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1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

3 CAUSE NO: 364 OF 2007

4 BETWEEN:

5 **JEC PROPERTY CONSULTING LIMITED**
6

Plaintiff



7 AND:

- 8 (1) SIMON AMESBURY
- 9 (2) AQS CAYMAN LIMITED
- 10 (3) GLADYS MARY LEE ROWLANDSON
- 11

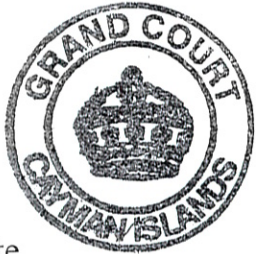
Defendants

12 BEFORE: The Honourable Madam Justice Levers

13 APPEARANCE:

- 14 Mr. S. Wilson of Diamond Law & Associates for the Plaintiff
- 15 Mr. W. Sykes of Appleby for the First Defendant
- 16 Ms. K. Houghton of Campbells for the Second and Third Defendants
- 17

REASONS



19 This is an application by the Plaintiff in this case to extend an ex parte
20 injunction granted on 12th September 2007, in the following terms:

- 21 (1) An injunction is hereby granted restraining the
- 22 Defendants or any of them whether by themselves or
- 23 their officers, servants, agents or otherwise, from acting
- 24 contrary to the express provision of Clause 12 of the
- 25 Agreement made 22 December 2004 or continuing to do
- 26 so;

- 1 (2) The Second Defendant and Third Defendant whether by
2 themselves or their officers, servants, agents or
3 otherwise, shall not suffer or permit the First Defendant
4 in any way to breach the First Defendant's obligations
5 under Clause 12 of the Agreement dated 22 December
6 2004;
- 7 (3) The said injunction shall expire 14 days after the date of
8 this Order but the Plaintiff shall have liberty to apply to
9 extend or vary the same before its expiration upon giving
10 3 days notice of any application it may wish to bring;
- 11 (4) The Defendant shall give the Plaintiff and the Court at
12 least 3 days notice of any application it may wish to
13 make in relation to the injunction; and
- 14 (5) Costs of this application are reserved to the next *inter*
15 *partes* hearing (if one should occur) or further Order of
16 the Court.
17

18 Background

19

20 From the reading of the evidence, the facts are that the Plaintiff is a
21 Caymanian local company and has conducted business since 1984 in the
22 Cayman Islands. The objects of the company and the services rendered by it
23 were the following: property management, project management,
24 construction cost management, quantity surveying, valuations, development
25 & insurance appraisals and loss adjusting.

1

2 The First Defendant, a 39 year old individual possessing a Bachelor of
3 Honours in Quantity Surveying, subsequently became a member of the
4 Royal Instituted of Chartered Surveyors in December 1997. He moved to
5 the Cayman Islands with his wife and 4 year old son to take up employment
6 with the Plaintiff in March 2005. He signed a contract with the Plaintiff and
7 was permitted to work in the Cayman Islands only as a Quantity Surveyor.
8 Having settled in to his life in the Cayman Islands, he purchased a home
9 which is presently being built and nearing completion.

10

11 The Plaintiff and the First Defendant signed a contract, after a discussion,
12 which is dated 22nd December 2004. It was a one year contract containing
13 the usual terms as to work permit etc. that prevail in the Cayman Islands and
14 it was agreed that on approval of the temporary work permit, the Plaintiff
15 would apply for a standard two year permit. Amongst other clauses, Clause
16 12 which is the subject matter of the entire case, read as follows:

17

18 “At the expiration of this contract, it is agreed that
19 you will not seek employment with any other
20 surveying/valuation organization in the Cayman

1 Islands or carry out similar work in competition
2 with J.E.C. as a self employed person for a period
3 of one year.”
4

