IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD NO. 125 OF 2011

5-07-11

BETWEEN	FORTUNE EAST ASIA HOLDING CORPORATION	
AND	WYNNER GROUP LIMITED	INTENDED PLAINTIFFS
AND	TEMPO GROUP LIMITED	INTENDED DEFENDANT

IN CHAMBERS
BEFORE THE ANTHONY SMELLIE, CHIEF JUSTICE
THE 1ST JULY 2011

APPEARANCES: Mr. Graeme Halkerston of Appleby for the intended Plaintiffs, with him Miss Katie Brown

Mr. Mac Imrie, Mr. Alexander and Mr. Golaszewski of Maples for the intended Defendant

RULING

1. The Plaintiffs bring this action by way of Originating Summons in which they seek a permanent injunction to restrain the Defendant from breaching the terms of a Settlement Agreement entered into between them in March 2011. By the Settlement Agreement they settled litigation that had been engaged between them in the British Virgin Islands. In particular, the injunction would restrain against the breach of a negative covenant of the Settlement Agreement by which the parties agreed that the terms of the Settlement Agreement would not be disclosed to any third party except those listed in Clause 10.1 of the Settlement Agreement itself.

2. It has come to the attention of the Plaintiffs that the Defendant intends to disclose certain terms of the Settlement Agreement by way of its citation of them in an affidavit prepared for disclosure in FSD Cause 82 of 2011 (formerly Grand Court Cause 291 of 2004) and in response to a strike out application in that Cause set to be heard on 7th July 2011. The

Settlement Agreement is expressed to be governed by the laws of the Cayman Islands, hence this application being taken before this Court.

3. The Plaintiffs seek an immediate interlocutory injunction to prevent the disclosure by use of the affidavit in the way proposed or otherwise in breach of the Settlement Agreement until the Originating Summons can be tried and a decision reached on the relief sought in it by way of the permanent injunction.

4. By reliance on the case law, Mr. Halkerston submits that the Plaintiffs are entitled to the interlocutory injunction. He emphasised in particular the following dictum, from ***Araci v Fallon [2011] EWCA Civ. 668***, citing ***Doherty v Allman [1878] 3 App. Cas. 709***:

> *"Mr. Lawrence submits that where there is a clear breach of a negative covenant, there must be special circumstances before the court, in the exercise of discretion, will withhold relief. In support of this submission Mr. Lawrence relied on the authorities, neither of which was cited to the judge below.*
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> *In Doherty v Allman...Lord Cairns LC enunciated the following statement of principle:*
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> > *"If the parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case, the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury – it is the specific performance, by the court, of that negative bargain which the parties have made with their eyes open, between themselves."*

5. That dictum has been so often cited as to have become settled law. It was applied by the English Court of Appeal even earlier in ***AG v Barker and another [1990] 3 All. E.R. 257,*** in which a former employee of the Royal Household sought to publish a book of his

experiences at work within the Household in breach of his covenant not to do so. The result was a holding in these terms (as taken from the headnote):

> "The Attorney General's claim was not based on a *breach of confidentiality but on breach of contract, the consideration for the covenant by the first defendant not to publish matter concerning his experiences in the royal household being the agreement to take him on the staff of the royal household and to pay him wages or a salary. Accordingly, the first defendant had for a consideration entered into a negative covenant which was limited neither territorially nor in time and such a covenant was enforceable provided it could not be attacked for obscurity, illegality or on public policy grounds such as being a restraint of trade."*

6. Viewed as a binding covenant not to disclose its terms, the Settlement Agreement would appear to meet the criterion of the case law for enforcement by way of a permanent injunction.

7. There are however, issues of construction raised by Mr. Imrie on behalf of the Defendant to the effect that the terms of the Settlement Agreement do not involve a covenant against the Defendant disclosing them for the purposes intended here; which will involve only disclosure to a party who is indirectly a party to the Agreement by way of affiliation and to the Court for the purpose of addressing a relevant issue arising in Cause FSD 82 of 2011.

8. In Clause 10.1 the Settlement Agreement specifically exempts from the covenant against disclosure, disclosure to "Affiliates" of any of the parties and disclosure where the party disclosing is under a legal or regulatory obligation to disclose.

9. The "affiliation" is said to arise here by virtue of the fact that the defendant to whom the disclosure is to be made in Cause FSD 82 of 2011 – Fortuna Development Corporation ("Fortuna") – is an entity whose shares are held in varying degrees by the Plaintiffs and Defendant to this action and themselves the parties to the Settlement Agreement.

10. Thus, while Mr. Halkerston denies that the connection is sufficient to meet the test of affiliation intended by the Settlement Agreement, he is compelled to accept that at the very least, an issue of construction of the Settlement Agreement has arisen which must first be resolved on this his client's Originating Summons proceedings, before entitlement to the permanent injunction can be established.

11. Plain and obvious, he says nonetheless, is the efficacy of the negative covenants and so irreversible would be its breach by disclosure including in the context of FSD Cause 82 of 2011; that an interlocutory injunction is justified until the Originating Summons can be finally resolved and the permanent injunction put in place. The Court has an undoubted discretion to grant an interlocutory injunction in circumstances where the status quo should be preserved until a permanent injunction can be obtained.

