

***Independent Corporate Services Ltd v. Stevens* [2002] WASC 280 (Roberts-Smith J, 26 November 2002)**

Confidential Information - Employment — business in competition with former employer — fiduciary duty — fidelity — acts preparatory to establishing business — whether breaches of duty to employer — whether knowledge of customer lists, billing cycle and fees confidential information — canvassing of customers of former employer — whether breach of duty — interlocutory injunction — contract of employment — implied terms of fidelity and confidentiality — whether use of confidential information to canvass customers of former employer — evidence — whether serious question to be tried

The application

This was an application for an interlocutory injunction seeking to restrain the defendant (“Stevens”), from soliciting clients of the plaintiff (“Independent”) and further seeking that Stevens provide details of Independent’s clients with whom Stevens had had contact since he ceased employment with Independent.

Issues

Independent was for over 20 years in the business of incorporating shelf companies, establishing and administering superannuation funds, conducting corporate and credit searches and providing corporate registry services. Independent alleged that Stevens was employed for approximately 10 years as the manager of the Corporate Registry Division. Independent said this position was one of trust, with significant power, control and responsibility, which allowed Stevens to have access to information such as the client database, information relating to the business and the records of the companies serviced by Independent.

Independent alleged that such information was confidential and that by reason of his position with Independent he was bound by express or implied obligations of confidence and fidelity. Specifically, Independent alleged that Stevens directly approached at least two of their clients while he was still in their employ telling them that he intended to leave and establish his own corporate registry business and soliciting their custom.

Stevens said that he did not deliberately memorise Independent’s client database before he left the employ nor take Independent’s information with him in electronic or any other form. Further, he denied the confidentiality of the information such as Independent’s pricing policy was common knowledge, as it was contained in brochures detailing the plaintiff’s services and charges, which had been sent to potential clients and appeared on its website.

Whilst, he admitted telephoning Independent’s clients, this was done from knowledge he acquired from the years of working for Independent rather than from a conscious effort to memorise the information.

Result

His Honour found there was no evidence giving rise to an inference that the defendant deliberately memorised the plaintiff's list of existing clients.

In relation to the evidence that conversations with certain clients established that Stevens was soliciting clients for his proposed new business, the court was of the view that the evidence of Independent was incapable of establishing what it purported to assert. The expression of a belief by the managing director of Independent that Stevens spoke to the clients with such purpose was not evidence of the fact.

His Honour, applied the decision in *Faccenda Chicken Ltd v. Fowler* [1986] All ER 617 to determine that in the absence of an express term in the contract of employment, Stevens could as an ex-employee canvass clients of his former employer as a general proposition.

There was also no evidence past a mere assertion, that Stevens used secret or confidential information of Independent following his departure. Certain evidence of witnesses relied upon by Independent were hearsay.

In short, the court found that the evidence fell short of proving Stevens did anything wrongfully during his employment or in the course of preparing to compete with Independent.

Accordingly, there was no serious question to be tried. The balance of convenience necessitated an examination of the strengths and weaknesses of Independent's case. Such an examination revealed in his Honour's view a serious weakness in Independent's case.

Accordingly, the interlocutory injunction was refused.

Injunctions

As a practical guide, his Honour set out in simple and comprehensive terms the principles that must be addressed if someone seeks an interlocutory injunction. These were:

1. There must be a serious question to be tried;
2. If there was a serious question to be tried, an injunction would not be granted if common law damages were an adequate remedy;
3. If there was a serious question to be tried and damages would not be an adequate remedy, the court had to consider whether the balance of convenience lay in favour of granting or refusing the relief sought;
4. When considering the balance of convenience, the relative strengths and weaknesses of the applicant's case may be taken into account;
5. The court should not try to determine factual conflicts arising from the material nor should difficult questions of law be determined (Owen J in *Mott v Mount Edon Gold Mines* (1994) 12 ACLC 319 at 321; see also

American Cyanamid Co v Ethicon [1975] AC 396 at 407; *Castlemaine Tooheys Ltd v State of South Australia* (1986) 161 CLR 148).