IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 9
ARC 15/10

IN THE MATTER OF	special leave to remove proceedings from the Employment Relations Authority
BETWEEN	BEN SMITH Plaintiff
AND	EVOLUTION E-BUSINESS LIMITED Defendant

Hearing: 16 February 2010
(Heard at Auckland)

Appearances: Michael O'Brien and Nura Taefi, counsel for the plaintiff
Michael McFadden, advocate for the defendant

Judgment: 16 February 2010

ORAL JUDGMENT OF JUDGE B S TRAVIS

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[1] Mr Smith applied yesterday for special leave to remove a claim brought against him in the Employment Relations Authority by the respondent, Evolution E-business Limited ("Evo") and sought urgency as the Authority was to convene its investigation meeting next Tuesday 23 February 2010.

[2] Mr Smith had applied on 3 February 2010 under s 178 of the Employment Relations Act 2000 to have the employment relationship problem removed in its entirety to the Court. After receiving submissions the Authority, on 12 February, determined the matter on the papers, declining the removal application. When the Authority declines to remove any matter, special leave may be sought from the Court which must apply the following criteria set out in paragraphs (a)-(c) of sub-section (2) of s 178:

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it may be removed immediately to the Court; or

(c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; …

[3] The sole ground relied on for special leave by Mr Smith is that contained in s 178(2)(a) and a summary of the important issues of law which counsel for Mr Smith submits are likely to arise in this matter, other than incidentally, were set out in the application for special leave.

Factual background

[4] Only a little of the factual background can be found in the amended statement of problem which claims that while Mr Smith was an employee of Evo he breached confidentiality terms in the written employment agreement on or around the time he had tendered his notice of resignation on 5 January 2009. This was to take effect on 13 February and part of the time he was put on garden leave. It is pleaded that Evo became aware that Mr Smith had disclosed confidential information in a manner that directly contravened the terms of the employment agreement, that Evo reminded him of his obligations under the agreement, that it became aware of a number of further actions on Mr Smith's part, which allegedly breached the confidentiality provisions. These included the following:

(a) the ongoing provision of confidential information to a competitor of Evo;

(b) working for a competitor whilst employed by Evo;

(c) of his own volition assisting a competitor involved in litigation against Evo.

[5] No other particulars are provided. It then pleaded that Mr Smith chose to ignore all requests to comply with the terms of the employment agreement and that his actions were deliberate and caused significant harm, "financial and otherwise" to Evo. No details of that harm are provided. Evo seeks a compliance order requiring Mr Smith to adhere to the terms of his agreement, enquiry by the Authority into the damages arising in respect of his breaches and a penalty of $5,000 be awarded against him for each and every breach he allegedly committed.

[6] By contrast Mr Smith's amended statement in reply sets out, in considerable detail, the circumstances in which he freely admitted to providing a competitor of Evo with an affidavit to be used in High Court proceedings. The statement in reply annexes that affidavit and a number of judgments of the High Court which dealt with the litigation.

[7] In a broad summary, which may turn out to be at variance when the matter is heard and determined, it appears that Evo was in a joint venture with Transactor Technologies Limited ("TTL") providing and marketing loyalty and gift technology solutions, using what was described as TTL's proprietary intellectual property called the "Thor System". That joint venture came to an end in October 2008 and TTL claimed the return from Evo of the Thor System which it claims it owned. An action was commenced in the High Court by TTL against Evo on 18 December 2008. The High Court heard the evidence of Henry John Norcross, the managing director of Evo, which confirmed that Evo did not have in its possession, custody or control any material relating to the Thor System, other than one backup it had supplied to MarketSmart International (NZ) Limited ("MS"), the other defendant in the High Court proceedings.

[8] On 22 December 2008, Harrison J granted an injunction in favour of TTL against Evo and MS, preventing them from accessing or using or copying the Thor System. Mr Smith claims that Evo failed to inform its staff or employees of the injunction order.

[9] On the day that the injunction was granted, which at the time he claims he had no knowledge of, he was instructed by Evo to continue with the adaptation,

copying, mapping and assisting the technical team from MS with reverse-engineering work on TTL's proprietary Thor System. He claims to have only been made aware of the injunction by an ex-colleague from TTL on 23 December 2008 when he was given a copy of the injunction order to read. He claims he was shocked to find out that what he was instructed to do by Evo was a complete breach of the Court order.

