

FILEFORCE SDN BHD

v.

LAI MAY TING & ORS

High Court Malaya, Kuala Lumpur
Mohd Sofian Abd Razak J
[Originating Summons No: WA-22NCVC-176-04-2018]
21 August 2019

Civil Procedure: Anton Piller Order — Application to set aside — Whether plaintiff had not made full and frank disclosure when applying for order — Whether order ought to be set aside

Enclosure 143 was the 1st defendant's application to set aside the Anton Pillar Order ("APO") granted by the court. The APO was granted pursuant to the plaintiff's application in encl 5 and supported by an affidavit in support in encl 6. The 1st defendant's affidavit in support of encl 143 was in encl 144. Enclosure 143 accordingly was filed by the 1st defendant as a result of the unilateral withdrawal of encl 79 by the 1st defendant on 19 November 2018 on the mistaken belief that the plaintiff would also withdraw encl 5, ie the application for the APO. It was the contention of the plaintiff that the re-filing of encl 143 which mirrored in most respect encl 79 was an abuse of court process. By doing so it had delayed the hearing of encl 34 of which a date had been fixed. On the merits of the application, the defendants essentially contended that the APO was for a collateral purpose to cause an embarrassment and irreparable damage to the defendants. It was also the 1st defendant's case that the plaintiff had not made a full and frank disclosure when applying for the APO.

Held (dismissing the application with costs):

(1) In the contract of employment between the 1st defendant and the plaintiff, there was a clause on Conflict of Interest and Confidentiality which stated *inter alia* that while being in the employment of the plaintiff company, the 1st defendant should not divulge to any person whatsoever or make use of any trade secret or any confidential information concerning "the business or finances of the company ... of its suppliers agents distributors or customers." The court opined that it was quite clear that while in the employment of the plaintiff, the 1st defendant was strictly forbidden to divulge any information or trade secret to its customers. In this context, Sunway was previously the customer of the plaintiff and had since switched to the 1st and 3rd defendants as their supplier. In this respect, the plaintiff had satisfied the court in its *ex parte* application for the APO. The court having perused the affidavit in support in encl 6 was of the view that there was no non-disclosure made judging from the two volumes of affidavit in support filed. On the other issues raised by the 1st defendant, the court was of the view that from the facts presented, there existed a strong arguable case for the APO. (paras 53-56)



Case(s) referred to:

Arthur Anderson & Co v. Interfood Sdn Bhd [2005] 1 MLRA 375 (refd)

Leaway v. Newcastle City Council (No: 2) [2005] 220 ALR 757 (refd)

N-Visio Sdn Bhd v. Horizon Multimedia Sdn Bhd & Ors [2009] 3 MLRH 637 (refd)

Legislation referred to:

Contracts Act 1950, s 28

Counsel:

For the plaintiff: Justin Voon (Christina Chin with him); M/s Justin Voon Chooi & Wing

For the defendants: Balbir Singh (Daniel Ong with him); M/s K Y Thong & Co

For contemnors: Tan Yan Yong; M/s Ranjit Singh & Yeoh

JUDGMENT**Mohd Sofian Abd Razak J:**

[1] Enclosure 143 is the 1st defendant's application to set aside the Anton Pillar Order (hereinafter called the 'APO') granted by the court on 11 October 2017. The APO was granted pursuant to the plaintiff's application in encl 5 and supported by an affidavit in support in encl 6. The 1st defendant's affidavit in support of encl 143 is in encl 144.

[2] In encl 143, the prayers sought by the 1st defendant are as follows:

- (a) that the time for filing the affidavit in reply and the date fixed for the hearing of this application be abridged,
- (b) that all proceedings be stayed;
- (c) the 1st defendant be granted an extension of time to file this application to set aside the Order dated 11 October 2017 and the consequential order made.
- (d) the Order dated 11 October 2017 be set aside;
- (e) the *ad interim* order dated 23 October 2017 be set aside;
- (f) that the cost of this application be cost in the cause;
- (g) that the court shall make any other order deemed just and fit in the circumstances.

[3] Enclosure 143 accordingly was filed by the 1st defendant as a result of the unilateral withdrawal of encl 79 by the 1st defendant on 19 November 2018 on the mistaken belief that the plaintiff would also withdraw encl 5, ie the application for the APO.



[4] It was the contention of the plaintiff that the re-filing of encl 143 which mirrored in most respect encl 79 is an abuse of court process. By doing so it has certainly delayed the hearing of encl 34 of which a date has been fixed.

