IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT NO. C.L. 1134 of 1966

BETWEEN NATIONAL CHEMSEARCH CORPORATION CARIBBEAN — PLAINTIFF

AND PAUL A. DAVIDSON — DEFENDANT

--O--

David Coore Q.C., and Emil George for the Plaintiff/Applicant
Leacroft Robinson Q.C., and Joseph Cools-Lartigue for the Defendant/Respondent.

--O--

- J U D G M E N T -

On this summons, the applicant National Chemsearch Corporation Caribbean (hereinafter called "the applicant") seeks an interlocutory injunction to restrain the respondent Paul Davidson from doing certain acts contrary to the provisions of a Sales Representative Agreement (hereinafter called "the agreement") between the applicant and the respondent.

The agreement entered into between the respondent and the National Chemsearch Corporation (hereinafter called "the corporation") on the 1st November 1962, contains the following relevant clauses:-

3. It is expressly recognized and acknowledged by Representative that Company and its affiliated and associated Companies are engaged in the manufacture, distribution and sale of disinfectants, soaps, detergents, cleaners, insecticides, chemical specialties, paints, water treatments, maintenance chemicals, adhesives, glues, paper products for industry and institutions, degreasing and sanitary supply and floor maintenance materials and equipment and related products, in substantially all of the states in the continental limits of the United States, including the assigned territory.....

4. Representative expressly covenants and agrees that during the term of his employment by Company and for a period of eighteen (18) months immediately following the expiration or termination of such employment for any reason including, without

/limitation,.....

limitation, termination by mutual agreement, (i) he will not at any time for himself or on behalf of any other person(s), firm(s), partnership(s), or corporation(s), sell, offer for sale, or solicit the sale of disinfectants, soaps, detergents, cleaners, chemical specialties, paints, water treatments, maintenance chemicals, insecticides, adhesives, glues, paper products for industry and institutions, degreasing and sanitary supply and floor maintenance materials and equipment within the assigned territory, viz:

A. 1. Jamaica, West Indies

2. Windward and Leeward Islands, West Indies

B. Any territory(ies) which hereafter assigned to Representative by written contractual change or designation;

C. Any territory(ies) not presently assigned to Representative, but which was assigned as part of his territory under any prior contract of employment with Company or one or more of its affiliated and associated companies;

D. Any territory(ies) to which Representative is transferred by mutual consent of the parties whether or not such agreement is evidenced in writing;

E. Any territory(ies) which Company in the exercise of its discretion may assign to Representative, whether or not such assignment is evidenced in writing;

F. Any territory(ies) in which Representative sells, offers for sale, or solicits the sale of disinfectants, soaps, detergents, cleaners, chemical specialties, paints, water treatments, maintenance chemicals, insecticides, adhesives, glues, paper products for industry and institutions, degreasing and sanitary supply and floor maintenance materials and equipment for Company or one or more of its affiliated and associated companies;

and (ii) he will not in any way, directly or indirectly, for himself or on behalf of or in conjunction with any other person(s), partnership(s), firm(s) or corporation(s), solicit, divert, take away or attempt to take away any of the Company's customers or

/the business.....

the business or patronage of any such customers located within said assigned territory. (iii) Representative further covenants and agrees that he will not within said period of time, directly or indirectly, engage in or enter the employment of or act as a sales agent or broker for the products of or as n advisor or consultant to any person(s), firm(s), partnership(s) or corporation(s) engaged in or about to become engaged in the manufacture, distribution or sale of disinfectants, soaps, detergents, cleaners, insecticides, chemical specialties, paints, water treatments, maintenance chemicals, adhesives, glues, paper products for industry and institutions, degreasing and sanitary supply and floor maintenance materials and equipment within the assigned territory.....

5. Each restrictive covenant hereinabove set forth in Paragraph 4 is separate and distinct of every other restrictive covenant set forth in said paragraph and in the event of the invalidity of any such convenant the remaining obligations shall be deemed independent and divisible. The parties agree that the inclusion of all the territories hereinabove set forth in Paragraph 4 is reasonable and necessary for the protection of Company. If, however, the inclusion of all said territories shall be deemed too extensive and therefore unreasonable, such lettered paragraph under Paragraph 4 above shall be deemed as separate and divisible, and to the extent necessary to make the territory reasonable, shall be eliminated in the reverse order from which each is stated.

