

Optimex Ltd v Berthelot

1993 MR 286

1993 SCJ 59

Glover CJ*, Boolell J

The respondent entered into a written contract of employment with the appellant whereby she agreed to refrain from being employed by any enterprise involved in a similar activity in Mauritius for a period of 6 months after any eventual termination of her employment, and she also agreed in a contemporaneous albeit separate document not to divulge or use, at any time, any technical information relating to the appellant's textile export services.

The respondent, who had been employed as merchandiser by the appellant, left her employment on the 31st August 1992 and, at an unidentified point in time, subsequently started working for an admittedly rival concern as quality controller.

The appellant discovered this in November and summoned the respondent by notice to honour her undertaking not to be so employed until the 28th February 1993. The notice having remained unanswered, the appellant applied *ex parte* to the Judge in Chambers for the issue of an interim order in the nature of an injunction restraining the respondent from being so employed. This was not granted but the respondent was summoned to show cause why an interlocutory order should not be made. After an exchange of affidavits and argument by counsel the learned Judge has, on the 11th January last, refused the application with costs. As can be seen the present appeal against that judgment has been heard in priority.

Learned counsel for the respondent, in the course of his able argument, laid stress on the principles applicable relating to such appeals. These are set out in Hadmor Productions Ltd v Hamilton (1982) 1 All E.R. 1042 at 1046 and in Garden Cottage Foods Ltd v Milk Marketing Board (1983) 2 All E.R. 770 at 772 and 773. In the words of Lord Diplock in the latter case –

“...On an appeal from the Judge's grant or refusal of an interlocutory injunction an appellate court, including your Lordships, must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of an appellate court is initially that of review only. It is entitled to exercise an original discretion of its own only when it has come to the conclusion that the judge's exercise of his discretion was based on some misunderstanding of the law or of the evidence before him, or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the Judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that

there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where, even though no erroneous assumption of law or fact can be identified, the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

Learned counsel for the appellant for his part, in thorough and clear submissions, pointed to another equally well settled principle to the effect that, when it is established that a respondent has entered into a clear negative covenant and it is manifestly established that he or she had committed a breach thereof, the Judge does not have a discretion to exercise in deciding upon an injunction application and that, in such instances, considerations such as the balance of convenience are irrelevant. (See Halsbury, Law of England, Fourth Ed., Vol. 24, para. 992).

We may at once observe that the learned Judge in Chambers appears to have taken care to point out that questions of law and of fact had been raised regarding the nature of the covenant and of the alleged breach thereof. For example and having regard to the settled case-law concerning the limitations on contracts in restraint of employment, it might have become necessary to consider whether, in the circumstances, the respondent had validly bound herself not to obtain employment with a rival firm in any capacity whatsoever and consequently whether there had in fact been an unmistakable breach of the covenant. A second point could have related to the circumstances in which the respondent's employment with the appellant had been terminated, about which there was undoubtedly some measure of conflicting evidence.

It follows in our judgment that the principle relied upon by learned counsel for the appellant does not find its application here and that the Judge in Chambers was entitled to exercise his discretion in the matter. Accordingly we must, before deciding whether we are entitled to intervene on appeal, determine whether there has, or has not, been some misunderstanding of the law or the evidence or an incorrect inference drawn from the facts. This is a convenient time to turn to the grounds of appeal which are:-

1. Because the learned Judge misconstrued the undertaking given by the respondent which was the basis of the application.
2. Because the learned Judge, having found that the respondent had left the appellant's (then Applicant's) employment on 31 August 1992 and had ever since worked to Tex Services, a firm carrying on activities similar to those of the appellant (then applicant) in breach of her undertaking had no alternative than to grant the application;

