TARA SINGH v GRANTS WATERHOUSE AGENCY, WILLIAM WATERHOUSE AND ROBERT WATERHOUSE

Court of Appeal Appellate Jurisdiction
Casey, Kapi and Handley, JJ
17 November, 2000
ABU0059/2000S (on appeal from HBC 372/2000)

Injunction – dissolution - whether restraint of trade clause in informal contract valid — whether exercise of discretion by trial judge vitiated by error of principle – purpose of restraint clause discussed – Court of Appeal Act s12(2)(f)(ii)

Appellant General Manager, summarily dismissed from Grants Waterhouse after 8 years, established a betting agency in violation of the agreement but the respondent obtained an exparte injunction restraining the appellant from 'being in anyway engaged or concerned or interested in the business of a gaming, lottery or betting shop in Fiji until further order'. The High Court refused to dissolve an ex-parte injunction against the appellant. The appellant appealed, and applied for a stay which was refused. It was common ground that the appellant did not have a written contract of service as General manager prior to change of ownership. On change, he signed an agreement incorporating a restrictive clause not to compete with the respondent 'in any business' in Fiji during and for 3 years after his employment with the respondent ended. Thirteen days later, he was suspended without pay, effectively summarily dismissed. During the hearing of the appeal, the respondent was disallowed from substituting Grants Waterhouse Agency for Waterhouse Bet Limited as plaintiff, but was given leave to add Messrs William and Robert Waterhouse as additional plaintiffs. The court found the pleadings did not establish matters raised in the affidavit as there was no evidence that the appellant had acquired personal knowledge of an influence over customers or had acquaintance with employer's trade secrets, or had direct dealings with customers as alleged in affidavit. Although urged by the respondent to apply so much of the restraint as was valid, the court declined to exercise any power to alter the contract made by parties, in the absence of statute.

Held – (1) Where the restraint is prima facie valid the balance of convenience strongly favours the grant of an interlocutory injunction to maintain the status quo because restraints are typically of limited duration and damages is not an adequate remedy.

(2) where restrictive covenant is one contractual restriction for the protection of the respondent's entire business it must stand or fall as a whole, in its unaltered form.

(3) The onus is on former employer to establish prima facie case of validity of restraint and onus on respondent to prove that restraint was no wider than required for employer's protection. The respondents' interest in protecting their trade could not justify a blanket prohibition on all competition throughout Fiji, even in Suva.

(4) Restraint against competition was void as the Plaintiff failed to provide evidence that the appellant would use trade secrets against the respondent in competition, that the appellant did not have a long term contract but could be dismissed on 7 or 14 days notice, and the contract was completely one-sided and unfair.

Judgment of High Court in error. Interlocutory injunction set aside. Respondents to pay for costs of High Court hearings. Appellant at liberty to apply for damages. Parties at liberty to apply to High Court for directions for further hearing of action.

Cases referred to in judgment
ref ***Performing Right Society Ltd v London Theatre of Varieties Ltd*** [1924] AC 1
ref ***Weldon v Neal*** (1887) 19 QBD 394
ref ***Sneade v Wotherton Barytes and Lead Mining Co. Ltd*** [1904] 1 KB 295, 297
appl ***Mason v the Provident Clothing and Supply Co Ltd*** [1913] AC 724
appl ***(Mason) and Herbert Morris Ltd v Saxelby*** [1916] 1 AC 688
dist ***Rentokil Pty Ltd v Lee*** SCSA 2 November 1995
ref ***Attwood v Lamont*** [1923] 3 KB 571

Abhay K Singh for the appellant
Viren Kapadia for the respondent

17 November, 2000. **JUDGMENT**

Casey, Kapi and Handley, JJ

This is an appeal from the decision of Fatiaki J, delivered on 15 September 2000, when he refused to dissolve an ex-parte injunction granted by him on 1 September which restrained the appellant from breaching the restrictive agreement in favour of 'Grants Waterhouse Agency' which he had signed on 19April 2000. The appeal to this Court lies as of right pursuant to s.12 (2)(f)(ii) of the Court of Appeal Act.