11. This contract shall be construed under and governed by the laws of the STATE OF TEXAS.

12. The provisions of this contract shall be fully applicable whether Representative is employed by Company, or by any of its subsidiaries, affiliates, successors or associated companies, it being understood and agreed that this Agreement may be assigned without notice at any time and from time to time by Company to or by any of its subsidiaries, affiliates, successors or associated companies. In the event of such an assignment, any such Company to which the Agreement is assigned shall automatically be

/substituted for.....

substituted for the Company executing this Agreement for all intents and purposes and to the same extent as if such assignee were the Company executing this Agreement.

The applicant alleges certain breaches of clause 4 by the respondent; and on the 8th July 1966, caused a Writ to be issued. By the endorsement on this writ, the applicant claims an injunction in the terms therein stated. On the same day, that is, the 8th July 1966, the applicant issued this summons for an interlocutory injunction in precisely the same terms as those indicated on the endorsement on the writ.

It is, of course, clear that the purpose of an interlocutory injunction is to preserve matters in statu quo until the actual trial. It is, however, equally clear that in dealing with an application for such an injunction, the Court must confine itself strictly to the points which it is required to decide, although there appears to have crept into some other jurisdictions, a tendency to avoid litigating the same matter over again. Nevertheless, the authorities make it abundantly plain that where the party seeking an interlocutory injunction asserts a right, contractual or otherwise, he is required to show no more than a good prima facie case, and if he succeeds in establishing this, the Court will interfere without waiting for the right to be finally established. No judicial pronouncement or textbook has, as far as I know, ever attempted to lay down any general rule as to the method of application of these principles. Each case must be dealt with on the basis of its own merits or demerits.

Now the first question that calls for an answer in this case is: By what legal system is the agreement herein to be governed?

It is, I think, correct to say that it is now beyond argument that the legal system by which the essential validity of a contract must be determined is what has been called the proper law of the contract. The law of this country is committed to the principle of the unfettered freedom of contract and where the parties to a contract have therein expressed an intention that a particular legal system shall govern their

/rights and.....

rights and obligations that intention almost invariably must prevail, See Mount Albert Borough Council v. Australasian Temperance Society (1938) A.C. 224; Vita Food Products Inc. v. Unus Shipping Co. Ltd. (1939) A.C. 277.

But the law of this country is also committed to another principle which I may state thus: Where a contract, the proper law of which is that of a foreign jurisdiction is, by the law of this country, prima facie void as being contrary to the public policy of this country, it must be shown to be essentially valid not only by its proper law, but also by the law of this country if it is sought to be enforced here. See Rousillon v. Rousillon (1880) Ch. D. 351.

I now pass on to consider clause 4 of the agreement. In the earlier history of this branch of law, all agreements in restraint of trade were regarded as contrary to that time-honoured concept, public policy, and therefore void. It was not until the early part of the 18th century that the attitude of the courts began to be influenced by some measure of rethinking on the question what was or was not in the public interest. And so in Mitchel v. Reynolds (1711) 1 P.W. 181, Lord Macclesfield was able to observe that -

> "wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained....."

It was not until 1913 that the House of Lords in Mason v. Provident Clothing and Shipping Co. Ltd. (1913) A.C. 535, finally removed certain anomalies and established the principle that all covenants in restraint of trade were prima facie void and that they could not be enforced unless in the particular circumstances of any given case they could be held to be reasonable.

With regard to the case of a covenant in restraint of trade as between employee and employer, very sharply distinguished from that between vendor and purchaser in Mason's case (supra), the House of Lords has held, in Morris v. Saxelby (1916) 1 A.C. 688, that such a restraint is always void as being unreasonable in the absence of some exceptional proprietary interest of the employer that requires to be

/protected.....

protected. In the words of Lord Parker, at p. 710:

> "The reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection, or in the nature of trade secrets, for the protection of which such a restraint is - having regard to the duties of the employee - reasonably necessary."

I apprehend that the only two matters in respect of which it can fairly be said that an employer has any proprietary interest are those indicated by Lord Parker, namely, his trade secrets and his trade connection. In the particular context of the applicant's case, the authorities appear to establish the following propositions:-

(i) The restrictive covenants must be shown to be reasonable in the interests of the parties to the contract as well as in the interests of the public; the onus of proving the former being on the applicant and the onus of proving the latter being on the respondent: Morris v. Saxelby (supra).