5 After determination of the First Defendant’s employment with the Plaintiff,
6 the First Defendant sought work not with another surveying organization but
7 he was approached by Kozaily Designs Ltd., an architectural and design
8 company to work for it. He has not competed with JEC as a self employed
9 person and he submits that as a result, the restrictive covenant does not apply
10 in the present circumstances. However, there is evidence that the First
11 Defendant formed a company called AQS Cayman Limited, (the Second
12 Defendant in this action) and that the majority shareholder was Gladys Mary
13 Lee Rowlandson, (the Third Defendant in this action). During the course of
14 the hearing at the inter partes level, it became apparent that neither the
15 Second Defendant nor Third Defendant were involved, as the First
16 Defendant and the Third Defendant had agreed to terminate any application
17 for a shared work permit. Therefore, the Court discharged the Second and
18 the Third Defendant with the agreement of the Plaintiff.
19

20 As stated previously, the contract was for one year. Subsequently the

1 First Defendant and the Plaintiff had discussions but the terms of the
2 renewal of the second year's contract were not written. The Plaintiff
3 therefore contends that the first year's contract and the conditions therein
4 continued into the second year. At the end of the second year, the First
5 Defendant left the Plaintiff, whether it was on the 28th February 2007 or the
6 7th March 2007 as alleged by the Plaintiff really matters not for purposes of
7 this application. The contract was not renewed on its anniversary. There is
8 a factual dispute as to why it was not renewed but for purposes of this
9 application, once again, the details are not relevant.

10

11 The background to the ex parte injunction being applied for was that the
12 Plaintiff was in breach of the restrictive covenant in the written contract of
13 the first year and the Plaintiff asserted that the First Defendant removed and
14 retained confidential information. The Plaintiff also alleged that he could
15 suffer irreparable harm and that the covenant which was reasonable was
16 being breached. The Plaintiff took out a Writ of Summons against the First,
17 Second and Third Defendants on the 17th August 2007, a little over 5 months
18 from the date when the Defendant left his employment.

19

20 The Plaintiff's Case

1

2 The Plaintiff's case is that this is a question of a written contract of
3 employment, with a restrictive covenant contained in Clause 12 of that
4 contract. Although, he admits that the contract was not renewed on its
5 anniversary, he alleges that the First Defendant went on working on under
6 the terms of the written contract and therefore is bound by the restrictive
7 covenant. The Plaintiff also claims that the First Defendant left his
8 employment and set up another company AQS Limited in breach of the
9 covenant. For purposes of this injunction that is no longer an active issue as
10 all parties during the course of the hearing were ad idem, that as the question
11 of the First Defendant's work permit was not being pursued by the Second
12 and Third Defendants any longer, they should be discharged.

13

14 The Plaintiff submits that the work permit was granted for 2 years, to
15 December 2006, and that the First Defendant accepted any increases in
16 salary that were granted and that therefore he is bound by the covenant. The
17 Plaintiff asserts that he is now not only competing by himself but has
18 effectively made Kozaily Designs Limited, who was not previously a
19 competitor, is one now.

20

1 The Defendant's Case

2

3 Mr. Sykes on behalf of the First Defendant submits that the First Defendant
4 left the Plaintiff's employ on 7th March 2007 because he could not agree on
5 the terms of the contract to be renewed. His many attempts at discussion
6 about the issue were ignored. He says that the consequence of the Plaintiff
7 prevailing is that effectively, the First Defendant cannot work for one year,
8 and that damages will not suffice as the First Defendant will be irreparably
9 harmed. The fact that the First Defendant has spent his own money in
10 coming to the Cayman Islands, is building a house and has a legitimate
11 expectation that he will be allowed to remain here will cause him untold
12 damage as he is the breadwinner in the family, if the injunction is extended.