[5] The court was of the view that notwithstanding that encl 34 is pending, it has the discretion to hear encl 143 of which the discretion must be exercised judicially. In *Leaway v. Newcastle City Council (No: 2)* [2005] 220 ALR 757 on the right of the contemnor to be heard, it was stated eruditely this way at para 87:

“At the outset, I note that it is not suggested that the discretion that a judge might exercise in deciding not to hear a person in contempt is a completely open ended or unguided one. If it is to be a discretion which is exercised judicially, it needs to be one which aims at achieving an objective or objectives which are able to be stated as a matter of law or to involve a balancing of factors which can be said, as a matter of law, to be ones which are appropriate to take into account for the purpose of exercising that discretion. Only one standard has been invoked, as the objective which is sought to be advanced by sometimes declining to hear someone who is in contempt, by the judges who have favoured it being a matter of discretion whether a person in contempt should be heard. That standard is what is appropriate for the administration of justice.

But it is now recognised that there is no general rule that a court will not hear an application for its own benefit by a person in contempt unless until he has first purged his contempt; so that, in order to avoid the application if that rule the party in contempt must bring himself within some established exception. The approach which the court should adopt is now found in the judgment of Lord Bingham of Cornhill, Chief Justice, in *Arab Monetary Fund v. Hashim and Others* (unreported). After referring to speeches of Lord Bridge of Harwich and Lord Oliver of Aylmerton in *X Ltd v. Morgan-Grampston*, Lord Bingham said this: From those speeches, it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then ask if the instant case falls within an exception to that general rule. It is preferable to ask whether in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt which the court must attach to the prompt and unquestioning observance of court rules.”

[6] The court is of the view that it has the discretion to hear encl 143 filed by the 1st defendant notwithstanding that she has not purged the contempt.

[7] Whether by filing encl 143 is an abuse of court process, although the 1st defendant in its written submission did not address this issue nevertheless, the court was of the considered view that there is no abuse of court process as encl 79 was never heard. The 1st defendant had informed that encl 79 was withdrawn on a mistaken belief that the plaintiff would also withdraw encl 5. For whatever the reasons given for the withdrawal of encl 79, the fact remains that no application to set aside the Order dated 11 October 2017 has been heard and a decision made. Therefore, the court was of the considered view that there is no abuse of court process with the filing of encl 143.



[8] As regards the allegation of delay in filing encl 143 which according to the plaintiff is about 16 months, if one would to consider the date from 18 November 2017 and the filing of encl 143 on 20 March 2019 and 4 months if considered from the date of the withdrawal of encl 79 on 19 November 2018 till 20 March 2019. The facts herein revealed that the 1st defendant had embarked on filing an application to set aside the leave to issue contempt proceeding. It was thought that at the material time the foremost thinking was to set aside the leave granted. It was only that when the application to set aside the leave was not successful that encl 79 was filed and later withdrawn. So taking that as a starting point to determine the delay in filing encl 143. The Court is of the considered view that although the 1st defendant did not specifically address the reasons why she took four months to file encl 143, the justice of the case overrides any other considerations. Therefore, the Court considers the filing of encl 143 rightfully exerts her right in challenging the granting of the APO on 11 October 2017 and there is no prejudice occasioned to the plaintiff by filing encl 143.

[9] In *N-Visio Sdn Bhd v. Horizon Multimedia Sdn Bhd & Ors* [2009] 3 MLRH 637 the court held *inter alia* that subsequent hearing would only follow if the defendant wishes to set aside the *ex parte* order on grounds that it had been improperly granted or that the plaintiff had caused grave prejudice or that it had caused an injustice to the defendant.

[10] As for the merits of the application in encl 143, it has to cross-refer to encl 6 being the affidavit in support to encl 5 which gave rise to the APO dated 11 October 2017.

[11] In an application for an *ex parte* APO the criteria which the plaintiff has to satisfy the court are as follows:

- (a) To disclose an extremely *prima facie* strong arguable case;
- (b) That a refusal to grant the order will have a strong serious effect;
- (c) That it must be established that the defendants have in their possession the relevant documents and /or material being sought for and that there is a real possibility that the defendants may destroy such documents and /or materials before the *inter parte* application could be heard;
- (d) That the plaintiff is required to make full and frank disclosure and;
- (e) That the order should contain the necessary undertaking and safeguards to be complied with upon its execution.

