

Between

WENDY LU AI SWAN

....Appellant

And

FREME TRAVEL SERVICES SDN BHD

....Respondent

**(High Court of Brunei Darussalam)
(Civil Appeal No. 9 of 2005)**

Headnote:.....

Coram: Cons, P; Power and Mortimer, J.JA.

Date of Hearing:

Date of Judgment:

Power, JA.:

The Appellant, Wendy Lu Ai Swan, entered into a contract of employment with the Respondent, Freme Travel Services Sdn Bhd on the 8th July 1996. This contract is evidenced by a letter signed by the Appellant and Michael L.P.Lee (Mr. Lee) the Managing Director of the Respondent.

The Appellant states that the Appellant is to be employed as a Travel Consultant and says, inter alia, *“All business transactions in our office(s) are strictly confidential and no member of the staff is permitted to divulge any travel information of clients or company trade practices to any outside persons or airlines. Such acts of disloyalty will result in immediate dismissal.....”*

The letter goes on: *“I also covenant not to engage in any other occupation or business during the term of my employment but will devote my time and abilities to*

furthering the interest of Freme Travel Services” . On the same day the Appellant signed a “Non-Compete and Confidentiality Agreement” which stated:

“I, WENDY LU AI SWAN, hereby covenant with FREME TRAVEL SERVICES SDN BHD in Brunei that I will not disclose or use any confidential information relating to FREME TRAVEL SERVICES concerning any business practices and affairs, trade and customer information of which it has become possessed while an employee of FREME TRAVEL SERVICES and which is not within the public domain to any competitor or any outside third parties at any time. I also covenant not to aid any individual or business that is a competitor or potential competitor to FREME TRAVEL SERVICES SDN BHD”

The Appellant in due course became a Travel Manager with the Respondent. On 15th April 2004 she tendered her resignation giving 2 months notice to expire on 10th June 2004.

In an affidavit dated 28th August 2004 in support of an ex parte application for an interlocutory injunction Mr. Lee said that when the Appellant tendered her resignation she told him that she was leaving in order to join her husband in Bangkok but that he later found that she had joined a competitor, Southern Cross Travel (S.T.C.) in Seria.

Set out below are Mr. Lee’s principal complaints which were based upon information which he had received:

- i) That the Appellant on 9th June 2004, the day before she left the Respondent’s employment *“informed the central booking system called “ABACUS” that certain clients of the Plaintiffs, who had made their booking through the Plaintiffs, had requested that their booking be transferred and their tickets be issued by Southern Cross Travel. As a*

result of this the Plaintiffs lost the said bookings and the commission that they would have earned from these bookings”

- ii) That there has been a dramatic fall in sales with reference to 15 named clients subsequent to the Appellant leaving the Respondent and that these former clients are now purchasing their tickets through the Appellant from S.T.C.
- iii) That on 10th January 2004 a long time employee of the Respondent was approached by the Appellant and one William Tay, who was at that time General Manager of the Respondent, to leave employment with the Respondent and to join them at S.T.C.
- iv) That other members of the Respondent’s staff had been similarly approached.
- v) That the Appellant had been making photocopies of the Respondent’s brochures and customer information since early 2004 and had been cultivating customer relationship with a view to using the same when she left the Respondent’s employment.

He stated that because of these matters the Respondent had suffered and was suffering damage and sought an immediate interlocutory injunction.

On 28th August 2004 after an ex parte hearing Hayati J. granted that application ordering that the Appellant be restrained from:

- (i) “further committing the tort of wrongful interference with the contract of employment of the Plaintiffs’ members of staff” until trial.

- (ii) “further committing the tort of wrongful interference in contractual relations involving or in relation to the Plaintiff” until trial.
- (iii) “tampering, amending, varying, changing, modifying and/or doctoring any communication in any form whatsoever from the Plaintiffs or involving the Plaintiffs”

Hayati J. further ordered that the Appellant “*disclose the information with regards to the list of clients that she has contacted, within 7 days from the date the injunction granted is served on*” her.

The order concluded by setting out the usual provision that a person failing to comply may be held in contempt of court and liable to imprisonment.

A return date for an inter partes hearing was fixed for 16th September 2004 at 2.00 pm.

On 16th September the Appellant’s counsel was granted a further 7 days to file the affidavit.

On 22nd September the Appellant’s affidavit was filed.

Before dealing with that affidavit I return to the disclosure order in the interlocutory injunction. In the context of this matter it is difficult to understand how it could be suggested that it orders anything other than disclosure of a list of the clients whom the Appellant had contacted since leaving the employment of the Respondent.