13

14 He also submits that the First Defendant did not gain any special skills from
15 the Plaintiff as he was already a qualified quantity surveyor and that there is
16 no allegation or specific allegation that anything confidential was taken by
17 the First Defendant. A general allegation, he submits, will not suffice. He
18 also submits that the balance of convenience is on the First Defendant's side.
19 He further submits that the restrictive covenant is likely to expire long
20 before the case comes up for trial and therefore the grant of the extension

1 will essentially be deciding the case. He urges me to look at the merits to
2 the extent that they need to be looked at for purposes of deciding on this
3 application.

4

5 In summary, Mr. Sykes submits:

6

7 (a) That the restrictive covenant is unenforceable in law in that it is
8 contrary to public policy;

9 (b) The restrictive covenant does not apply to the present circumstances;

10 (c) The restrictive covenant expired pursuant to the terms of the
11 employment agreement;(this need not be decided by me, this is a
12 matter for trial);

13 (d) The Plaintiff has not requested an injunction in the Statement of
14 Claim (the court has already indicated that it should not spend any
15 time in examining this objection, as it is of the opinion that it is not
16 valid);

17 (e) The Plaintiff has not established that a balance of convenience favours
18 the granting of an injunction. On the contrary, the balance of
19 convenience favours the First Defendant in that an impact of the

1 injunction on him is dramatically more severe than the impact on the
2 Plaintiff if the injunction is discharged;

3 (f) The Plaintiff has not established that the injunction is necessary to
4 protect a genuine interest which the court should protect by way of an
5 injunction; and

6 (g) The Plaintiff in waiting months before applying for an injunction has
7 demonstrated that there is no urgency and, by its own conduct, that
8 there is no need for the protection of its interests.

9

10 The Law

11

12 The House of Lords in *NWL Limited v Woods* [1979] 1 WLR 1294 has
13 established that the *American Cyanamid* principles are applicable to trade
14 disputes.

15

16 Lord Diplock pointed out in the same case that their Lordships in the
17 *American Cyanamid* case were not dealing with an issue in which the grant
18 or refusal of an injunction at the interlocutory stage would, in effect, dispose
19 of the action finally in favour of whichever party was successful at the

1 hearing of the application because there would be nothing left on which it
2 was in the unsuccessful party's interest to proceed to trial.

3

4 He said:

5

6 "Where, however, the grant or refusal of the
7 interlocutory injunction will have the practical
8 effect of putting an end to the action because the
9 harm that will have been already caused to the
10 losing party by its grant or its refusal is complete
11 and of a kind for which money cannot constitute
12 any worthwhile recompense, the degree of
13 likelihood that the plaintiff would have succeeded
14 in establishing his right to an injunction if the
15 action had gone to trial, is a factor to be brought
16 into the balance by the judge in weighing the risks
17 that injustice may result from his deciding the
18 application one way rather than the other."

19

1 A two judge Court of Appeal affirmed in *Lawrence David Ltd v Ashton*
2 [1989] FSR 87 that the *American Cyanamid* principles applied to a claim for
3 an interlocutory injunction to enforce a contract in restraint of trade.

4

5 There is no dispute that the employment contract to which this applies
6 between the Plaintiff and the First Defendant falls within the category of
7 contracts and restraint of trade. There is therefore a *prima facie* assumption
8 that it is void and requires to be justified according to the test of
9 reasonableness. Is it in the interest of the community that this restraint
10 should be held to be reasonable and enforceable?

11

12 Although covenants and restraint of trade are negative covenants on period
13 of time Lord Denning MR said:

14

15 “Covenants in restraint of trade are in a special
16 category....if they are *prima facie* valid and there
17 is an infringement the courts will grant an
18 injunction.”

19

20 A covenant will be *prima facie* valid, in my view, if:

1 (a) all the facts are before the court; and

2 (b) the covenant is reasonable in ambit, area, and duration.

3

4 In this case, the Court has to consider the *American Cyanamid* categories,
5 which are:

6

7 (1) Is there a serious action to be tried?

8 (2) Are damages an adequate remedy?

9 (3) Does the balance of convenience militate towards the granting of an
10 injunction?

