying work out for tender as one general contract for carrying services including the following categories of work: Fisher and Paykel container pick-ups, hourly-rate deliveries, semi-trailer-container deliveries, and general pick-ups. The present system established by QR National has opened up each of those categories of service for separate tender. Since 1990, the applicant's sales with QR National have grown from approximately $1,000,000 a year to approximately $4,000,000 - $5,000,000 a year.

The QR National Fisher and Paykel work, carried out by the respondents, amounts to approximately $130,000 a year by way of fees payable to the applicant. The respondents receive by way of contractual payment approximately seventy-five per cent. of that sum, i.e., approximately $97,500 per annum. The respondents have been the sole contractors carrying out the QR National Fisher and Paykel carrying work for the past five to six years. In the course of undertaking that work Mr Hudson has developed a working relationship with employees of QR National.

The contract between the applicant and the respondents contains in clause 7 a restraint which in its narrowest terms, which are the relevant ones for this application, provides as follows:

"7. RESTRAINT

[The respondents]...shall not...:

(a) ...
(ii) perform either directly or indirectly and whether as servant or agent for any other person carrying work for regular clients of [the applicant]

...

(b) (i) during the term of this agreement
(ii) for a period of 6 months after the termination of this agreement

(c) (i) within a radius of 20 kilometres of the intersection of Reginald and Boundary Streets, Rocklea in the State of Queensland

...

This clause shall be construed and have effect as if it were a number of separate sub-clauses which results from combining the commencement of this clause with each sub-paragraph of paragraph (a) and combining each such combination with each sub-paragraph of paragraph (b) and combining each such combination with each sub-paragraph (c), each such resulting sub-clause being severable from each other such resulting sub-clause, and it is agreed that if any such separate resulting sub-clauses shall be invalid or unenforceable for any reason such invalidity of unenforceability shall not prejudice or in any way affect the validity or enforceability of any other such resulting sub-clause. The term 'regular clients of [the applicant]' shall mean and include:

(d) clients who have engaged the services of [the applicant] for carrying work during the period of 2 months preceding the date of termination of this agreement or where it is alleged a breach of this clause has occurred during the currency of this agreement the term shall mean any client who shall have engaged [the applicant] for carrying work at any time during the period of 2 months preceding the alleged date of breach; and

(e) the total of invoices from [the applicant] to such client in respect of carrying work for such period of 2 months as aforesaid equals or exceeds the sum of $1,500.00; and

(f) 20% of the payment by [the applicant] to [the respondents] during such period of 2 months as aforesaid were derived from carrying work performed on behalf of such client."

It is said on behalf of the applicant that QR National is a regular client within the meaning of that term in clause 7 and that all of the preconditions (d), (e), and (f) have been satisfied. It is also asserted on behalf of the applicant that the work carried out by the respondents for QR National occurs within a radius of twenty kilometres of the applicant's place of business, which is at the intersection of Reginald and Boundary Streets, Rocklea.

In about June or July 2005 QR National advised that it was inviting tenders for the next round of contracts for its Fisher and Paykel carrying work, which tenders were to be submitted on or before 19 August 2005.

The applicant submitted a tender for the work, and so did the respondents without notifying the applicant. The respondents were the successful tenderers and they have entered into a contract with Queensland Rail dated 18 October 2005. On 18 October 2005 the applicant received notification from the respondents purporting to terminate the contract they had with the applicant with effect from today. Under clause 4.2 of the contract an independent contractor may terminate an agreement upon giving at least one month's notice in writing to the applicant of such termination.

The applicant now seeks an interlocutory injunction which will have the effect of preventing the respondents' carrying out the work they have contracted to do with QR National. I should mention here that QR National were notified by officers

of the applicant of the restraint provisions in the contract the applicant had with the respondents.

In the often-quoted words of Lord Macnaghten in Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company Ltd [1894] A.C. 535:

> "All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." (p.565)

The restraint must afford no more than adequate protection to the party in whose favour it is imposed: Herbert Morris Ltd v. Saxelby [1916] 1 A.C. 688 at p.707.

The purpose of clause 7 is to protect the applicant from the exploitation of the connextion built up by the respondents as contractors with the applicant's customers. In this case the applicant seeks to rely on the clause only at its narrowest: restraints for six months and within a radius of twenty kilometres and for work for regular customers. In determining whether the six-month period is justified one must consider what period would reasonably be required to break the connexion between the respondents and the customers. See N E Perry Pty Ltd v. Judge (2002) 84 S.A.S.R. 86.

In my view, on what is before me, the restriction of the restraint to the six-month period to performing work within a twenty kilometre radius of the applicant's place of business and to work for regular clients could reasonably be regarded as providing no more than adequate protection to the applicant.

