

JERSEY / JUDGMENT

Nautech -v- CSS Ltd and Others

[2013] JRC 153 (31 July 2013)

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judgment

the deputy bailiff: 1. On 13 th May, 2013, the Court, differently constituted, sat to receive an application by the first, second, third and fifth defendants to discharge an Anton Piller order which the plaintiff had obtained on 11 th April, 2013. For the reasons given in that judgment the Anton Piller orders obtained ex parte were discharged, and sundry other orders were made. At paragraphs 92 to 95 of the judgment, the Court gave a summary of the position at which it had arrived. On the one hand, the Anton Piller orders had been improperly obtained. On the other hand, the material which had been discovered as a result of the execution of the Anton Piller orders showed that the defendants' conduct also left much to be desired. The Court was of the view that the material had been secured and should be available to enable the plaintiff to prove its case, and also that the defendants should not be prevented from taking additional steps to run their business. Accordingly the plaintiff should be prevented from maintaining orders which restrained competition as opposed to protecting its legitimate rights. 2. At paragraph 93 of the judgment, there was some analysis as to the nature of the information which it appeared existed on the plaintiff's database, assuming there was a database as it contended. Much of that information could not be said to belong to the plaintiff, including, for example, the copy medical records and religious details of particular or potential employees. The Court reflected on the fact that the fourth defendant had been in the business for many years and the second and third defendants for some years. The Court noted that the first defendant appeared to be owned by persons who had some experience in the marine field. The Court rejected the view that on the material which had been provided, the plaintiff was entitled to a springboard injunction which prevented the defendants from doing business. The Court reached that opinion for the purposes of determining the nature of the interim injunctions which would be substituted for the Anton Piller orders and other injunctions obtained ex parte. 3. Given the clear terms of the Court's judgment on 13 th May, it was of some surprise therefore that the Court was required to sit on 3 rd June to consider a fresh application by the plaintiff for a springboard injunction. At the close of the hearing, we indicated that the application for a springboard injunction was refused, and reasons would be delivered later. This judgment contains the reasons for that decision. 4. It is unnecessary to set out the facts again. They are sufficiently set out in the Court's judgment dated 13 th May. Nothing new was put before us, at least of substance, over and above what was known

in May. The Plaintiff's Case 5. The basis of the plaintiff's application was that, without having taken, copied and misused the plaintiff's database, the first defendant would have been unable to trade at all in the same business as the plaintiff; and would have been unable to recruit and provide seismic geophysical engineers and maritime personnel for shipping activities worldwide. The argument was that the defendants had provided no evidence of any other business that could be said to be legitimate, and there was no evidence that the first defendant would have been able to offer the maritime services which it clearly did. On the basis that the first defendant had obtained information to which it was not entitled, it was said that the Court ought to be assiduous to prevent it from using the information as a springboard for activities detrimental to the person whose information it was. It was submitted that the springboard injunction was necessary to deal with the consequences of the second, third and fourth defendants having acted in breach of contract or in breach of fiduciary duty, and that the first to fourth defendants inclusive should be prevented from obtaining a head start in competition with the plaintiff as erstwhile employer of the second to fourth defendants, who had left the plaintiff's employment to join a competitor. In essence, the submission was made that where an employee acts in breach of obligations and gains an advantage in the marketplace, the springboard injunction is available to remove that advantage. Furthermore the plaintiff asserted that these defendants were made of straw. The plaintiff was unaware what assets they had. It followed that damages would not be an adequate remedy - indeed they might be neither assessable nor recoverable. Advocate Sinel put the question rhetorically to us - how did the defendants get to where they are? How can the first defendant get the business off the ground? The only reason it could do so was because the second to fourth defendants had taken information of the plaintiff to which they were not entitled, and provided it to the first defendant, thus giving the first defendant a head start. 6. Advocate Sinel asserted that the whole plan of the defendants was to steal information from the plaintiff - it was not possible to do what the first defendant had done without stealing the plaintiff's information. He asserted there would not be any backers for the first defendant if the second to fourth defendants had not taken the information in question. If there had been a gap before the new business was set up that might be different. This however was not legitimate competition. He submitted that there should be injunctions put in place until trial. He agreed that trial should take place in a hurry. The plaintiff should have to compete in the future, but not against an outfit that used illegally obtained information. Reliance was placed in particular upon three English cases - *Terrapin v Builders' Supply Co* (Hayes)

