

**BETWEEN** : **B & M PATEL (HARDWARE) LIMITED** a limited liability company having  
its registered office at Nakavu, Nadi. **PLAINTIFF**

**AND** : **SAPAN PANDYA** of Tavewa Avenue, Lautoka, Manager. **DEFENDANT**

**Counsel**

Mr K Vuataki for the Plaintiff-Applicant

Mr J Sharma for the Defendant-Respondent

Date of Hearing : 04 April 2013

Date of Judgment : 11 April 2013

**INTERLOCUTORY JUDGMENT**

1. The plaintiff filed a writ of summons dated 23 January 2013 seeking a declaration that the defendant be estopped from being employed by any hardware company in Fiji for three years from 16 October 2012.
2. By its summons dated 23 January 2013, the plaintiff simultaneously sought following injunctive reliefs:

(i) *An order by way of injunction restraining defendant from enticing any customer of plaintiff until further order;*

(ii) *Same as above;*

(iii) *An order by way of injunction restraining defendant from divulging or using any trade secret of plaintiff until further order;*

(iv) *An order by way of injunction restraining defendant from starting a product line similar to Davey Pump until further order; and,*

(v) *An order by way of injunction restraining defendant from being employed by R.C. Manubhai and Company Limited or any hardware company in Fiji until further order.*

3. The summons was supported by an affidavit from Mr Manish Patel dated 23 January 2013 in his capacity as a director of the plaintiff-company. Mr Patel stated that the plaintiff-company was involved in the fields of general building and construction, hardware, water-pumps and water treatment products; and, that it has been carrying on such business for last 35 years.
4. The defendant, who was experienced in the hardware industry in view of his previous employment with Vinod Patel, another competitive trader in the same field in Fiji, and in other allied trades, was employed by the plaintiff with effect from 01 June 2010.
5. Mr Patel specifically averred that the defendant was employed to an important position designated as 'Product Development Manager' considering his multi-skilled exposure, which consequently required having a 'restraint of trade clause' in his contract of employment. The restraint of trade clause read as follows:

*Confidentiality of Information*

*During your employment you may become aware of information relating to the business of the Company, including but not limited to client lists, trade secrets, client details and pricing structures.*

*Confidential information remains the sole property of B & M Patel (Hardware) Ltd. You shall not, either during or after your employment, without the prior consent of the Company, directly or indirectly divulge to any person or use the confidential information for your own or another's benefit.*

*Employee shall devote all of this time, attention, knowledge, and skill solely and exclusively to the business and interests of employer, and employer shall be entitled to all benefits, emoluments, profits, or other issues arising from or incident to any and all work, services, and advice of employee. Employee expressly agrees that during the term hereof and three years after the termination of contract he will not be interested, directly or indirectly, in any form, fashion, or manner, as partner, officer, director, stockholder, advisor, employee, or in any other form or capacity, in any other business similar to employer's business or any allied trade in Fiji and South Pacific countries.*

6. It was the above clause, which formed the basis for the plaintiff's claim for a declaration as the substantive relief on the writ [of summons]; and, for the injunctive reliefs in his summons, as set-out above, after the defendant left the plaintiff-company and joined R C Manubhai and Company Limited (RCM), another competitor in the trade in October 2012.
7. The plaintiff claimed that the defendant, who was trained on the products marketed by it including Daveys water-pump, had access to confidential information and trade secrets. The plaintiff, in the circumstances, claimed that the employment of the defendant by RCM would cause incalculable damage to the plaintiff; and, that the defendant's conduct was a breach of the 'restraint of trade clause', and should be restrained by the injunctions sought.
8. The defendant, by his response dated 18 February 2013 to the summons, admitted that he was employed by the plaintiff from June 2010-September 2012 considering his experience in the hardware trade including those at Vinod Patel, which was considered to be a leading hardware company in Fiji. The defendant specifically pleaded that he left the plaintiff and joined RCM on 27 October 2012 as a Manager based in Lautoka in view of his family commitments
9. The defendant stated that RCM had many Fiji-wide sales outlets while the plaintiff had only one at Nadi and that the plaintiff has been the authorized distributor for Davey water-pumps in the Pacific. The plaintiff has been selling the Davey water-pump to the defendant and such sale did not cease even after he (the defendant) commenced his employment with RCM; and, business transactions between the two companies, too, continue to be in existence in many fields.
10. The defendant further averred that the RCM had a wider clientele and that there was no need or room for him to entice any of the customers of the plaintiff. The defendant further averred that his responsibility as the Product Development Manager at the plaintiff-company was to give advice and suggestions to customers on what the Davey product would be suitable for.
11. It is in light of the foregoing pleadings of the parties that court is called upon to consider the application for injunctions.
12. Mr Vuataki, learned counsel for the applicant, relied on *American Cyanamid Co v Ethicon Ltd.* [1975] 1 All ER 504 in support of his plea for the injunctions. Lord Diplock, with whose opinion the other Law Lords of the House of Lords agreed, held at 509 that:

*...the object of the interlocutory injunction is to protect the plaintiff against injury by 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 the trial. The court must weigh one need against another and determine where the 'balance of convenience' lies...*