11 (4) Is it against public policy? and

12 (5) Is the covenant too wide or unreasonable and therefore void?

13

14 It is in order to decide the above issues that this Court had to look at the
15 issues involving the factual matters and the disputes. Whilst it is not the
16 function of this Court to go into the merits of the matter, it must in order to
17 decide the balance of conveniences look at the factual situation. The Court
18 needs to be satisfied only that there is a serious question to be tried on the
19 merits. The result is that the Court is required to investigate the merits to a
20 limited extent only. All that needs to be shown is that the claimant's cause

1 of action has substance and reality. Beyond that it does not matter if the
2 claimant's chance of winning is 90% or 20%. (See *Mothercare Ltd. v Robson*
3 *Books Ltd.* [1979] FSR 466, per Megarry V-C at 474). In this case I am of
4 the view that there is in fact a serious issue to be tried.

5

6 The next question that I have to ask myself is if there is a serious question to
7 be tried on the merits of the substantive claim, whether the applicant will be
8 adequately compensated by an award of damages at the trial. The test was
9 stated in the following way by Lord Diplock in *American Cyanamid Co v*
10 *Ethicon Ltd.* [1975] AC 396 at 408:

11

12 "If damages in the measure recoverable at
13 common law would be an adequate remedy and the
14 defendant would be in a financial position to pay
15 them, no [interim] injunction should normally be
16 granted."

17

18 Damages, in my view, will be inadequate if:

19

- 1 (1) The defendant is unlikely to be able to pay the sum likely to be
2 awarded at trial;
- 3 (2) The wrong is irreparable;
- 4 (3) The damage is non-pecuniary, e.g. trade secrets etc.
- 5 (4) Damages would be difficult to assess. Examples are loss of good
6 will, etc.

7

8 In other words, where the claimant has shown that there is a serious
9 question to be tried, if damages would be an adequate remedy that is the
10 end of the matter and the injunction must be refused, in my view.

11

12 The next question that I must ask myself is, whether on the balance of
13 convenience, an injunction should be granted. In *American Cyanamid*
14 *Co. v Ethicon Ltd.* [1975] AC 396 Lord Diplock said, at page 408:

15

16 “...it would be unwise to attempt even to list all
17 the various matters which may need to be taken
18 into consideration in deciding where the balance
19 lies, let alone to suggest the relative weight to be

1 attached to them. These will vary from case to
2 case.”

3 This is obvious.

4
5 In other cases such as *Cayne v Global Natural Resources plc* [1984] 1
6 All ER 225, the courts have insisted that it is not mere convenience that
7 needs to be weighed, but the risk of doing an injustice to one side or the
8 other.

9
10 Lord Diplock, in fact, stressed, in the *American Cyanamid* case (supra)
11 the extent to which the disadvantages to each party would be incapable of
12 being compensated in damages are always a significant factor in
13 assessing where the balance of convenience lies.

14
15 Each case turns on its own facts, but to my mind the matters found to be
16 important must include:

- 17
18 (1) Being deprived of employment;
19 (2) Damage to business;
20 (3) Damage to the goodwill of a business;

1 (4) Preserving confidential information;

2 (5) The public interest; and

3 (6) Preserving a substantial financial investment or company etc.

4

5 I am aware that in the grant of an injunction the Court must look at or
6 endeavour to preserve the *status quo*; however, the status quo appears to be
7 the state of affairs before the First Defendant started the conduct complained
8 of. In this case, that is not applicable.

9

10 There is a further element in this case and that is, there has been a delay on
11 the part of the Plaintiff in bringing this action so that in fact the restraint as it
12 appears in the contract even if valid and reasonable would be only for a
13 further five months. To my mind two questions arise. First, on the
14 assumption that the injunction is refused and taking into the account the
15 likely length of time it will take to get to trial and the probable factual
16 situation at that time, is there any realistic possibility that the claimant will
17 wish to proceed to trial. In other words, as in this case when the injunction
18 can only last for a further five months, is it really likely that the plaintiff will
19 then wish to proceed to trial. Assertions by the claimant that they will in any
20 event proceed to trial to recover damages, may to my mind be disregarded if

1 in reality a trial would be a meaningless gesture. This principle was
2 reinforced in *Lansing Linde Ltd. v Kerr* [1991] 1 WLR 251.