[10] Mr Smith claims that he had concerns for his liability and whether what he had done amounted to a contempt of Court for having continued to work on the Thor System. On 21 January 2009, after having spoken to other ex-colleagues in TTL he decided to meet with TTL's lawyers, Bell Gully, and he related to them the jobs and tasks he had been performing. He sought an immunity by offering to assist TTL by providing a sworn affidavit of what he had done in the relevant period. The affidavit he provided was used by TTL to obtain from the High Court an interim preservation order, an Anton Pillar order. What was found and the consequences, are set out in a subsequent judgment of the High Court of Courtney J, issued on 23 December 2009, granting indemnity costs against MS and recording that Evo and TTL had reached a confidential settlement between them.

[11] In the copious material that has been filed on behalf of Mr Smith, I can find no other references to any breaches of confidentiality contained in the employment agreement as alleged without particulars in the statement of problem. It may be, however, that Evo intends to provide that information to the Authority as part of its investigation.

Grounds

[12] The important questions of law which Mr Smith's counsel says will arise, are specified as follows:

(a) Whether Evo's unlawful conduct, including breaching an order of the High Court, could constitute "confidential" information or a "trade secret" to use the words contained in the employment agreement, and in any event whether it was an implied term of the employment

against that any such construction involving such unlawful conduct would be void for want of legality.

(b) Even if the information was found to properly constitute confidential information, whether, given the Court's equitable and good conscience jurisdiction:

(i) the inequity rule would constitute a complete defence for Mr Smith;

(ii) Evo's claim should be denied given the equitable maxim that "he who comes to equity must come with clean hands";

(iii) issues of causation including the extent to which Mr Smith would be liable for Evo's legal costs in the High Court proceedings involving MS;

(iv) whether the serious breach of the employment contract by Evo meant that the employment contract has been cancelled and has become unenforceable against Mr Smith.

Determining the issues

[13] Mr O'Brien submitted that the Authority in its determination declining the removal had applied a test that, as the issues of law arose from factual matters in dispute and no findings had yet been made, it was premature to find that important issues of law were likely to arise. I accept his submission that to extrapolate out that logic would mean that no matter would be able to be removed to the Court ahead of the Authority conducting an investigation and making findings of fact which would, be inconsistent with the intent of s 178 which uses the words "likely to arise". Mr O'Brien referred to my judgment in *Lloydd v Diagnostic Medlab Services Ltd*[1],

[1] [2009] ERNZ 42, at 46

where I had cited *Hanlon v International Educational Foundation (NZ) Inc*[2] to the effect that:

> A question of law arising in a matter would be important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision of it or a material part of it.

[14] In *Lloydd* while I accepted a submission that the facts would determine the case, I was satisfied that the questions of law raised were important in the sense of those words in s 178(2)(a).

[15] Section 178(1) normally requires the removal before the Authority has investigated the matter not after. It then allows for the Court to hear and determine the matter which must include the factual findings necessary. I accept Mr O'Brien's submission that the allegations of unlawful conduct on Evo's part do raise an important question of law in construing the agreement as to whether there is an implied term that confidential information would not extend to information about unlawful acts. Further, on the material before the Authority and the Court, there is prima facie evidence that Evo acted unlawfully, an allegation it denies. There is almost an inevitability that these legal questions will arise.

[16] If that information is found to properly constitute confidential information, then the Court, when exercising its equity and good conscience jurisdiction under s189, would need to consider the equitable defence that there is "no confidence in the disclosure of an inequity" (*Gartside v Outram*[3]). This defence has been recognised in New Zealand: *European Pacific Banking Corporation v Fourth Estate Publications*[4] and in *European Pacific Banking Corporation v Television New Zealand Ltd* [5] the Court of Appeal stated[6]:

> What has been called ever since *Gartside v Outram* the defence of iniquity is an instance, and probably the prime instance, of the principle that the law

[2] [1995] 1 ERNZ 1 at p 7
[3] (1856) 26 LJ Ch 113
[4] [1993] 1 NZLR 559
[5] [1994] 3 NZLR 43
[6] Ibid, at 46

> will not protect confidential information if the publication complained of is shown to be in the overriding public interest.

[17] I accept Mr O'Brien's submission that issues as to the extent to which the inequity rule can be invoked and also likely to arise are important. They will involve in this case considerations of the public interest in the administration of justice in the High Court. Whether Evo's claim for a breach of contract is barred by the equitable maxim of coming with clean hands is also an important issue of law which is likely to arise.