13. Mr Vuataki also relied on ***Honeymoon Island (Fiji) Ltd. v Follies International Ltd.*** ABU 63 of 2007 and submitted that there was a serious question as regards the 'restraint of trade clause' to be tried and urged court to consider the grant of injunctions on the basis of balance of convenience, which, in his submission, weighed in favour of the applicant.
14. Learned counsel, in seeking the injunctions, complained of two matters based on the confidentiality clause. They were:

*(a) Alleged usage of plaintiff's property being the usage of confidential information on Davey Water Product and use of client listings; and,*

*(b) Within a three year period after leaving employment of the plaintiff, the defendant has interest as an employee in a business similar to plaintiff's business.*

(Paragraph 25 of the written-submission: Underlined for emphasis)

15. The confidentiality clause found in the contract of employment between the plaintiff and the defendant is, in fact, a restraint of trade clause. Legal effect of such a contractual restraint of trade was considered as far back as in 1894 by the House of Lords in ***Thorsten Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company Limited*** [1894] A.C 535, where it was held at 565:

*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.*

16. In **McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society Limited** [1919] A.C. 548, the House of Lords reinforced the above principle as at 562, when Their Lordships summed-up specific the principle as follows:

*A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public.*

17. The above principles have been consistently applied without aberration. And, **Halsbury's Laws of England**<sup>4<sup>th</sup></sup> Ed. Vol. 16 states at p. 528 that:

**Covenants in restraint of trade** [:] *Restraints imposed on employees are generally against competing with the employer after leaving his employment in a stated area and for a stated period. A covenant in restraint of trade is, it seems, unenforceable unless supported by valuable consideration, even if it is contained in a deed. A covenant or agreement between an employer and an employee which is on the face of it in restraint of trade is unenforceable unless both (1) it is reasonable as between the parties, and (2) it is reasonable with reference to the public interest. The onus of establishing that an agreement is reasonable as between parties is on the person who puts forward the agreement. The onus of establishing that an agreement which is reasonable between the parties is contrary to the public interest is on the person alleging that it is contrary to the public interest. A restraint which would be reasonable if entered into between the vendor and purchaser of a business may be unreasonable if entered into between an employer and an employee.*

See also and **Mason v Provident Clothing and Supply Co Ltd** [1913] AC 724.

18. Lord Parker in **Herbert Morris Ltd v Saxelby** HL [1916] 1 AC 688 said at p 710:

*...In fact 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. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employers business.*

19. In **Singh v Grant’s Warehouse Agency** [2000] FJCA 48, the Fiji Court of Appeal referred to **Herbert Morris’s** case (supra) and adopted the House of Lords’ opinion on contractual protection against competition from a former employee, who had acquired his knowledge and skill in their employment, as laid down by Lord Atkinson at pp. 703-705:

*It is claimed however...that this organization and general method of business are trade secrets which the respondent is not entitled either to divulge to another, or use his knowledge of them in the service of any persons other than themselves.*

*The respondent cannot, however, get rid of the impressions left upon his mind by his experience on the appellants’ works; they are part of himself; and in my view he violates no obligation express or implied arising from the relation in which he stood to the appellants by using in the service of some persons other than them the general knowledge he has acquired of their scheme of organization and methods of business.*

*...[T]hat the danger against which the appellants desired to be protected is neither the enticing away of customers, nor the divulgence or use and employment of any trade secret. It is this, that the respondent would carry away and might put to use in the establishment of their trade rivals the superior skill and knowledge he, the respondent, has by his talent acquired in their works...*

*[A]n employer [cannot] prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself...A good deal has been said about organization. The evidence is singularly scanty in regard to details upon the exact meaning of that word in*

*the present case; but I apprehend that a man who goes into an office is entitled to make use in any other office, whether his own or that of another employer, of the knowledge which he has acquired in the former of details of office organization... To acquire the knowledge of the reasonable mode of general organization and management of a business of this kind, and to make use of such knowledge, cannot be regarded as a breach of confidence...*

20. Learned counsel for the applicant cited the above authorities and relied heavily on their legal principles both in his oral as well as written-submissions. It became, therefore, incumbent on the applicant to establish what, in fact, it was seeking to prevent the defendant from especially in light of the essence of the authority in **Herbert Morris'** case (supra).
21. The applicant in this case, however, has not presented evidence to establish the nature and the character of the trade secret or information that it had wanted to preserve as its own proprietary right. Instead, the applicant merely said that the defendant had access to its trade secrets and confidential information. Such an imprecise and vague assertion would not, in my view, be sufficient to meet the stringent test laid down by the law to impose a restraint of trade on a former employee/s. This would be clearer when one examines the formulation of the grounds for the injunctions where the applicant relies on '*alleged usages [of trade secrets and confidential information]*' manifesting that there was no actual, potential or imminent usage of information but only an apprehension of suspicion.
22. I hold that the applicant has not discharged its legal burden that the restraint of trade was reasonable between the parties to be enforced between them as set-out in the contract of employment in respect of any protectable aspects of its trade. Applying the legal principles in *American Cyanamid* (supra), I am convinced that there is no triable issue in favour of the applicant. Moreover, I am not convinced that the balance of convenience, in any event, favours the applicant justifying the grant of an interlocutory injunction.
23. Application for the injunctions sought on the basis of the summons dated 23 January 2013 is dismissed. I am, however, not inclined to award costs. Parties to bear their own costs.

Priyantha Nāwāna  
Judge  
High Court  
Lautoka  
11 April 2013