The relevant paragraphs of the Appellant’s affidavit are as follows:

“(2) I refer to paragraph 5 of the Order obtained by the Plaintiff herein requiring me to provide a list of the customers whom I allegedly contacted

whilst in the employ of the Plaintiff and make this affidavit in protest for the reason hereinafter set out.

- (3) I am advised by my Solicitors that there has not been a full and proper determination of the issue as to my liability with regard to the issue of the disclosure of the alleged confidential information or the customers whom I allegedly contacted to divulge the alleged information, when both parties would have had the opportunity of fully arguing this issue.
- (4) I am advised that until such an issue is fully argued by both parties at any inter-partes hearing or a trial proper, my liability in this regard has not been established. I am therefore not liable to respond to the requirement set out in paragraph 5 of the Order.
- (5) If which is denied, I am liable to provide the list of customers as alleged, I deny that whilst in the employ of the Plaintiff, I contacted the customers as alleged by the Plaintiff or indeed any customers or that I made any efforts to solicit or to direct such customers to Southern Cross Travel (SCT).”

Paragraphs (2) and (5) contain what might well be argued is a deliberate misunderstanding of the Order i.e. a suggestion that she was being ordered to provide a list of clients she had contacted “whilst in the employ of the Plaintiff...”. However that may be, paragraphs (3) and (4) contain matters of much more serious moment. Put shortly she there states that her solicitor has advised her that until there is an inter partes hearing she is entitled to defy the order of the court.

On 5th October 2004 the Appellant filed a further affirmation. It dealt with the matters raised in Mr. Lee’s affidavit and with the matters pleaded in the Respondent’s statement of claim filed on 28th August 2004. It denied any breach of orders (i), (ii) and (iii) of the interlocutory injunction but made no further mention of the failure to comply with the order to provide a list of clients.

On 23rd October 2004 the Respondent made an application for leave for an Order of Committal under section 52 Rule 2(2) of the Rules of the Supreme Court supported by a further affidavit from Mr. Lee. He alleges therein that the Appellant:

- (a) Has failed to disclose the list of her clients.
- (b) Has aided the business of a competitor.
- (c) Has contacted and induced the Respondent's clients.
- (d) Has tampered, amended, varied, chanced, modified and or doctored by tampering and doctoring a letter from S.D.C to the Respondent dated 20th September 2004.

Leave was granted on 23rd October 2004 by Hayati J. and a notice of motion pursuant to that leave was heard by her on 6th June 2005. Before dealing with that hearing I advert to a further affidavit of the Appellant filed 9th January 2005 in which she again refused to provide the list saying:

“8. Further, as stated in my Affidavit dated 22nd September 2004, I did not at any time contact any clients of Freme to induce them to transfer their bookings away from Freme whilst in the employment of Freme nor have I, since leaving Freme, contacted any such clients. I am advised by my solicitors that the Plaintiffs have not by any affidavit evidence substantiated this in support their allegations. For these reasons, I am unable to provide the list of clients of Freme which I have allegedly contacted. More importantly, I am advised that it is a legal issue whether I had contacted such clients and it is subject to argument at an inter-partes hearing.”

At the hearing of this motion before Hayati, J. Mr. David Teo, counsel for the Appellant referred to 0.52 r 2(2) of the Rules of the Supreme Court which states that the statement accompanying the application for leave to make an application for an order of

committal must state, inter alia, “The Grounds on which” the committal is sought and by an affidavit verify the facts relied on.

He argued that the statement of the Respondent, was defective in that it failed to set out any or sufficient particulars of the alleged breach or contempt and that there was therefore, a failure to comply with 0.52 r 2(2). He argued further that the terms of the Interlocutory Injunction of 30th August 2004 were ambiguous and unclear. He argued finally that the Appellant was not in breach of any terms of the Interlocutory Injunction.

Hayati J. commenced her ruling by correctly observing that matters such as this “must depend upon the background of each case.....”