3

4 Secondly, on the assumption that the injunction is granted, is there any
5 realistic prospect of the First Defendant insisting on going to trial Where
6 neither party has a real interest in going to trial, the interim application will
7 finally determine the action. In the latter case, if the defendant did truly
8 have a defence and applying the *American Cyanamid* principles or
9 guidelines, his defence truly destroyed the claimant's case then it would be
10 wrong to run the risk of causing an injustice to a defendant who is being
11 denied the right to trial were the defence put forward has been substantiated
12 by affidavits and a number of exhibits. The reality in this situation is that it
13 is not possible for the claim to be tried before expiry of the period of the
14 restraint. There simply is no prospect of a trial proceeding speedily.

15

16 Is the restraint of trade unreasonable? In view of the facts in this case, what
17 in fact it would mean to the First Defendant is that he will not be able to
18 conduct his trade for a whole year although he is the breadwinner in the
19 family. The First Defendant's damage if he could not find suitable
20 employment for some time might be difficult to assess. The only way this

1 could be mitigated is by ordering a speedy trial, which as I have already
2 expressed is not a possibility for this matter at this late stage. This has been
3 contributed to by the Plaintiff in bringing the injunction at this late stage. I
4 find it difficult to say that the restrictive covenant is too wide because
5 Cayman is such a small island where it would be difficult to restrict the First
6 Defendant to one parish alone. I am not however convinced that the
7 restraint is unreasonable. The First Defendant is an in house surveyor
8 working for a design/architect company and if there are particular jobs that
9 have been bid for which I have no evidence of then that would be
10 compensatable in damages. I have no evidence whatsoever before me that
11 the First Defendant has endeavored to take clients from the Plaintiff. In
12 *Thorsten Nordenfelt (Pauper) Appellant; v the Maxim Nordenfelt Guns and*
13 *Ammunition Company Ltd.* [1894] A.C. 534 at p17 it was said:

14

15 “The true view at the present time I think, is this:

16 The public have an interest in every person

17 carrying on his trade freely: so has the individual.

18 All interference with individual liberty of action in

19 trading, and all restraints of trade of themselves, if

20 there is nothing more, are contrary to public

1 policy, and therefore void. That is the general rule.
2 But there are exceptions: restraints of trade and
3 interference with individual liberty of action may
4 be justified by the special circumstances of a
5 particular case. It is a sufficient justification, and
6 indeed it is the only justification, if the restriction
7 is reasonable--reasonable, that is, in reference to
8 the interests of the parties concerned and
9 reasonable in reference to the interests of the
10 public, so framed and so guarded as to afford
11 adequate protection to the party in whose favour it
12 is imposed, while at the same time it is in no way
13 injurious to the public. That, I think, is the fair
14 result of all the authorities. But it is not to be
15 supposed that that result was reached all at once.”

16
17 I will next consider the question of the confidential information alleged to
18 have been stolen by the First Defendant. The Plaintiff has failed, in my
19 view, to define with sufficient precision what information it claims to want

1 to protect, or to be returned and in those circumstances, I do not believe that
2 the injunction should be granted on this ground.

3

4 Conclusion

5

6 Having reviewed all the evidence and all the authorities before me I hold
7 that adopting and applying the principles set out in the various authorities,
8 the balance of convenience lies heavily in favour of the refusal of an
9 injunction and in the circumstances, the Plaintiff's application is dismissed.

10 I will hear Counsel on the question of costs at a later date.

11

12 Dated this 3rd day of October 2007

13



14 Judge of the Grand Court