[1967] RPC 375, *Allied Irish Bank Plc v Diamond*

[2011] 1 EHC 505; and *QBE Management Services (UK) Ltd v Dymoke*

[2012] EWHC 80 . Defence Submissions 7. Advocate Baker contended that the second and third defendants were entitled to leave the plaintiff's employment and set up in competition. The contract of employment from the plaintiff contained no restrictive covenants. The one month notice period to which they were subject under that contract of employment had expired. As to the information which was claimed to be a trade secret, ownership of the personal details of contractors with whom the defendants had had connections lay with

the contractors and not the plaintiff. It would be simple to get their details by advertisement in the marine press or by recollection. There was nothing wrong in setting up in competition. Indeed, there was some evidence that the plaintiff's former clients might welcome doing business with the second and third defendants. 8. Advocate Baker submitted that although the defendants could be criticised for their correspondence, the plaintiff was properly protected by the injunctions which the Court had put in place when discharging the Anton Piller order. The reality, he said, was that the effect of a springboard injunction was that it would strangle the first defendant at birth and ensure there was no competition. There was only one example of actual use of the plaintiff's information, which was the bulk email sent by Mr Coleman - but in fact this was the use of names and contact details and it was contended that the plaintiff had no proprietary rights to that information. Furthermore, if there had been any unfair advantage, it was not the case that that continued. The injunctions prevented that. The defendants were anxious to rid themselves of material which they ought not to have had so that they could get on with their business. It was also asserted that a springboard injunction would be in any event disproportionate because the effects of any breach of duty had worn off. Maritime people were responding to their advertisements. That was unconnected with wrongful use of information but related to lawful advertising in the affidavits which the defendants had lodged. To the extent that any harm had been done, damages would be an adequate remedy. 9. Advocate Baker submitted that information which had been obtained from the plaintiff was actually public information and there was nothing wrong in the defendants taking this and entering it onto their own computer system. Confidence and copyright did not attach to the information itself but to the way in which the plaintiff organised it. He emphasised that the defendants did not admit to copying the plaintiff's database. Reply 10. In reply Advocate Sinel suggested that the Court should look at a demonstration of the database at that time. He asserted that database was something capable of being protected. If the Court looked at the database, it would be obvious that this was not something which could be carried away in the head of an employee. He asserted it was quality controlled. An examination of the database would show that it was usable. We record that we declined that invitation. It seemed to us that to accept it would take us into a hearing on the facts as to the nature of the database which the plaintiff asserted it had and the nature of the database which the defendants now had, with a comparison between the two. It would require evidence by way of explanation of each database, and cross examination by each party. It would amount to a mini hearing of the issues which were to be determined at trial. 11. Advocate Sinel went on to submit that if the information was not confidential, as Advocate Baker had claimed, why bother to copy it? It was the plaintiff's information that the defendants used to get underway. The problem with the injunction set out at paragraph 96(iii) of the Court's judgment of 13 th May was that it did not go far enough because it covered only what was written down but not the know-how as to how to use it. Reasons for refusal of springboard injunction 12. The reasons for refusing the application for a springboard injunction are these:- (i) In the course of considering the application for the discharge of the Anton Piller orders and injunctions, the Court

considered the extent to which injunctions were needed to protect adequately on an interim basis the position of the plaintiff. The formal application for a springboard injunction was brought after the application to discharge the Anton Piller orders, but the Court was aware of the pending springboard application. This is obvious from the fact that paragraph 93 of the judgment of 13 th May refers to the Court's view that on the material in the case, the plaintiff was not entitled to a springboard injunction which prevented the defendants from doing business. Despite that view being clearly expressed, the Court is asked to revisit the question. We mention this only because there does not appear to us to have been anything very new in factual terms between 13 th May and 3 rd June when the application was argued. 13. As we have emphasised previously, the Court does not take the view that all of the information in the plaintiff's database, assuming it to exist as the plaintiff contends, amounts to trade secrets which can be the subject of protection. After the decision on the present application was given, Advocate Sinel wrote to the Bailiff's Judicial Secretary to send the Supreme Court decision on 22 nd May, 2013, in the litigation between Vestergaard Frandsen A/S and Others v Best Net Europe Limited and Others