[12] This was set out in *Arthur Anderson & Co v. Interfood Sdn Bhd* [2005] 1 MLRA 375. If any one of those conditions has not been satisfied, then the Court shall not grant the order sought.



Failure To Make Proper Disclosure

[13] In the affidavit in support of encl 5, the plaintiff states that it has a strong case in that the plaintiff owns proprietary information which consisted of:

- (i) technical specifications and 'know-how';
- (ii) design ownership; and
- (iii) profit and loss, business channels, distribution networks, customers list, suppliers and pricing of products.

[14] In the same affidavit in support, the plaintiff further avers that:

- (i) The 1st defendant is bound by her letter of employment dated 1 November 2007;
- (ii) The 1st defendant resigned on 10 October 2016 by giving a letter dated 6 October 2016 to the plaintiff;
- (iii) The 1st defendant had a one-month notice period which the plaintiff never waived.;
- (iv) During this period while still in employment, the 1st defendant breached her contract of employment by setting up her company, the 3rd defendant and committed all matters which form the basis of the plaintiff's 'very strong case' against the defendants.

[15] It is the case for the defendants that the plaintiff has failed to disclose to the Court that the so called exclusive technical knowledge is common in the market place and derived from expired patents and designs held by the 3rd parties. They had never sold or tried to sell the plaintiff's unique product called the 'T-Glide filing system'. At all material times as employee, the 1st defendant was under strict instructions to push only the plaintiff's file products, which were manufactured by a related company of Jonathan Bong; it was a very limited product list designed to support the plaintiff's own so called design and products which were very limited. There was very limited or no customisation offered by the plaintiff. There may be some superficial overlap but the defendants were not selling the plaintiff's type or brand products specifically. The defendants basically customised the customers' needs with what was available in the market place.

[16] The plaintiff has also failed to disclose that the so called customer list is available by a search on Google office furniture exhibitions and trade fairs where the plaintiff's so called 'exclusive customers' would be looking for alternatives, to not just the plaintiff's products but alternative to whatever the customer is currently using where the defendants currently were marketing to a large number of customers by identifying new products and design entering the market place.



[17] The defendants have never infringed the plaintiff's intellectual property nor is the claim hinged on that because other than some trademarks, the plaintiff was itself utilising other parties' design and/or parties' design and intellectual property without licence.

[18] The plaintiff failed to disclose that it had expressly waived the notice period that the 1st defendant was required to serve. The so called 'strong allegation' that the 1st defendant whilst in the employment of the plaintiff had set up a company and engaged to sell the competitors' product as contended is probably wrong. The defendants probably at least have a strong arguable case that the actions undertaken by the 1st defendant was not while she was still an employee.

[19] The plaintiff failed to draw the court's attention that the defendants were entitled to rely on s 28 Contracts Act 1950 which states: - "Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void."

[20] The plaintiff has failed to show that there was any breach of confidential information by the 1st defendant but merely relied on the restraint of trade clause in the employment contract to allege breach of conduct by the defendants. All facts submitted by the plaintiff are relating to restraint of trade but not breach of confidential information. What the plaintiff seeks is the defendants not to compete with the plaintiff.

[21] The plaintiff failed to disclose that the address the plaintiff sought to search was not the 3rd defendant's place of business. It was not an address the defendants had control over. The defendants at all material times operated from B3-1-1, Solaris Dutamas, No: 1 Jalan Dutamas, Kuala Lumpur. At no time did the defendants maintain an address at B1-3-3A, Solaris Dutamas No:1 Jalan Dutamas, Kuala Lumpur was its place of its business or a place it had control over. The plaintiff was aware of the business address of Fortisco Sdn Bhd and the plaintiff had ceased dealing with Fortisco Sdn Bhd before the 1st defendant left the employment of the plaintiff.

[22] The address stated in the APO is the address of Fortisco Sdn Bhd which had fallen out with the plaintiff and was no longer dealing with the plaintiff. However, it was alleged by the defendants that the plaintiff had also sold products of Fortisco from time to time.

[23] The plaintiff had stated that the 1st defendant operated the 3rd defendant while she was still an employee however the plaintiff failed to disclose that the plaintiff had waived the notice period and that the 1st defendant's employment came to an end on 10 October 2016.

[24] The letter of resignation of the 1st defendant dated 6 October 2016 states as follows:



“I would like to inform you that I am resigning from my position as Sales Manager from FILEforce Sdn Bhd 1 month effective from October 10, 2016.”

