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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 26 March 2013

BEFORE:

HIS HONOUR JUDGE SEYMOUR QC
(Sitting as a Judge of the High Court)

- - - - - -

BETWEEN:

ADAMS & MOORE LIMITED

Applicant

- and -

EGBERT JOHNSON

Respondent

- - - - - -

MR CHRIS BRYDEN appeared on behalf of the Applicant

MR RICHARD ALOMO (instructed by Anthony Ogunfeibo & Co) appeared on behalf of the Respondent

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Approved Judgment

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(Official Shorthand Writers to the Court)

Tuesday, 26 March 2013

JUDGE SEYMOUR:

1. The claimant in this action is Adams & Moore Limited. The defendants are first, Mr Egbert Johnson, and, secondly, a company, E Johnson & Associates Limited.

2. Mr Johnson was employed as a production manager by the claimant, Adams & Moore Limited, as from 12 October 2009. He entered into a contract in writing which took the form, first, of a document entitled "Statement of Main Terms of Employment", which both he and someone on behalf of the claimant signed on 8 October 2009, and, secondly, Mr Johnson and Mr Bhanot on behalf of the claimant signed also on 8 October 2009 a document headed "Restrictive Covenant Agreement". The Restricted Covenant Agreement included at clause 1(1)(a), under the rubric "non-solicitation and non-dealing covenants of existing clients":

> "The employee shall not, during the period of 12 months after the date of termination of his/her employment with the company, directly or indirectly on his/her account or on behalf of or in conjunction with any person, firm, company or other organisation or entity, either -
>
> (a) conduct restricted business; or
>
> (b) canvass or solicit or by any other means seek to conduct restricted business with any restricted client with whom the employee shall have had material dealings in the course of his/her duties during the relevant period." [Quote unchecked]

3. The expressions "restricted business", "restricted client" and "relevant period" were all defined expressions. The definitions were as follows:

> "'Restricted business' shall mean any business or activity carried on by the company at any time during the relevant period and in which the employee shall have been concerned during the relevant period.
>
> 'Restricted client' shall mean any person, firm or company or other organisation or entity who was at any time in the relevant period a client of the company.
>
> 'Relevant period' shall mean the 12 month period preceding the date of termination of the employee's employment with the company ending on that date."

[Quote unchecked]

4. The contract of employment between the claimant and Mr Johnson came to an end in circumstances set out in a letter dated 1 March 2012 written on behalf of the claimant by Mr Ranjiv Bhanot. The letter said this:

> "Dear Egbert
>
> Further to our meeting of today's date, this is to confirm that your employment with Adams & Moore has been terminated with immediate effect. Any remaining holidays will be paid to you with your final salary at the end of March. Your payslip and P45 will also be issued in due course. I would like to take this opportunity to thank you for your contribution to date and wish you all the best for the future. If you wish to discuss anything further with me, please do let me know." [Quote unchecked]

5. It was not suggested to me at the hearing of the present application that the letter which I have just read was not a genuine letter or that its intended effect was something other than that which was stated in it. On that basis, if there were nothing more to be said, it would be plain that the covenant in the restrictive covenant agreement which I have read out would have expired on 28 February 2013 and, as today is 26 March, it would follow that there was not any possibility of it being seriously suggested that Mr Johnson was still subject to the restrictive covenant in question.

6. However, what was said by Mr Bhanot in his first witness statement prepared for the purposes of the application now before me, which was made on 27 February 2013, at paragraph 6 was this:

> "As part of the move from the claimant to Adams & Moore (Audit) Limited it was agreed between the claimant and the first defendant that the latter would enter into a new contract with Adams & Moore (Audit) Limited and would cease to be employed by the claimant. For the reasons that I will come on to shortly in this witness statement, this was, in effect, a technicality and the claimant continued to work for and be paid by the claimant." [Quote unchecked]