On behalf of the respondents it was argued that there are difficult questions of construction arising from clause 7, but I am not persuaded that there are any substantial difficulties of construction. It was argued first that clause 7 is self-limiting, in that clause 7(a)(ii) should be taken as limiting the restriction to performing work as a servant or agent for the regular customers as defined. That in my view is a strained construction of that part of the clause. I accept Mr Crowe's submission that the words, "and whether as servant or agent for any other person" are intended clearly enough to qualify the word "indirectly." It was said secondly that the clauses are ambiguous in using the expression "directly or indirectly" and that the expression "carrying work" is not defined. Accepting the construction that I mentioned Mr Crowe contended for, I am not persuaded that the expression "directly or indirectly" is ambiguous; and the expression "carrying work" is in the context of the contract quite clear in my view. It was said thirdly that the restriction upon procuring of custom is not confined to procuring the business of carrying from customers. That appears to me directed at clause 7(a)(iii), which is not relied on by the applicant; and similarly the fourth suggested difficulty of construction,

also referring to the prohibition on procuring custom, is directed to that part of the clause not relied on. It is suggested fifthly that the definition of "regular client" is ambiguous, the argument being - as I understand it - that the reference to twenty per cent. would not apply to proportions greater than twenty per cent. In my view it does no violence to the language to say that if one receives 100 per cent. of a payment from a specified source, that that 100 per cent. includes twenty per cent.

The respondents assert that the applicant has been in breach of the agreement between it and the respondents by retaining a fuel levy charged to QR National, thus disentitling it to the equitable remedy it now seeks. In an affidavit filed by leave yesterday, Mr Paul Kahlert, general manager of the applicant, explained the history of the levy, certain administrative errors associated with it, and the steps taken to correct those errors. From that account I see no justification arising from the history of the levy for depriving the applicant of the remedy it seeks.

On my assessment, there is a serious question to be tried in this case, although it must be said that there is an absence of evidence concerning the temporal and geographical restrictions which could, it must be accepted, be demonstrated by evidence adduced at a trial to be more than is required for the adequate protection of the applicant.

On behalf of the respondents it was submitted, correctly I think, that the applicant seeks in effect final relief, and, that being so, the Court must be satisfied to a high degree of assurance that the applicant will be successful on the trial of the matter and that the balance of convenience weighs significantly in favour of the applicant. Bearing in mind the general rule concerning restraints of trade and the possibility that further evidence may defeat the applicant's case, I am unable to say that there is a high degree of assurance that the applicant will be successful.

On behalf of the applicant it was submitted that the respondents should not be allowed to rely on a breach of their contract with the applicant as a factor in their favour when an assessment of the balance of convenience is made. But that submission assumes, of course, that the respondents are guilty of a breach of contract, a matter yet to be established.

On the whole, the balance of convenience appears to me to be about even, or if it is tilted one way, it is towards refusing the application. That is because the damage to the applicant resulted from the respondents' alleged breach is likely to be small in comparison with the damage likely to be suffered by the respondents if they are prevented from working for QR National: loss of part of a trade connexion and of profits less than $32,500 per annum ($130,000 per annum less 75 per cent. paid to a truck owner less other outgoings) even if the applicant had succeeded in obtaining the work in question from

QR National, as against the loss by the respondents of a large proportion of their income.

I should mention here that in Mr Kahlert's affidavit filed by leave yesterday, he referred to the current revenue received by the applicant from QR National in connexion with the four categories of work I have referred to. He swore that the applicant's sales to QR National are currently between $4,000,000 and $5,000,000 per annum. He swore that the revenue from the container pick-up work is approximately $832,000 per annum, and that the revenue from the hourly-rate work upon which the applicant's tender was also unsuccessful represented approximately $450,000 per annum, but that the balance of approximately $4,000,000 was made up of general pick-up and other specialized contract work. That is why I mentioned that the applicant's loss was of part only of its trade connexion with QR National.

In addition to the matters I have already mentioned, the respondents have undertaken to keep records of their income from their contract with QR National.

Those considerations leave me to conclude that the application should be refused. The applicant will have, on my assessment, an adequate remedy in a claim for damages.

I should mention there was some discussion during the course of the hearing arising from the formulation by the applicant of the relief sought in the originating application. That

relief is formulated as interlocutory relief only but, in the course of the hearing, Mr Crowe indicated that the applicant would seek final injunctive relief and damages, and the point taken by the respondents arising from the absence of any claim to final relief then ceased to be of any moment.

There was also discussion in the course of the hearing concerning the adequacy of the applicant's proffered undertaking as to damages but, in the circumstances, it is not necessary for me to proceed further to consider that.

The application will be dismissed.

...

HIS HONOUR: The application is dismissed, and I adjourn further consideration of the question of costs to a date to be fixed.

...