Grants Waterhouse Agency which was named as the plaintiff in the writ and all subsequent proceedings is a business name registered in 1967 in the name of Francis Peter Grant. However, it was common ground that for many years prior to 1998 the business was in fact carried on by a partnership between Francis Peter Grant, John Waterhouse, and William Waterhouse, and that Mr Grant holds the business name in trust for the firm. The partnership carried on business in Fiji as a commission agency which took or placed bets on horse races in Australia on behalf of its customers.

Disputes between the partners led to Court proceedings and on 9 March 1998 the High Court appointed Mr Ross McDonald as receiver of the partnership business. The receiver carried on the business until 17 April 2000 when, pursuant to an order of the High Court of 15 February 2000, he sold it to Mr William Waterhouse and Mr Robert Waterhouse (herein the new owners). The sale

was completed on 17 April.

In 1982 the appellant commenced employment with the partnership as a clerk and in 1992 he was appointed General Manager, a position he retained until his dismissal on 1 May 2000.

It was common ground on the appeal that the appellant did not have a written contract of service as General Manager prior to the sale and was not at that time subject to any express contractual restraint on his trading activities after the termination of his employment. The parties will not be bound at a future trial by this or any other concessions made for the purposes of this appeal which are based on the present state of the evidence, which is necessarily incomplete.

On 31 March 2000, the receiver gave written notice to the appellant terminating his services as from 15 April. This was done, as he explained, to enable the new owners to offer employment to him and the other staff as from 17 April when they took over the business. The appellant received one week's wages in lieu of notice.

On 17 April the appellant commenced working for the new owners as General Manager under an informal contract of employment.

On 19 April the appellant signed an agreement which imposed a contractual restraint on his freedom to trade after he ceased to be employed by the new owners. The agreement was as follows:

> "I, Tara Singh of 10 Moivi Place Nasinu hereby acknowledge, whereas under the terms of my employment with Grant's Waterhouse Agency (GWA) I was bound not to compete with GWA in any business in the Fiji Islands during and after this employment, that I am bound under my new employment with the new owners of GWA not to compete with GWA in any business in the Fiji Islands during and after this employment. I therefore acknowledge that I may not compete with GWA during my employment and for three years after any conclusion of my employment. I hereby undertake, to the new owners of GWA, neither to compete with GWA either during my employment or for three years after any conclusion of my employment, nor to assist any person or entity to compete with GWA."

This was the only agreement he signed with the new owners.

On the evidence before this Court, the appellant was employed under a weekly or possibly a fortnightly hiring, so that his employment could be terminated at any time without breach of contract, by the giving of either 7 or 14 days notice, or by payment of wages in lieu.

On 1 May 2000, the new owners acting through Mr McCoy, their

representative in Fiji, purported to suspend the appellant without pay until further notice.

a An employer has no implied right to suspend an employee without pay, and since the appellant's contract of service with the new owners was an informal one, his suspension without pay took effect as a summary dismissal.

Fatiaki J. did not find that the appellant had been guilty of misconduct in the employment of the new owners, which would justify his summary dismissal and this court is in no position to make, and does not make any finding on that *b* question.

After his dismissal the appellant took steps to establish a betting agency in Suva and elsewhere and he opened for business on 1 September. This was a clear breach of the contractual restraint in his agreement of 19 April, provided that agreement was valid, and Mr Singh who appeared for the appellant, did not *c* suggest otherwise.

On 1 September 'Grant's Waterhouse Agency' as the named plaintiff obtained an ex parte injunction from Fatiaki J restraining the appellant from breaching his agreement of 19 April. On 5 September the appellant applied by notice of motion to have the injunction dissolved but on 15 September Fatiaki J *d* dismissed the motion.

On 25 September the appellant appealed to this Court and on the same day applied for the injunction to be stayed pending the hearing of the appeal. This application was dismissed by Fatiaki J on 2 November.

The appellant then sought to bring his appeal on for hearing during the *e* current sittings. The case was referred to a single Judge of the court for case management, and a directions hearing was held on the afternoon of Friday 10 November.

The record evidenced considerable uncertainty and confusion as to the identity of the real party or parties behind Grants Waterhouse Agency. Prima *f* facie, this was the trading name of Francis Peter Grant who remained the registered owner of the business name and therefore was the apparent plaintiff. This would be irregular as Order 81 of the High Court Rules does not enable a single person carrying on business under a registered business name to sue in the name of the firm.