[25] The reply by the plaintiff *inter alia* states:

“With reference to your emailed dated 6 October 2016, we acknowledge receipt of your resignation letter dated 10 October 2016 and respectfully accept your resignation.

In accordance with your contract of employment the notice period is 30 days starting 10 October 2016. However, we agree to waive the notice period and will pay you in full for the 30 days, plus any utilized days of annual leave prorated up to 8 November 2016.”

[26] It was alleged by the 1st defendant that in the affidavit in support of encl 5, this waiver of contractual notice was disclosed. This according to the 1st defendant is a critical and material non-disclosure because it was the stand of the plaintiff that the 1st defendant operated the 3rd defendant while still in the employment of the plaintiff. The 1st defendant bought the shelf company after she left the employment of the plaintiff.

[27] The APO does not contain the necessary safeguard to be complied with upon execution.

[28] The handphone and laptop were to be surrendered to the plaintiff’s representative and not to a third party who would search the handphone and laptop for the appropriate information.

[29] The plaintiff did not arrange for the necessary software to duplicate the data.

[30] The plaintiff did not make any attempt to search the 3rd defendant’s office which would be where the 1st and 3rd defendants kept the records. The plaintiff avers that the 3rd defendant’s office is a virtual office and was always locked.

[31] The plaintiff obtained the APO by asserting that the defendants’ business address was B1-3-3A and the court order was directed to that address.

[32] The discovery of the defendants’ dealing with Sunway was on 29 November 2016. The plaintiff’s agent provocateur contacted the 1st defendant on 19 July 2017 and the 1st defendant responded on 20 July 2017 but the APO was only obtained on 11 October 2017 if there was an imminent danger requiring a APO.

[33] The alternative submission by the defendant was that the same information could have been obtained by normal discovery or from the market place where the defendant was a competitor of the plaintiff. The APO was obtained after three months of planning with the agent provocateur and 11 months after knowing that the defendants were dealing with Sunway.



[34] The APO was for a collateral purpose to cause an embarrassment and irreparable damage to the defendants.

The Plaintiff's Reply Submission

[35] The plaintiff avers that the application in encl 143 was made out of time and no cogent reasons are given for the delay in filing. The conduct of the defendants shows bad faith and lack of candour in an attempt to delay the proceedings. The defendants have deliberately disobeyed and disregard the *ex parte* APO granted by court.

[36] It was the contention of the plaintiff that in essence the defendants are not challenging the prerequisite in granting the *ex parte* APO but raise issues on the purported non-disclosure of material facts by the plaintiff. It is also the contention of the plaintiff that it was successful in showing that all material disclosure had been made before the court and that the encl 143 should be dismissed. The plaintiff acknowledges the power of Court to set aside the *ex parte* APO if the plaintiff failed to disclose a material fact in applying the *ex parte* APO.

[37] As regard the non-disclosure of the address of premises, B1-3-3A is the business premises of Fortisco whereas the 1st defendant stated that the business address was at B3-1-1.

[38] As to the averment that the plaintiff has misled the court with regard to the address, it was clearly shown that the plaintiff in its AIS for encl 5 had explained to the court that the premises is believed to be the address used by Fortisco and is also a showroom for the 1st defendant. This address was given by the 1st defendant herself, the agent provocateur. An investigation into the address at B3-1-1 showed that it was a virtual office shared by others. In this regard the plaintiff avers that the court was appraised of the facts before granting the *ex parte* APO.

[39] On the issue of the *ex parte* APO was used purportedly to obtain 'important information' from Fortisco and the 1st defendant was a victim of competition between the plaintiff and Fortisco, it is baseless.

[40] The plaintiff avers that Fortisco was appointed by the plaintiff to build racks and cabinets to produce plaintiff's products and since the 'important information' belongs to Fortisco and not the 1st defendant there is no reason for the plaintiff to extract 'important information' from its supplier, Fortisco.

[41] As such the proper party to bring up that issue would be Fortisco and not the 1st defendant.

[42] As for the alleged mistaken address of the 3rd defendant that it is located in the said premises instead of the said address of B3-1-1 which is the actual address of the 3rd defendant, it was a clerical mistake when one refers to the address stated in the SOC which mentioned B3-1-1 as the business address of



the 3rd defendant. There was no intention of misleading the Court. It was a genuine mistake.