She was satisfied, not surprisingly in my view, that “the Defendant (Appellant) had clear knowledge of the order requiring her to provide the list and restraining her from the acts set out in the Order and that she had deliberately breached the terms of Order by the following acts:

- a) *not providing the list of the plaintiff’s clients she had been in contact with since she left the plaintiff and joined SCT within 7 days of the injunction as ordered;*
- b) *approaching Ms Connie of SDC to SCT, with the letter, which she well knew was the existing customer of the plaintiff, despite the term of the injunction prohibiting her ‘from doctoring any communication whatsoever involving the plaintiffs’;*
- c) *by being involved in the transfer of SDC, which she knew was the plaintiff’s client and with whom she was regularly dealing when she was employed by the plaintiff and this ‘aided SCT, a competitor of the plaintiff in breach of the confidentiality clause she signed’ whether or not the clause was operative after she left the plaintiff or whether it covers the said act is an issue for the hearing proper but until the injunction is set aside, the respondent must abide*

by the terms of the order (breach of para 111 of the order and detailed in para 5/8/10 of the statement)."

Hayati J. having considered the affidavit of the Appellant went on to order:

"In spite of the clear and deliberate flouting by the defendant of the terms of the preliminary injunction, I am prepared, in view of the 'wrong' legal advice the defendant purportedly received, to consider that the defendant did have a 'bona fide motive' for not complying so as to 'mitigate' her contempt and for that reason, I am prepared to suspend the committal order for 14 days from today, on terms, as follows:-

That –

- a) within 14 days from today, the defendant to provide to the plaintiff a list of names and addresses of all the customers she personally dealt with on behalf of SCT from the date she joined SCT – 16th June 2004 to the date of the injunction – 30th August 2004.*
- b) the defendant undertake not to come in contact with any staff or customers of the plaintiff until the Injunction granted on the 30th August 2004 is set aside or until any further order from the court."*

An appeal before this court is *"against the whole of the said decision."*

Given her findings Hayati J. appears to have been satisfied that three of the four alleged contempts in Mr. Lee's second affidavit had been established. They were:

- i) Failing to disclose the list.*
- ii) Doctoring the communication from Ms. Connie of SDC.*
- iii) Aiding STC by being involved in the transfer of the business of SDL, a client of the Respondent, to STC.*

The Appellant before this court complains first of a “Procedure Error” submitting that the Judge’s failure to deal with a submission that the statement supporting the application for leave failed to provide sufficient particulars as is required by 0.52 Rule 2.2 and that failing to deal with this as a preliminary objection deprived the Appellant of the opportunity to argue the issue properly or at all. There is nothing in this ground. I am satisfied that the notice was sufficient and that it was supported by a verifying affidavit. Further it is a matter entirely within the discretion of the court whether it deals with a matter as a preliminary issue or deals with after having heard all of the evidence.

It is further argued that the proceeding were not properly conducted as the court relied solely on affidavit evidence *“when it was clear that the issues regarding the alleged breaches of injunctive orders required the calling of witnesses to be examined and cross-examined”*.

There was no application to call witnesses. The court was left by the parties to decide the matter upon the affidavit evidence. There can now be no complaint that this course was followed. There is no merit in this submission.

It was further argued that the alleged contempts were not supported by the evidence.

As to the doctoring of the communication from Ms. Connie of SDC it was submitted that the evidence established no more than that the Appellant had drafted a letter for Ms Connie to sign and that this was no evidence of “doctoring”. The term “doctoring” is an unusual one. Properly understood it means interfering with the text or appearance of a document so as to make it convey a false meaning or impression. The term simply cannot be stretched to cover the mere drafting of a document which is what is alleged occurred in the present case. The Judge was I am satisfied wrong to have held that the drafting of the letter by the Appellant and its provision to Ms Connie constituted a doctoring.

As to the alleged aiding of STC by transferring the business of SDC to it, it is submitted that this cannot have been a breach of the interlocutory injunction as it occurred on 9th June 2004 some 2 ½ months before the grant of the interlocutory injunction on 28th August 2004. This submission must be correct. Both of the above matters may be of considerable significance should the Respondent's action come to trial but neither were breaches of the injunction. It is true that part from the provision of the list, to which I next turn, there was evidence from Mr. Lee of other matters which might arguably have constituted breaches of the interlocutory injunction but the Judge was not prepared to act upon that evidence.

As to the failure to provide the list the Appellants contention seems to be that no such order should ever have been made and that she was entitled, relying upon legal advice, to ignore it. Such a submission could not be more wrong. This was a clear contempt of the order. There can be no suggestion that the contempt has not been established as it is proved in incontestable form from the mouth of the Appellant herself in her affidavits. The Appellant had been guilty of deliberate, persistent, serious and continuing contempt.

This appeal is dismissed and the matter is remitted to Hayati J.

CONS, P.

MORTIMER, J.A.

POWER, J.A.

Mr..... of M/s Ibrahim Chee Teo & Ho for the Appellant.
Mr. of M/s Cheok Sankaran Halim for the Respondent.