

UPDATE

In business, it's not what you know, it's who you know - part 2 of the Nautech and CSS saga

Update prepared by Luke Olivier (Counsel, Jersey)

Earlier this year, the Jersey Court of Appeal provided us with a timely reminder of the important role of a court of first instance when it comes to the assessment of the oral testimony of witnesses of fact, as well as the need for parties to take great care in the wording they use in orders they seek for injunctive relief.

Introduction

In a landmark judgment delivered by the Royal Court in Jersey on 26 August 2014 in *Nautech Services Limited v CSS Limited and Ors* [2014] JRC0159, it was held for the first time that a business' client contact information, stored on a database such as Microsoft Outlook, is protected by laws of confidentiality and copyright, even if a client's contact details are readily available on the internet or social media sites. The Jersey Court of Appeal in *CSS Limited and Ors v Nautech Services Limited* [2015] JCA021 on 30 January 2015 has also now had its say on matters related to the same dispute and found as follows.

- When a finding of fact depends upon a determination as to the credibility or reliability of a witness, a court of first instance finding against that witness ought, however succinctly, indicate the basis upon which it finds the evidence of the particular witness either to be unreliable or not entitled to be found credible.
- Interim injunctive relief needs to be expressed in clear, certain and unambiguous language and this necessitates that the form of wording of the injunction itself should be so. The language used should be so precise that no issue of interpretation should be required, save where terms of art or contractual terms are used.

Background to decision of the Jersey Royal Court

In April 2013, Nautech Services Limited (**Nautech**), a company engaged in the provision of specialist employees to the oil and gas industries across the world, obtained interim injunctions against three of its former employees, their new employer, CSS Limited (**CSS**), and the managing director of CSS, in order to prevent the use of confidential information and/or trade secrets which its three former employees had taken from Nautech's databases whilst still employed there and which had been passed to CSS. These interim injunctions were amended by order of the Royal Court on 7 May, 2013, so that the three former employees, CSS and its managing partner, were prohibited 'from infringing [Nautech's] copyright in any of [Nautech's] confidential information and/or trade secrets or any part thereof for any purpose ...'

CSS was a competitor company which two of the three former Nautech employees had helped to establish and all three employees admitted to having extracted substantial amounts of information from Nautech's databases. Nautech considered that the injunction had been breached and therefore brought proceedings to enforce it.

The Royal Court held that, as the new employer had taken steps to comply with the terms of the interim injunction, it had not acted in breach of its terms; however, the Royal Court held that the previous actions of one of the former Nautech employees (named **Mr Inns**) did amount to a breach of the interim injunction.

Mr Inns had copied his work contacts from his BlackBerry to his personal Gmail account and then onto his new iPhone without deleting the folder from his personal Gmail account. He had used the information stored in his Gmail account to email some of Nautech's contacts directly, for the benefit of CSS. Therefore, CSS was held to be vicariously liable for those actions.

The Royal Court held that in the absence of a public database of suitably qualified contractors for the global oil and gas industry, Nautech's contact database was at the very heart of its business operations. It rejected CSS's arguments that the contact information of potential clients and specialists could have easily been found from other sources.

The Royal Court also held that the database was protected by copyright, pursuant to the Intellectual Property (Unregistered Rights) (Jersey) Law 2011. However, despite this finding, the Royal Court refused to find that this protection extended to a LinkedIn account, notwithstanding that Nautech had paid for a premium account and the account had been accessed from a Nautech email address. In this regard, the Royal Court noted that the terms of the LinkedIn user agreement stated that a LinkedIn account and all content and information in relation to that account belonged to the user and held that, absent any agreement to the contrary, that user agreement would stand.

Mr Inns and CSS were both found to be in contempt of court.

Background to Appeal

CSS and Mr Inns appealed against the decision of the Royal Court.

The appeal turned on the evidence before the Royal Court that Mr Inns had used confidential contact information belonging to Nautech, rather than from another source, to send five emails to individuals. The finding of the Royal Court that Mr Inns had been in contempt had turned on its finding that the evidence of Mr Inns had not been credible.

Evidence before the Jersey Royal Court

CSS and Mr Inns challenged the findings of fact by the Royal Court on various grounds, including in particular that the evidence before the Royal Court did not support findings that Mr Inns' Gmail contact list was sourced from his workstation at Nautech and that Mr Inns had used a confidential directory of Nautech.