(ii) The applicant must show that the covenants extend no further than is reasonably necessary to protect its proprietary interest. Put another way, the applicant, having shown that it has some interest requiring protection must go further and show that the covenants on which it relies in terms of the area and duration of their operation are thereby rendered reasonably necessary.

Now, what is the proprietary interest which the applicant seeks to protect? As I understand the applicant's case, it is essentially a case which has been argued on the basis that its interest is one involving its customers, or its trade or business connection in Jamaica. The affidavits and evidence of Mr. James Dyer, the Director of International Operations of both the corporation, and the applicant, and the affidavits of Sydney Stoliar, the Co-ordinator of Sales of the applicant, are to the effect that on the 1st November 1962, the agreement was entered into between the corporation and the respondent following several interviews between Mr. Dyer and the respondent. Prior to the signing of this agreement, the respondent had been taken on in September 1962, on a trial basis, probably because he was in financial

/difficulties.....

difficulties and was quite anxious to start earning an income. He was given certain sales materials, a product presentation booklet, samples of the corporation's products, some equipment with which to demonstrate those products, and product literature. In addition, he was advised in the sales techniques of the corporation. Armed with this material and know-how, the respondent started on the business of selling the corporation's products and it is clear that his efforts met with not a little success. By 1965 he had established such a large volume of sales that he was able to earn for himself some $10,000 by way of commission. In so doing he had won for his employer not an insignificant number of customers. Undoubtedly, he was what might fairly be called a live-wire sales representative. Bearing in mind that it was the respondent who launched the sales of the corporation's products in Jamaica, that he must have demonstrated some considerable skill and judgment in his field of operation, that the many customers that he gained must obviously have relied to a great extent on such skill and judgment; that the volume of his sales consistently increased from year to year, and that all or most of those customers have had to deal with him directly and personally, it is, in my view, clear that he was a representative who, in the words of Lord Parker in Morris v. Saxelby (supra), acquired not merely a thorough knowledge of his customers, their needs and their problems, but must have been in a peculiarly good position to exercise some influence over most, if not all, of them. It is true that he did lose a small number but certainly not because of any circumstance for which he was responsible. The nature of the corporation's business, as indeed that of the applicant, and the nature of the respondent's duties combined to make him a representative in respect of whom his employer would be clearly entitled to some measure of protection against an unfair invasion of its customers. In my view it would be quite unreal to hold otherwise.

This leads me to the more vital question: What is the extent of the protection to which the applicant is entitled? The answer to this must depend on the view I take of the nature, area, and duration of

/the relevant.....

the relevant covenants. But before attempting to answer this question, I pass on to consider another question: Who is the respondent's employer? In other words, is it the applicant who is entitled to enforce the relevant covenants or any of them?

By the terms of clause 12 of the agreement, the corporation was clearly entitled to assign this agreement to the applicant without notice to the respondent. The evidence is that the corporation did assign this agreement to the applicant with effect from the 1st January 1963. The respondent contends that he was not aware of this assignment. Mr. Dyer says that he did so advise the respondent. It seems clear, however, that even if the respondent's contention is correct, he cannot complain of the exercise by the corporation of their right under the agreement. Mr. Robinson, however, urges me to find as a fact that there was no assignment of the agreement so that the applicant would have no right to institute any proceedings against the respondent. He argues that the several letters written to the respondent by the officers of the corporation in connection with the respondent's duties, commission, sales, inter alia, demonstrate conclusively that he never ceased to be employed by the corporation and that he was never in fact employed by the applicant. This is perhaps one inference that it may be possible to draw from an examination of the mass of correspondence I have seen. It is certainly not the only inference bearing in mind that Mr. Dyer and Mr. Punte each occupied similar positions in both the corporation and the applicant-corporation. It no more follows that the respondent was not an employee of the applicant than it follows that the respondent was an employee of Musson Ltd. because he signed at least one letter, albeit in error it seems, purporting to show that he was an officer of that company.

I have no doubt that if these proceedings involved the trial of an action in which this question had been put in issue on the pleadings, the evidence would have been much more elaborate. These proceedings do not however, involve a trial and I could not justify going in the face of the positive, oral and affidavit evidence before me in

/favour of.....

favour of what can at best be only a very inconclusive inference. The cheques in settlement of the respondent's commission - and of these I have seen only one unpaid cheque - involve precisely the same considerations, having regard to certain facts surrounding the two corporations which I find it unnecessary to catalogue.