7. Mr Bhanot's explanation in paragraph 6 of his first witness statement did not suggest that Mr Johnson's employment had not come to an end, indeed it actually confirmed that Mr Johnson's employment by the claimant came to an end as a result of the agreement recorded in the letter of 1 March 2012. What Mr Bhanot went on to explain in his first witness statement, and to elaborate in his second witness statement which was made on 23 March of this year (so

yesterday), was that actually, after Mr Johnson became, as it is common ground that he did, a director and the sole employee of Adams & Moore (Audit) Limited, he continued to perform work for the claimant and, in the course of performing that work, to use the stationery of the claimant and to sign letters describing himself as Finance Manager. He continued to be paid, it seems, some amounts of money, at any rate, by the claimant and, in due course, an HM Revenue & Customs P45 form was produced in which it was recorded on the face of it that the claimant was employer of Mr Johnson.

8. No explanation was given in any witness statement put before me of the documents to which I have just referred, beyond an assertion by Mr Bhanot that Mr Johnson continued as an employee of the claimant. The documents which I have mentioned are certainly consistent with there having been an agreement between the claimant and Mr Johnson subsequent to the letter of 1 March 2012 that Mr Johnson should enter into a new contract of employment with the claimant.

9. However, what was wholly unclear from the material which was put before me was what were the terms of any such new contract of employment. Mr Chris Bryden, who appeared on behalf of the claimant, submitted that I should infer that the terms of the new contract were the same as the terms of the old contract. But in my judgment, there is no justification for that inference. The evidence before me was simply entirely silent as to whether there had been any new contract of employment and, if so, upon what terms.

10. What actually happened, as Mr Johnson continued to do work for the claimants, is that he became involved with a number of other representatives of the claimant in undertaking some work for a company which traded as Kirilov Accounting, but which I think was actually formally called Georgi Kirilov Limited. It was common ground, as I understood it, that prior to about June or July 2012, Kirilov Accounting had referred to the claimant clients who desired services of an accounting nature which Kirilov Accounting was not itself able to provide. However, in his first witness statement, at paragraph 9, Mr Bhanot explained the circumstances in which a different relationship arose between the claimant and Kirilov Accounting. He said this:

> "In early 2012, Kirilov Accounting was investigated by HMRC. Kirilov Accounting then approached the claimant for assistance and a number of employees were formed into a team tasked with proposing and implementing a solution. These included Hakeem Adeleye, Gori Olusina Daniel and the first defendant. The first defendant was to deal with HMRC and provide support to Kirilov Accounting by assisting with implementing new processes and procedures to the satisfaction of HMRC. He was also tasked with the research and assessment of the options open to Kirilov Accounting." [Quote unchecked]

The anticipated benefits to the claimant of this new relationship with Kirilov Accounting Mr Bhanot explained at paragraph 10 of his first witness statement:

> "The first defendant reported back his findings by email dated 23 July 2012 and continued to work closely with the team to prepare a solution for Kirilov Accounting. The plan devised by the team involved a member of our staff, the intention being that it be the first defendant in effect being seconded to Kirilov Accounting to supervise the implementation of the solution. That member of staff would be based in their offices for between three and four days a week with Kirilov Accounting then outsourcing to us trial accounts for us to prepare returns for HMRC. Kirilov Accounting would pay us £51,300 per annum for advisory services rendered at an operational level, £92,000 per annum for the processing the outsourced accounts work, £20,000 per annum for processing the outsourced tax return work, £18,000 per annum for the claimant to manage the project in its entirety and a share of the profit of the whole project which would not be less than £15,000 per annum. These recurring annual fees were meant to be paid over five years." [Quote unchecked]

11. In a witness statement which he made on 19 July for the purposes of the application presently before me, Mr Kirilov explained that the sums which had been discussed with the claimant seemed to him to be excessive and unsustainable and would lead to the termination of his business. In those circumstances, he says, he became interested in selling his business.