Other evidence suggested that the real plaintiff was either 'The Waterhouse *g* Group' whatever that may be Messrs William & Robert Waterhouse, or Waterhouse Bet Ltd. Clarification was sought at the directions hearing and it became clear that Messrs William and Robert Waterhouse were the purchasers of the business under the contract of sale with the receiver, that Waterhouse Bet Ltd was 'intended' to be the ultimate owner and that the accountants for the Messrs Waterhouse had or would arrange by 'internal means' for the business to be transferred to that company.

Directions were given to facilitate proof of these matters when the appeal came on for hearing before the Full Court on Monday 13 November.

When the appeal came on for hearing, Mr Singh, counsel for the appellant abandoned a number of the grounds of appeal and indicated that the only grounds to be pressed were those directed to the validity of the contractual restraint at common law.

The court then required Mr Kapadia, who appeared for the respondent to put the record in order, so far as the name of the plaintiff was concerned. He sought to have Waterhouse Bet Ltd substituted as sole plaintiff or added as an additional plaintiff, but no contract was produced which evidenced any sale by the Messrs Waterhouse to that company, and it was not registered as the owner of the business name. The court declined to take any notice of the unproved 'internal means' which, at some unspecified date, and in some unspecified manner, were said to have transferred the ownership of this business to that company. How such a transfer could have any effect on the contract entered into with the appellant on 19 April, was never made clear.

The identity of the true plaintiff or plaintiffs was no technicality. The plaintiff would be responsible for costs and for the usual undertaking as to damages which had been given to obtain the interlocutory injunction. On the face of the material in the record the sole plaintiff was Mr Francis Peter Grant, however there was nothing to indicate that he had had anything to do with the business since 17 April or had any knowledge of the litigation.

In due course Mr Kapadia applied to have Messrs William & Robert Waterhouse added as plaintiffs in the writ and all subsequent proceedings leaving Grants Waterhouse Agency, in effect Francis Peter Grant, as a continuing party to the proceedings.

The evidence and concessions by both counsel established that Messrs William and Robert Waterhouse were the true owners of the business, the beneficial owners of the business name and the other party to the contract of 19 April. As such they were entitled to apply for an interlocutory injunction to enforce the contractual restriction without joining the legal owner of the business name as a party to the proceedings, although the legal owner would have to be joined as a plaintiff or defendant before final judgment. See **Performing Right Society Ltd v London Theatre of Varieties Ltd** [1924] AC 1, 19, 34-5.

The Court was therefore entitled to treat the Messrs Waterhouse as the real plaintiffs from the beginning. Accordingly on Monday 13 November this Court ordered that the writ and all subsequent proceedings in the action and in the appeal be amended by adding Mr William Waterhouse and Mr. Robert Waterhouse as additional plaintiffs and respondents as the case may be. This order was intended to take effect forthwith, although with retrospective effect, notwithstanding High Court Rules O.15 r.9 (4). It is well established that orders granting leave to amend apply with restrospective effect unless they provide

otherwise. See **Weldon v. Neal** (1887) 19 QBD 394, and **Sneade v. Wotherton Barytes and Lead Mining Co. Ltd.** [1904] 1 KB 295, 297. Mr Kapadia was directed to obtain and file a written undertaking as to damages from the Messrs Waterhouse on Tuesday 14 November. This was duly done.

The new owners are prima facie entitled to an interlocutory injunction to restrain breaches of the contractual restriction, provided that restriction is valid. Where the restraint is prima facie valid the balance of convenience strongly favors the grant of an interlocutory injunction to maintain the situation which existed before the breach (the status quo), because restraints are typically of limited duration and damages awarded much later even if they are recovered, will not be an adequate remedy.

However it is essential, in a case such as this, for the former employer to establish a prima facie case that the contractual restraint on the former employee is valid. A former employer who fails to make out such a case is not entitled to an interlocutory injunction to enforce the restraint.