The answer to the immediately foregoing question must therefore be that the applicant was the respondent's employer from the 1st January 1963 until the termination of his employment.

I now turn to the question as to the extent of the protection to which the applicant is entitled. It is clear that where the measure of protection sought to be taken by the covenantee is no more than necessary for that purpose it will not be held to be offensive. In Rousillon v. Rousillon (supra), Fry J. said, at p. 363 -

> "Now, what is the criterion by which the reasonableness of the contract is to be judged? I will take the law on that point from the language of Chief Justice Tindal, in delivering the judgment of the Court of Exchequer Chamber, on appeal from the Court of Queen's Bench in Hitchcock v. Coker (C.A. & E. 438). He said: 'We agree on the general principle adopted by the Court, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void.' That passage was adopted by Lord Wensleydale, when a Baron of the Court of Exchequer, in delivering judgment in Ward v. Byrne (5 M. & W. 548) and therefore the rule so expressed has the authority of the Courts of Queen's Bench, Exchequer and Exchequer Chamber. If, therefore, the extent of the restraint is not greater than can possibly be required for the protection of the Plaintiff, it is not unreasonable."

I now examine the first of the three restrictive covenants on which the applicant relies. This covenant seeks to prohibit the respondent from selling or offering for sale in the assigned area, any of the articles therein mentioned. An examination of this covenant leads inevitably to the conclusion that its real purpose is to prohibit the respondent from selling or offering for sale any of the named articles to anyone, whether a customer of the applicant or not, in the area defined. It is abundantly plain that such a restraint is really only a device which involves no more and no less than a means of protection against competition, and, in the present state of the

/authorities,.....

authorities, must therefore be void ab initio. See Gledhow Autoparts Ltd. v. Delaney (1965) 3 A.E.R. 288.

And now to the second covenant. This seeks to prohibit the respondent from soliciting, diverting, taking away or attempting to take away for himself or on behalf of or in conjunction with any other person, firm, partnership or corporation, any of the applicant's customers or the business or patronage of any such customer located within the assigned area, for a period of 18 months.

From what I have noted above as to the respondent's knowledge of the applicant's customers, their requirements, their problems - and this is amply supported by his own evidence - it is clear that he is in a position to do precisely what this covenant seeks to prevent. Indeed he says that he has already approached some of the applicant's customers on behalf of one Trevor DaCosta and has indeed got at least one order for competing products. He says that it is his intention to continue to do this. I have not the slightest doubt that in the present state of the law, the applicant is entitled to be protected against this invasion of their business connection by the respondent in respect of any or all of the applicant's customers in Jamaica - including those who ceased to be be customers prior to the termination of the respondent's employment: see Plowman & Son Ltd. v. Ash (1964) 2 A.E.R. 10.

As to the duration of the prohibition, a period of 18 months from the 4th of July 1966 cannot, in my view, be said to be unreasonable. It may be that the respondent who, at the time he was engaged by the corporation, had just completed a two year course in the techniques of life insurance salesmanship, and who was able to satisfy Mr. Dyer that he was the kind of representative that the Chemsearch Organization needed in the assigned area, did not require to be subjected to as intensive a programme of training as another person may have required. But this, in my view, does not go to the problem. The question is, how long would it take the applicant to put a fully trained productive sales representative in the field? Mr. Dyer who undoubtedly has had considerable experience in this field and who must

/be presumed.....

be presumed to know the nature and extent of training required, or still required, by Norman Stewart or any other representative for the purpose of effectively replacing the respondent, is of the opinion that a period of at least 18 months is necessary. There is nothing in the evidence before me which would justify my holding otherwise.

As to the area of the prohibition, I can see nothing which can b be held to be unreasonable. No useful purpose would, in my view, be served by reviewing the numerous authorities on this aspect of the case. Here, again, each decision must rest on the facts of the particular case. What is indeed clear is that where at the inception of the agreement the parties agree on a defined area of operation, there cannot be any warrant for holding any prohibition extending to that area to be unreasonable. Indeed Harman L.J. in Plowman & Son Ltd. v. Ash (supra) said, at p. 13 -

> ".....but I have always thought that, when dealing with a solicitation covenant as opposed to a carrying on business covenant, area was not as a rule mentioned."