12. Mr Johnson on 10 September 2012, wrote a letter under the rubric "Letter of resignation", addressed to the partners, Adams & Moore Limited and Adams & Moore (Audit) Limited in which he said this:

> "I wish to formally tender my letter of resignation from my current post. My main reason for resigning from my post is that the post of accounts manager does seem to have vanished or merged with another post that someone else is responsible for. My terms of employment do indicate a week's notice of termination. I will very much hope to extend that to the end of the month, making my last day at work Friday, 28 September 2012 provided that is convenient for the firm.
>
> As previously agreed, I wish to transfer my shareholdings in Adams & Moore (Audit) Limited at the earliest convenience within this period." [Quote unchecked]

13. Mr Johnson was in fact the majority shareholder, as I understand it, in Adams & Moore (Audit) Limited. That company was not a wholly-owned subsidiary or a controlled subsidiary of the claimant. What actually happened is that Mr Johnson caused the second defendant company to be incorporated on 10 September 2012 and that company then merged with Georgi Kirilov Limited and took over the business of Kirilov Accounting.

14. In those circumstances, the application which is now before me was issued on behalf of the claimant. It was issued on 1 March of this year, and sought what was described at section 3 of the application notice as "an injunction in the form of the attached draft (1) restraining the first defendant from breaching the post-termination obligations in his contract of employment (2) restraining the second defendant from inducing the first defendant to breach his said obligations". It is not necessary, I think, for the purposes of this judgment to refer to the draft order. The Claim Form in this action was issued on 1 March also.

15. The application for an injunction came first before Supperstone J on 13 March 2013 and on that occasion Supperstone J directed that the hearing be adjourned to today, and so it was that the application has come on for hearing before me.

16. The application for injunctions was resisted on behalf of the defendants, who were represented by Mr Richard Alomo. One of the important questions which arose on the hearing of this application was whether there was demonstrated on the material put before me a serious issue to be tried as between the claimant and the defendants. That issue arose because, for the reasons which I have already explained, the contract of employment which included the covenants which it was sought to enforce had been terminated with immediate effect on 1 March 2012, and so the 12 month period during which the restrictive covenant was effective had expired by the time of the hearing before me.

17. Mr Bryden submitted that I should infer that the terminated employment somehow had not been terminated as a result of what was set out in the letter of 1 March 2012, so that the contract of employment originally made in October 2009 continued in effect; alternatively, that I should infer that in some way a new contract of employment had been made which incorporated the restrictive covenant which was agreed in the contract of employment signed in October 2009.

18. With great respect to Mr Bryden, those submissions seem to me to be wholly unsustainable. It is obvious, indeed it was not in dispute so far as the evidence before me went, that the original contract of employment was terminated on 1 March 2012. It may well be that thereafter in some way a new contract of employment on some terms was made between the claimant and Mr Johnson. As I have indicated, there is evidence which is consistent with that analysis which has been put before me. However, not a scrap of the evidence which was put before me indicated the terms upon which any new contract of employment had been agreed, and in particular there was no evidence that a

new contract of employment incorporated any restrictive covenants, and in particular not the ones that had been agreed in October 2009.

19. In those circumstances, I am not satisfied that there is a serious question to be tried as between the parties before me and on that ground, the application fails and is dismissed.

20. If I had come to a different conclusion, it would have been necessary for me to consider whether damages would be an adequate remedy for the matters complained of. The material before me demonstrates, in my judgment, that damages would certainly be an adequate remedy for the matters complained of. What is complained of is, in effect, that Mr Johnson, through his company (the second defendant) has taken from the claimant the business of Kirilov Accounting. There is no evidence before me to indicate that Mr Johnson has attempted to infringe the restrictive covenant which I have read, assuming that otherwise to be valid and continuing to be enforceable, in any way other than by taking the business of Kirilov Accounting. The worth of that business going forward Mr Bhanot explained in paragraph 10 of his first witness statement, which I have read, and in those circumstances, it is manifest, as it seems to me that what the claimant has lost as a result of Mr Johnson, in effect, taking over the business of Kirilov Accounting, is simply what, but for that happening, Kirilov Accounting would have paid to the claimant going forward.

21. There is no justification, in my judgment, for supposing that damages would not be an adequate remedy, if otherwise the restrictive covenant sought to be enforced was enforceable.