The recital in the agreement of 19 April that the appellant was previously bound by the terms of his employment not to compete with Grant's Waterhouse Agency in any business in the Fiji Islands after his employment ceased appears on the evidence before this Court, to be incorrect. No express contract to that effect has been proved, and at common law there is no implied restriction on the trading activities of a former employee.

The evidence established that the business sold to the new owners on 17 April was carried on at branches or shops at Suva, Nabua, Nadi, Lautoka, Ba, Nausori and Sigatoka. The statement of claim also alleged that the business was carried on at Martintar, but there was no evidence to this effect.

It appears that the business was only carried on in significant towns but the restraint prevents the appellant 'competing' with the new owners in any business in the Fiji Islands. On one view of the contract the appellant may have been free to carry on a betting business in Navua, Tavua, Rakiraki, Tailevu, Levuka, Labasa, and Savusavu without being in breach of this agreement because Grant's Waterhouse Agency did not have branch or shop at those centers. A business carried on by the appellant in those towns may not have competed with the business of the new owners carried on in other towns. However, the new owners considered that the appellant would be competing with them if he carried on the same business anywhere in Fiji, because they sought and obtained an injunction which applied to the whole of Fiji.

The business of Grant's Waterhouse Agency was carried on in shops in the named towns. During his employment by the original partners, the appellant acquired considerable knowledge of the horse betting business (Record 11, 167). However, the agreement he signed prevented him from competing with the new owners in 'any business' in Fiji, and the injunction granted by Fatiaki J restrained him from carrying on 'the business of a gaming, lottery or a betting shop'.

In the end result the only question for this Court was whether the respondents had established a prima facie case that the contractual restraint in the agreement of 19 April was valid. Expressed another way the question for this court was whether the exercise of discretion involved in the decision of Fatiaki J to continue the ex parte injunction was vitiated by any error of principle. The only error that was pressed at the hearing of the appeal related to the validity of the contractual restraint.

The principles which govern the validity of a contractual restraint given by an employee to his employer are well established. They are to be found in the decisions of the House of Lords in **Mason v The Provident Clothing & Supply Co Ltd** [1913] AC 724, (Mason) and **Herbert Morris Ltd v. Saxelby** [1916] 1 AC 688 (Herbert Morris).

In order for a contractual restraint to be valid 'it must be reasonable in the interest of the contracting parties ... what is meant is that ... it must afford no more than adequate protection to the party in whose favor it is imposed: Saxelby at 707 per Lord Parker (emphasis in original). Lord Parker continued at 710:

> "...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."

The contractual restriction in this case, is in terms directed against competition from the former employee, and is therefore prima facie invalid and not a proper subject matter for enforcement by an interlocutory injunction.

The respondents argued that they had established a prima facie case in that the appellant had acquired knowledge of the firms trade secrets and was in a position to take advantage of their trade connection, and that the restriction was therefore prima facie justifiable. It is well established that the respondents, in seeking to enforce the contractual restraint, had the onus of proving that the restraint was no wider than was required for their protection and hence they had to adduce evidence of the facts which established the nature and extent of the proprietary rights which justified such protection.

The evidence adduced by the respondents to establish these matters was sketchy in the extreme. The appellant was employed as the general manager of the business from 1992 until 1 May this year but there is no evidence as to the nature of his duties. He worked at the Suva branch but there were 6 other branches in Fiji. Mr McCoy in his affidavit of 13 October stated:

> "...the plaintiff has pleaded in its claim that the defendant whilst working for the plaintiff company for the past 18 years has acquired confidential

> information, customer lists, betting trade secrets and knowledge of specialised computer programs peculiar to the plaintiffs business which is unique in Fiji. The defendant has learned everything that he knows about horse betting from the plaintiff's business and would not have been in a position to set up such business with betting trade connections in Australia if that specialized knowledge had not been acquired by him during his 18 years with the plaintiff company."

The matters, said to have been pleaded were not pleaded either in the statement of claim or in the reply and defence to counter claim, but in any event there was no evidence of those matters before the Court.

To take the words of Lord Parker in Herbert Morris at 709, there was no evidence that the appellant had acquired 'such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained'. On the present state of the evidence there was therefore no question to be tried as to whether the employers' interest in protecting their trade connection could support this contractual restriction.