And I adopt the words of Davies L.J. in the same case (at p.13) where he says -

> "So far as concerns the area, it is, I suppose, theoretically possible that the covenant in its terms might cover a large area; but on the evidence here it seems reasonably plain that the practical application of the covenant would be limited in effect to South Lincolnshire and the country round about."

This observation is eminently applicable to the covenant now being considered with a change in the last seven words to the word 'Jamaica'. The next point taken by Mr. Robinson is that the fact that the respondent's employment could be terminated after only one day or indeed an hour without notice makes the agreement, from its inception, hopelessly unreasonable. For this proposition he places somewhat great faith in the diction of Diplock L.J. in Gledhow Autoparts Ltd. v. Delaney (supra) at p. 295. I regret that I cannot share Mr. Robinson's faith in a diction pronounced in a context quite different from the situation existing here. For myself, I find it not a little difficult to see why a short period of notice or the fact that an agreement may be terminated without any notice by either side ever came to assume any

/great importance.....

great importance as a test in determining the reasonableness or otherwise of a solicitation covenant. Quite obviously, the sooner the agreement is terminated so much less will be the number of customers gained by the representative, and since the covenant can operate only in favour of those who qualify as customers, it follows that the earlier the termination is effected the narrower the scope of operation of the covenant will be. I need hardly add that I make this observation not by way of any attempt at generality but with specific reference to the particular circumstances of the agreement herein.

In any event, Diplock L.J. certainly recognized that even in the circumstances he was considering a covenant restricted to customers might have been justified.

In the result I am constrained to hold that this covenant is quite unobjectionable in the sense that, subject to the question as to severability, the protection sought thereby is no more than is reasonable in the particular circumstances of this case. I may add here that there is nothing in the evidence before me to suggest that there is anything in this covenant that can be said to be contrary to public policy. It is convenient to note here that there was much argument devoted to the question what products of the applicant could or could not be sold in Jamaica by reason of some alleged prohibition against certain imports. It may be that the entry into Jamaica of some of the applicant's products is prohibited at any rate for the time being. However, this may be I do not pursue this matter as I am unable to see its relevance to the question whether this covenant satisfies the test of reasonableness or not.

And now to the question as to severability. The answer, in my judgment, must be sought by reference to the law of Texas and this involves a question of pure fact. I quote here from paragraph 5 of the affidavit of Mr. Edwin Tobolowsky:

> "Clause 4 of the (agreement) contains three covenants which are independent and divisible. A Texas Court would regard each such covenant as severable from the others. In the event that the court regarded anyone or more as unreasonable

/but the.....

> "but the remainder as reasonable the Court would enforce the reasonable covenant or covenants and sever and delete the unreasonable covenant or covenants as the case may be."

In the circumstances, it seems quite clear that I must hold that this covenant is severable by the law of Texas. Mr. Robinson submitted that this question of severability should be decided by reference to the common law and he went on to cite the English authorities on the point; and more particularly, the observations of Lord Moulton in Mason's case (supra) at p. 745. He did not, however, cite any authority in support of his submission and I rather suspect that this was because he was unable to find any such authority. There can be no doubt now, I think, that all matters affecting the substance or essential validity of a contract properly come within the proper law of that contract. But apart from this, the parties have themselves agreed that each covenant is separate and distinct. Even if I were to accede to Mr. Robinson's submission, I would have no doubt that the common law principles of severability would apply to make the covenants herein severable and, in my view, Lord Moulton's observations, however correct they may be, would have no relevance to the particular facts of this case. As Sarjant J. observed in Nevanas & Co. v. Walker & Foreman (1914) 1 Ch. 413 at p. 423:

> "I do not think that these remarks (of Lord Moulton) were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants."

And now to the third covenant. For the reasons I have already given in connection with the first covenant, I hold this covenant to be equally void. In the result, there will be an injunction limited to the second covenant in the terms of the summons herein, and in any case, such injunction will not operate for a period longer than eighteen months from the 4th July, 1966.

The operation of this injunction is subject to an undertaking as to damages being given by the applicant's solicitors to the respondent within fourteen days. This would in my view, be a quite sufficient

/measure of.....

measure of protection for the respondent in the event that the applicant fails to establish its claim at the trial.

The applicant will prepare, file and serve the usual formal order. The costs of and incident to this summons are left to be decided at the trial of the action.

Dated this 18th day of August, 1966.

(Sgd.) C. H. Graham-Perkins
PUISNE JUDGE (ACTING).