3. Because the learned Judge was wrong to have taken into consideration the fact that at least 2½ months must have elapsed when the notice was served upon the respondent.
4. Because the learned Judge misconstrued the evidence on record when he found that “two colleagues were laid off” inasmuch as one of them, namely Mrs Anoorada Eject (after saying that “the laying off of the merchandisers had become necessary”) clearly said that on 31 July 1992 she had left Optimex Ltd for Socota Limited;
5. Because the learned Judge erred in finding that the case of Hardy Henry & Cie Ltée v Kaloo “could be easily distinguished from the present case.”
6. Because the learned Judge was wrong to have given any weight to the averment of the appellant (then Applicant) that he intended to enter an action against the respondent to claim damages as this fact alone cannot debar the appellant (then Applicant) from obtaining the writ prayed for.
7. Because the Learned Judge was wrong to find that the “balance of convenience” was in favour of the respondent inasmuch as the breach of undertaking by the respondent was clearly established.
8. Because the learned Judge was wrong
 - (a) to take into consideration the fact that the respondent “had been in that job for the past 4½ months and that any order which might be made by him would lapse at the end of February;”
 - (b) that the appellant (then Applicant) could be adequately compensated by damages.

We will not concern ourselves, in this exercise, with ground 2, with which we have by implication already dealt, with ground 5 which cannot be supported since there clearly are differences between the case referred to and the instant one and with ground 7, the point regarding which we have also considered earlier.

Grounds 1, 6 and 8(b) can be taken together. It is true that the learned Judge in Chambers erred in considering, as he did, that the undertaking not to obtain employment with a rival firm was signed “in order not to divulge ... information ...” The secrecy undertaking was a permanent one, quite distinct from the no-employment one, which was no more than a kind of consideration, of limited effect, in return for the respondent being given employment, training, experience and know-how by the appellant. True is it also that the absence of a main action, at the relevant stage of the proceedings,

was not a complete bar to the application for temporary relief in the particular circumstances and that the appellant had eventually abandoned the idea of a main action altogether.

Nevertheless we cannot fail to observe that the appellant had, in the two affidavits put in on its behalf, chosen to lay great stress on the secrecy undertaking and averred that it was suffering inestimable prejudice and event that the respondent was actually disclosing information to its competitor. We are accordingly unable to hold that the Judge's approach was such as to compel us to hold that he wrongly exercised his discretion in that respect.

The point regarding grounds 3 and 8(b) was that, while exercising his discretion, which we have held he was entitled to do, the Judge took into account two facts, namely that, although this was through no fault of the appellant, harm may already have been done concerning the divulging of information by the time the respondent was put *en demeure* and that, once again through no one's fault in particular, the no-work prohibition only had six weeks to run by the time he came to deliver his judgment. Again we cannot say that, in so doing, he erred in law.

Ground 4 can be shortly disposed of. The respondent had, in her affidavits regarding the circumstances in which her employment came to be terminated, averred that her situation with the appellant had become precarious because of certain occurrences relating to the company's business and went on to fortify her claim by saying that 2 of her colleagues had actually been laid off as a result. One of those two persons put in affidavit to say:-

2. That in June, 1992 Mr Alain Lenoir informed me that the contract with Next Limited had been determined and that the laying off the merchandisers had become necessary.
3. That on the 31st of July, 1992 I left Optimex Limited for Socota Limited.

There was no affidavit in rebuttal from Mr Lenoir, the appellant's manager. In the circumstances the use of the term "laid off", although it was a rather loose piece of paraphrasing, cannot be said to constitute flawed reasoning.

For all those reasons this appeal is dismissed with costs. Having regard to the tenour of certain submissions made to us, we wish to add a few remarks. It is well settled, and we know that this is of frequent occurrence, that it is quite legitimate for employers to bind their workers, in appropriate cases, to a negative covenant regarding future employment, but such an undertaking will only be enforced if it is in clear and limited terms. For example we apprehend that the courts might be loth to enforce a covenant the intent of which would be to prevent a skilled mechanic from taking other employment as a driver. Moreover, the breach should be clearly established and the parties concerned should take care to have, for future reference, a proper record of what occurs instead of expecting the court to decide important issues, as happened in this case, on the basis of

conflicting affidavits about a worker's husband moving to Rodrigues or his being assigned duties to one particular customer.

For Appellant:

Mr Attorney de Froberville
Mr Y Hein, of Counsel

For Respondent:

Mr Attorney P Boodhna
Mr R Stephen, of Counsel