[18] Mr O'Brien submitted that while Evo has not particularised its claim for damages it appears to arise from its litigation with TTL which raises complex issues of causation. He cited from Chief Judge Colgan's decision in *Rooney Earthmoving v McTague*[7] that "the law of causation of loss following breach of contract is among the most difficult elements of remedies for contract breach". The matter may be further complicated because the settlement between TTL and Evo was said to be confidential.

[19] Mr O'Brien submitted that the fact that the Authority had only set down one day for the investigation suggests that the complex legal issues, in particular causation, which were likely to arise, could not be adequately investigated in the timeframe provided.

[20] A further issue is said to arise out of the circumstances which had led to Mr Smith's resignation. If it can be established that Evo's actions constituted serious breaches of the employment agreement and that Mr Smith's resignation amounted to an acceptance of that repudiation, an important question of law will arise as to whether any of the terms of that agreement will remain in force for the benefit of Evo, see *Grey Advertising (New Zealand) Ltd v Marinkovich*[8] and *AG and S Building Systems Pty v G & J Holdings Ltd*[9].

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[7] [2007] ERNZ 356 at [43]
[8] [1999] 2 ERNZ 844
[9] unreported HC Auckland 8 October 2004, CIV 2004-404-2565

[21] In its determination the Authority appears to have disposed of the question of law by finding that because Mr Smith resigned on notice which included a period of garden leave, he could not have been said to have cancelled the contract. I accept Mr O'Brien's submission that this does involve a legal issue as to whether the giving of notice is fatal and noted his citation of *Para Franchising v Whyte*[10] in the area of unjustified constructive dismissals.

Proximity of Authority's investigation

[22] Mr Smith will be travelling from London to attend the one day investigation. The matter will most likely only be part heard. Mr O'Brien submitted that, given the likelihood that either party may challenge the Authority's finding, a hearing in the Court will most likely provide a quicker result relying on Judge Couch's comment in *The Vice-Chancellor of Lincoln University v Stewart (No2)*[11] in which he found the interests of justice would be best served by hearing in the first instance by the Court.

[23] I appreciate that Mr McFadden has had limited time to prepare for the Court hearing, although he has relied upon the submissions which were made by Evo to the Authority. Mr McFadden referred to the fact that Mr Smith has not once but twice withdrawn his consent for his current solicitors to act for him and then reinstructed them. Such actions on Mr Smith's part have no doubt caused a degree of frustration to both the Authority and Evo. Mr McFadden stressed the lateness of the application for leave and submitted that Mr Smith's motives were suspect because of his desire to have the investigation adjourned until June 2010, to allow him to complete working on a project in London. The Authority determined that in making an application for removal so late, and in such circumstances, was a strong factor in persuading the Authority to the opinion that it should continue the investigation. The Authority determined that the ground for removal under paragraph (d) of s 178(2) – which is not available to the Court – that the Authority was of the opinion that in all the circumstances the Court should determine the matter – did not apply.

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[10] [2002] 2 ERNZ 120 at 128
[11] [2008] ERNZ 249 at [44]

[24] Mr O'Brien went to some length to try and explain the delay but it appears to me at this stage that although Mr Smith was performing his obligations that the Authority had set out in relation to the investigation there were some delays which may have been partly caused by the repeated withdrawal and reinstructing of his solicitors. Mr Smith must therefore bear some responsibility for the situation that now arises.

[25] However, as Mr O'Brien has clearly established the existence of the sole ground for special leave relied on in this case, namely the existence of important questions of law which are likely arise other than incidentally, it is appropriate to grant Mr Smith's application for special leave and order the removal of the entire matter to the Court.

Conditions

[26] As to the conditions I should apply to the removal, I consider that the matter should be afforded a degree of urgency to make up the time that has been lost. Both the Court and Mr Smith would be assisted by the filing and service of a statement of claim which complies with reg 11 of the Employment Court Regulations 2000 and which properly informs Mr Smith and the Court of the particulars of the breaches alleged and sets out in adequate detail the financial consequences said to flow from those breaches. That statement of claim should be filed and served within 30 days of the date of this judgment. The address for service of Kensington Swan can be used for service on Mr Smith.

[27] Mr Smith should then file and serve a statement of defence, which complies with reg 20, within 30 days of the date of service of a statement of claim. From the statement in reply it appears that Mr Smith may also be seeking to counter-claim, if so this should be included with the statement of defence.

The parties should consider the issue of disclosure and when they are ready should arrange for a callover of the matter to an early fixture. Leave is provided to the parties to seek further directions.

Costs

[28] Costs in relation to this successful application for special leave are reserved.

B S Travis
Judge

Oral Judgment delivered at 2.45pm on 16 February 2010