[43] As for allegation that the *ex parte* APO was contrary to the Contracts Act and Federal Constitution, it was contended that the *ex parte* APO was a restraint of trade to prevent the 1st defendant from venturing into similar trade to the plaintiff. On this issue the plaintiff avers that the *ex parte* APO was to restrain the defendants from using, distributing and disclosing the plaintiff's proprietary information obtained by the 1st defendant through her employment with the plaintiff. It was the contention of plaintiff that the 1st defendant owes a contractual duty not to divulge any trade secret and proprietary information of the plaintiff.

[44] The plaintiff is restraining the 1st defendant from using, distributing and disclosing the proprietary information of the plaintiff and not to prevent the 1st defendant from venturing into trade similar to the plaintiff's industry. There has been no non-disclosure of material facts when applying for the *ex parte* APO and it prays that encl 143 is dismissed with cost.

Observation And Decision Of The Court

[45] The APO is said to be a draconian order granted by the court upon the balance of undertakings by the applicant (plaintiff) and upon specific terms and conditions. Those terms and conditions cannot be ignored or left for subsequent compliance at will. It is an invasion of privacy capable of abuse by competitors in business or other activity where there is competition. Unless the applicant can satisfy the Court that all the conditions for applying for an APO are met, the application should be refused.

[46] In an application for an *ex parte* APO the criteria which the plaintiff has to satisfy the court are as follows:

- (a) to disclose an extremely *prima facie* strong arguable case;
- (b) That a refusal to grant the order will have a strong serious effect;
- (c) That it must be established that the defendants have in their possession the relevant documents and/or material being sought for and that there is a real possibility that the defendants may destroy such documents and/or materials before the *inter parte* application could be heard;
- (d) That the plaintiff is required to make full and frank disclosure and;
- (e) That the order should contain the necessary undertaking and safeguards to be complied with upon its execution.



[47] It is the 1st defendant's case that the plaintiff has not make a full and frank disclosure when applying for the APO. Those so called non-disclosure that learned counsel referred to is stated in the written submission at paras 6.1 to 6.5 and the court does not propose to repeat them. Suffice for the Court to refer to them when necessary.

[48] Among the reasons for the APO application by the plaintiff was the averment that the 1st defendant whilst in the employment of the plaintiff had been in contact with the customers of the plaintiff giving quotations for products which the plaintiff were selling. In this respect the plaintiff in its affidavit in support of encl 5 in para 34 of encl 6 states that the quotation of the 3rd defendant and the plaintiff bears similarity. The quotation by the 3rd defendant was dated 3 November 2016. The 1st defendant was to join the 3rd defendant after her employment with the plaintiff ended on 8 November 2016.

[49] In this regard the customer of the 3rd defendant was Sunway who happened to be the customer of the plaintiff when the 1st defendant was still in the employment of the plaintiff.

[50] On 1 December 2016 Sunway informed the plaintiff that it had given the supply contract to another supplier namely the 1st and 3rd defendants.

[51] Learned counsel for the 1st defendant on the other hand argued that the products that the 1st and 3rd defendants had supplied to their customers were already in the marketplace and there was exclusivity about the product. It was further contended that to restraint the 1st defendant from engaging in similar trade as the plaintiff would be in breach of s 28 of the Contracts Act 1950 and any form of restriction imposed is void.

[52] The Court has looked at the contract of employment between the 1st defendant and the plaintiff in exh 'J5'. There is a clause on Conflict of Interest and Confidentiality which states *inter alia* that "while you are in the employment of the company, you should not divulge to any person whatsoever or make use of any trade secret or any confidential information concerning the business or finances of the Company ... of its suppliers agents distributors or customers."

[53] The court was of the view that it is quite clear that while in the employment of the plaintiff, the 1st defendant is strictly forbidden to divulge any information or trade secret to its customers. In this context Sunway was previously the customer of the plaintiff and has since switched to the 1st and 3rd defendants as their supplier. In this respect, the court agrees that the plaintiff has shown to the court that it has satisfied the court in its *ex parte* application for the APO.

[54] The court having perused the affidavit in support in encl 6 was of the view that there was no non-disclosure made judging from the 2 volumes of affidavit in support filed.



[55] On the other issues raised by learned counsel for the 1st defendant, the court was of the view that from the facts presented, there exists a strong arguable case.

[56] In conclusion after perusing encls 5 and 6 and after reading encls 143 and 144 and the written submission filed and hearing further oral submission, the court found that there are no merits in the application by the 1st defendant. Enclosure 143 is dismissed with cost of RM3,000 and 4% allocatur.

[57] Case management for encl 1 and hearing of encl 34 is fixed on 8 November 2019 at 3.00 pm.