[2013] 1 WLR 1556 . In that case the claimant companies had developed techniques enabling them to manufacture and sell long lasting and insecticidal nets, designed to protect sleepers from mosquitos and to reduce the mosquito population. They sought damages and other relief for misuse of that confidential information when former employees and a consultant who had played a major role in developing the claimant's techniques started a new business in competition. There are many factual differences between that case and the present case, not least in relation to the nature of the contractual duties which existed. However the purpose in our referring to the Supreme Court decision in Vestergaard at this stage is to emphasise that there is all the difference in the world between information in which the claimant company can assert a proprietary interest and information which belongs to other people, and which the claimant company might have organised in a convenient way for the purposes of doing business. In the latter case, the information does not belong to the claimant company. What belongs to the claimant company is the way in which it has been organised. In our view therefore, we should distinguish between injunctions which operate to prevent the defendants from using the plaintiff's information from injunctions which prevent the defendants from carrying on business using information which is not the plaintiff's information. 14. If it were impossible to set up business without using the plaintiff's database, then we might have been more sympathetic to the application for a springboard injunction. However, there is no sufficient evidence that that is so. We accept that it would be reasonably easy for a business to set up in competition by advertising for maritime personnel and many people could be expected to volunteer their own personal information as it would be simply another method for them to obtain employment. Furthermore, the second, third and fourth defendants have been in this business for some time. They will carry many names and contact details in their heads. They may have them written down among their own records. The plaintiff is not entitled to orders which would prevent the defendants from

using information which they have entirely lawfully. That information might enable them to set up in competition. It follows that the plaintiff is a long way away from being able to establish a prima facie case that the first defendant would be unable to operate in competition with the plaintiff without using information improperly obtained. The fact is that by recruiting the second, third and, if it has, fourth defendants as employees, the first defendant has placed itself in a position where its business could operate in competition with that of the plaintiff. 15. We consider that the deletion of some of the material which has already taken place is another reason why the springboard injunction is unnecessary. We do not think that the deleted material can reasonably be stated to have formed the basis of such steps as the first defendant has been able to take to date. Furthermore, the seizure of the defendants' hardware (other than that of the fourth defendant), as a result of the Anton Piller orders improperly obtained prevented the first defendant from trading for a considerable period. By the time the application for the springboard injunction came to be argued, in our view sufficient time had passed to render any advantage obtained by the defendants from the wrongly obtained material tenuous at best. 16. Finally, the injunctions at paragraph 96 of the Court's judgment of 13 th May provide protection to the plaintiff which holds a fair balance between the need to ensure that the defendants do not use wrongly obtained information and the plaintiff does not unfairly inhibit competition. We are very conscious that there were and are no restrictive covenants inhibiting the second, third and fourth defendants from joining a competitor. We think that it is the loss of the engine room of those employees rather than access to the plaintiff's database which causes the greatest harm to the plaintiff's business, and there is no contractual or other reason which prevents the second, third and fourth defendants operating in competition. 17. The Court does not have any doubt that in a proper case the springboard injunction procedure is appropriately deployed to protect a plaintiff. We are simply not satisfied on the facts of this case that it is proper to deploy that injunction here. Accordingly, the application is refused. Authorities Nautech-v-CSS Ltd and Others

[2013] JRC 089 . Terrapin v Builders' Supply Co (Hayes) [1967] RPC 375. Allied Irish Bank Plc v Diamond

[2011] 1 EHC 505. QBE Management Services (UK) Ltd v Dymoke

[2012] EWHC 80 . Vestergaard Frandsen A/S and Others v Best Net Europe Limited and Others

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