The Court of Appeal confirmed that it can only interfere with findings of fact made by the court of first instance in limited circumstances and that this is particularly the case when that court has had the opportunity to consider oral testimony, the terms in which that testimony is couched and the demeanour of witnesses.

The leading Appellate Court case in Jersey in this regard is *Pell Frischmann v Bow Valley Iran Limited* [2008] JCA 146 where it was also stated that in an appeal on matters of fact, the Court of Appeal must not only be convinced that the decision of the court below it is wrong, but also that there was no evidence which could have supported the relevant findings made by that lower court.

In carrying out this task, it may be that occasions arise where it appears that there was simply no primary evidence to support a particular finding in fact. But, where the finding is one based on inference from ascertained primary facts, the Court of Appeal must accord a very high degree of respect to the findings of the Jurats (who are lay people appointed by the Royal Court to be arbiters of fact in first instance proceedings). In this case it had to be shown, to the criminal standard, that what was used by Mr Inns had been information contained within Nautech's database. There had to be no reasonable doubt that the information could have come from any other source.

In jurisdictions where lay assessors of fact are not utilised by the courts, it is incumbent upon fact-finding tribunals to give express reasons for a finding of lack of credibility or lack of reliability of witnesses. In Jersey, however, it was to be remembered that very significant weight is allowed to the findings made by the Jurats: in *AG v Edmond-O'Brien* [2006] JLR 133, the Privy Council specifically stated that, at least in criminal matters, questions of credibility were a matter for the Jurats and it was not the function of the Court of Appeal to say, for example, that the evidence of the accused should have been accepted.

That being said, when a finding is dependent upon a determination as to the credibility or reliability of a witness, the court of first instance ought to indicate the basis upon which it finds the evidence of that

witness either to be unreliable or not credible (even if it does so only briefly). If it does not do so there is no basis upon which the Court of Appeal could itself express a view as to the credibility or reliability of Mr Inns.

The Court of Appeal also made it clear that, even when working to the criminal standard of proof, there may be enough evidence to convict where an inference can be drawn in the event of the defendant not explaining the existence of an alternative source (see *AG v Evans* [1965] JJ 527 at 530).

In this case, however, the Court of Appeal found it difficult to look past the fact that the Royal Court had made no specific finding that the contacts used in the five emails were taken from any of the Nautech databases to which the interim injunction related. Accordingly, that question was remitted to the Royal Court and the appeal was successful in that limited regard.

Language used in the interim injunctions

The Court of Appeal noted that interim injunctions must be expressed in clear, certain and unambiguous language.

It further confirmed the general line taken in this jurisdiction, which is that interim injunctions in Jersey form part of an Order of Justice (Jersey's equivalent of particulars of claim) and are not in that sense free standing as they would be in other jurisdictions like England. Therefore, it may be necessary for the wording of an interim injunction in Jersey to be interpreted in the context of the words or expressions used in the Order of Justice, particularly where those words or expressions have been defined in the body of the latter.

Quite importantly the Court of Appeal then went on to indicate in its concluding remarks that, notwithstanding the general approach in Jersey, the prerequisite that interim injunctions need to be expressed in clear, certain and unambiguous language unavoidably meant that the form of wording of the injunction itself should be clear, certain and without ambiguity. The language used should be so precise that no issue of interpretation should be required save where terms of art or terms from a contractual lexicon are used.

Conclusions

Part 2 of this saga serves as a reminder of the important role of a court of first instance when it comes to assessing the oral testimony of witnesses of fact and the limited circumstances in which an appellate court will interfere with findings of fact. It does also, however, show the importance of the first instance court in providing an explanation of its reasons where it finds the evidence of any witness unreliable or not credible.

Furthermore, parties to Jersey proceedings seeking to obtain interim injunctive relief should also take great care in the wording they use in the orders they are seeking. Precision and consistency in the application of the relevant wording (including terms of art or contractual terms) is key.

Finally, notwithstanding the Court of Appeal's decision, the judgment of the Royal Court in August 2014 should still be received positively by employers, by providing comfort that their contact databases will be protected in appropriate circumstances. Nonetheless, employers should continue to make use of carefully drafted restrictive covenants, particularly given the ease with which contact information can be found on the internet.

A case in point are LinkedIn accounts, where employers may wish to have their employees enter into an agreement pursuant to which the employee assigns to the employer all rights to his or her LinkedIn account, although there may well be sensitivity around this issue which will require delicate handling.

Contacts

Luke Olivier
Counsel, Jersey
+44 1534 676 069
luke.olivier@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED

[Document Reference]