12. Mr. Halkerston relies upon the well known principle enunciated in ***American Cyanamid Co. v Ethercon Ltd.: [1975] A.C. 397*** (as taken from the headnote):

> *"...in all cases including patent cases [which American Cyanamid was] the court must determine the matter on a balance of convenience, there being no rule that it could not do so unless first satisfied that, if the case went to trial on no other evidence than that available at the hearing of the application, the plaintiff would be entitled to a permanent injunction in the terms of the interlocutory injunction sought; where there was a doubt as to the parties respective remedies in damages being adequate to compensate them for loss occasioned by any restraint imposed on them, it would be prudent to preserve the status quo."*

13. The "balance of convenience", is said by Mr. Halkerston to come down heavily in favour of the grant of the interlocutory injunction here because once the disclosure is allowed in Cause FSD 82 of 2011, the damage could be irretrievable, including by way of the general publication of the terms of the Settlement Agreement finding their way into a written judgment of the Court which would be a public document. Better, he says, to restrain disclosure pending resolution of the permanent injunctive relief sought by the

Originating Summons, in which context all issues of construction of the Settlement Agreement will be resolved.

14. To that end, he gives his clients' undertaking that they would not object to the postponement of the next steps in FSD Cause 82 of 2011 (which in any event are being taken indirectly on behalf of his clients who would benefit from the application to strike out the Defendant's claim in that Cause) until after the Originating Summons is determined.

15. Mr. Imrie argues to the contrary. He submits that the true balance of convenience lays in allowing the judge in FSD Cause 82 of 2011 to decide the matter of disclosure which is an issue that arises in that Cause. The question of whether the terms of the Settlement Agreement are relevant to the issues in FSD Cause 82 of 2011 is best suited to be decided in that Cause by the judge seized of the issues in that Cause.

16. As Fortuna is the opposite party to his client in FSD Cause 82 of 2011, there is ultimately to be no objection to disclosure to Fortuna (which must be deemed to know what the Settlement Agreement involves); the objection is in reality therefore, to disclosure to the Court.

17. As questions of relevance can be decided only by the Court and safeguards can be provided by order of the Court to prevent wider disclosure, Mr. Imrie also argued that the balance of convenience comes down in favour of allowing the Court in FSD Cause 82 of 2011 to decide, as a preliminary issue, whether the disclosure would be a breach of the Settlement Agreement. This would include in particular, the issue whether Fortuna, as a party to FSD Cause 82 of 2011, qualifies as an "Affiliate" within the meaning of the Settlement Agreement and so as a party to whom the Defendant may disclose the terms of the Settlement Agreement.

18. Approached in that way, the irreversible harm apprehended by the Plaintiffs per Mr. Halkerston, need not be realised.

19. At this stage of considering whether interlocutory injunctive relief should be granted, those are all competing considerations to which I consider I may properly have regard in deciding on the balance of convenience within the meaning of the ***American Cyanamid*** principles. As Lord Diplock explained in his lead judgment given on behalf of the Judicial Committee (at page 406 C-F):

> *"...when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. ...The object of the interlocutory injunction is to protect the Plaintiff against injury by the violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against the other and determine where "the balance of convenience" lies.*

Thus, the "balance of convenience" is the appropriate test and this is precisely what I seek to apply now."

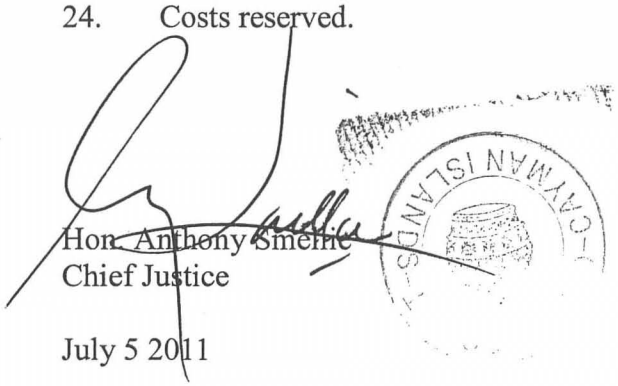
20. We are not yet at the stage of having to decide on the final injunctive relief sought by the Originating Summons in which context, after due resolution of the issue of construction of the Settlement Agreement in favour of the Plaintiffs, they would plainly be entitled to permanent injunctive relief as advised by ***Doherty v Allman*** and the successive line of cases mentioned above. As yet, however, *"the particular thing that the parties have covenanted shall not be done"* is still moot.

21. In my view, the balance of convenience here does not come down in favour of precluding the Court in FSD Cause 82 of 2011 from even considering whether the terms of the Settlement Agreement may be relevant to its deliberations. If the terms of the Settlement Agreement are deemed to be relevant, the Court might yet take the view that they are also disclosable pursuant to Clause 10.1 of the Settlement Agreement as coming within the "legal obligation" therein mentioned.

22. Accordingly, the order to make at this stage is not to injunct entirely the reference to the terms of the Settlement Agreement in FSD Cause 82 of 2011, but instead to issue the injunction to allow the parties to arrive at an arrangement by which they might agree upon the manner in which the information from the Settlement Agreement sought to be put before the Court in FSD Cause 82 of 2011 can be put for the Court to consider its relevance and without wider disclosure of the terms of the Settlement Agreement itself.

23. I had already at the outset of this hearing indicated my thinking in this respect to the parties. It is not far removed from the disposition for which Mr. Imrie argued and so it is reasonable to expect that by the time of the delivery of this ruling, the parties will have arrived at an agreed approach towards the identified objective.

24. Costs reserved.



Hon. Anthony Smellie
Chief Justice

July 5 2011