22. Had I come to a different conclusion on that point, it would then have been necessary for me to consider the balance of convenience. This application is made very late. Assuming that the submission of Mr Bryden were correct and that the covenant that was sought to be enforced was enforceable until 9 September 2013, more than half of the period defined as the "relevant period" in the covenants sought to be enforced has already elapsed. In his second witness statement Mr Bhanot contended that the claimant was unaware of Mr Johnson's involvement in taking over the business of Kirilov Accounting until December 2012. He deals with the matter rather vaguely in paragraph 22 of his second witness statement, but he says:

> "I confirm that it did come to our attention in mid/late December 2012 that the first defendant appeared to be in breach of his covenants." [Quote unchecked]

23. So mid/late December 2012, rather unhappily, seems to cover a period, perhaps, of two weeks which, in the circumstances of the present case, is an unfortunately wide period.

24. Mr Bhanot went on in paragraph 22 of his second witness statement:

> "However, January is an incredibly busy time for businesses such as ours with the need for tax returns to be filed prior to the deadline at the end of that month. We simply did not have time to carry out the investigations required to satisfy ourselves of the position. We carried out those investigations in February 2013 and approached legal advisers on an initial basis in late January to take advice as to our position and possible remedies. I therefore respectfully submit that we acted as promptly as could be expected of a firm of the size of the claimant given the particular pressures in January in relation to our business." [Quote unchecked]

25. An injunction is a discretionary remedy and it is an equitable remedy. It is appropriate for someone seeking an injunction to seek it promptly. It is, as I have emphasised, particularly unfortunate that Mr Bhanot was not more precise in indicating in his second witness statement when exactly it was that the claimant became aware that Mr Johnson had taken over the business of Kirilov Accounting.

26. What is quite obvious is that, once the claimants had become aware of that, they knew all they needed to know in order to make the application which is presently before the court. Consequently, as it seems to me, there is no possible justification for the long delay which then ensued before the application which is now before me was made which, as I have said, was on 1 March. That, as it seems to me, would be a material consideration for me to take into account on the balance of convenience. It would also be material for me to take into account, I think, that what Mr Johnson has done is to agree to provide, in effect, for Kirilov Accounting new services which had not been provided by the claimant to Kirilov Accounting until, on any basis, the summer of last year, and that what has happened has meant that the business of the second defendant cannot now conveniently be separated from the business formerly carried on by Kirilov Accounting. It was suggested by Mr Bryden that, while it may be that the reality is that any injunction against the second defendant should not prevent it from continuing to service the existing clients of Kirilov Accounting which it has taken over, that does not mean that Mr Johnson needs to be concerned in that business.

27. It is plain from the witness statement of Mr Kirilov and the witness statement of Mr Johnson that it is, as it seems to me, unrealistic to expect the business of the second defendant to be viable without the personal contribution of Mr Johnson to the continuing organisation and management of the business. The effect of granting an injunction against the first defendant on the material put before me would, I think, be to bring an end to the business of the second defendant incorporating the business of Kirilov Accounting. That also, in my judgment, is a material matter for me to take into account on the balance of convenience, were it necessary to consider the balance of convenience.

28. Consequently, had it been necessary for me to consider the balance of

convenience, my conclusion would have been, because of the lateness of the making of the application and the consequences, not only for Mr Johnson and the second defendant, but also for innocent third party clients of Kirilov Accounting, that the balance of convenience favoured the defendants and not the claimant.

29. I think it is appropriate for me also to record that I take into account on the balance of convenience that, although at paragraph 21 of his first witness statement Mr Bhanot said:

> "I have been made aware that the claimant has obligations in connection with this application to undertake to compensate the defendants if it is subsequently determined that the claimant was not entitled to the relief sought, I am authorised to give the appropriate undertaking on behalf of the claimant and I confirm that the claimant has sufficient resources to meet any such liability." [Quote unchecked],

no evidence as to the resources of the claimant has been put before me, and in particular there has not been put before me the latest filed accounts, as one would ordinarily expect.

30. For all of those reasons, this application fails and is dismissed.

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