It was not even established that the appellant, as General Manager of the business, had any direct dealings with customers of the firm. One may reasonably infer that many, if not most of those customers, would transact their business in person at the shops or branches operated by the firm.

It is highly unlikely that the appellant had any 'personal knowledge of and influence over' the firm's ordinary customers even at the Suva branch, let alone the other branches. The business may have had a number of significant customers who operated accounts or conducted betting on credit by telephone. The appellant may have known such customers and even known them well, but there is no evidence of this. The words of Lord Atkinson in Herbert Morris at 702 are therefore in point:

> "...there is nothing to show that the respondent ever came into personal relations with any of the officers of these departments or undertakings, or that through his acquaintance or personal influence with any of them he might be able to divert their custom from the appellants to any other firm."

The respondents may have been able to protect their trade connection with any major customers who might be known personally to the appellant, but their interest in protecting that trade connection could not justify a blanket prohibition on all competition throughout Fiji, and in particular competition even in Suva, for cash customers who come off the street.

The respondents based their case in support of the validity of the contractual restraint on the evidence of Mr McCoy, quoted above that:

> "The defendant has learned everything that he knows about horse betting

> from the plaintiffs business and would not be in a position to set up such a business with betting trade connections in Australia if that specialized knowledge had not been acquired by him during his 18 years with the plaintiff company."

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However it is well established that an employer is not entitled to protection against the use by a former employee of such knowledge in a competitive business.

In Herbert Morris the House of Lords unanimously rejected a claim by an employer to contractual protection against competition from a former employee who had acquired his knowledge and skill in their employment. At pages 703-5 Lord Atkinson said:

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> "It is claimed however ....that this organisation 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 appellant's 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 organisation and methods of business.

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> It is moreover ...perfectly clear ... that 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 on the establishment of their trade rivals the superior skill and knowledge he, the respondent, has by his talent acquired in their works..... an 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 organisation. 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 organisation..... To acquire the knowledge of the reasonable mode of general organisation and management of a business of this kind, and to make use of such knowledge, cannot be regarded as a breach of confidence".

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In the same case Lord Parker said at 712:

> "All that he could carry away was the general method and character of the scheme of organization practised by the plaintiff company. Such scheme and method can hardly be regarded as a trade secret."

The appellant truly said in his affidavit of (Record 27) "...the plaintiff had not provided any evidence to say that I had some trade secret that I may

use against it in competition with it."

There is another and independent reason for holding this contractual restriction void. On the evidence before this Court the appellant had no long term contract of employment with the firm but could be dismissed on 7 or 14 days notice. Yet in that situation the respondents took from him a contractual restraint for three years preventing him from competing with them anywhere in Fiji in any business.

The contract on its face was completely one sided and unfair. In 1913 the House of Lords refused to enforce a similar agreement where an employee bound himself in a contract of employment not to be employed by any person in a business the same as or similar to that of the employer for three years. See **Mason** [1913] AC 724. At 732 Viscount Haldane said that this was "an agreement, be it observed, which might not have lasted more than a fortnight". At 741 Lord Shaw said:

> "...has it been shown that this restraint sought to be put upon the appellant was reasonable for the protection of the respondents? His period of service under the contract might have been only a fortnight, and the restraint, in all its comprehensiveness, and for the same period of years ...would have been the same. In respect of that fortnight's employment his bargain would have been to debar himself from all manner of service in the same class of trade for three years ..."

Faced with these principles during argument, Mr Kapadia asked the court to read down the contractual restraint and grant a more limited injunction to enforce so much of the restraint as would have been valid. There is legislation in New Zealand and New South Wales which enables a Court to do this in a proper case, but we were informed that there is no similar legislation in Fiji. We are therefore bound to apply the common law, which does not give the court any power to alter the contract made by the parties. As Viscount Haldane said in **Mason** [1913] AC 724 at 732:

> "...the question is not whether they could have made a valid agreement, but whether the agreement actually made was valid."

On the same point Lord Shaw said at 742:

> "Courts of law should not be astute to disentangle such contracts and to grant injunctions...which are not justified by their terms. There is no occasion for the framing, in the present instance, of a limited injunction, the contract not being in separate and clearly - defined divisions. It stands as a whole, and in my opinion it is not enforceable by law."

Lord Moulton was even more emphatic at 745-6:

> "I do not doubt that the court may enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But in my opinion, that ought only to be done in cases where the parts so enforceable are clearly severable, and even so

> only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport or substance of the clause. It would in my opinion be [wrong] if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance and carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master..... the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, the court would in the end enable them to obtain everything which they could have obtained by acting reasonably. It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business, and having so acted they must take the consequences."

Mr Kapadia referred the court to the decision of the Full Court of the Supreme Court of South Australia in **Rentokil Pty Ltd v Lee** of 2 November 1995, which he had discovered by diligent search, where severance was permitted in a case involving contractual restraints given by an employee. However, in that case the contractual restriction was very different, and was clearly divisible in form. Doyle CJ quoted with approval the statement of principle by Younger LJ in **Attwood v Lamont** [1923] 3 KB 571 at 593:

> "The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in fact a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only. Now here, I think, there is in truth but one covenant for the protection of the respondent's entire business and not several covenants for the protection of his several businesses. ...In my opinion this covenant must stand or fall in its unaltered form."

In the present case, there is in truth but one contractual restriction for the protection of the respondents' entire business, and it too must stand or fall as a whole, in its unaltered form.

Fatiaki J. in his decision of 15 September referred to the statement of principle by Lord Parker in **Herbert Morris** [1916] 1AC 688 at 709, that "I cannot find any case in which a covenant against competition by a servant as such has ever been upheld by the Court" but unfortunately he failed to apply that principle to the contractual restraint in this case, which on its face and in terms was a covenant against competion as such. He added

> "In light of the foregoing, there is no doubt in my mind that there are serious issues to be tried in this case not the least of which is the question

of the reasonableness of the duration of the restraint".

This indicates that his Lordship failed to appreciate and give full weight to the fact that the principle stated by Lord Parker invalidated this restraint, irrespective of its duration. This contractual restriction, being directed against competition as such, was prima facie void as Lord Parker said. In considering the balance of convenience Fatiaki J. said:

> "...defence counsel submits that the Fiji wide coverage of the restraint and its extended duration for three years is ex facie unreasonable and unjustifiable. Neither reason however has been canvassed in any meaningful way by the defendant in his affidavit or statement of defence".

With respect, Fatiaki J. reversed the onus of proof which clearly lies on the party seeking to uphold the validity of the restraint. See **Herbert Morris** [1916] 1 AC 688 at 706-7 per Lord Parker.

It is clear that his Lordship's consideration of this case was distracted by a number of false, irrelevant or marginal issues. The only real issue that required serious consideration was the prima facie validity of this contractual restraint. If it was prima facie valid it should have been enforced by interlocutory injunction. However if it was prima facie invalid the ex parte injunction should have been dissolved.

In our judgment, for the reasons we have given, the exercise of discretion by Fatiaki J. miscarried, and the appeal must be allowed. We make the following orders:

1. Dispense with any requirement for formal amendments, pursuant to the order amending the record made by this Court on 13 November, to affidavits, notices of motion, and orders.

2. Liberty to either party to make the formal amendments to the writ, the pleadings, and the notice of appeal at any time within or after the expiration of the period of 14 days referred to in High Court Rules 0.15 r.9 and 0.20 r.8.

3. Appeal allowed with costs to be paid by the respondents, assessed at $1,250 for professional costs plus disbursements incurred after 2 November, the amount for disbursements to be fixed by the Registrar if the parties are unable to agree.

4. Interlocutory injunction granted by Fatiaki J. on 15 September 2000 set aside.

5. Plaintiffs to pay the defendant's costs of the hearings in the High Court of the defendant's notice of motion of 5 September and the defendant's notice of motion of 25 September.

6. The appellant to have liberty to apply to the High Court for an Order that the Plaintiffs, pursuant to their undertaking as to damages, pay the damages occasioned to the appellant by the

grant of the ex parte and interlocutory injunctions and for directions as to the assessment of such damages.

7. Liberty to any party to apply to the High Court for directions for the further hearing of the action.

Appeal allowed with costs.

Marie Chan